

CFIUS Reform Legislation Signed into Law with New Mandatory Reporting Requirements

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The Committee on Foreign Investment in the United States (CFIUS) reviews foreign acquisitions of U.S. companies for national security considerations. Its rulings have significant impacts on U.S. investment policy and foreign investment flows into the U.S., especially those from China. On August 13, 2018, the President signed the Foreign Investment Risk Review Modernization Act (FIRRMA) into law as part of the FY 2019 NDAA.

FIRRMA significantly expands the jurisdiction and operational mandate of CFIUS to review transactions that were not previously subject to CFIUS scrutiny and reforms the CFIUS review process in several other important respects, including the addition of new mandatory reporting requirements. Although the CFIUS process has traditionally been voluntary, certain investment reporting will now be mandatory, with failure to report subject to civil penalty. The following is a summary of some of the law's major provisions.

Expanded Scope of Transactions Subject to CFIUS Jurisdiction

Whereas CFIUS was previously authorized to review only transactions that could result in foreign control of a U.S. business, **CFIUS will now be able to review certain non-controlling investments**. These include non-controlling investments in businesses dealing with critical technologies, critical infrastructure, and sensitive personal data of U.S. citizens if the investment could provide the foreign person access to material nonpublic technical information, board membership or observer rights or the right to nominate a board member, or certain substantive decision-making involvement (other than through voting of shares). Investments by a foreign person through an investment fund that affords the foreign person membership as a limited partner on

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an advisory board or committee of the fund will be excluded from these new provisions, provided certain criteria are met.

FIRRMA also authorizes CFIUS to review transactions involving the purchase or lease of private or public real estate located within the United States, if it is located within an air or maritime port or in close proximity to a U.S. military installation or another sensitive U.S. Government facility. The purchase or lease of a single housing unit or real estate in an urbanized area will generally not be treated as a covered transaction, though CFIUS is authorized to prescribe regulations limiting this exception. FIRRMA also treats as a covered transaction any change in the rights that a foreign person has with respect to a U.S. business in which the foreign person has an investment if the change could result in foreign control of the U.S. business or an investment in a critical technology company, a critical infrastructure company, or a company that maintains or collects sensitive personal data of U.S. citizens as described above.

Voluntary and Mandatory Declarations

FIRRMA allows parties to a covered transaction to submit short-form “declarations” in lieu of a written notice. Such “short-form” filings will provide basic information regarding the transaction and generally will not exceed five pages in length. Within 30 days of the submission of a declaration, CFIUS will either (1) request that the parties file a written notice; (2) inform the parties that it is unable to complete action with respect to the transaction on the basis of the declaration alone; (3) initiate a unilateral review of the transaction; or (4) notify the parties in writing that the Committee has completed all action with respect to the transaction.

Subject to certain exceptions, declarations will be mandatory for any transaction involving the direct or indirect acquisition of a substantial interest in a critical technology company, a critical infrastructure company, or a company that maintains or collects sensitive personal data of U.S. citizens by a foreign person in which a foreign government has a direct or indirect substantial interest. The term “substantial interest” will be defined in the implementing regulations but will not include voting interests of ten percent or less. FIRRMA also authorizes CFIUS to require the submission of declarations for covered transactions involving critical technology companies.

Enhanced Mitigation Provisions

FIRRMA allows CFIUS to enter into and impose mitigation agreements and conditions in cases where a party to a covered transaction has voluntarily chosen to abandon the transaction and to enter into and impose mitigation agreements and conditions on covered transactions that have already been completed. FIRRMA prohibits CFIUS from entering into any mitigation agreement or imposing any condition unless CFIUS determines that the agreement or condition resolves the national security concerns and requires CFIUS to formulate plans for monitoring parties’ compliance.

Other Notable Provisions

In addition to the changes noted above, FIRRMA also lengthens the initial CFIUS review period from 30 days to 45 days; allows CFIUS to extend an investigation for one 15-day period in “extraordinary circumstances”; permits and encourages the disclosure of confidential information to local and allied foreign governments for national security purposes; allows CFIUS to suspend a proposed or pending covered transaction while the transaction is under review; and authorizes CFIUS to collect a filing fee capped at the lesser of \$300,000 or one percent of the value of the transaction.

Implementation and Next Steps

While many provisions of FIRRMA become effective immediately, other provisions (including those expanding the scope of what constitutes a “covered transaction” and provisions governing voluntary and mandatory declarations) will not go into effect until the earlier of 18 months after enactment or 30 days after publication in the *Federal Register* of a determination by CFIUS that the regulations, organizational structure, personnel, and other resources necessary to administer the law’s provisions are in place. The focus now turns to the rulemaking process, where stakeholders will have an opportunity to submit comments and help shape the regulations that the U.S. Department of Treasury ultimately adopts to implement this sweeping new law. We also expect CFIUS to launch one or more pilot programs in the coming months to implement certain new authorities under FIRRMA. The scope and procedures for any pilot programs under FIRRMA will be published in the *Federal Register* in advance.