

CFIUS Reform Enacted

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Legislation to update US controls on foreign investment has been signed by the President and enacted into law. The Foreign Investment Risk Review Modernization Act of 2018 (“FIRRMA”) expands the scope of review by the Committee on Foreign Investment in the United States (“CFIUS”) of foreign investment in critical and foundational technologies that impact US national security, broadly defined. FIRRMA is intended to target current risks, revise and streamline the CFIUS review process and focus review on investments from “countries of special concern” – *i.e.*, China.

Established in 1988 by the Exon-Florio Amendment to the Defense Production Act of 1950, CFIUS is a multi-agency panel chaired by the Treasury Department that is tasked to review the impact on US national security of certain foreign investments. CFIUS took on its current structure and role following legislation known as the Foreign Investment and National Security Act of 2007 (“FINSA”). Under FINSA and its implementing regulations, CFIUS may review “any merger, acquisition, or takeover ... by or with any foreign person which could result in foreign control of any person engaged in interstate commerce in the United States.” CFIUS evaluates whether such transactions subject to its jurisdiction (known as “covered transactions”) could have a negative impact on US national security, including critical infrastructure, and where appropriate, the President may suspend or prohibit the transaction, or impose conditions to mitigate the impact.

Private parties are not required to submit transactions for CFIUS review. If, however, a transaction does result in “foreign control” (the definition of which is fluid) and the subject matter of the investment could impact US national security or critical infrastructure (the definitions of which are also fluid), review and clearance by CFIUS will result in a “safe harbor” precluding future involuntary proceedings. Under current law, CFIUS is required to rule on most review submissions within 30 days of filing, though in cases involving acquisitions by entities with foreign-government ownership or other complicating factors, the initial 30-day review can be extended by an additional 45 days for a more thorough investigation. Upon recommendation by CFIUS, the President may determine during the subsequent 15 days to request modification or cancellation of the transaction.

In recent years the volume of filings with CFIUS has increased, from approximately 65 in 2009 to more than 170 in 2016. More important, however, is that there has been mounting sensitivity in the United States to foreign investments, particularly from China, directed at new or foundational technology that has the potential to become critical to future military and commercial development. Many of these investments do not result in “control” under current standards nor involve technologies with an immediate impact on national security.

FIRRMA is intended to address this by expanding the authority of CFIUS while simultaneously increasing CFIUS’ flexibility with regard to how it will address new risks and how it will manage its increased workload. Differing versions of FIRRMA were passed by the Senate and House. The differences were ironed out by a Conference Committee, and the agreed text was included as Title XVII of H.R. 5515, the “John S. McCain National Defense Authorization Act for Fiscal Year 2019,” which was signed by the President and thus now is law.

FIRRMA expands the purview of CFIUS by explicitly adding four new types of "covered transactions," including:

- Any non-passive investment by a foreign person in any U.S. business involved in critical infrastructure or in the production of critical technologies, or that maintains sensitive personal data that, if exploited, could threaten national security
- Any change in a foreign investor's rights regarding such a U.S. business
- Any other transaction, transfer, agreement or arrangement designed to circumvent or evade CFIUS
- The purchase, lease, or concession by or to a foreign person of certain real estate in close proximity to military or other sensitive national security facilities

FIRRMA provides that "critical technologies" will include "emerging and foundational technologies."

To help keep CFIUS review from acting as a brake on the economy or slowing investments that would pose little security risk, and to reduce the expenditure of CFIUS staff time on non-controversial investments, FIRRMA will allow parties to obtain a form of initial review after filing a simplified (five-page maximum) declaration. CFIUS' response to a declaration may include a request to file a full notice, a request for additional information, initiation of a unilateral review, or notification that no further action will be necessary. Although declarations will be voluntary in most cases, they will be mandatory in certain circumstances, particularly where a foreign government has a direct or indirect interest in the acquirer. It is thus likely that FIRRMA will have a chilling effect, reducing the number of foreign investments, especially from China, as that country is singled out for special attention by the legislation.

FIRRMA also includes provisions that:

- Set forth the circumstances under which CFIUS may unilaterally initiate a review, as well as how a transaction attains "safe harbor" status
- Give CFIUS extra time to review each transaction by extending the initial review period from 30 days to 45 days, with a 15-day period extension for extraordinary circumstances
- Require CFIUS to establish a mechanism to identify any covered transactions for which a notice or declaration has not been filed and on which information is reasonably available
- Provide exemptions from review for investment fund investments where the foreign investor is a limited partner and certain other restrictions apply
- Allow CFIUS to impose filing fees not to exceed the lesser of one percent of the transaction value or \$300,000

In addition, rather than provide immediate direct restrictions on certain Chinese investments or US companies' joint venture agreements both inside and outside the country, the Trump Administration worked with Congress to include in the Export Control Reform Act of 2018 (legislation adopted simultaneously with FIRRMA) export control provisions that will allow the United States to maintain leadership in "science, engineering, technology research and development, manufacturing, and foundational technology that is essential to innovation." To that end, the legislation provides for an

inter-agency committee “to identify emerging and foundational technologies that are essential to the national security of the United States.” In its control of such foundational technologies shared with foreign persons as part of a joint venture or similar collaborative agreement, the Commerce Department is authorized to “require the applicant to identify any foreign person participating in the arrangement” and “any foreign person with significant ownership interest in a foreign person participating in the arrangement.”

Significant regulations will be forthcoming from the Treasury Department to implement FIRRMA and from the Commerce Department to implement the new export controls. Although certain portions of FIRRMA became effective upon final enactment of the legislation, many of the more significant changes, including the expanded definitions of covered transactions and critical technologies, will take effect 30 days after publication of regulations, which is required to occur within 18 months. More details as to the impact of FIRRMA will therefore have to await publication of the implementing regulations.