

Charting the Way Forward: A Comparison of the Proposed Reforms to CFIUS

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The proposed CFIUS legislation represents the most comprehensive revision since the Foreign Investment and National Security Act (FISIA) was enacted in 2007. On June 26, 2018, the U.S. House of Representatives passed H.R. 5841,^[1] also known as the Foreign Investment Risk Review Modernization Act of 2018 (FIRRMA). About a week prior, the U.S. Senate incorporated its version of FIRRMA into the National Defense Authorization Act for Fiscal Year 2019.^[2]

These bills, once reconciled and signed by President Trump, would update the statute governing reviews of foreign investment by the Committee on Foreign Investment in the United States (CFIUS). While the changes seem monumental, most changes are ones which codify the practices applied by the Obama Administration in its later years, such as the provisions discussing real estate transactions, which should provide greater clarity to businesses seeking CFIUS review. The following chart illustrates the differences between the current legislation and the proposed House and Senate versions of the bills.

Covered Transactions

Current	House – FIRRMA (H.R. 5841) (June 26, 2018)	Senate – FIRRMA (S. 2098) (June 27, 2018)
<ul style="list-style-type: none"> Any merger, acquisition, or takeover which results in “foreign control of any person engaged in interstate commerce in the United States” <ul style="list-style-type: none"> “Control” is defined broadly and includes direct or indirect control Any economic activity in “critical industries” and homeland security <ul style="list-style-type: none"> “Critical industries” include 16 sectors that are critical to U.S. infrastructure, such as chemical, defense industrial base, energy, financial services, and transportation 	<ul style="list-style-type: none"> “Any investment in an unaffiliated United States business by a foreign person,” which covers a national, government, or foreign entity of a “country of special concern,” or a foreign entity controlled by, organized under, or with “substantial interest” held by a “country of special concern,” and that would result in obtaining: (1) sensitive personal data of U.S. citizen that “may be exploited in a manner that threatens national security”; (2) involvement in “substantive decision-making,” including the use of personal data or critical 	<ul style="list-style-type: none"> Any foreign investment, other than a “passive investment,” in U.S. critical technology or critical infrastructure company where the foreign entity has a substantial interest Non-passive investments include transactions where a foreign person obtains access to nonpublic technical information CFIUS may develop regulations to exempt “transactions from identified countries” from additional restrictions, based on certain criteria, including, for example, whether the country is a NATO member, adheres to

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Current	House – FIRRMA (H.R. 5841) (June 26, 2018)	Senate – FIRRMA (S. 2098) (June 27, 2018)
<p>systems.^[3] Acquisitions which involve “products or key technologies essential to the U.S. defense industrial base” should notify CFIUS</p>	<p>technologies; or (3) “material nonpublic technical information” in possession of the U.S. company. A “foreign government-controlled transaction” includes foreign entities of a country of special concern that is a non-market economy</p>	<p>nonproliferation control regimes, etc.</p>
	<ul style="list-style-type: none"> • Countries of special concern: Those subject to an arms embargo, those specified in CFIUS regulations, those deemed state sponsors of terror, and countries subject to specific export restrictions (China, Russia, and Venezuela). CFIUS may exempt a country for up to one year if it specifies to congressional committees that the exemption is important to U.S. national interest 	<ul style="list-style-type: none"> • Countries of special concern: When considering national security risks, CFIUS may consider whether a transaction involves a “country of special concern,” which is one which poses a “significant threat to the national security interests of the United States”
	<ul style="list-style-type: none"> • “Substantial interest” is to be determined by regulations, but does not include less than 10% percent voting interest or passive investment 	<ul style="list-style-type: none"> • “Substantial interest,” means investments that result in “the acquisition, directly or indirectly, of a substantial interest” in a U.S. critical infrastructure or critical technology company • “Substantial interest” is to be determined by regulations, but should consider “the means by which a foreign government could influence the actions of a foreign person, including through board membership, ownership interest, or shareholder rights.” It does not include less than 10 percent voting interest or passive investment

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Transactions Not Subject to CFIUS Review

Current	House – FIRRMA (H.R. 5841) (June 26, 2018)	Senate – FIRRMA (S. 2098) (June 27, 2018)
<ul style="list-style-type: none"> • Transactions undertaken “solely for the purpose of investment,” or an investment in which the foreign investor has “no intention of determining or directing the basic business decisions of the issuer” <ul style="list-style-type: none"> ◦ Solely investment purposes: (1) transaction does not involve owning more than 10 percent of the voting securities of the firm; or (2) investments that are undertaken directly by a bank, trust company, insurance company, investment company, pension fund, employee benefit plan, mutual fund, finance company, or brokerage company “in the ordinary course of business for its own account” 	<ul style="list-style-type: none"> • Transactions that are simply financial or passive investments • Passive investment: No section specifying definition and/or guidance for determining what qualifies as passive investment 	<ul style="list-style-type: none"> • Transactions that are simply financial or passive investments • Passive investment: Investments that do not afford the foreign investor certain rights, such as access to “material nonpublic technical information” or membership status on a board of directors. This decision should be made “without regard to how low the level of ownership interest” is. Criteria are listed for how to determine whether investment funds are passive investments (i.e., where a foreign person is a limited partner). For example, if a fund is managed exclusively by a U.S. general partner, managing member, or equivalent

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Declarations for Certain Covered Transactions

Current	House – FIRRMA (H.R. 5841) (June 26, 2018)	Senate – FIRRMA (S. 2098) (June 27, 2018)
<ul style="list-style-type: none"> • Written notice 	<ul style="list-style-type: none"> • Establishes an option for foreign entities to voluntarily file an abbreviated “declaration” with “basic information regarding the transaction.” These are specifically intended for transactions which “are likely to pose limited risk” 	<ul style="list-style-type: none"> • Establishes an option for foreign entities to voluntarily file a “declaration” with “basic information regarding the transaction” • Foreign entities from identified countries could be exempted

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U.S. Real Estate Transactions

Current	House – FIRRMA (H.R. 5841) (June 26, 2018)	Senate – FIRRMA (S. 2098) (June 27, 2018)
<ul style="list-style-type: none"> None specified (falls under covered transactions) 	<ul style="list-style-type: none"> Required transactions for CFIUS review encompass real estate transactions in close proximity to a military installation or U.S. government facility or property of national security sensitivities Exempts single housing units and, except as specified in CFIUS in regulations, real estate in urban areas Includes joint ventures in “covered transaction” definition 	<ul style="list-style-type: none"> Required transactions for CFIUS review encompass real estate transactions in close proximity to a military installation or U.S. government facility or property of national security sensitivities Exempts single housing units and, except as specified in CFIUS in regulations, real estate in urban areas Provides jurisdiction in cases of proximity to land border crossings and U.S. government facilities that are sensitive for national security purposes

Filing Fees/Funding

Current	House – FIRRMA (H.R. 5841) (June 26, 2018)	Senate – FIRRMA (S. 2098) (June 27, 2018)
<ul style="list-style-type: none"> None 	<ul style="list-style-type: none"> Filing fee equivalent to one percent of the value of the transaction, or a maximum of \$300,000 adjusted annually CFIUS may factor in the effect of the fee on small business concerns, and the effect of the fee on foreign investment 	<ul style="list-style-type: none"> Left to regulations, but “may not exceed the costs of administering [the] section” Factors to be taken into consideration include small business concerns, and the priority of the filing to CFIUS Fee amounts would be periodically reconsidered CFIUS would be authorized to establish a fee scale to prioritize the timing of the Committee’s response to a draft or final written notice if the Committee is unable to respond during the required time period due to an “unusually large influx of notices”

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Export Control		
Current	House – FIRRMA (H.R. 5841) (June 26, 2018)	Senate – FIRRMA (S. 2098) (June 27, 2018)
<ul style="list-style-type: none"> Falls under “covered transactions,” in that it encompasses outbound transactions of intellectual property and associated support by U.S. critical technology companies to foreign entities 	<ul style="list-style-type: none"> Establishes a new export control authority, and essentially requires CFIUS to incorporate the Export Control Reform Act of 2018, meaning the Secretary of Commerce would have the authority to regulate the export of dual-use items (i.e., civilian and military applications) 	<ul style="list-style-type: none"> Establishes a new, “regular, ongoing interagency process to identify emerging and foundational technologies” and the effect of new export controls on development of such technologies in the United States Would grant the Secretary of Commerce explicit authority to “establish appropriate controls under the Export Administration Regulations on the export, re-export, or in-country transfer” of emerging and foundational technologies, as identified. Would permit Commerce to specify an applicable level of control, and require licenses before export or transfers of technology to any country subject to an embargo Requires Secretary of Commerce to establish an “Emerging Technology and Advisory Committee”
Information Sharing		
Current	House – FIRRMA (H.R. 5841) (June 26, 2018)	Senate – FIRRMA (S. 2098) (June 27, 2018)
<ul style="list-style-type: none"> Permits some exceptions to the confidentiality requirements related to information or documentary material filed under CFIUS 	<ul style="list-style-type: none"> The requirements should “not prohibit the disclosure of information or documentary material that the party filing such information or material consented to be disclosed to third parties” 	<ul style="list-style-type: none"> Adds additional exceptions, in that the requirements should not prevent the disclosure of “information relevant to any administrative or judicial action or proceeding” or “information to any domestic or foreign governmental entity”

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Current	House – FIRRMA (H.R. 5841) (June 26, 2018)	Senate – FIRRMA (S. 2098) (June 27, 2018)
		<ul style="list-style-type: none"> CFIUS may share information with any foreign or domestic entity for national security purposes
Timing of Review		
Current	House – FIRRMA (H.R. 5841) (June 26, 2018)	Senate – FIRRMA (S. 2098) (June 27, 2018)
<ul style="list-style-type: none"> 30 calendar days No timeline for feedback on draft notices and acceptance of formal notices 	<ul style="list-style-type: none"> 45 calendar days Possibility of one 15-day extension of the process 	<ul style="list-style-type: none"> 45 calendar days Possibility of one 30-day extension to the process Must provide comments on a notice within 10 business days of receipt and accept a formal filing within 10 business days
“Factors” in Evaluating Whether a Transaction Threatens to Impair U.S. National Security		
Current	House – FIRRMA (H.R. 5841) (June 26, 2018)	Senate – FIRRMA (S. 2098) (June 27, 2018)
<ul style="list-style-type: none"> 12 factors which President may consider on whether to block a foreign acquisition CFIUS members may consider the same 12 factors during their review processes⁴¹ 	<ul style="list-style-type: none"> Adds six additional “factors,” such as “the potential national security-related effects of the cumulative control of any one type of critical infrastructure, energy asset, material, or critical technology by a foreign person,” and “whether the covered transaction is likely to exacerbate cybersecurity vulnerabilities,” and “the availability of human resources, products, technology, materials, and other supplies and services,” with “the availability of human resources,” meaning potential losses resulting from reduction in employment of persons “whose knowledge or skills are critical to national security” 	<ul style="list-style-type: none"> It is the “sense of Congress” that CFIUS may consider the factors when considering national security risks; CFIUS may consider whether a transaction involves a country of special concern that has demonstrated a strategic goal of acquiring a type of critical technology or critical infrastructure that would affect United States technological and industrial leadership in areas related to national security

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Miscellaneous Provisions		
Current	House – FIRRMA (H.R. 5841) (June 26, 2018)	Senate – FIRRMA (S. 2098) (June 27, 2018)
<ul style="list-style-type: none"> N/A 	<ul style="list-style-type: none"> Sec. 602 – CFIUS may not require divestment by or of a U.S. business as a mitigation measure unless certain conditions are met CFIUS must consider the effect of a transaction on the U.S. workforce, such as an investment depriving the U.S. of jobs and skills that are critical to national security 	<ul style="list-style-type: none"> Sec. 1708 – circumstances under which CFIUS may unilaterally initiate reviews of transactions Sec. 1727 – prohibition on modification of civil penalties under export control and sanctions law (specifying Chinese telecommunications companies)

[1] Foreign Investment Risk Review Modernization Act of 2018, H.R. 5841, 115 Cong. (2018).

[2] Foreign Investment Risk Review Modernization Act of 2018, S. 2098, 115 Cong. (2018).

[3] For a full list, see <http://www.dhs.gov/critical-infrastructure-sectors>.

[4] P.L. 110-49.