

## CFIUS Developments: House Committee on Foreign Affairs Considers CFIUS Reform and Related Export Control Regimes

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CFIUS

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### Summary

We are writing to report on the latest Congressional hearings related to reform of the Committee on Foreign Investment in the United States (“CFIUS”) and potential efforts to enhance and reform the U.S. export control regime.

Specifically, on March 14, 2018, the House Committee on Foreign Affairs (“House Foreign Affairs Committee” or “HFAC”) held an open hearing entitled “Modernizing Export Controls: Protecting Cutting-Edge Technology and U.S. National Security.” This was the Committee’s first hearing on export controls and CFIUS since Congress began consideration of the Export Control Reform Act of 2018 (“ECRA”)—a bill introduced in February 2018 by HFAC Chairman Ed Royce (R-CA) and Ranking Member Eliot Engel (D-NY) to update the statutory authority underlying the Export Administration Regulations (“EAR”). Our prior report on ECRA is available [here](#).

Notably, Covington’s Senior Policy Advisor, [Ambassador Alan Larson](#), former Under Secretary for Economic, Business, and Agricultural Affairs for the U.S. Department of State, was among the witnesses at this hearing. Ambassador Larson’s [testimony](#) focused on the role CFIUS should play as part of a secure, but open, U.S. investment environment. Ambassador Larson noted the importance of foreign investment in the United States in promoting technological development and economic dynamism. While efforts to modernize CFIUS, including providing additional resources for CFIUS, would be welcomed as CFIUS reviews an increasing number of transactions, Ambassador Larson also noted that the United States should not use CFIUS as a form of economic leverage. Rather, by limiting CFIUS review to narrow questions of national security, the United States will simultaneously protect national security and also promote healthy foreign investment, which, in the long run, contributes to economic vitality and U.S. security.

In addition, on March 15, 2018, the House Financial Services Subcommittee on Monetary Policy and Trade (“HFSC”) held a hearing entitled “Evaluating CFIUS: Administration Perspectives.” This was the Subcommittee’s third hearing on CFIUS reform, and the first one involving testimony strictly from CFIUS officials in the Trump Administration (who previously had testified before the Senate). Reports of the prior hearings are available [here](#) and [here](#).

Below is a more detailed report on these two latest hearings.

## **HFAC Hearing on Modernizing Export Controls**

The HFAC hearing provided an opportunity for Congressional members to discuss ECRA, along with legislative reforms such as the Foreign Investment Risk Review Management Act (“FIRRMA”)—the CFIUS reform bill introduced by Senator John Cornyn (R-TX) in the Senate and Congressman Robert Pittenger (R-NC) in the House.

Members of Congress participating in the hearing included Chairman Royce and Ranking Member Engel, as well as Christopher Smith (R-NJ), Brad Sherman (D-CA), Ted Yoho (R-FL), Albio Sires (D-NJ), Ann Wagner (R-MO), and Tom Garrett (R-VA). In addition to Ambassador Larson, the Committee heard testimony from two former officials of the Department of Commerce.

During the hearing, members expressed concern about efforts by China and Russia—among other nations—to acquire “dual use” technologies from the United States. Chairman Royce stated that existing U.S. regulatory regimes have “potential gaps” that could allow U.S. advancements in fields such as artificial intelligence and robotics to fall into the wrong hands. Members asked the witnesses to provide their perspective on statutory and regulatory measures that would prevent the improper transfer of such technologies.

ECRA served as one point of discussion for these reform efforts. Chairman Royce provided an overview of ECRA’s aims, stating that the bill seeks to modernize the Cold War-era authorities underlying the Export Administration Regulations and to better control the transfer of “dual use” technology. According to Chairman Royce, ECRA will implement “unilateral” export controls for “dual use” technologies where necessary. However, ECRA will otherwise encourage U.S. coordination with allies to ensure that sensitive technologies do not reach potential adversaries. Chairman Royce further noted that, under ECRA, CFIUS will retain the primary responsibility for monitoring inbound foreign investments for national security concerns.

More broadly, the witnesses agreed that Congressional reform efforts should preserve the United States’ current use of interrelated regulatory regimes to protect national security and encourage foreign investment. Ambassador Larson noted, for example, that concerns regarding protection of intellectual property and the competitiveness of the U.S. should be addressed by authorities possessing the appropriate core expertise, such as the U.S. Trade Representative.

Several members of HFAC discussed the FIRRMA reform bill in detail. Rep. Wagner asked whether FIRRMA could be leveraged to promote greater cooperation with nations such as Singapore and Malaysia, who could assist with export controls in the Asia-Pacific region. Rep. Wagner also asked about the potential political impact of FIRRMA in China. Ambassador Larson, in addressing the China issue, emphasized that dialogue would play an important role in managing the bilateral relationship. According to Ambassador Larson, the United States should continue to engage with China through candid discussions and stress that the United States welcomes foreign investment, and will use export controls and CFIUS in a targeted way to protect national security.

Rep. Garrett questioned whether FIRRMA or similar legislative authorities should be expanded to cover the potential loss of “dual use” technology under the EB-5 visa program. Rep. Garrett suggested that this program, which extends visas to foreign investors supporting U.S. commercial enterprise, currently risks permitting foreign nationals to observe sensitive U.S. technology and export the associated know-how to their home countries. The witnesses

supported Congressional oversight on this issue, though they did not suggest that a regulatory regime such as CFIUS was best positioned to address such risk.

### **HFSC Hearing on Administration Perspectives for CFIUS Reform**

The HFSC hearing provided an opportunity for Subcommittee members to hear from a panel of three Administration witnesses regarding FIRRMA: Heath Tarbert, Assistant Secretary of the Treasury for International Markets and Investment Policy; Richard Ashooh, Assistant Secretary of Commerce for Export Administration; and Eric Chewning, Deputy Assistant Secretary of Defense for Manufacturing and Industrial Base Policy. These three Administration officials previously testified before the Senate Committee on Banking, Housing, and Urban Affairs, on January 25, 2018. A report on this prior hearing is provided [here](#).

The hearing was well attended, including participation by Chairman Andy Barr (R-KY) and Ranking Member Gwen Moore (D-WI), as well as by Roger Williams (R-TX), Frank Lucas (R-OK), Gregory Meeks (D-NY), Rep. Pittenger, Al Green (D-TX), Denny Heck (D-WA), French Hill (R-AR), Brad Sherman (D-CA), Warren Davidson (R-OH), Alexander Mooney (R-WV), and Trey Hollingsworth (R-IN). The Subcommittee, without objection, also invited Chairman Royce of HFAC. The Administration witnesses focused on whether FIRRMA would provide sufficient enhancements to CFIUS in order to keep pace with efforts from foreign governments, particularly China, to obtain a technological advantage through the acquisition of sensitive U.S. technologies. Questions from Subcommittee members centered on distinguishing the need for CFIUS reform from the need to modernize the export control regime.

The witnesses began by expressing strong support for the proposed legislation in its current form. Mr. Tarbert, the principal political appointee with oversight responsibility for CFIUS, suggested in prepared remarks that FIRRMA contains “four pillars” that drive needed CFIUS modernization: (i) an expanded set of reviewable transactions under CFIUS jurisdiction; (ii) greater authority for CFIUS to coordinate transaction reviews with other appropriate agencies; (iii) increased information sharing with partner nations and their CFIUS analogues; and (iv) the establishment of a CFIUS appropriations fund to ensure that CFIUS is adequately resourced. Mr. Ashooh stated that FIRRMA properly frames CFIUS as complementary to the export control system, describing the latter as highly adaptive and with aggressive enforcement capabilities. Mr. Chewning reiterated his position that FIRRMA is “a whole-of-government response to a critical national security challenge—an insurance policy on the hundreds of billions of dollars per year we invest in our defense industrial base.”

The witnesses, as well as a majority of the members, further agreed that FIRRMA provides for the essentials of CFIUS reform, but many expressed the need for modest amendments to ensure any such reform advances CFIUS’s statutory goal of protecting U.S. national security and encouraging foreign direct investment. For example, Mr. Tarbert expressed support for FIRRMA’s expansion of CFIUS jurisdiction to include the review of joint ventures not currently subject to CFIUS review, but suggested recommended amendments from the Department of Treasury would be forthcoming to ensure that CFIUS’s jurisdiction is expanded to include only those transactions that do not involve technology transfers subject to existing export controls.

Relatedly, the witnesses and most members viewed the export control system and CFIUS as complementary, mutually reinforcing, and providing for a layered defense. The former stands on the front line in guarding national security, while the latter is positioned as a backstop—possessing transactional jurisdiction to review potential threats that fall through the export

control system, but nonetheless may still pose national security risks. For witnesses, as well as members, the hearing evinced the perspective that FIRRMA is an evolution in the understanding of what constitutes a national security risk in today's world and would expand CFIUS's transactional jurisdiction to address those risks—namely real estate transactions near military and sensitive facilities, joint ventures involving the contribution of intellectual property, and emerging technologies.

The witnesses and members focused many of their comments on China:

- Mr. Tarbert emphasized that today's data driven economy is creating new national security risks that have never been seen before and that FIRRMA's predecessor pieces of legislation did not envision. The witnesses and members expressed concern that the United States cannot maintain technological and military superiority if China and other near-peer foes are able to easily access, with little to no development of their own, technological know-how through joint ventures.
- Furthermore, Mr. Chewing expressed concern that China then takes this technology, enhances it, and forbids the export of any intellectual property concerning these enhancements to those outside of China. Accordingly, U.S. businesses operating in joint ventures with China-based entities contribute to enhanced Chinese military power without any return that would benefit U.S. national security and the U.S. defense industrial base.
- When Rep. Pittenger asked the witnesses to identify China-based industries that have benefited from the gaps between CFIUS and the export controls systems, Mr. Chewing asserted that emerging and critical technologies that exist today, but currently do not have military applications, may invoke national security concerns because of the possibility that military applications could be forthcoming.

Notably, some members did raise concerns about FIRRMA. Ranking Member Moore expressed concern about the expansion of CFIUS's jurisdiction. Mr. Tarbert rebutted that CFIUS remained focused on those transactions which implicate national security concerns. Moreover, he stated that the Department of Treasury remained committed to working with Congress to further tailoring FIRRMA's specifics. Both Congressmen Meeks and Hollingsworth also expressed concern that FIRRMA could hinder U.S. companies and that the defense industrial base could be hindered by an inability to access non-U.S. technological advances through the use of joint ventures. Mr. Ashooh remarked that there were advantages in ensuring companies had incentives to develop those technological enhancements within the United States.

Finally, Subcommittee members, as well as the witnesses, struggled to identify the necessary budgetary and personnel resources required to efficiently and effectively compensate for the expected drastic increase in the number of CFIUS cases, should FIRRMA be passed. Mr. Tarbert assured the Subcommittee that the Treasury Department is currently working to establish the required level of resources.

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We hope that you find this report useful. Please do not hesitate to contact the following members of our CFIUS practice if you would like to discuss any aspect of the foregoing in further detail:

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