

## CFIUS Changes Are Coming: What Attys Need To Know

By **Benjamin Horney**

*Law360 (February 6, 2018, 4:31 PM EST)* -- Strong bipartisan support for legislation that would modernize the mandate of the Committee on Foreign Investment in the U.S. means changes are likely coming soon, and attorneys must be prepared to provide advice about how those potential changes might affect their clients' deals.

The reality that CFIUS and its processes will almost certainly be refined via legislation has been clear since early November, when the House and Senate each introduced versions of the Foreign Investment Risk Review Modernization Act, or FIRRMA. The bills, introduced by Rep. Robert Pittenger, R-N.C., and Sen. John Cornyn, R-Texas, respectively, aim to overhaul and strengthen CFIUS' ability to review and police foreign investment.

The House version currently has 29 total co-sponsors, including five Democrats, and the Senate version has 10 co-sponsors, four of which are Democrats. Meanwhile, over the last few months, Congress has held a series of hearings examining the proposed legislation and getting advice from panels of witnesses and experts, and while not every lawmaker agrees on all of the details of FIRRMA, it has become clear that the push to make changes to CFIUS is only gaining momentum.

In a political environment in which it seems to be increasingly difficult to garner support from those on the other side of the aisle, the agreement between Republicans and Democrats that CFIUS should be updated to reflect the modern age is telling, according to Giovanna M. Cinelli, leader of the international trade, national security and economic sanctions practice at Morgan Lewis & Bockius LLP.

"It's important to note the level of bipartisan support for these bills," Cinelli said. "That speaks volumes to how important this is to Congress and the country."

All of this has led to a heightened public profile in general for CFIUS, and even though no bill has yet been passed into law, clients are taking notice.

"Generally, there has been an increased interest from companies with respect to the CFIUS process, its potential impacts and timings," said Joseph Falcone, a disputes partner working out of Herbert Smith Freehills LLP's New York office who leads the firm's efforts to advise clients about the potential impact of CFIUS and related issues on proposed U.S. acquisitions or investments.

The way in which the state of CFIUS is currently in flux, and the increased public attention it is getting,

reminds Falcone of the issues of cybersecurity, data protection and privacy, which he also deals with in his practice.

“A few years ago, those types of issues were perhaps more confined to technology and related specialists, in the same way CFIUS previously might have been more of an issue for certain transactional lawyers,” he said. “Now, I think both issues are top of mind for the broader business community, as well as the legal and regulatory communities.”

Thus, any lawyer whose practice involves advising on deals that could include a non-U.S. entity should be up to date on some of the main potential changes that might be made to CFIUS.

For instance, FIRRMA would expand the types of transactions that CFIUS has the authority to oversee to include things like joint ventures, licensing agreements and deals involving real estate. It would also allow the interagency committee to judge the validity of outbound investment in addition to inbound investment.

The expanded mandate takes into account some different national security concerns that may not have been obvious in the past. For example, as of right now, if a foreign buyer decided to buy a vacant plot of land that sits adjacent to a U.S. military base, CFIUS would have no authority to question the transaction.

“Given intelligence collecting activities that could occur with some bad intent, review of cross-border transactions that leverage those types of activities should be within the purview of CFIUS,” Cinelli said.

The proposed legislation also includes some measures to try and increase the amount of money CFIUS would have access to — something sorely needed if the panel is going to be able to successfully do the job lawmakers are asking it to do, according to Daniel “DJ” Rosenthal, co-chairman of the CFIUS advisory practice at investigative firm Kroll Associates.

“I think resources are a real concern,” Rosenthal said. “They are really stretched.”

One way FIRRMA hopes to address that concern is by implementing an application fee for CFIUS filings. As currently proposed, the filing fee would be set at 1 percent of the value of a given deal, with a \$300,000 cap that could be adjusted for inflation.

“The fees are designed, in part, to help the quality of the review process,” Cinelli explained. “To ensure the resources are there to provide an even stronger decision-making ability on the part of the government.”

During Congressional hearings, the question of whether fees might actually do more harm than good has been raised, with the thought process being that companies might just not make CFIUS filings in order to avoid any potential headaches. But according to Cinelli, that line of thinking misses the mark.

“In my view, the fees themselves are unlikely to discourage entities from filing when the review provides certainty, which helps in dealing with business objectives,” she said.

Another argument that popped up during the congressional hearings is whether or not drastic changes to CFIUS are even necessary, given that there are other laws already on the books that could take on some of the burden the panel is being asked to handle.

Rod Hunter, a partner at Baker McKenzie who formerly served as senior director for international economics at the National Security Council, told lawmakers during a mid-January hearing that U.S. export control laws, which include International Traffic in Arms Regulations and Export Administration Regulations, could be used to manage certain matters.

However, that doesn't justify scrapping FIRRMA, Cinelli said.

"There are a number of laws in place that all work together to address national security issues," she explained. "But it's mixing apples and oranges if people believe that there might be difficulty moving forward with [FIRRMA] because the export laws exist."

Lawyers who are well-informed on all things CFIUS will be highly sought after, and are already starting to be more in demand as the specter of legislative changes draws near. In a dealmaking environment that is constantly introducing new and unique challenges, the point Cinelli made about certainty rings true: Those attorneys who can provide their clients with certainty that they are receiving the best possible counsel will have plenty of work to do, while those that don't have answers to certain questions may find that their clients are seeking legal advice elsewhere.

"We've seen an increase in client questions," Cinelli said. "Clients have questions about how the [CFIUS] process should be approached, what kind of information should be provided, and when and how they should file."

As for when FIRRMA might actually get passed into law, it isn't entirely clear as of yet, but lawyers should advise that legislative changes are coming, and they may come sooner rather than later.

"We generally look to the statements that have been made during hearings," Cinelli said. "There appears to be a high degree of seriousness in getting something through and up to the president's desk sometime this year."

--Editing by Rebecca Flanagan and Emily Kokoll.