

Trump Administration Signals Support for CFIUS Modernization

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For the first time in 30 years, Congress may expand the jurisdiction of the Committee on Foreign Investment in the United States (“CFIUS”). In testimony before the Senate Banking Committee on January 25, 2017, three Administration officials expressed support for the [Foreign Investment Risk Review Modernization Act of 2017](#) (“FIRRMA”), which would significantly amend CFIUS’s authorizing statute, as detailed in our prior [Client Memo](#). FIRRMA has attracted substantial bipartisan support from both houses of Congress and the Trump Administration and has been the subject of two other hearings in the [House](#) and [Senate](#) this year.

The senators heard testimony from three witnesses: the Honorable Heath P. Tarbert, Assistant Secretary of the Treasury for International Markets and Investment Policy; the Honorable Richard Ashooh, Assistant Secretary of Commerce for Export Administration; and Mr. Eric Chewning, Deputy Assistant Secretary of Defense for Manufacturing and Industrial Base Policy (MIBP). These witnesses represent three of the nine federal agencies and offices that comprise the full voting membership of CFIUS.

The hearing, set against the backdrop of growing concerns arising from what Senator Crapo (R-ID) referred to as China’s “weaponization of its foreign investments strategy,” centered around a theme of how to balance national security and economic growth. Despite concerns about China’s industrial policies and activities, the Committee members and witnesses repeatedly emphasized the significant benefit to the U.S. economy from foreign investment (including Chinese investment) and the need to preserve America’s longstanding open investment policy.

Each witness offered his perspective on the role of CFIUS and advocated for various elements of CFIUS modernization. Although the witnesses generally supported FIRRMA, Ashooh noted certain provisions of the bill that may duplicate existing export control authorities. Senator Crapo and Senator Warren (D-MA) raised questions about emerging technologies, which elicited mild disagreement among the panelists on the extent to which new legislative authorities are needed to safeguard such technologies. Ashooh expressed his belief that the Commerce Department already has the authority to control the release of emerging technologies, once they are identified, while Tarbert expressed his view that FIRRMA complements, rather than overlaps with, the Commerce Department’s existing authorities. Both Tarbert and Chewning specifically expressed their support for FIRRMA’s proposed expansion of the scope of transactions potentially reviewable by CFIUS.

All of the panelists and several senators noted the necessity of ensuring that CFIUS has sufficient additional resources to carry out its expanded responsibilities under FIRRMA, with Tarbert commenting specifically on CFIUS’s current increased case load and the complexity of those cases. He noted that last year, CFIUS’s volume of cases was nearly 240, compared to an average volume of fewer than 100 in 2009 and 2010. He also revealed that in 2017, approximately 70 percent of CFIUS cases went into an investigation following the initial 30-day review period, compared to approximately four percent in 2007. Finally, Tarbert noted that in 2017, about 20 percent of the covered transactions that CFIUS reviewed required mitigation or prohibition, whereas from roughly 2008 through 2015, this figure was less than 10 percent.

A video of the hearing, the witnesses’ written testimonies, and Senator Crapo’s opening statement is available [here](#). The Banking Committee has not yet announced a markup on the legislation.

If you have any questions regarding the matters covered in this publication, please reach out to any of the lawyers listed below or your usual Davis Polk contact.

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