A Primer on CFIUS: Navigating the Evolving U.S. National Security Foreign Investment Review Process

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The Trump Administration's spotlight on foreign investment and trade issues, as well as its recent highly publicized intervention to block Broadcom's hostile bid for Qualcomm, has raised the public profile of the Committee on Foreign Investment in the United States ("CFIUS" or the "Committee"), the inter-agency committee charged with reviewing foreign investments in U.S. businesses for potential national security issues. At the same time, U.S. companies continue to develop cutting-edge technologies with potential defense applications while collecting, storing, and analyzing ever more data on U.S. citizens, leading CFIUS to increase its scrutiny of cross-border deals, particularly by investors hailing from countries of special concern such as China and Russia. Against these realities, national security regulatory lawyers are increasingly being asked by clients for help navigating the U.S. foreign investment review process.

In this article, we provide an overview of the CFIUS review process from start to finish, highlighting current hot topics and exploring the implications of recently proposed reforms.[1] Antitrust practitioners should be aware of the impact that CFIUS review may have on the client's transaction, in terms of timing and substance, especially where divestitures of U.S. businesses to foreign companies are contemplated to address competition concerns. Although opaque and evolving, and despite the uniquely aggressive stance of the current Committee, CFIUS reviews should not bar the overwhelming majority of cross-border transactions when risks are identified and mitigated early in the deal process.

The Committee

In terms of composition, process, and available remedies, CFIUS differs in meaningful ways from the U.S. regulators with whom antitrust practitioners normally interact. CFIUS is a nine-member interagency committee within the Executive Branch of the U.S. government tasked with reviewing "covered transactions," i.e., any transaction that could result in "control" of a U.S. business by a foreign person (including minority investments and other transactions falling short of complete acquisitions), for potential risks to "national security." Unlike deals subject to notification under the HSR Act,[2] transacting parties can decide whether to submit a voluntary notification to CFIUS. Where CFIUS determines that a covered transaction may pose a national security concern, however, CFIUS can and increasingly does proactively contact parties to strongly encourage them to submit a voluntary notification. If the parties refuse, CFIUS can self-initiate an investigation (an

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[1] For an overview of the various regulatory approval processes implicated in international mergers, see Am. Bar Ass'n Section of Antitrust Law, Report of the Task Force on Foreign Investment Review (Sept. 28, 2015), https://www.americanbar.org/content/dam/aba/administrative/antitrust_law/20150928_foreign_investment.authcheckdam.pdf.

[2] Hart-Scott-Rodino Antitrust Improvements Act, Pub. L. No. 94-435, 90 Stat. 1383 (1976) (codified as amended at 15 U.S.C. § 18a).

Agency Review). Where national security concerns are identified, CFIUS will negotiate mitigation agreements or insist on assurances from the parties to address those concerns. Should CFIUS determine that mitigation is not feasible, or if the parties and CFIUS cannot agree on mitigation measures, CFIUS can recommend that the President suspend or prohibit the transaction.

Authority and Composition

The Committee's authority springs from Section 721 of the Defense Production Act of 1950, as amended, which gives the President authority to investigate the impact on U.S. national security of mergers, acquisitions, and takeovers by or with foreign persons that could result in foreign control over persons engaged in interstate commerce in the United States. This authority enables the President to suspend or prohibit transactions—or, in the case of a completed transaction, order mitigation measures or divestitures—if the President concludes (1) there is credible evidence that the foreign interest exercising control might take action that threatens U.S. national security, and (2) existing law (other than the International Emergency Economic Powers Act[3]) does not provide adequate authority to protect U.S. national security. Rather than house such reviews within the White House, however, the President has delegated investigative authority to CFIUS by executive order.[4]

Administratively, the Department of the Treasury chairs the Committee, which is composed of eight other voting members consisting of the Departments of Justice, Homeland Security, Commerce, Defense, State, and Energy; the Office of the U.S. Trade Representative (USTR); and the Office of Science & Technology Policy. As appropriate, other Executive Branch offices observe and participate in CFIUS's activities, including the Office of Management and Budget, the Council of Economic Advisors, the National Security Council, the National Economic Council, and the Homeland Security Council. In addition, both the Director of National Intelligence and the Secretary of Labor serve as ex-officio members of CFIUS without voting power.

Initiating Reviews

The review process begins with the submission to Treasury of a draft joint voluntary notice (JVN) from the parties, detailing the transaction, the U.S. target, and the foreign acquirer. As provided by regulation, the JVN must include, among other things: (1) the nature and purpose of the transaction and copies of relevant deal documents; (2) names, addresses, and other information for each parent entity of the buyer(s) up through the ultimate parent entity; (3) personal identifier information (PII) for officers, directors, and certain shareholders at every entity in the foreign investor ownership chain (which must be submitted in a separate enclosure with the JVN); and (4) buyer disclosures regarding plans to shut down or move any of the target's facilities offshore, consolidate or divest product lines or technologies, modify or terminate government contracts, or elimi-

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[3] The International Emergency Economic Powers Act (50 U.S.C. §§ 1701 et seq.) (IEEPA) provides the President with broad authority to "deal with any unusual and extraordinary threat . . . to the national security, foreign policy, or economy of the United States," but invoking IEEPA requires the President to first declare a "national emergency." And as noted during passage of the Exon-Florio amendment (which added section 721 to the Defense Production Act of 1950), using IEEPA in the context of a particular foreign investment in a U.S. business would be "virtually the equivalent of a declaration of hostilities against the government of the acquirer company." *Acquisitions by Foreign Companies: Hearing Before the S. Comm. on Commerce, Science, and Transp.*, 100th Cong. 17 (1987) (statement of Sen. Wilson). Accordingly, as a practical matter, IEEPA is unlikely to be invoked in the context of a transaction subject to CFIUS review (though it technically could be).

[4] Exec. Order No. 11,858, 3 C.F.R. 990 (1971–1975), *reprinted as amended in* 3 C.F.R. 13456 (2008).

nate the domestic supply of any product.[5] Because a key focus of CFIUS is evaluating the extent of potential foreign government control in the target post-transaction and any resulting threat to national security—including whether any foreign government would have contingent rights, "golden shares," appointment rights, or convertible voting instruments in the target, buyer, or buyer's parents—identifying such foreign government control early may allow parties to structure transactions or take other steps at the outset to mitigate concerns, which can save valuable time later.

The JVN also must provide market share estimates for the products and services offered by the U.S. business that is the subject of the transaction and identify whether the U.S. business is a sole source or single qualified source for any U.S. government agency. Where the U.S. business has large or dominant market shares, there may be national security concerns around the potential for supply disruption of products or services to the U.S. government by the foreign acquirer. It is generally good practice to ensure that market share estimates disclosed to CFIUS are consistent with those provided to the U.S. Federal Trade Commission and Department of Justice as part of a substantive competition review, but the antitrust regulators are not typically part of the CFIUS review and their views on market definition may differ significantly from those of the Committee.[6]

The antitrust regulators may also have an interest in the outcome of the CFIUS process. For example, the FTC closely followed CFIUS's review of NXP's 2015 sale of its RF Power business to a Chinese state-owned entity, JAC Capital, because that transaction was intended to alleviate competition concerns related to the FTC's review of the pending NXP merger with Freescale Semiconductors. The FTC was hesitant to approve the NXP/Freescale merger until it became clear that CFIUS would not block NXP's carve-out of its RF Power business.

Once submitted, CFIUS staff will review the parties' draft JVN and provide comments, normally within about two weeks. After revising the draft JVN to address any comments from CFIUS, the parties submit a final JVN, which the Committee typically accepts by sending a "Day 1" letter to the parties within a week or so. Acceptance kicks off a 30-day review period during which the intelligence agencies perform a national security threat assessment to help CFIUS determine whether the foreign party and the transaction may present national security concerns. During this 30-day review, parties can expect to receive follow-up questions from CFIUS, which must be addressed within three business days, absent an extension from the Committee. At the end of the 30-day review, CFIUS may open a 45-day investigation if a member agency advises the Staff Chair that the transaction could threaten national security or if an agency taking lead on the 30-day review recommends that CFIUS do so.[7]

In 2017, 70 percent of the nearly 240 CFIUS reviews proceeded to the investigation phase.[8] If an investigation is opened and the Committee and the parties to the transaction are unable to agree to mitigation terms before the 45-day period lapses, with CFIUS's permission, the parties may withdraw and refile their JVN, effectively restarting the 75-day clock. Parties can continue to withdraw and refile their JVN as long as CFIUS continues to grant permission for them to do so.

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[5] *See* Regulations Pertaining to Mergers, Acquisitions, and Takeovers by Foreign Persons; Final Rule, 73 Fed. Reg. 70,702 (Nov. 21, 2008) (codified at 31 C.F.R. pt. 800).

[6] *See* 31 C.F.R. § 800.402(c)(3)(i) and (v).

[7] There is a rebuttable presumption in favor of a 45-day investigation in situations where: (i) the buyer represents or is controlled by a foreign government; or (ii) the transaction involves "critical infrastructure."

[8] *See Perspectives on Reform of the CFIUS Review Process Before the Subcomm. on Digital Commerce and Consumer Protection of the H. Energy and Commerce Comm.*, 115th Cong. 3 (Apr. 26, 2018) (statement of Heath Tarbert, Assistant Sec'y of the Treasury) [hereinafter Tarbert Statement].

Although the practice of withdrawing and refiling is not new, there has been a marked expansion in its use during the Trump Administration, resulting in extended timetables for CFIUS investigations, particularly those involving Chinese investors.

Risk Identification and Mitigation

CFIUS will conduct a risk-based assessment examining the "threat" posed by the foreign buyer or investor and the potential vulnerabilities associated with the U.S. business. The threat may be specific to the investor's country or the investor itself or both. The Committee will consider a wide range of factors in performing its risk assessment, including: (1) whether the U.S. business is considered part of "critical infrastructure"; (2) the physical proximity of assets of the U.S. business to U.S. government and military facilities and restricted airspace; (3) any advanced technology controlled by the U.S. business that may have defense applications, including, for example, semiconductors, artificial intelligence and robotics; (4) access through the U.S. business to sensitive and personal data of U.S. citizens or valuable confidential business information; (5) sensitive U.S. government contracts, particularly classified contracts, of the U.S. business; and (6) the involvement of state-owned enterprises or other foreign government-controlled entities.[9] Considering this wide range of potential risk factors, parties should identify and assess possible hot-button issues at the outset to avoid delays or other impediments likely to appear once CFIUS initiates its review.

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Transactions notified to CFIUS often also implicate other national security-related regulatory processes, which can impact parties' timelines and affect the Committee's review. For example, foreign investors need to be mindful of the International Traffic in Arms Regulations (ITAR) and other export control regimes that might require filings with the State Department or the Commerce Department. Similarly, to the extent that a foreign investor seeks control of a U.S. business that has a facility clearance and engages in classified activities, counsel will need to engage with the Defense Security Service of the Department of Defense to put in place Foreign Ownership, Control, or Influence (FOCI) mitigation measures.

Ultimately, CFIUS may conclude a 45-day investigation unconditionally or ask the parties to agree to mitigation measures that alleviate national security concerns. Such mitigation agreements could include, for example: (1) restricted individual- or entity-level information access or control rights; (2) restricted physical access to facilities; (3) assurances that the U.S. business will continue supplying products and services to the U.S. government, or that the U.S. business will not move particular operations offshore; (4) assurances that U.S. government agencies will maintain access to information possessed by the target or the target's systems; and/or (5) a pre-closing production "ramp up" to ensure sensitive U.S. government or defense contractor clients have time to find alternative suppliers. On enforcement, CFIUS's regulations permit mitigation agreements to include actual or liquidated damages for breach.

Ability to Halt Transactions

CFIUS itself cannot permanently suspend or block transactions, but it can recommend the President do so if the Committee concludes a covered transaction imposes unresolvable national security concerns. The President then has 15 days to make a decision, which is final and not appealable. As a practical matter, parties will usually abandon their transaction when CFIUS sig-

[9] For a full list of factors CFIUS may consider in its national security review, see Defense Production Act of 1950 § 721(f), 50 U.S.C. § 4565(f).

nals an intent to oppose the deal. Indeed, formal executive action has been used to halt transactions only five times, although three such instances have occurred within the past two years:

- On February 2, 1990, President Bush ordered the state-owned China National Aero-Technology Import & Export Corporation to divest Mamco Manufacturing Company, a Seattle-based company that manufactured aerospace parts;
- On September 28, 2012, President Obama ordered Ralls Corporation, a U.S. company owned by Chinese nationals, to divest its interests in four wind farm projects in Oregon located near restricted airspace;
- On December 2, 2016, President Obama blocked the sale of the U.S. assets of a German semiconductor manufacturer, Aixtron SE, to a Chinese investor, Fujian Grand Chip Investment Fund;
- On September 13, 2017, President Trump blocked the sale of Lattice Semiconductor to Canyon Bridge Capital Partners, a private equity firm managed by U.S. nationals but backed by funds from several Chinese state-owned entities; and
- On March 12, 2018, President Trump prohibited Broadcom, a semiconductor manufacturer co-headquartered in Singapore and the United States, from acquiring Qualcomm, a leading U.S. semiconductor and telecommunications equipment manufacturers.

Although only the President can permanently suspend or block covered transactions, CFIUS does have the ability to impose any condition to mitigate national security threats implicated by covered transactions and "take any necessary actions in connection with the transaction to protect the national security of the United States."

Although only the President can permanently suspend or block covered transactions, CFIUS does have the ability to impose any condition to mitigate national security threats implicated by covered transactions[10] and "take any necessary actions in connection with the transaction to protect the national security of the United States."[11] The full extent of the Committee's powers has never been tested, but CFIUS's recent actions in connection with a highly publicized hostile bid for Qualcomm by Broadcom shows that the Committee interprets them quite broadly.

On January 29, 2018, Qualcomm submitted a unilateral notification regarding Broadcom's attempt to elect a majority of Qualcomm's board—using CFIUS as a "shield"—before any agreement had been reached between the parties, and without Broadcom's cooperation. At the time, Broadcom was a widely held company, publicly traded on NASDAQ, and co-headquartered in the United States and Singapore, but the company's parent was a Singapore entity, its legal address was in Singapore, and Broadcom had not finished relocating its domicile to the United States. This provided a jurisdictional "hook" that allowed CFIUS to investigate, which it did.

On March 4, 2018, Treasury Secretary Steven Mnuchin issued an interim order on behalf of CFIUS, requiring Qualcomm's upcoming annual stockholder meeting be postponed for 30 days and obligating Broadcom to provide CFIUS with five business days' notice "before taking any action toward re-domiciliation in the United States."[12] The interim order was followed a day later by an explanatory letter from Treasury's Deputy Assistant Secretary of Investment Security, spelling out the Committee's concerns with the transaction.[13] Although such exchanges are normally hidden from public view, Qualcomm filed copies of the interim order and explanatory letter with the SEC shortly after receiving them. Adding to the unusual nature of the review, Broadcom

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[10] 50 U.S.C. § 4565(l)(1)(A).

[11] 50 U.S.C. § 4565(b)(2)(A).

[12] *See* Qualcomm Incorporated, Current Report (Form 8-K) (Mar. 5, 2018) (attaching March 4, 2018 Interim Order from the Committee on Foreign Investment in the United States as Exhibit 99.1), https://www.sec.gov/Archives/edgar/data/804328/000110465918014823/a18-7296_48k.htm.

[13] *See* Qualcomm Incorporated, Current Report (Form 8-K) (Mar. 6, 2018) (attaching March 5, 2018 Letter from the U.S. Department of Treasury as Exhibit 99.1), https://www.sec.gov/Archives/edgar/data/804328/000110465918015036/a18-7296_78k.htm.

reportedly did not comply with the Committee's interim order and instead hastened its re-domiciliation, announcing on March 12, 2018, that it was "in the final stages" and revising the expected re-domiciliation date to April 3, 2018. Later that same day, President Trump issued an executive order blocking Broadcom's takeover efforts.[14]

Although it was the President's order in the end that stopped Broadcom from acquiring Qualcomm, the Committee's attempt to stop Broadcom from taking further steps to re-domicile in the United States (which would have removed the hook for CFIUS's jurisdiction) shows that, in the current climate, CFIUS will not hesitate to use every arrow in its quiver where it perceives threats to national security.

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An Unprecedentedly Proactive Committee

CFIUS has steadily staked out more aggressive (and some would say increasingly politicized) positions over the past few years, finding sufficient "control" to warrant jurisdiction in ever-more-attenuated circumstances and declining to entertain mitigation to resolve concerns previously handled by agreement. For example, it was widely reported in February 2016 that Unisplendour, a Chinese IT firm indirectly owned by a Chinese state-owned enterprise, withdrew its planned $3.8 billion investment in Western Digital, an electronic storage solutions manufacturer based in the United States, after encountering resistance from CFIUS. Under the terms of that deal, Unisplendour would have received a minority stake in Western Digital (about 15 percent) and the right to nominate a single director to Western Digital's board, but no intellectual property rights, sensitive technologies, or other assets that typically attract attention from the Committee.

Going further, a group of Chinese and Singapore investors announced in September 2017 that they were abandoning a minority (10 percent) investment in HERE Technologies, an Amsterdam-based company that provides high-resolution maps to leading carmakers.[15] Transactions that result in 10 percent or less foreign ownership are expressly carved out of CFIUS's jurisdiction by regulation if they are "solely for the purpose of passive investment,"[16] so the Committee's objection to the HERE investment was taken as a clear erosion of the "passive investment" safe harbor by the CFIUS bar.

In many ways, the Committee's handling of the Qualcomm/Broadcom review represents a high-water mark. For the first time, CFIUS recommended that a transaction be blocked before any deal agreements were executed, apparently concluding that Broadcom's efforts to elect a majority of Qualcomm's directors would give Broadcom enough control over Qualcomm to satisfy the Committee's jurisdictional requirements. And on potential harm to U.S. national security, CFIUS appears to have focused on threats entirely independent of Broadcom's status as a foreign investor. As the Committee's March 5, 2018 letter to the parties explains, CFIUS was concerned that Broadcom would reduce Qualcomm's research and development funding (notwithstanding the company's pledges to the contrary), allowing third-party Chinese companies (particularly Huawei) to take the lead on 5G telecommunications technology and also possibly disrupting supply under critical Department of Defense and other U.S. government contracts. But Qualcomm

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[14] *See* Presidential Order of Mar. 12, 2018, Regarding the Proposed Takeover of Qualcomm Incorporated by Broadcom Limited, 83 Fed. Reg. 11,631 (Mar. 15, 2018), https://www.gpo.gov/fdsys/pkg/FR-2018-03-15/pdf/2018-05479.pdf.

[15] *See* HERE Press Release, *HERE Expands into China; Provides Update on Shareholders* (Sept. 26, 2017), https://www.here.com/en/company/newsroom/press-releases/2017-26-09; *see also* Yuan Yang, *Chinese Bid for Mapping Company Falls at US Hurdle*, FIN. TIMES (Sept. 27, 2017), https://www.ft.com/content/6f0e519c-a33f-11e7-9e4f-7f5e6a7c98a2.

[16] 31 C.F.R. § 800.302(b).

and all other U.S. businesses are permitted under U.S. law to reduce R&D spending or make other internal business decisions without inviting CFIUS interference.

Heightened Focus on Sensitive Technology and PII

Coinciding with the Committee's across-the-board ramp up has been a heightened focus on deals involving sensitive technologies, such as those related to semiconductor design and manufacturing. President Obama made headlines in December 2016 when he issued an executive order blocking the sale of the U.S. assets of a German semiconductor, Aixtron SE, to a Chinese investor, Fujian Grand Chip Investment Fund. From the text of the order, Aixtron's use of Metal Organic Chemical Vapor Deposition (MOCVD) systems to build semiconductor materials was clearly a key concern to the Committee. A highly complex manufacturing process, MOCVD is used to produce Gallum Nitride (GaN) semiconductors, which are often found in military products, such as radar transmitters and electronic-jamming equipment.

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About nine months later, President Trump similarly made headlines when he blocked the sale of Lattice Semiconductor to Canyon Bridge Capital Partners, a private equity firm managed by U.S. nationals and backed by funds from several Chinese state-owned entities. The concern, as articulated in a press release issued by Secretary Mnuchin, related to "the potential transfer of intellectual property to the foreign acquirer, the Chinese government's role in supporting [the] transaction, the importance of semiconductor supply chain integrity to the U.S. government, and the use of Lattice products by the U.S. government." Not all semiconductor-related investments are the same, however, as CFIUS recently signaled when it cleared the sale of Akrion Systems LLC, a small U.S. equipment supplier to semiconductor manufacturers, to Naura Microelectronics Equipment Co Ltd, a Chinese equipment supplier to semiconductor manufacturers, within a single 75-day review cycle.

Another key area of concern at CFIUS is the extent of consumer or other potentially sensitive data that the target U.S. business collects, uses, or otherwise can access. Earlier this year, MoneyGram International Inc. and Ant Financial Services Group called off their proposed merger after a well-publicized and protracted review in response to CFIUS concerns about MoneyGram's consumer data and potential breaches of that data in China. Prior to the Ant Financial/MoneyGram review, the most notable PII-related case study had been Fosun International's acquisition of Ironshore Inc., an insurer that owned a subsidiary serving federal employees. Fosun and Ironshore initially decided against notifying CFIUS of the transaction, but CFIUS approached the parties shortly after closing with concerns regarding Wright USA, a small Ironshore subsidiary serving federal employees. Ultimately, according to public reports, Fosun divested Wright USA to a third party to resolve the Committee's concerns before selling the rest of Ironshore to Liberty Mutual.

Strict Scrutiny of Chinese Investment

The current environment is uniquely challenging for Chinese investors, who must convince a skeptical administration heavily focused on U.S.-China geopolitical and trade considerations, that the proposed transaction raises no national security concerns. Doing so is not impossible, however. Based on parties' public reports, CFIUS has cleared at least eight transactions involving Chinese investors since January 1, 2017. To put this in perspective, at least 16 such investments were abandoned in the face of CFIUS opposition during the same period. Three others are currently pending, and one of the recently cleared transactions—the sale of Genworth Financial, a U.S.-based insurance company, to China Oceanwide, a Chinese real estate and financial serv-

ices company—went through at least four or five review cycles. Close scrutiny from CFIUS is not new to Chinese investors but, as the numbers reflect, the Committee now demands almost absolute perfection, analyzing every possible risk factor and increasingly declining to consider even exceedingly robust mitigation proposals.

Underscoring the uphill battle Chinese investors face and the geopolitical and economic considerations they must contend with, this past March President Trump directed Secretary Mnuchin to propose restrictions on Chinese investment in "industries or technologies deemed important to the United States" using "any available statutory authority." The President's order coincided with a report from USTR, summarizing the conclusions of a seven-month-long investigation into the effects of China's policies and practices on U.S. intellectual property rights, innovation, and technology development. As part of the investigation, USTR staff reviewed "hundreds" of transactions in "technology-intensive" sectors, such as aviation, integrated circuits, information technology, biotechnology, and industrial machinery. Particularly noteworthy, the report concluded that China directs and facilitates the systematic investment in, and acquisition of, U.S. companies and assets by Chinese companies to obtain cutting-edge technologies and intellectual property and to generate large-scale technology transfer. At press time, neither President Trump's directive nor Secretary Mnuchin's public remarks on the subject clarify whether any investment restrictions will exist within the current CFIUS framework, but heightened formal restrictions on Chinese investment are clearly a priority for the administration.

Proposed Legislative Reforms

Independent of any forthcoming China-specific investment restrictions being considered by USTR and Secretary Mnuchin, a bipartisan group of lawmakers introduced sweeping reform legislation in both the House and Senate last November to close perceived gaps in CFIUS's jurisdiction and bolster the Committee's powers. A number of reform efforts have come and gone with little effect since enactment of the last major overhaul bill in 2007, but the recently proposed bill—the Foreign Investment Risk Review Modernization Act (FIRRMA)—enjoys broad support from the administration, and passage appears to be more a question of "when" (and in what form) than "if."

One striking and potentially far-reaching aspect of FIRRMA relates to the treatment of "emerging and foundational technologies." As originally introduced last November, FIRRMA would have expanded CFIUS's jurisdiction beyond M&A transactions to broadly include IP transfers to foreign persons by U.S. "critical technology companies." But this aspect of FIRRMA has been the subject of several congressional hearings and extensive lobbying efforts, and the current draft bill contemplates using enhanced export control processes to address the transfer of "emerging and foundational technologies." Specifically, FIRRMA in its current form would create an interagency process to identify emerging and foundational technologies "essential to the national security of the United States" (but not considered "critical technologies" under the Defense Production Act) that would be subject to the Department of Commerce's export control regime.

The Senate version of FIRRMA also would allow CFIUS to review any foreign investment in a U.S. "critical infrastructure company" or a U.S. "critical technology company"—terms that are broadly defined to include any U.S. businesses that own, operate, or primarily provide services to entities that operate critical infrastructure, or U.S. businesses that produce, trade in, design, test, manufacture, service, or develop critical technologies. Purely "passive investments" would be exempt if the foreign investor would not have any of the following: (1) access to non-public technical information possessed by the U.S. business; (2) membership or observer rights to the board of directors, or the right to nominate a member or observer; (3) involvement (other than through the voting

shares) in substantive decision making; or (4) a parallel strategic partnership or other material financial relationship with the U.S. business.

Lastly, FIRRMA would extend CFIUS's jurisdiction to purchases or leases of private or public real estate in the United States if that real estate is in "close proximity" to a sensitive U.S. government property or facility, regardless of whether the transaction involved control over a U.S. business. At present, this expansion of jurisdiction likely will be limited to commercial real estate outside of urban areas. As a practical matter, however, especially if the foreign acquirer is from a country of concern, "physical proximity" analysis is a standard part of due diligence in real estate transactions, virtually all of which involve the acquisition of a U.S. business.

While FIRRMA would extend the Committee's jurisdiction to reach the types of real estate transactions, minority investments, and contribution arrangements described above, FIRRMA would also authorize CFIUS to enact regulations exempting some transactions otherwise covered by these new categories based on the identity of the host country. In determining which foreign countries are eligible for exemption, FIRRMA would direct CFIUS to consider factors, such as whether the United States has a mutual defense treaty in effect with the country or whether the United States and the foreign country have a mutual arrangement to safeguard national security as it pertains to foreign investment. The Senate version would also allow CFIUS to consider whether a country is a party to nuclear non-proliferation regimes in developing the "white list."

In sharp contrast to the existing voluntary-notice framework, the draft legislation mandates that parties disclose their transactions to CFIUS in some circumstances, including situations where practitioners today might recommend not submitting a transaction to CFIUS for voluntary review. In the original version of FIRRMA, parties to transactions involving a foreign person's acquisition of a voting interest of at least 25 percent in a U.S. business would be required to disclose their transaction to the Committee where a foreign government directly or indirectly owned a voting interest of at least 25 percent in the foreign person. Parties subject to the mandatory disclosure requirement would have the option of submitting a "short form" notice providing basic information about the contemplated transaction at least 45 days before closing or filing a full written notice no later than 90 days before closing. As the legislation has moved through congressional committees, the provision has evolved to require such mandatory disclosures where a foreign government acquires a "substantial" interest in a U.S. business. Whether this survives in the final bill or the requirement of mandatory disclosures is left for CFIUS to define in implementing regulations based on criteria included in the bill is an open issue. The current Senate version would exempt investors from "white list" countries from the mandatory declarations requirement.

If enacted in its current form, FIRRMA would dramatically increase the number of transactions that are subject to CFIUS review, placing significant new demands on the already over-burdened Committee. Last year, CFIUS reviewed nearly 240 cases, up from about 95 cases a decade ago; moreover, 70 percent of CFIUS cases went to a second-phase 45-day investigation.[17] To ameliorate resource concerns, FIRRMA would establish a dedicated fund in the U.S. Treasury, call for appropriations "as may be necessary to perform the functions of the Committee," authorize CFIUS to assess and collect fees for written notices filed with the Committee, and confer special hiring authority on CFIUS member agencies, enabling them to shortcut the traditional government hiring process.

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[17] *See* Tarbert Statement, *supra* note 8.

Procedurally, FIRRMA would also increase the initial review period to 45 days (from 30 days), and provide for an additional 30-day extension in "extraordinary circumstances" to complete the Committee's investigation, meaning that some CFIUS reviews potentially could take as long as 120 days. Adding authority independent of the President, FIRRMA would give CFIUS the power to "suspend" transactions during the Committee's investigation, and the legislation contemplates civil penalties should parties violate any "order" issued under the reform statute.

Conclusion

In light of the current public spotlight on foreign investment and trade-related concerns, the Committee's unprecedentedly aggressive approach to national security reviews, and the very real prospects for significant legislative reform, now is a uniquely interesting and challenging time for antitrust practitioners to understand the CFIUS process when developing a comprehensive strategy to obtain regulatory approvals for their client's transactions. ●