ALERT MEMORANDUM

Congress Set to Expand Scrutiny of Foreign Investment in the United States

July 11, 2018

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On June 26, 2018, the U.S. House of Representatives passed its version of the Foreign Investment Risk Review Modernization Act of 2018 ("FIRRMA").[1] Just over a week earlier, the U.S. Senate passed the National Defense Authorization Act for Fiscal Year 2019, which incorporated its version of FIRRMA.[2] The bills, which passed their respective chambers by very wide margins, would update the statute authorizing reviews of foreign investment by the Committee on Foreign Investment in the United States ("CFIUS") to reflect changes in CFIUS's practice over the ten years since the last significant reform, expand CFIUS's jurisdiction, and make significant procedural alterations to the CFIUS process. Introduced to "modernize and strengthen" review of foreign investment in the United States, FIRRMA would cement a relatively aggressive approach to foreign investment review. However, ultimately FIRRMA's changes to current CFIUS practice are modest, and many of the changes merely codify practices in place since the later years of the Obama Administration.

The bills are similar but not identical and will have to be reconciled in a conference committee. Both the Senate and the House versions of FIRRMA would:

- Expand the scope of transactions covered by CFIUS to include:
    - a broader range of non-controlling foreign investment involving critical technology and critical infrastructure (bearing in mind that CFIUS already routinely reviews investments falling far short of majority control).

[1] Foreign Investment Risk Review Modernization Act of 2018, H.R. 5841, 115 Cong. (2018). *See also* Foreign Investment Risk Review Modernization Act of 2017, H.R. 4311, 115 Cong. (2017).

[2] John S. McCain National Defense Authorization Act for Fiscal Year 2019, H.R.5515, 115 Cong. §§ 1701-33 (2018) [hereinafter NDAA]. *See also* Foreign Investment Risk Review Modernization Act of 2018, S. 2098, 115 Cong. (2018); Foreign Investment Risk Review Modernization Act of 2017, S. 2098, 115 Cong. (2017).

  - most transactions involving real estate at (or functioning as part of) ports in the United States or proximate to (or otherwise permitting surveillance of) military or sensitive government facilities located in the United States;
  - any transaction or change in rights of an existing investment that would result in foreign control of a U.S. business or result in an investment involving critical technologies or critical infrastructure that does not meet heightened standards of passivity;
  - bankruptcy proceedings and other defaults on debt; and
  - transactions structured to "evade" CFIUS review;

- Permit parties to submit declarations (i.e., short-form descriptions of transactions not to exceed 5-pages) in lieu of the standard written notice;
- For the first time, create mandatory filings of declarations (or notifications) prior to investments related to U.S. critical technology by non-U.S. persons in which non-U.S. governments have a "substantial interest";
- Add additional national security factors for CFIUS to consider;
- Extend the official time allotted for CFIUS reviews and investigations;
- Authorize CFIUS to impose filing fees to fund its operations;
- Update CFIUS enforcement powers, including with respect to mitigation agreements; and
- Create new exceptions to CFIUS's overarching requirement to keep information provided by transaction parties confidential.

Equally importantly, neither version of the bill incorporates earlier proposals to give CFIUS broader authority over export controls, technology joint ventures, and other non-equity transactions.[3] Earlier proposals to do so, strongly resisted by U.S. technology companies, were dropped from both bills.

Although the House and Senate versions of FIRRMA are broadly similar, they differ in a few respects that will need to be reconciled in conference. Among the most notable are the following:

- In expanding review of non-controlling investments involving critical technology or critical infrastructure, the House bill targets a "blacklist" of jurisdictions subject to the expanded review

[3] *See* S. 2098, 115 Cong. § 3 (2017) (covering "the contribution (other than through an ordinary customer relationship) by a United States critical technology company of both intellectual property and associated support to a foreign person through any type of arrangement, such as a joint venture"); H.R. 4311, 115 Cong. § 3 (2017). Both bills include provisions to establish an interagency process to define emerging and foundational technologies and generally expand the authority of the United States to impose unilateral measures to control the export of such technologies. NDAA §§ 1725-26; H.R. 5841, 115 Cong. §§ 801-28, 31-34, 41-42 (2018). The House version of the bill, which addresses export controls in greater detail than the Senate version,

while the Senate bill exempts a "whitelist" of jurisdictions, and the House bill adds "sensitive personal data" to the areas of concern.

- The House bill would create a list of "jurisdictions of special concern" subject to heightened scrutiny; the Senate bill permits, but expressly does not require, CFIUS to maintain such a list.

- The Senate version of FIRRMA provides an exemption from mandatory review of government-linked investments for private equity limited partnership investments meeting heightened passivity criteria.

- The Senate bill includes a mechanism for limiting the pre-notification period for CFIUS reviews (i.e., the period of informal review by the CFIUS staff that precedes the formal acceptance of CFIUS notices).

- The Senate bill includes adjustments to the available judicial review of CFIUS decisions.

It remains to be seen how Congress will reconcile these differences and whether any last-minute changes will be inserted.

1. Background

The Exon-Florio amendments to the Defense Production Act of 1950 (50 U.S.C. § 4565) and their implementing regulations (31 C.F.R. part 800) (together, "Exon-Florio") authorize the President to suspend or prohibit foreign acquisitions, mergers, or takeovers of U.S. businesses that threaten to impair the national security of the United States. CFIUS, which conducts reviews of transactions under Exon-Florio, is an inter-agency committee of representatives from various government agencies and offices that may approve the transaction, clear a transaction subject to conditions, or recommend that the President issue an order to block the transaction (or require divestment if the transaction already has occurred).[4]

FIRRMA addresses long-term, bipartisan trends in foreign investment review. Although the Trump Administration's trade-related conflicts have captured recent headlines, most of the proposals in FIRRMA reflect shifts in CFIUS practice and areas of concern that began in the Obama administration or earlier. In particular, the primary sponsors of FIRRMA have focused on the nature of Chinese outbound investment to the United States, which reached a record $65 billion in 2016:[5] Senator John Cornyn has described Chinese investment as "weaponize[d],"[6] and Representative Robert Pittenger has called it "a strategic,

would also enact the Export Control Reform Act of 2018 to replace the Export Administration Act of 1979. H.R. 5841 §§ 801-28.

[4] To learn more about CFIUS, see our alert memorandum, Recent Revisions to Exon-Florio "National Security" Reviews of Foreign Investment in the United States (Dec. 22, 2008).

[5] Nicholas Farfan and Karl But, New Hurdles Trip Up China-US M&A. How Has Growing Regulatory Scrutiny Affected Cross-border Activity?, Dealogic Research (Aug. 8, 2017).

[6] Foreign Investments and National Security: A Conversation with Senator John Cornyn, Council on Foreign Relations (June 22, 2017).

coordinated, Chinese government effort to target critical American infrastructure."[7] This focus on China, however, is not new. FIRRMA's updated catalog of potential national security issues is also consistent with issues identified by CFIUS reviews in recent years. Finally, the approach to procedural issues in both bills attempts to address longstanding issues with the CFIUS process, timing, and funding.

2. Primary Changes to CFIUS Review

a. Expanding CFIUS Jurisdiction

The DPA nominally applies to acquisitions of "control" of a "U.S. business." However, although "control" is defined (in part) as "the power, direct or indirect . . . to determine, direct, or decide important matters affecting an entity,"[8] CFIUS has long examined transactions in which a foreign party acquires some governance rights falling well short of affirmative control. CFIUS's existing regulations provide a presumptive (not absolute) "safe harbor" for transactions in which a foreign person acquires less than 10% of the voting interest in a U.S. business solely for the purpose of passive investment (including, *inter alia*, an absence board representation);[9] in practice, CFIUS has tended to treat any transaction not meeting those criteria (as well as any transaction providing any form of contractual veto or approval right over significant decisions) as potentially subject to review. "U.S. business" includes "any entity, irrespective of the nationality of the persons that control it, engaged in interstate commerce in the United States, but only to the extent of its activities in interstate commerce";[10] this has not included the purchase of assets not operated as a stand-alone business, such as real estate without employees.

Both bills would expand CFIUS's jurisdiction to include:

- investments involving "critical technology" or "critical infrastructure" that do not meet heightened standards of passivity;
- purchases or leases of, or concessions regarding real estate that are—
    - located in or part of airports or sea ports (the Senate bill would also cover land ports); or
    - proximate to (or otherwise permitting surveillance of) military or sensitive government facilities located in the United States;
- any change in rights of an existing investment that would result in foreign control of a U.S. business or result in an investment involving critical technologies or critical infrastructure that does not meet heightened standards of passivity; and

[7] Press Release, U.S. Congressman Robert Pittenger, Taking Aim at China: Pittenger and Cornyn Introduce Legislation to Enhance National Security Review of Foreign Investment in the United States (Nov. 8, 2017).
[8] 31 C.F.R. § 800.204(a).
[9] 31 C.F.R. § 800.302(b).
[10] 31 C.F.R. § 800.226. Both versions of FIRRMA would add a statutory definition of "United States business"; the House version tracks the CFIUS regulations, but the Senate version tracks the existing Exon-Florio language and does not include (or preclude) the limit "to the extent of its activities in interstate commerce." NDAA § 1703; H.R. 5841, 115 Cong. § 201 (2018).

- any transaction designed to evade or circumvent CFIUS review.[11]

In addition, under both versions of the bill, "covered transaction" would include any transaction that otherwise fits the definition but "arises pursuant to a bankruptcy proceeding or other form of default on debt."[12]

The House and the Senate bills take slightly different approaches to expanding review of minority investments involving critical technology and critical infrastructure. Both bills would consider a transaction reviewable if the investor were to receive material nonpublic technical information or have involvement (other than through voting shares) in substantive decision-making related to critical technologies or infrastructure.[13] The Senate adds an option for a maximum ownership percentage above which an investment is deemed not passive.[14]

The Senate bill would also deem investments not to be passive if the foreign person and the U.S. critical technology company or U.S. critical infrastructure company have a parallel strategic partnership or other material financial relationship.[15] However, the Senate bill permits investments to avoid review if they are made through an investment fund controlled by a U.S. general partner, managing member, or equivalent, so long as the foreign investor's rights are consistent with those of a passive limited partner.[16] Furthermore, under the Senate version of FIRRMA, the expansion of CFIUS's jurisdiction related to non-passive, non-controlling investments in critical infrastructure and critical technology companies would not apply to transactions where each foreign party (and each person that owns or controls each foreign person party) is from exempt whitelisted jurisdictions.[17]

Under the House bill, the expansion of jurisdiction over investments involving critical technology or critical infrastructure is limited to instances in which the investor is from (or controlled by persons from) blacklisted "countries of special concern," or the government of such a country has a "substantial interest" in the investor.[18] The House bill would also expand CFIUS jurisdiction to cover transactions where

[11] NDAA § 1703; H.R. 5841 § 201.
[12] NDAA § 1703; H.R. 5841 § 201.
[13] NDAA § 1703; H.R. 5841 § 201.
[14] NDAA § 1703.
[15] NDAA § 1703.
[16] NDAA § 1703. Limited partners must not belong to an advisory board or other body with the ability to approve investments or decisions about portfolio companies (other than with respect to conflicts of interest) nor have the votes unilaterally to approve or block fundamental decisions such as compensation or removal of the general partner. This is a tighter version of the existing CFIUS regulations' exemption for limited partnerships, which has narrowed significantly as a practical matter in CFIUS's practice.
[17] NDAA § 1703. Exempted jurisdictions would be designated by CFIUS based on factors such as whether (1) the country's process for reviewing national security effects of foreign investment also safeguards U.S. interests; (2) the country is a member of NATO or is a major non-NATO ally; (3) the country adheres to nonproliferation control regimes; and (4) excluding transactions by persons from the country advances U.S. national security objectives.
[18] H.R. 5841 § 201. Such countries include: (1) those subject to arms embargoes pursuant to 15 C.F.R. § 744.21 (currently China, Russia, and Venezuela); (2) those determined by the Secretary of State to be a state sponsor of terrorism (currently North Korea, Iran, Sudan, and Syria); and (3) those both subject to a U.S. arms embargo, as specified in list D:5 of Country Group D in Supplement No. 1 to 15 C.F.R. part 740, and specified by CFIUS in regulations.

investors from (or controlled by persons from) countries of special concern could obtain sensitive personal data.[19]

As noted above, the Senate bill would exempt passive investments through a fund managed exclusively by a U.S. general partner, managing member, or equivalent (each, a "US GP Equivalent").[20] A foreign person investor could be a member of a fund advisory board or committee, so long as such board or committee is unable to approve, disapprove, or otherwise control investment decisions or decisions made by the US GP Equivalent.[21] Likewise, such investor would not be permitted to control the fund, including through the ability (1) to approve, disapprove, or otherwise control investment decisions of the fund; (2) to approve, disapprove, or otherwise control decisions made by the US GP Equivalent related to entities in which the fund is invested; or (3) to unilaterally dismiss, prevent the dismissal of, select, or determine the compensation of the US GP Equivalent.[22] Further conditions could be adopted by regulation.

Under the Senate bill, passive investment funds would not be subject to regulations limiting the magnitude of a passive investment.[23] In addition, the right (pursuant to terms of an agreement) of a foreign person investor or an advisory board or committee to waive potential conflicts of interest, waive allocation limitations, or engage in "a similar activity" would not be deemed to be control of the investment decisions of the fund or decisions relating to entities in which the fund is invested.[24]

As noted above, the Senate and the House bills would expand CFIUS jurisdiction to cover real estate transactions proximate to seaports, airports, and military or other sensitive government facilities, but both bills would exclude single housing units and, except as specified by CFIUS in regulations, real estate in urban areas from CFIUS's expanded jurisdiction.[25] The Senate version of the bill would extend the whitelist of exempted jurisdictions to real estate transactions; whereas the House bill contains no exceptions.[26]

b. Additional National Security Factors

In addition to expanding CFIUS's jurisdiction, FIRRMA would expand the list of national security considerations to be assessed during reviews. The House and Senate bill differ somewhat in their approaches to these factors, but substantively both bills permit CFIUS to review:

- the potential national security-related effects of the cumulative market share of or a pattern of recent transactions in any one type of infrastructure, energy asset, critical material, or critical technology by foreign persons;

- whether the acquirer has a history of complying with U.S. laws and regulation;

[19] H.R. 5841 § 201.
[20] NDAA § 1703.
[21] *Id*.
[22] *Id*.
[23] *Id*.
[24] *Id*.
[25] NDAA § 1703; H.R. 5841 § 201.
[26] NDAA § 1703.

- whether the transaction is likely to exacerbate cybersecurity vulnerabilities or are likely to result in a foreign government gaining a significant new capability to engage in malicious cyber-enabled activities against the United States, including such activities designed to affect the outcome of any election for federal office; and

- the extent to which the transaction is likely to release, either directly or indirectly, sensitive personal data of U.S. citizens to a foreign person that may exploit that information in a manner that threatens national security.[27]

In addition, the House bill would add:

- the degree to which the covered transaction is likely to threaten the ability of the U.S. Government to acquire or maintain the equipment and systems that are necessary for defense, intelligence, or other national security functions; and

- whether the covered transaction is likely to expose any information regarding sensitive national security matters or sensitive procedures or operations of a federal law enforcement agency with national security responsibilities to a foreign person not authorized to receive that information.[28]

The Senate bill would add:

- whether a transaction involves a country of special concern that has a demonstrated or declared 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.[29]

c. Short-Form "Declarations".

As drafted, both the Senate and House bills would create a new short-form filing, or "declaration," that would permit the parties to file an abbreviated notice (targeted for five pages or less) describing basic information regarding the transaction.[30] Based on the declaration, CFIUS could (1) clear the transaction, (2) request that the parties file a full notice, (3) inform the parties that CFIUS is unable to conclude action under Exon-Florio on the basis of the declaration (in which case, parties could voluntarily file a full notice to have the transaction cleared by CFIUS), or (4) initiate a unilateral review of the transaction.[31] CFIUS would be required to reach one of the four decisions listed above within 30 days of receipt of a declaration.[32]

It remains to be seen whether declarations will be a useful tool for voluntary notices. Although Congress appears to be acknowledging that some transactions are less sensitive than others, one might reasonably ask whether there is much point to making a voluntary filing at all in cases that do not raise significant

[27] NDAA § 1702(b); H.R. 5841 § 308.
[28] H.R. 5841 § 308.
[29] NDAA § 1702(b).
[30] NDAA § 1706; H.R. 5841 § 302(a).
[31] NDAA § 1706; H.R. 5841 § 302(a).
[32] NDAA § 1706; H.R. 5841 § 302(a).

issues. However, some parties may be interested in making such filings to try to obtain the safe harbor of a clearance. However, unless it is obvious that there are no national security issues (or that CFIUS lacks jurisdiction, a finding it rarely makes), it seems unlikely that CFIUS will clear many transactions on the basis of a 5-page declaration, and if CFIUS proceeds to a full examination of the transaction, the filing of a short-form declaration merely adds another 30 days to the process.

d. Mandatory Filings.

Although CFIUS has the authority to compel parties to notify transactions and the ability to initiate reviews and subpoena information, at present the CFIUS process is voluntary in the first instance.[33] Under FIRRMA, filing of at least a declaration would be mandatory for investments involving access to U.S. critical technology by foreign persons in which a foreign government owns, directly or indirectly, a substantial interest, though the details differ slightly in the two bills.[34]

Both bills would leave "substantial interest" to be defined by regulation but would prohibit CFIUS from defining passive investments of less than 10 percent as "substantial."[35] Under the Senate bill, declarations would be required for acquisitions of a "substantial interest" in a U.S critical technology company or a U.S. critical infrastructure company by a foreign person in which a foreign government owns, directly or indirectly, a substantial interest unless each foreign person party (and each person that owns or controls a party) is from an exempted jurisdiction (as described above).[36] The Senate version of FIRRMA would also empower CFIUS to designate additional areas that would be subject to mandatory declarations because of (1) the sector involved, (2) difficulty remedying any harm to national security post-closing of the transaction, or (3) difficulty of otherwise obtaining information about a particular type of transaction.[37]

By contrast, the House bill would require mandatory declarations for any investment that results in the release of critical technologies by any U.S. business to a foreign person in which a foreign government has, directly or indirectly, a substantial interest and does not provide an exception for transactions involving friendly countries.[38]

Together with mandatory declarations, FIRRMA would introduce mandatory waiting periods for closing. At present, parties are able to close transactions (subject to the ability of CFIUS to issue interim orders and at the parties' risk) despite the pendency of a CFIUS review. Under both the House and Senate bills, parties would be required to submit mandatory declarations no later than 45 days prior to closing.[39] Both

[33] *See, e.g.*, 31 C.F.R. § 800.701(a).
[34] *See* NDAA § 1706; H.R. 5841 § 302(a).
[35] NDAA § 1706; H.R. 5841 § 201.
[36] NDAA § 1706.
[37] *Id.*
[38] H.R. 5841 § 302(a).
[39] NDAA § 1706 (requiring submission of mandatory declarations no later than 45 days prior to closing); H.R. 5841 § 302(a) (permitting CFIUS to issue regulations that require submission of mandatory declarations at a date no more than 45 days prior to closing).

bills would also permit parties to submit a full notice in lieu of a mandatory declaration, but the minimum 45-day waiting period would still apply.[40]

e. Side Agreements.

Both bills would authorize CFIUS to issue regulations formalizing the requirement for the parties to submit all partnership agreements, integration agreements, and other side agreements relating to a transaction. [41]

f. Reforms to the CFIUS Timeline.

The Senate and the House versions of FIRRMA both have provisions meant to reform the timetable for CFIUS review. Under current law, the CFIUS timeline is nominally 30 days for an initial review, 45 days for a second-stage investigation, and (rarely) 15 days for a presidential determination.[42] However, the statutory timetable only commences after CFIUS accepts the parties' notice; in recent years, CFIUS has taken ever-increasing amounts of time to request additional information not called for by the CFIUS regulations or simply held notices without action before accepting them and starting the review period. CFIUS has also with increasing frequency pressured parties to "voluntarily" withdraw and resubmit notices in order to re-start the review periods. Taking into account the pre-acceptance period and the ability of CFIUS to request that parties withdraw and resubmit notices, the statutory review period has become increasingly fanciful.

Both the Senate and House versions of FIRRMA would extend the statutory timeline for CFIUS proceedings. Under both bills, the initial review would be extended from 30 to 45 days, followed by, if necessary, a 45-day investigation that could be extended (by 30 days in the Senate bill or 15 days in the House bill).[43] The Senate bill also attempts to add certainty to the pre-filing period, requiring CFIUS to either accept a CFIUS notice or provide comments explaining why the notice is materially incomplete within 10 business days after submission of the draft, so long as the parties stipulate that a transaction is a "covered transaction" within CFIUS jurisdiction.[44] Finally, both bills address government shutdowns, tolling CFIUS's statutory deadlines during any lapse in appropriations.[45]

These changes to the formal timetable may reduce the frequency of CFIUS's bending its rules to extend that timetable, but their impact obviously remains to be seen.

g. CFIUS Filing Fees.

The U.S. government does not currently charge fees for CFIUS filings. Both versions of FIRRMA would permit CFIUS to collect filing fees for notifications; this dedicated funding sources is intended to provide

[40] NDAA § 1706; H.R. 5841 § 302(a). Under the Senate bill, parties opting to file a full notice in lieu of a mandatory declaration would be required to submit such notice at least 90 days prior to the transaction closing. NDAA § 1706.
[41] NDAA § 1705; H.R. 5841 § 301.
[42] 50 U.S.C. § 4565(b)(1)(E), (2)(C).
[43] NDAA § 1709; H.R. 5841 § 303(1)-(2).
[44] NDAA § 1704.
[45] NDAA § 1709; H.R. 5841 § 303(3).

additional CFIUS staff to address current delays and increased future volume of notifications.[46] The House bill authorizes CFIUS to charge filing fees that do not exceed an amount equal to the lesser of 1 percent of the value of the transaction or $300,000, as adjusted annually for inflation;[47] the Senate bill leaves the fee to be determined, so long as the total fees collected do not exceed the cost of administering CFIUS.[48] The Senate bill also contemplates a supplemental filing fee for expedited treatment of draft notices.[49] Both bills would require that CFIUS periodically updated the filing fee and, in setting the fee, consider factors such as (1) the effect on small business, (2) CFIUS's expenses, and (3) the effect on foreign investment.[50]

h. Updated Enforcement Powers.

Both the Senate and the House versions of FIRRMA codify existing practice and, in some cases, give CFIUS additional tools to enforce remedies addressing national security issues identified with respect to covered transactions. Powers that would be covered under FIRRMA include:

- Greater oversight power over mitigation agreements, including the power to initiate an enforcement action for unintentional breaches of mitigation agreements;
- The power to impose mitigation conditions on a party that has abandoned a transaction; and
- The ability to suspend or prohibit a pending or proposed transaction when a risk to national security is implicated.[51]

i. Judicial Review.

The Senate version of FIRRMA would make adjustments to the available judicial review of CFIUS decisions, adding to the DPA's existing bar against judicial review of the President's substantive determination of whether a transaction threatens national security and what action is necessary to address the threat.[52] The U.S. Court of Appeals for the D.C. Circuit would have exclusive jurisdiction over civil actions challenging an action or finding of the committee; the court would have an opportunity for *ex parte* and *in camera* review of the classified record, if the court determines that the use of such information is necessary; and the government would be able to use information obtained pursuant to the Foreign Intelligence Surveillance Act.[53] The House bill does not address judicial review.

j. Information Sharing with Foreign Governments.

The Senate version of FIRRMA would permit CFIUS to share information with any domestic or foreign governmental entity to the extent necessary for national security purposes, highlighting a trend in recent

[46] NDAA § 1722; H.R. 5841 § 503.
[47] H.R. 5841 § 503.
[48] NDAA § 1722.
[49] *Id*.
[50] NDAA § 1722; H.R. 5841 § 503.
[51] NDAA §§ 1714, 1717; H.R. 5841 § 309.
[52] 50 U.S.C. § 4565(e).
[53] NDAA § 1715. Foreign Intelligence Surveillance Act of 1978 use of information provisions would not apply in a civil action brought against the committee. *Id*.

transactions toward international consultation regarding perceived threats.[54] Both the House and Senate bills instruct CFIUS to set up a formal information sharing process between the United States and its allies and partners.[55]

3. Outstanding Issues to be Resolved in Conference

As discussed in greater detail above, there are a number of issues of varying importance to be resolved in the conference committee. To summarize, the primary issues include:

- Whether to "whitelist" specified jurisdictions and exempt acquirers from those jurisdictions from reviews of real estate transactions, reviews of non-passive critical technology and critical infrastructure investments, and mandatory reviews of government-related transactions (Senate version).

- Whether to treat investments through U.S.-led private equity funds as presumptively passive so long as listed conditions are met (Senate version).

- Whether strategic partnerships or other material financial relationships between a party automatically render any critical technology or critical infrastructure investment non-passive (Senate version)

- Whether to include land ports in real estate transactions to be reviewed (Senate version).

- Whether to extend review of non-passive investments transactions involving "sensitive personal data" (House version).

- Whether to "blacklist" countries to trigger review of non-passive investments in critical technology/critical infrastructure/personal data (House version).

- Whether to permit extension of the investigation phase by 15 (House version) or 30 (Senate version) days

- Whether to add to judicial review provisions (Senate version).

- Reconciling additional national security review factors.

- Information sharing between CFIUS and national and international authorities regarding national security threats (Senate version).

4. Next Steps

The next step will be reconciliation of the House and Senate versions of the NDAA, which could lead to the insertion of new provisions or deletion of common provisions as well as resolution of the differences

[54] NDAA § 1713.
[55] NDAA § 1713; H.R. 5841 § 603.

outlined above. Given FIRRMA's overwhelming bipartisan support across chambers, its passage is near certain and expected prior to the fall election. The expansion of CFIUS's jurisdiction to purchases, leases and other concessions related to U.S. real estate and non-passive, non-controlling investments and the imposition of mandatory declarations are unlikely to occur until new CFIUS regulations are issued implementing the changes, which is likely to take at least a year (likely in 2019). However, several provisions may be effective upon enactment.

The Senate bill calls for immediate effectiveness of, for example, provisions that (1) expand CFIUS jurisdiction to cover: changes in rights that could result in acquisitions of control of a U.S. business by a foreign person, any transactions designed or intended to evade or circumvent the definition of covered transaction, any bankruptcy or similar proceedings that otherwise meet the definition of covered transaction; (2) add or update the definitions of access, control, critical materials, critical technologies, foreign person, intelligence community, United States, and United States business; (3) require notice submissions to include partnership, integration, and side agreements; (4) permit stipulations that a transaction is a covered transaction or foreign government-controlled transaction; (5) remove intentionality as required element for breach of a mitigation agreement; (6) extend the initial review to 45 days; (7) permit the extensions of investigations in extraordinary circumstances; (8) permit tolling for lapses in appropriation; (9) update the process and requirements for the analysis by the Director of National Intelligence; (10) update the ability of the President to impose interim actions and order divestment; (11) update the judicial review process; (12) add new hiring authorities; and (13) update the requirements for imposing, and the process for monitoring and enforcing compliance with, mitigation agreements.[56] The House bill does not address timing of effectiveness for these or other provisions, which will also need to be addressed in conference.

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[56] NDAA § 1732.