

FIRRMA Broadens Scope of Foreign Investments Subject to CFIUS Review

IN SHORT

The Situation: The National Defense Authorization Act ("NDAA"), which contains the Foreign Investment Risk Review Modernization Act ("FIRRMA"), broadens the scope of foreign investments subject to scrutiny by the Committee on Foreign Investment in the United States ("CFIUS").

The Result: Certain noncontrolling foreign investments involving "critical infrastructure," "critical technologies," or sensitive data are subject to CFIUS review as well as certain foreign investments in real estate.

Looking Ahead: Some of FIRRMA's provisions will be effective immediately, while others will be further refined and implemented via regulation.

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President Trump signed the NDAA today following a rare demonstration of strong bipartisan Congressional support. The NDAA contains the much anticipated FIRRMA. As we previously [reported](#), FIRRMA modernizes and strengthens the CFIUS process by broadening the scope of transactions within the jurisdiction of CFIUS to include certain real estate transactions and certain transactions in U.S. "critical infrastructure" and "critical technology" companies and U.S. companies that maintain or collect sensitive personal data.

CFIUS remains an important consideration for foreign parties looking to invest in the United States. FIRRMA codifies the ways in which CFIUS has evolved in recent years. In addition to expanding CFIUS's jurisdiction, FIRRMA extends CFIUS's period of review and introduces a "declarations" process that mandates filings for certain transactions and establishes a process for parties to voluntarily file streamlined notices for expedited review. The NDAA also includes the Export Controls Act of 2018 that, among other things, introduces a process to identify and control the export, re-export, and transfer of "emerging and foundational technologies."



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Expanded Jurisdiction

FIRRMA expands CFIUS's authority to review new types of transactions.

- **"Other Investments" Involving Critical Infrastructure, Critical Technologies, or Sensitive Data.** CFIUS now enjoys broader authority to review noncontrolling investments in "critical infrastructure" and "critical technology" companies, as well as companies that maintain or collect sensitive data of U.S. citizens.
- **Real Estate Transactions.** CFIUS is now authorized to review the purchase, lease, or concession of certain private or public real estate that is: (i) a part of an air or maritime port or (ii) in close proximity to a U.S. military installation or other sensitive government location.
- **Changes in the Rights of a Foreign Person.** CFIUS is now tasked with more closely scrutinizing any change in the rights that a foreign person has with respect to their existing investments in U.S. businesses.
- **Evasion or Circumvention.** CFIUS will also evaluate transactions carefully to assess whether they are designed to evade or circumvent CFIUS's jurisdiction.

Short-Form and Mandatory Declarations

FIRRMA establishes a streamlined process for certain parties to submit a short-form "declaration" in lieu of a traditional notice and provides that the information required will generally not exceed five pages in length. CFIUS will then have 30 days to respond to the declaration after which CFIUS will either clear the transaction, invite or request the parties to file a traditional notice, or initiate a unilateral review of the transaction.

FIRRMA also requires mandatory declarations for foreign government-controlled investments in "critical infrastructure" and "critical technology" companies, as well as companies that maintain or collect

sensitive data of U.S. citizens, when the investment would result in the foreign government acquiring a "substantial interest." CFIUS is also authorized to mandate declarations for transactions involving U.S. "critical technology" companies, regardless of the size of an investment.

Timing and Filing Fees

FIRRMA immediately extends the initial 30-day review period to 45 days, followed by the traditional 45-day investigation period. FIRRMA also authorizes CFIUS one 15-day extension for "extraordinary circumstances." FIRRMA allows CFIUS to require filing fees for CFIUS reviews, but fees will be determined by regulation, though they are capped at the lesser of one percent of the value of the transaction or \$300,000 (adjusted annually for inflation).

Private Equity Investors

Under FIRRMA, foreign limited partners, investing through a fund managed exclusively by U.S. persons, may be exempt from CFIUS jurisdiction when investing in "other investments," so long as the limited partners do not participate on any advisory boards granting them the ability to control investment decisions or gain access to nonpublic technical information, or otherwise have the ability to control the fund.

Emerging and Foundational Technologies

One of the most significant changes to the final legislation was the removal of the so-called "joint venture" provision that was one of the most hotly contested provisions of the proposed legislation. However, under the companion export control legislation, the U.S. Department of Commerce could evaluate the national security considerations with regard to technology transfer via joint ventures or development agreements under certain circumstances, such as in the context of reviewing export license applications. In addition, the President will establish an interagency process to identify "emerging and foundational technologies" that are essential to the national security of the United States and not currently controlled under U.S. export control regimes.

THREE KEY TAKEAWAYS

1. FIRRMA expands CFIUS's authority to review new types of transactions, and CFIUS remains an important consideration for foreign parties looking to invest in the United States.
2. Foreign parties looking to invest in the United States should: (i) be aware that it may take longer for CFIUS to clear transactions with traditional notices; (ii) evaluate whether an investment will require a mandatory "declaration" to CFIUS; and (iii) consider the option of filing a voluntary "declaration" to potentially expedite the CFIUS review process.
3. The U.S. government will establish a process for identifying and controlling "emerging and foundational technologies," which may become off-limits to certain foreign investors.

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