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## WHITE PAPER

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### U.S. Congress Introduces Legislation to Change Foreign Direct Investment Review

Congress recently introduced two pieces of legislation that could significantly change foreign direct investment review in the United States. The Foreign Investment Risk Review Modernization Act of 2017 (“FIRRMA”) seeks to modernize and strengthen the Committee on Foreign Investment in the United States (“CFIUS”) process to more effectively guard against the risk to U.S. national security posed by certain types of foreign investment. FIRRMA appears to have a good chance of becoming law, perhaps even by the end of this year. In addition, the United States Foreign Investment Review Act of 2017 (“USFIRA”) would create a new process whereby the economic effects of certain proposed foreign investments in the United States would be reviewed by the U.S. Department of Commerce. Unlike the near certainty that FIRRMA will become law, USFIRA may be less likely to be enacted.

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In the last month, Congress introduced two pieces of legislation that could significantly change foreign direct investment review in the United States.

The [Foreign Investment Risk Review Modernization Act of 2017](#) (“FIRRMA”), introduced on November 8, 2017, by U.S. Senator John Cornyn (R-TX) and U.S. Representative Robert Pittenger (R-NC), seeks to modernize and strengthen the Committee on Foreign Investment in the United States (“CFIUS”) process to more effectively guard against the risk to U.S. national security posed by certain types of foreign investment. With reported bipartisan support and expected endorsement from President Trump, FIRRMA, which reportedly was developed in consultation with key Trump Administration officials, appears to have a good chance of becoming law, perhaps even by the end of this year.

In addition, the [United States Foreign Investment Review Act of 2017](#) (“USFIRA”), introduced on October 18, 2017, by U.S. Senators Chuck Grassley (R-IA) and Sherrod Brown (D-OH), would create a new process whereby the economic effects of certain proposed foreign investments in the United States would be reviewed by the U.S. Department of Commerce. Unlike the near certainty that FIRRMA will become law, USFIRA may be less likely to be enacted.

## FIRRMA

### Expanded Scope of Transactions Within the Jurisdiction of CFIUS

CFIUS has jurisdiction over so-called “covered transactions,” which currently are limited to transactions that could result in control of a U.S. business by a foreign person. FIRRMA expands the definition of “covered transaction” to include the following.

- The purchase or lease by a foreign person of real estate located in close proximity to a U.S. military installation or to other sensitive U.S. government property.
- Any non-passive investment by a foreign person in a U.S. critical technology company or critical infrastructure company.
- Any change in the rights that a foreign person has with respect to a U.S. business in which the foreign person has an investment, if that change could result in foreign control of the U.S. business or a non-passive investment in a

U.S. critical technology company or critical infrastructure company.

- The contribution by a U.S. critical technology company of both intellectual property and associated support to a foreign person through any type of arrangement, such as a joint venture. This provision would significantly expand the jurisdiction of CFIUS by providing CFIUS with authority to review, for example, joint ventures located outside the United States and technology licensing agreements with foreign parties.
- Any other transaction, transfer, agreement, or arrangement structured to evade or circumvent the CFIUS review process.

### Exemptions for Certain Transactions Involving Certain Countries

FIRRMA authorizes CFIUS to exempt certain transactions from the expanded definition of “covered transaction” if each foreign person that is a party to the transaction is organized in or otherwise subject to the jurisdiction of countries identified by CFIUS, using criteria such as: (i) whether the United States has a mutual defense treaty in effect with that country; (ii) whether the United States has in effect with that country a mutual arrangement to safeguard national security as it pertains to foreign investment; and (iii) the national security review process for foreign investment in that country.

### Declarations for Certain Covered Transactions

FIRRMA authorizes parties to a covered transaction to submit a “declaration” containing basic information regarding the transaction instead of a traditional CFIUS notice. Although the regulations adopted by CFIUS to implement FIRRMA would specify the information that should be included in declarations, FIRRMA indicates that declarations should be abbreviated notifications that generally do not exceed five pages.

Under FIRRMA, declarations would be *mandatory* for the following transactions, a significant change from the current voluntary process:

- The acquisition of at least 25 percent of a U.S. business by a foreign person in which a foreign government owns at least a 25 percent interest.
- Transactions that CFIUS will specify in regulations implementing FIRRMA based on a number of factors, including: (i) the technology, industry, or economic sector in which

the U.S. business operates; (ii) the difficulty of remedying the harm to national security resulting from the transaction; and (iii) the difficulty of obtaining information regarding the transaction through other means.

FIRRMA provides that a mandatory declaration must be submitted at least 45 days before completion of the transaction. Any party that is required to submit a declaration may instead decide to submit a full CFIUS notice, which must be submitted at least 90 days before completion of the transaction. CFIUS can impose penalties if parties fail to comply with declaration requirements.

After receiving a declaration, CFIUS may: (i) request that the parties file a full notice; (ii) inform the parties that CFIUS is not able to complete action based on the declaration and that the parties may submit a full notice for CFIUS to complete action; (iii) initiate a unilateral review of the transaction; or (iv) notify the parties that CFIUS has completed all action with respect to the transaction.

FIRRMA states that CFIUS shall “endeavor” to take one of these actions within 30 days of receiving the declaration but does not make the 30-day time period mandatory. Given the uncertainty associated with timing for review of a declaration, and because CFIUS ultimately may request a full notice in response to a declaration, parties may decide to forego the declaration step and submit a full notice.

### **Extended Review Period**

Under FIRRMA, the initial review period would increase from 30 days to 45 days. In addition, in extraordinary circumstances, CFIUS may extend the 45-day investigation period by an additional 30 days. This will increase the standard review period from 75 days to 90 days and could result in a 120-day review period in extraordinary circumstances.

### **Filing Fees**

FIRRMA authorizes CFIUS to assess and collect a fee equal to one percent of the value of the transaction, subject to a maximum fee of \$300,000. There currently is no fee for filing a CFIUS notice.

### **Additional National Security Factors**

FIRRMA adds a number of national security factors that CFIUS may consider in connection with its review. Some of the new factors already have been taken into account by CFIUS in

recent years, even though not previously included in legislation. The factors include:

- Whether the transaction is likely to reduce the technological and industrial advantage of the United States relative to any country of special concern;
- The degree to which the transaction is likely to increase the cost to the U.S. government of acquiring or maintaining the equipment and systems necessary for defense, intelligence, or other national security functions;
- The potential national security-related effects of the cumulative market share of any one type of infrastructure, energy asset, critical material, or critical technology by foreign persons;
- Whether any foreign person that would acquire an interest in a U.S. business or its assets as a result of the covered transaction has a history of: (i) complying with U.S. laws and regulations; and (ii) adhering to contracts or other agreements with the U.S. government;
- The extent to which the covered transaction is likely to expose personally identifiable information, genetic information, or other sensitive data of U.S. citizens to a foreign government or foreign person that may exploit that information in a manner that threatens national security;
- Whether the transaction is likely to create any new or exacerbate any existing U.S. cybersecurity vulnerabilities;
- Whether the transaction is likely to result in a foreign government gaining a significant new capability to engage in malicious cyber-enabled activities against the United States;
- Whether the transaction involves a country of special concern that has a demonstrated or declared the strategic goal of acquiring a type of critical technology that the U.S. business possesses;
- Whether the transaction is likely to facilitate criminal or fraudulent activity affecting the national security of the United States; and
- Whether the transaction is likely to expose any sensitive information regarding certain federal law enforcement agencies to a foreign person not authorized to receive that information.

### **Broad Authority to Address National Security Concerns**

FIRRMA provides CFIUS with broad authority to address national security concerns raised by covered transactions. For example, if a covered transaction is voluntarily abandoned by the parties, CFIUS may impose restrictions that would prohibit

future consummation of the transaction. Also, if CFIUS reviews a completed transaction, CFIUS may impose conditions to mitigate any interim risk to U.S. national security that may arise as a result of the covered transaction until CFIUS completes its review. Further, CFIUS may suspend a proposed or pending covered transaction that may pose a risk to U.S. national security until CFIUS completes its review.

FIRRMA also authorizes CFIUS to take the following actions if parties are not in compliance with mitigation requirements: (i) negotiate a plan of action to remediate the lack of compliance; (ii) require that the party(ies) notify CFIUS of all covered transactions for five years; and (iii) seek injunctive relief.

### Limited Judicial Review

FIRRMA indicates that actions and findings of CFIUS and the President generally are not subject to judicial review. However, FIRRMA allows for parties to file a petition alleging that CFIUS action is a violation of a constitutional right, power, privilege, or immunity. The petition process applies only in cases where parties initiated the review of the transaction and CFIUS has completed all action with respect to the transaction. Petitions must be filed within 60 days after the challenged action. Under FIRRMA, the United States Court of Appeals for the District of Columbia Circuit would have exclusive jurisdiction over claims and could only affirm the action or remand the case to CFIUS for further consideration. This ability to seek judicial review likely is in response to the 2014 decision in *Ralls Corp. v. Committee on Foreign Investment in the United States*.

### Information Sharing

FIRRMA allows for information contained in a CFIUS notice to be disclosed to any domestic or foreign governmental entity to the extent necessary for national security purposes. This expands the current ability of CFIUS to share such information, which is limited to Congress or in an administrative or judicial action proceeding.

### USFIRA

USFIRA establishes a procedure that would operate in parallel with the CFIUS process and would authorize the Secretary of

Commerce to approve, prohibit, or require that parties modify certain types of transactions. Such transactions include actions that could result in foreign control of any person engaged in interstate commerce in the United States that: (i) in the case of transactions involving a state-owned enterprise, are valued at \$50 million or more; or (ii) in the case of any other transactions, are valued at \$1 billion or more. Parties would be required to notify the Secretary of Commerce in connection with transactions that satisfy those thresholds. Also, the Secretary of Commerce: (i) may require a notification where a transaction that meets such thresholds is not notified; and (ii) is required to initiate a review if requested by the chairman and ranking member of the Senate Finance Committee or the House Ways and Means Committee.

In connection with conducting a review, the Secretary of Commerce must consider any economic factors the Secretary considers relevant, including: (i) the long-term strategic economic interests of the United States; (ii) the history of distortive trade practices in each country in which a foreign party to the transaction is domiciled; (iii) control and ownership of each foreign person that is a party to the transaction; and (iv) the impact on the domestic industry, taking into consideration any pattern of foreign investment in the industry.

The Secretary of Commerce must approve the transaction or inform the parties that he needs additional time no more than 15 days after receiving a notification. If additional time is needed, the review may be extended for up to 45 days from the notification, at which time the Secretary must approve the transaction, prohibit the transaction, or require that the parties modify the transaction and resubmit the modified transaction for review. The Secretary may extend the review of a transaction an additional 15 days. As such, 60 days is the maximum time for any review called for under USFIRA.

USFIRA requires that the Secretary of Commerce and the Secretary of the Treasury coordinate with respect to transactions reviewed by both the Department of Commerce and CFIUS.

Jones Day will continue to monitor developments relating to FIRRMA and USFIRA.

## LAWYER CONTACTS

For further information, please contact your principal Firm representative or one of the lawyers listed below. General email messages may be sent using our “Contact Us” form, which can be found at [www.jonesday.com/contactus/](http://www.jonesday.com/contactus/).

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