

CLIENT ALERT

# CFIUS Reform Update: FIRRMA Comes Closer To Passage As House and Senate Versions Undergo Reconciliation

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## AUTHORS

**David Mortlock** | **Priya R. Aiyar** | **Russell L. Smith** | **Noman A. Goheer**

The House and Senate, by overwhelming majorities, have each passed versions of the “Foreign Investment Risk Review Modernization Act of 2018,” or “FIRRMA.” FIRRMA represents a significant expansion of the U.S. government’s authority to block or limit foreign direct investment based on national security concerns. That screening process is popularly known by the acronym of the inter-agency body that reviews foreign investment, the Committee on Foreign Investment in the United States, or “CFIUS.” The laws governing CFIUS were last revised in 2007, when Congress made the requirements of the review process more explicit but did not change the scope of CFIUS’s jurisdiction. FIRRMA, if enacted, will give the President greater authority to review and potentially block foreign direct investment in the United States by expanding the range and number of transactions subject to CFIUS’s review.

The Senate passed FIRRMA (85-10) on June 18, 2018, as part of the National Defense Authorization Act of Fiscal Year 2019 (“NDAA”). On June 26, 2018, the House of Representatives passed a stand-alone version of FIRRMA by an overwhelming margin (400-2). A conference committee is now attempting to reconcile differences between the two versions prior to a vote on the final bill by both chambers. The White House has stated its support for FIRRMA and, based on the likelihood of its passage, retracted a plan to impose additional Chinese investment restrictions administratively as part of its response to the United States Trade Representative’s Section 301 investigation of “China’s Acts, Policies, and Practices Related to Technology Transfer, Intellectual Property, and Innovation,” discussed below.

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### Key Provisions in FIRRMA

It is expected that the final version of the bill will more closely track the Senate version, which appears to be more complete and addresses a larger array of issues. Key provisions in both the Senate and House versions of FIRRMA are described below, with notable differences highlighted.

- (1) *Expanded jurisdiction over a wider range of transactions.* Currently, CFIUS defines “covered transactions” as transactions that would result in foreign control of a U.S. business. Under FIRRMA, CFIUS’s jurisdiction would expand to include non-passive investments involving “critical technologies” and “critical infrastructure.” Both the Senate and House bills use these terms to expand the scope of covered transactions, but in differing ways. The Senate bill also provides a more specific definition of a “passive” investment.
  - a. *Critical technologies.* The Senate version expands covered transactions to include any non-passive investment in a U.S. critical technology company, but includes possible exemptions for countries determined by CFIUS not to pose a threat to U.S. national security interests. The bill leaves it to CFIUS to define the term “critical technologies” in its regulations at a later date. The definition of critical technologies would also include new categories that would be ultimately defined by regulation. Covered transactions under the House version would encompass most equity investments, including non-controlling investments, by investors from “countries of special concern” if the investor could influence the U.S. business’s use, development, acquisition or release of critical technologies. “Countries of special concern” currently includes China, Russia, Venezuela, Iran, North Korea, Syria, and Sudan.
  - b. *Critical infrastructure.* The Senate bill again expands covered transaction jurisdiction to non-passive investments in U.S. critical infrastructure companies that own, operate, or provide services to an entity that operates within the critical infrastructure sector. The bill includes the same “friendly” country exemption identified for critical technologies. “Critical infrastructure” is defined in the Senate bill as systems or assets so vital that their incapacity or destruction would have a debilitating effect on U.S. national security. The House version, again, focuses on investments in critical infrastructure by investors from “countries of special concern,” as described above.
  - c. *Real estate transactions.* Both House and Senate versions expand CFIUS’s jurisdiction with respect to U.S. real estate transactions. While CFIUS already considers the proximity of U.S. business operations to sensitive and government facilities in reviewing transactions, its jurisdiction under FIRRMA would expand to include purchases, leases, and concessions related to real estate in close proximity to U.S. military installations and air and sea ports, regardless of whether they housed existing business operations. The

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Senate bill further includes real estate in proximity to border crossings and U.S. government facilities that are sensitive for national security reasons.

- (2) *Abbreviated “Declarations.”* Both versions of FIRRMA introduce a short-form “declaration” of a transaction, which could significantly shorten the notice period to a single 30-day review by CFIUS. However, use of the short form might also lengthen the process if CFIUS were to require the foreign investor to file a full CFIUS disclosure after the initial review. Declarations would be mandatory in different circumstances under the two bills. The Senate version would require a declaration for transactions involving foreign government-backed investments in critical technology or infrastructure companies, while the House version would require a declaration for transactions by foreign government-controlled companies if their investment results in a “release” of critical U.S. technology.
- (3) *Lengthened review process.* Both FIRRMA bills lengthen the timetable for the initial CFIUS review from 30 calendar days to 45 calendar days, with the Senate version allowing for an additional 30-day extension at the request of the head of the lead agency in “extraordinary circumstances.” The House version only provides for a possible 15-day extension of the process. The resulting expanded schedule could formally reach 120 days (45-day review, 45-day investigation, and 30-day investigation extension). At the initial submission stage for both draft and final notices, the Senate version requires CFIUS to either provide comments or accept the final notice within 10 business days of receipt. While the possibility of investigation extensions could result in a longer period of review, it would likely be offset by the mandatory 10-business day response period for comments on draft and final notices. Due to an increased CFIUS caseload, both the time period between submission of a draft notice by the parties and receipt of comments from CFIUS addressing the “completeness” of the notice, as well as the time period between submission and formal acceptance of a final notice, have recently been longer than in the past.
- (4) *Filing fees.* Without dedicated funding from the U.S. government, CFIUS has struggled with a markedly increased caseload in recent years. Both versions of FIRRMA authorize CFIUS to levy a filing fee not to exceed one percent of the value of the transaction or \$300,000 (subject to annual adjustment for inflation), while the Senate version will allow for the imposition of an additional fee when requested to expedite a filing.

Other reforms within both bills include: (1) the identification of specific factors to be included in the national security analysis, including reliance on foreign suppliers, reduction of technological advantage, loss of national security advantage, increased cost to maintain defense or intelligence equipment and systems, and several others; (2) a broadening of authority for executive action allowing CFIUS to impose mitigation conditions on voluntarily abandoned transactions and pending transactions; (3) the establishment of an appeals process; and (4) the allowance for wider dissemination of submitted information to any domestic or foreign governmental entity “to the extent necessary for national security purposes.”

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The differences between the two bills will be subject to negotiation during the conference process, which could result in further changes prior to the final vote by both chambers. Furthermore, there are many provisions within the bills that will require additional definitions, conditions, and clarifying language through regulations promulgated by the Treasury Department. This rulemaking process may be a lengthy one. When Congress last amended the CFIUS law in 2007, it took approximately 16 months for the Treasury Department to issue its implementing regulations. When asked about the pending legislation while [testifying](#) before the House Committee on Financial Services on July 12, Treasury Secretary Steven Mnuchin stated that Treasury stands ready to implement FIRRMA and has already begun drafting regulations in anticipation of its passage.

### Section 301 Investigation and FIRRMA

On March 22, 2018, the United States Trade Representative completed its investigation, commenced at the direction of the White House, of “China’s Acts, Policies, and Practices Related to Technology Transfer, Intellectual Property, and Innovation” pursuant to Section 301 of the Trade Act of 1974. The [Section 301 Report](#) identified unfair trade practices including forced technology transfers by U.S. businesses to China, discriminatory intellectual property license provisions, efforts to acquire technology through acquisitions of U.S. and European technology companies, and an increase in Chinese cyber-intrusions into U.S. businesses. President Trump issued a [Presidential Memorandum](#) the same day directing the Secretary of the Treasury to propose investment restrictions, which could be implemented using the President’s powers under the International Emergency Economic Powers Act (IEEPA), “to address concerns about investment in the United States directed or facilitated by China in industries or technologies deemed important to the United States.”

However, the White House released a [press statement](#) on June 27, 2018, retreating from its intention to impose investment restrictions through administrative action, and stating that FIRRMA will provide the needed tools “to combat the predatory investment practices that threaten our critical technology leadership, national security, and future economic prosperity.” The White House announcement was regarded as a victory for those in the Trump administration, particularly Secretary Mnuchin, who advocated the restriction of Chinese investment using CFIUS instead of invoking emergency presidential powers such as IEEPA. President Trump, though, stated that if the final version of FIRRMA is too weak, he would pursue other executive action.

### ZTE and FIRRMA

FIRRMA also contains language relating to the export controls and sanctions enforcement action against Chinese telecom company Zhongxing Telecommunications Equipment Corporation (“ZTE”). On April 16, 2018, the Commerce Department imposed a denial order on ZTE, preventing ZTE from purchasing any U.S.-origin items after ZTE violated the terms of its prior settlement agreement with Commerce. But in late May, President Trump, as part of his trade negotiations with Chinese President Xi Jinping, ordered Commerce to renegotiate a settlement that would allow ZTE to resume operations.

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Commerce did so and on June 6, 2018, announced that it would lift the export ban if ZTE met a number of conditions, including payment of a \$1 billion fine with an additional \$400 million held in escrow. ZTE has now fulfilled those conditions and Commerce has [lifted](#) the denial order.

The Senate version of FIRRMA, however, includes language that would re-impose for at least 30 days the ban on American companies supplying ZTE and until the President certifies to Congress that ZTE “has not, for a period of one year, conducted activities in violation of the laws of the United States.” The House version of FIRRMA does not include this requirement, although it does, as does the Senate version, ban U.S. government procurement from ZTE. The Trump Administration stated its objection to the Senate provision re-imposing the export ban in a [“Follow-On to Statement of Administration Policy”](#) on the NDAA released by the Office of Management and Budget. It is currently expected that the Administration and House positions will prevail and that the language of the ZTE amendment will be modified to allow Commerce’s lifting of the export ban. However, a number of Senators and Representatives, including Tom Cotton, Marco Rubio, Mark Warner, Roy Blunt, Bill Nelson, and Chris Van Hollen, have recently urged leadership to keep the export ban in place.

If you have any questions regarding this client alert, please contact the following attorneys or the attorney with whom you regularly work.

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**David Mortlock**

202 303 1136

[dmortlock@willkie.com](mailto:dmortlock@willkie.com)

**Priya R. Aiyar**

202 303 1189

[paiyar@willkie.com](mailto:paiyar@willkie.com)

**Russell L. Smith**

202 303 1116

[rsmith@willkie.com](mailto:rsmith@willkie.com)

**Noman A. Goheer**

202 303 1295

[ngoheer@willkie.com](mailto:ngoheer@willkie.com)

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