

New Law Expands National Security (CFIUS) Review of Mergers & Acquisitions

Congress recently passed legislation¹ expanding the jurisdiction and powers of the Committee on Foreign Investment in the United States (CFIUS), the U.S. multi-agency committee that evaluates the implications of foreign investment on national security. The new law, the Foreign Investment Risk Review Modernization Act or FIRRMA, significantly reforms the CFIUS review process. For example, the law:

- expands the transactions potentially subject to CFIUS review, which will include non-controlling foreign investments that may provide access to sensitive personal data of U.S. citizens or critical technologies, among other additions;
- extends the timing for the CFIUS review process;
- mandates, for the first time, notification to CFIUS of some transactions;
- requires CFIUS to impose filing fees; and
- empowers CFIUS to suspend a covered transaction that may pose a national security threat while CFIUS review is ongoing.

FIRRMA also provides CFIUS additional tools and resources to be able to process an increased volume of transactions and contains a provision permitting civil actions challenging CFIUS review in the United States Court of Appeals for the District of Columbia Circuit. The full scope and impact of these changes will depend in large part on the future regulations that CFIUS promulgates.

I. Expanded Review

Before FIRRMA, CFIUS was only able to review for national security concerns mergers, acquisitions, or takeovers that could result in control of a U.S. business by a foreign person. FIRRMA expands CFIUS purview to include several new types of “covered transactions”:²

- 1) certain real estate transactions that may present national security concerns. CFIUS will have authority to review transactions for real estate that is located near a U.S. military installation, air or maritime port, or other similarly sensitive site. However, single housing units and real estate in urbanized areas (unless otherwise prescribed by regulation) are excluded.
- 2) “other investments”³ by a foreign person involving “critical infrastructure,” “critical technologies,” or sensitive personal data of U.S. citizens. Significantly, CFIUS can review these types of investments even if the investment does not result in control by the foreign

¹ Both houses of Congress passed the National Defense Authorization Act, which includes the Foreign Investment Risk Review Modernization Act. John S. McCain National Defense Authorization Act of 2019, H.R. 5515, 115th Cong. (2018) (adopted as H.R. Rep. No. 115-847 at 540-608 (2018)) (NDAA). The President signed the bill into law on August 13, 2018.

² *Id.* at § 1703.

³ FIRRMA clarifies that, under certain circumstances, “other investment” does not include indirect investment by a foreign person through an investment fund—notwithstanding the foreign person’s membership on the fund’s advisory board or a committee of the fund. NDAA § 1703.

person. Instead, the key considerations are whether the investment grants the foreign person access to some material, non-public technical information in the possession of the U.S. business, the right to nominate or be a member or observer on the board of directors of the U.S. business, or any involvement, other than through voting of shares, in substantive decision making of the U.S. business regarding sensitive personal data, critical technologies, or critical infrastructure.

- 3) 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 that change could result in foreign control of the U.S. business or in an “other investment” involving critical infrastructure, critical technologies, or sensitive data.
- 4) any other transaction designed to evade or circumvent the CFIUS process.

FIRRMA’s expansion of “covered transactions” will take effect incrementally. The expansions that include evasion and changes in rights took effect immediately. The remaining expansions will take effect on the earlier of (a) 18 months after the date of enactment (mid-February 2020), or (b) 30 days after the publication in the Federal Register of a determination by the Secretary of the Treasury that the necessary resources are in place to make the provisions administrable.

II. Revised Timing for Review Process

Under FIRRMA, the initial CFIUS review period will be extended from 30 calendar days to 45 calendar days.⁴ Investigations—the second phase review period that may be initiated by CFIUS—will remain a 45-calendar-day process; however an investigation may be extended for one 15-day period in extraordinary circumstances. By statute, the full process can now take up to 105 days and has the potential to last even longer as FIRRMA does not prohibit the practice used in some transactions of withdrawing and refile notices, causing the review period to re-start and extending the timeframe of the overall review process. These new timeframes apply to any review or investigation initiated on or after the date of FIRRMA’s enactment.

However, FIRRMA may shorten the timing for the pre-review process. Typically, before a written notice requesting CFIUS review is filed, the parties submit a draft notice for CFIUS’ review to confirm the notice contains the requisite information. FIRRMA will require CFIUS to provide comments on a draft or formal written notice or accept a formal written notice within 10 business days after it is submitted (as long as the parties concede that the transaction is a covered transaction).

III. Declaration Process

FIRRMA introduces a new, abbreviated, declarations process: “A party to any covered transaction may submit to the Committee a declaration with basic information regarding the transaction instead of a written notice.”⁵

Before FIRRMA, CFIUS filings were optional and parties were under no obligation to file, unless directed to do so by CFIUS. For the first time, FIRRMA amends the law to require “declarations” for certain covered transactions. Unless CFIUS issues a waiver, parties to a covered transaction must submit a declaration

⁴ *Id.* at § 1709.

⁵ *Id.* at § 1706.

where “the transaction involves an investment “by a foreign person in which a foreign government has, directly or indirectly, a substantial interest”⁶ that results in the acquisition, directly or indirectly, of a substantial interest in a United States business” involved in critical infrastructure or critical technology, or that has access to the sensitive personal data of U.S. citizens.

CFIUS may impose penalties if parties fail to comply with mandatory declaration requirements.⁷ Within 30 days after a declaration is made, the committee may either (a) request that the parties to the transaction file a written notice under the full approval process, (b) “initiate a unilateral review of the transaction,” or (c) notify the parties in writing “that the Committee has completed all action under this section with respect to the transaction.” “Declarations” are expected to be no longer than five pages in length; their specific content is to be laid out in forthcoming CFIUS regulations.

The declarations process becomes effective (a) 18 months after FIRRMA’s enactment (mid-February 2020), or (b) 30 days after the publication in the Federal Register of a determination by the Secretary of the Treasury that the necessary resources are in place to make the provisions administrable, whichever comes first.

IV. New Fees

FIRRMA introduces a new filing fee regime.⁸ Prior to FIRRMA, CFIUS could not impose filing fees for review. After FIRRMA, CFIUS will be empowered to assess filing fees for covered transactions of up to \$300,000 (or, for transactions valued at less than \$30 million, 1% of the value of the transaction). FIRRMA directs CFIUS to set the fee “based on the value of the transaction” taking into account “the effect of the fee on small business concerns” and “foreign investment,” as well as the expense associated with the Committee’s review. Because FIRRMA directs CFIUS to impose fees determined according to regulation, the filing fees will not apply to transactions until such regulations are promulgated.

V. CFIUS Authority To Suspend Proposed or Pending Transactions

Finally, in addition to authorizing CFIUS to refer a transaction to the President at any time during the review period, FIRRMA authorizes CFIUS to suspend a proposed or pending covered transaction that may pose a national security threat while CFIUS review or investigation is ongoing.⁹ FIRRMA’s provision granting CFIUS this additional power is operational upon enactment.

⁶ *Id.*

⁷ Mandatory declarations are not required with respect to investments by investment funds if certain conditions are met, including that the fund is exclusively managed by a U.S. general partner or equivalent.

⁸ NDAA § 1723.

⁹ *Id.* at §§ 1714, 1718.

VI. Conclusion

FIRREA expands CFIUS power over foreign investment in the U.S. The extent of these augmented tools and the extended review period for CFIUS covered transactions may complicate or delay deals that involve a foreign buyer. For any transaction that may touch on foreign investment in the U.S., we recommend consulting counsel to fully understand the complexity of the CFIUS process and these new provisions.

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If you have any questions about the issues addressed in this memorandum or if you would like a copy of any of the materials mentioned, please do not hesitate to call or e-mail Elai Katz at 212.701.3039 or ekatz@cahill.com; Lauren Rackow at 212.701.3725 or lrackow@cahill.com; or Adam Mintz at 212.701.3981 or amintz@cahill.com.