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The Proposed CFIUS Reform Bill's Potential Impact on Private Equity

As the possibility of trade and other protectionist policies looms in the United States and globally, we highlight the pending Foreign Investment Risk Review Modernization Act of 2017 (FIRRMA) and its potential impact on private equity. In the fall of 2017, FIRRMA was introduced in the House and Senate by Rep. Robert Pittenger (R-NC) and Majority Whip John Cornyn (R-TX), respectively. FIRRMA's focus is the Committee on Foreign Investment in the U.S. (CFIUS), an interagency committee chaired by the Secretary of the Treasury and authorized to review certain M&A transactions on behalf of the president, who may then block or unwind any transactions that could result in direct or indirect foreign control of U.S. companies if control threatens to "impair U.S. national security." CFIUS has been particularly active in recent years, including issuing recommendations that resulted in several presidential orders to block deals involving Chinese acquirers.

FIRRMA's intent is to modernize and strengthen CFIUS to more effectively guard against risks to U.S. national security posed by certain types of foreign investment, and the bill in its current form would do so by significantly increasing the purview of the committee and therefore its potential impact on global investment in the United States. Among other things, FIRRMA proposes to (i) expand CFIUS oversight beyond acquisitions of control to other transactions (excluding a narrow category of passive investments without any observer, informational or decision-making rights), such as joint ventures/strategic partnerships, certain licensing agreements, noncontrolling interests in certain U.S.-critical technology/infrastructure companies and real estate acquisitions near sensitive U.S. government properties, (ii) make certain CFIUS filings mandatory (instead of voluntary as under the current regime) and establish filing fees, (iii) expand the definition of what would be considered critical technologies subject to CFIUS oversight, (iv) identify certain "countries of special concern" subject to particular CFIUS analysis and (v) extend CFIUS review timing significantly.

If FIRRMA were to be adopted in its current form, we would expect that private equity firms would have to carefully examine both the use of offshore funds and the level and nature of foreign L.P. ownership in a broader range of investments in U.S. companies than is currently the case (including investments that are clearly noncontrolling). Even without FIRRMA, it has been our recent experience that CFIUS is taking a greater interest in private equity investments in U.S. companies that it cares about from a national security perspective, even where control at the top clearly sits with U.S. citizens based in the United States.

FIRMA is currently winding its way through the committee and subcommittee process in Congress, so the prospects of its enactment are still unclear. We can also expect substantial revisions before it passes Congress. We will monitor this development and update should adoption become more certain.

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