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CFIUS Reform Bill (FIRRMA) Expands U.S. Foreign Investment Review Process

After passage with overwhelming bipartisan support, on August 13, 2018 President Trump signed the Foreign Investment Risk Review Modernization Act (FIRRMA) into law. The new law reforms and expands the foreign investment review process of the Department of the Treasury's Committee on Foreign Investment in the United States (CFIUS or the Committee), an inter-agency committee tasked with reviewing the national security implications of foreign investment in the United States. Among its key components, FIRRMA for the first time establishes mandatory CFIUS filing requirements for certain categories of transactions, introduces filing fees, and expands the universe of transactions subject to CFIUS jurisdiction (known as covered transactions). FIRRMA also reinforces the Committee's already broad authority to delay, block, and even unwind transactions deemed contrary to U.S. national security interests. According to sponsors of the legislation, the reforms promulgated under FIRRMA were motivated by increased concerns over foreign investment, particularly with respect to investment by certain sensitive countries, and foreign parties' access to sensitive and emerging U.S. technologies.

New CFIUS Provisions

FIRRMA establishes a number of important changes to the CFIUS review process. Notably, many of the new measures outlined below will only come into effect once CFIUS adopts implementing regulations, a process which could take a number of months. Key provisions of FIRRMA include the following:

- **Broadened Scope of Covered Transactions:** FIRRMA expressly expands the scope of transactions that CFIUS has authority to review to include sales or even leases of real estate in close proximity to U.S. government facilities, sales of U.S. "critical technology" or "critical infrastructure" companies, and

changes in investor rights of foreign persons (even if the investment does not necessarily result in foreign “control”) when critical technology or access to sensitive confidential information are at stake. Although certain passive investments continue to be exempt, the new definitions cover a much larger universe of transactions than before.

- New Short-Form Declaration Process: FIRRMA establishes a new short-form “declaration” filing process for parties to covered transactions. Declarations will be mandatory for transactions that involve foreign government control of a U.S. asset (described in greater detail below), while submission by declaration will remain voluntary for all other covered transactions. Having reviewed a short-form declaration, CFIUS will either clear the transaction based on the information contained in the declaration, conduct a unilateral review based on the declaration, or require the transaction parties to file a full CFIUS notice. The exact mechanics of the declaration process, and its ability to help CFIUS filter transactions, will become clearer when CFIUS promulgates declaration requirements regulations as required by FIRRMA.
- Mandatory Declarations: Under previous rules, all CFIUS notifications were voluntary (unless directed by CFIUS). Under FIRRMA, certain transactions involving foreign investment are now subject to mandatory filing requirements. Specifically, declarations are mandatory for transactions involving an investment (1) by a foreign person in which a foreign government has a “substantial interest,” that (2) results in the direct or indirect acquisition of a “substantial interest” in a U.S. critical infrastructure business, U.S. critical technology business, or a U.S. business that maintains personal data of U.S. citizens that could be exploited in a manner that threatens national security. Notably, FIRRMA leaves the terms “substantial interest” and “critical infrastructure” undefined pending issuance of CFIUS implementing regulations.
- New Filing Fees: For the first time FIRRMA authorizes CFIUS to impose filing fees based on the value of the transaction (with a statutory maximum of the lesser of 1 percent of the transaction value or \$300,000). In determining the fee, FIRRMA requires CFIUS to account for the effect of the fee on “small business concerns,” the effect on foreign investment, the expenses of the Committee, and any other factors the Committee deems appropriate. We expect no filing fees will be imposed until CFIUS implements regulations governing fee calculation.
- Extended Timing for Review: FIRRMA extends the time CFIUS has to complete the review process from 30 days to 45 days, and allows for a new 15-day extension of the 45-day investigation period for “extraordinary circumstances,” a term which will be defined by the Committee in regulations. Accordingly, the total time CFIUS has to complete the review and investigation process will be extended from its current maximum of 75 days to 90 days (105 in extraordinary circumstances).
- Biannual Reports on Chinese Investment: FIRRMA includes a requirement for the Secretary of Commerce to report to CFIUS and Congress information on foreign direct investment from China, including the type of investment, value of the investment, and newly-formed companies with funds originating from the government of China, as well as an analysis of whether Chinese investment furthers the “Made in China 2025” program. Although FIRRMA is not explicitly linked to increased Chinese investment in the United States, the biannual reporting requirement evidences U.S. government concerns regarding Chinese access to sensitive and emergent U.S. technologies.
- CFIUS and Commerce Reporting Requirements: FIRRMA provides additional reporting requirements with regard to investments made in the U.S. rail industry by entities that are owned or controlled by foreign governments. FIRRMA also provides for additional categories of information that CFIUS must report to Commerce in its annual report, such as information and data on declarations, compliance, non-notified transactions, and the average number of days that elapse between a submission and the response from CFIUS.

- Foreign Efforts to Influence Democratic Interests in the United States: FIRRMA also imposes a new requirement for the Treasury Department to brief Congress on any transactions that CFIUS determined could have allowed foreign persons or entities to influence democratic institutions and processes within the United States or any other country, which could be a reflection of the growing concern in Congress over foreign interference in the election process.

Modifications to the CFIUS Review Process:

- Modified Certification Requirement: FIRRMA prohibits CFIUS from completing its review of a covered transaction if one of the parties to the transaction has not submitted its required certification attesting to the completeness and accuracy of the information provided in the notification submission. If a party fails to submit its certification (or if any information provided to CFIUS is deemed to be false, misleading, or incomplete, CFIUS may recommend that the president suspend or block the transaction.
- Judicial Review Limitations: FIRRMA provides that civil actions against CFIUS findings may only be brought before the U.S. Court of Appeals for the District of Columbia Circuit.
- National Security Considerations: FIRRMA instructs CFIUS to prescribe regulations that require the consideration of the national security factors provided in 50 U.S.C. § 4565(f) and mandate parties to provide CFIUS with the information necessary to consider these factors.

New Definitions

FIRRMA also establishes several new defined terms, including “critical infrastructure” and “critical technologies,” among others. “Critical infrastructure” includes “[s]ystems and assets, whether physical or virtual, so vital to the United States that the incapacity or destruction of such systems or assets would have a debilitating impact on national security.” “Critical technology” includes items listed on the U.S. Munitions List (USML) as set forth in the International Traffic in Arms Regulations (ITAR), or on the Commerce Control List set forth in the Export Administration Regulations (EAR).

What Do the Changes Mean for New Deals?

Parties anticipating potential deals will need to expand their CFIUS-related due diligence considerations and timelines to account for the broader definitions of transactions subject to CFIUS review. Additionally, whereas previously, CFIUS notifications were voluntary, certain foreign investment transactions will now be subject to a mandatory “declaration.” Parties to a proposed transaction will need to assess whether a transaction is subject to a mandatory “declaration” sufficiently early in a transaction timeline to allow the preparation, submission, and processing of the required “declaration” (and potentially a follow-on full notification submission to CFIUS). Parties will also need to budget and plan for the new filing fees which will be imposed for CFIUS submissions.

Greenberg Traurig’s [Export Controls & Economic Sanctions](#) team has wide-ranging CFIUS experience, counseling both potential foreign investors as well as the U.S. targets of investment from the initial stages of proposed transactions through the conclusion of a CFIUS review. The team provides integrated CFIUS advice, taking into account operational and deal objectives, as well as transactional timelines, all the while anticipating U.S. government regulatory requirements and policy concerns. In addition, the team helps clients to design and implement mitigation measures.

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