

5 Ways New CFIUS Legislation Would Alter Review Process

By **Chelsea Naso**

Law360, New York (November 14, 2017, 6:57 PM EST) -- A bipartisan group of lawmakers recently introduced new legislation to “modernize and strengthen” the Committee on Foreign Investment in the United States, extending the interagency committee’s reach to more types of transactions, adding a mandatory filing component and fees, and adjusting the review timeline.

Sens. John Cornyn, R-Texas, Dianne Feinstein, D-Calif., and Richard Burr, R-N.C., chairman of the Senate Select Committee on Intelligence, introduced the Foreign Investment Risk Review Modernization Act in the Senate last week, while a companion bill of the same name was introduced in the U.S. House of Representatives by Rep. Robert Pittenger, R-Texas.

The Foreign Investment Risk Review Modernization Act comes after Cornyn in June said he was putting the “final touches” on a bill that would grow CFIUS’ reach to noncontrol and other uncovered transactions in a bid to stem Chinese investment in critical U.S. technologies.

It also comes after several government officials — including Secretary of Defense James Mattis, Director of National Intelligence Dan Coats, National Security Agency Director and Commander of U.S. Cyber Command Michael Rogers, and Attorney General Jeff Sessions — have called for a review of CFIUS in order to bring it up to date.

While the legislation is far from the first seeking to adjust CFIUS’ scope and practices, it’s making headlines due to its breadth, its backing by Senate Majority Whip Cornyn, and its bipartisan and bicameral support.

“They spent at least nine months thinking about how they wanted this bill to be drafted, very carefully going to others in Congress, and getting bipartisan support so it could be dropped simultaneously in the House and Senate,” said Joshua Gruenspecht, a Skadden Arps Slate Meagher & Flom LLP CFIUS associate. “What makes it stand out is the thoughtful way in which it was created. To the extent that a new law passes this term, it will be this bill that ends up being the basis for that legislation.”

Here, Law360 outlines five of the major changes CFIUS would see if the bill becomes law.

Expands Reach in Tech, Infrastructure Deals

The Foreign Investment Risk Review Modernization Act aims to broaden CFIUS’ reach in a number of

ways, with a particular focus on strengthening the interagency committee's oversight of both control and noncontrol transactions involving technology or infrastructure that may be deemed sensitive or critical to the U.S.

"The biggest change is it would extend CFIUS' reach to transactions that don't actually involve the acquisition of a U.S. business," said Timothy Keeler, a Mayer Brown LLP international trade partner. "That's a dramatic shift from current law."

CFIUS currently has the ability to review transactions where a foreign investor is taking control of a U.S. business. But the new legislation, if enacted as is, would expand the reach of CFIUS to include joint ventures, transfers of intellectual property, and licensing agreements in the critical technologies and critical infrastructure spaces.

Those deals just have to involve a U.S. company and could even be part of a U.S. company's investment in another country, such as China or Brazil, where investments are often done through a joint venture with a domestic company.

"CFIUS would have jurisdiction over contributions of intellectual property and associated support to a foreign person to joint ventures and any other arrangement," said Rod Hunter, a Baker McKenzie partner. "This, in other words, would extend CFIUS jurisdiction even to joint ventures and potentially other arrangements, like licensing, by certain U.S. companies, even abroad."

The legislation also explicitly calls for CFIUS to consider matters like whether the deal would contribute to the loss of technologies that are advantageous to U.S. national security, risk exposing personal identifying data or genetic information, create cybersecurity risks or establish a national security concern related to a foreign person's overall market holding of one type of infrastructure.

While the legislation certainly places an emphasis on strengthening CFIUS' ability to identify and review foreign investments in critical technology and critical infrastructure, it's not the only industry that would see its scope explicitly broadened. The legislation also calls for acquisitions of real estate located near military bases or other sensitive facilities to be considered a covered transaction.

Creates Mandatory Filings

As it stands now, CFIUS reviews are voluntary unless the government specifically points to a transaction and requests a filing, with companies often choosing to file in order to act as a safe harbor from the risk of the interagency committee unwinding the deal down the road.

But the Foreign Investment Risk Review Modernization Act would make certain filings mandatory.

"The bill would do away with the longtime framework under which CFIUS review has been entirely voluntary. There will now be mandatory filings in certain cases. Of course, we know that filings are not always voluntary, but for the most part, the existing regime relies on voluntary filings," said Stroock & Stroock & Lavan LLP special counsel Anne Salladin.

Mandatory declarations — which are being referred to as light filings because of their brevity in comparison to full notifications — would apply to transactions where a foreign acquirer that is at least 25 percent owned either directly or indirectly by a foreign government is getting a 25 percent or greater voting interest in a U.S. business.

A mandatory declaration may also apply to a deal based on other factors, such as the “technology, industry, economic sector, or economic subsector” of the company involved, but that would be determined by CFIUS itself. Any declaration that is mandatory would have to be made at least 45 days before the deal closes, and CFIUS would then have the discretion to decide if a full notification or review is necessary or opt to approve the transaction.

Those deals may be considered covered under the current CFIUS regime, but depending on their structure may be able to skirt through without a review.

“Clearly the government has concerns about certain foreign government investments and through this mandatory declaration is using other means to ensure that it becomes aware of such transactions,” said Brian Curran, a Hogan Lovells LLP partner.

The proposed legislation also features an option for voluntary declarations that would allow certain buyers to file similar abbreviated notices. The option is geared toward regular or low-risk buyers that routinely see their transactions approved.

Allows for Suspension of Deals

The Foreign Investment Risk Review Modernization Act also aims to give CFIUS the power to suspend a transaction, which is an authority that currently only the president holds. In effect, that means that CFIUS could prevent a deal from closing while it's being reviewed, serving somewhat as a temporary block.

“The proposed legislation would give CFIUS the authority to suspend a transaction that it is reviewing in the interest of national security. It would be the equivalent of temporarily blocking the transaction,” Curran said. “The president has that authority now, and this would give the committee the explicit authority to do that.”

Along with the suspension, the proposed legislation would give CFIUS the authority to cut a review or investigation short in order to refer it to the president for a final verdict, marking another expansion of the interagency committee’s powers.

The legislation also looks to make it easier for CFIUS to reopen a transaction that has already been reviewed by removing a single word — intentional — from the current phrasing, noted Salladin.

“The statute provides that CFIUS can reopen a previously reviewed transaction under certain circumstances, including if there is a material intentional breach of a mitigation agreement. This legislation would make it easier to reopen a previously reviewed transaction in these circumstances by removing the requirement that the breach be intentional,” she said.

Uses Fees to Expand Resources

The proposed legislation would also attach fees to the filing process for the first time, which would give CFIUS the ability to cover the cost of additional manpower given the growing number of covered transactions and filings due to the general global investment trends and the broader reach of the interagency committee.

The fees could also help to cover the costs of bringing on experts in certain areas, like technology, to help expedite the review process or help provide better resources to monitor any mitigation measures imposed by CFIUS.

“It’s not just a general lack of manpower for handling the caseload,” said Donald Vieira, a Skadden CFIUS partner. “It’s the lack of expertise on the committee in understanding emerging technology areas. So hopefully the funds will go to both those areas.”

The filing fee, as currently proposed, would be set at 1 percent of the value of the transaction, with a \$300,000 cap that could be adjusted for inflation.

Aside from attaching fees to the filing process, the proposed legislation also calls for the time frames attached to the review process to be extended and gives the lead agency the ability to seek an extension in certain circumstances.

The current 30-day period for the initial review would be lengthened to 45 days, while the optional second-stage review would remain at 45 days. For transactions that lead to investigations, the total review and investigation period would be extended to 90 days.

The lead agency would have the ability to get one 30-day extension in “extraordinary circumstances,” which would be defined in the regulation.

In theory, the extended timeline could potentially take 120 days rather than the 75 days currently allotted for CFIUS’ review. However, because deals can be forced to withdraw and refile if the current timeline cannot be met, some may ultimately see their timeline for review shrink.

“In practice, what these extensions are meant to do are to adjust to the reality that CFIUS is taking longer,” Hunter said.

Excludes Reciprocity, Net Benefit Tests

The proposed legislation contains a lot of potential changes for the CFIUS review process, but it’s also noteworthy that the Foreign Investment Risk Review Modernization Act, as introduced, does not feature any sort of investment reciprocity or net economic benefit test.

“The bill does keep the focus squarely on national security. There’s been some discussion about whether there should be a net economic benefit test or a reciprocity test, and this bill does not include either of those tests,” Salladin said.

Cornyn was clear from the outset that he would not support investment reciprocity — the idea that the U.S. should block a foreign entity’s investment in a particular industry when a U.S. buyer would be similarly blocked in that entity’s country — or any form of economic protectionism in the bill and would instead focus on plugging current gaps he saw in the interagency committee’s ability to protect critical technology and infrastructure.

But the debate surrounding whether investment reciprocity or a net economic benefit test should be part of the CFIUS review process or part of the overall scrutiny of foreign direct investment has popped up a handful of times over the last year.

Most recently, Sens. Chuck Grassley, R-Iowa, and Sherrod Brown, D-Ohio, introduced a bill known as the United States Foreign Investment Review Act that would require the review of certain foreign investments' potential impact on the U.S. economy and jobs. The bill, introduced in October, would allow the secretary of commerce to review the deal, rather than CFIUS, and would allow Congress the ability to request additional reviews.

The Foreign Investment Risk Review Modernization Act also does not add new members to CFIUS — despite a bill earlier this year that aimed to give high-ranking U.S. agricultural and food officials a permanent spot — and does not specifically cover greenfield investments or block investments in a specific sector.

The legislation still has a long way to go, however, before it becomes a law, meaning drastic changes could still be made.

“Some version of it is likely to become law. The question is whether CFIUS’ jurisdiction will be extended to certain transactions abroad and whether other proposals surrounding economic or trade policy analysis would be included as well,” Hunter said.

--Editing by Christine Chun and Emily Kokoll.