

On August 14, 2018, legislation reforming the Committee on Foreign Investment in the United States (CFIUS), the Foreign Investment Risk Review Modernization Act (FIRRMA), and dual-use export controls, the Export Controls Reform Act (ECRA), were signed into law as part of the John S. McCain National Defense Authorization Act for Fiscal Year 2019 (NDAA) (H.R. 5515, 115th Cong. (2018)). This legislation expands CFIUS's authority to review investment in US businesses and expand the scope of controlled technologies to include emerging technologies not currently controlled.

More investments will be covered transactions. CFIUS is an interagency body chaired and administered by the Department of Treasury that reviews certain "covered" foreign investments into the US for potential national security concerns. With the passage of FIRRMA, CFIUS authority now extends beyond "controlling" investments in US businesses and includes the following areas of coverage:

1. Acquisitions or leases of real property in proximity to facilities sensitive to national security interests
2. Minority investments (e.g., strategic or certain passive investments) in any US business that is involved in critical technologies, critical infrastructure or has access to sensitive personal data of US citizens (see the limited investment fund exemption to this authority below)

These new authorities will take effect in the near future, once CFIUS provides further guidance. In the meanwhile, CFIUS issued a statement that "parties should continue to notify transactions for CFIUS review as provided in CFIUS's current regulations."

Limited exemption for non-controlling investments by investment funds. There is a limited exemption for investment funds that have a US person general partner that is in sole control the fund's investment decisions and where the limited partners do not have investment control or access to certain non-public and non-financial information.

Mandatory filings for investors with "substantial" foreign government interest. Under FIRRMA, while CFIUS is authorized to prescribe "the types of covered transactions" that will require a mandatory abbreviated filing (called a "declaration"), the law specifically requires declaration filings for any non-controlling investment that falls within the new covered transaction authority if a foreign government will hold directly or indirectly a "substantial interest" (as to be defined by CFIUS) in the foreign investor. This provision could subject any number of state-controlled pension funds, wealth funds or companies with minority state-controlled shareholders to mandatory filings. Mandatory filings are not yet required by CFIUS, pending forthcoming guidance.

Exemptions and waivers for mandatory declaration filings.

FIRRMA provides two exemptions to the mandatory filing obligation, as well as the possibility of obtaining a waiver. Foreign investors are exempt from mandatory filings if (1) the investor would fall within the exemption for non-controlling investments by investment funds (noted herein); or (2) the foreign government-controlled interest is less than 10% of the total voting authority in the foreign investor. A waiver can be granted if the foreign investor shows that its investments "are not directed by a foreign government," and it "has a history of cooperation with the Committee."

Critical technology now includes emerging technologies.

The CFIUS definition of "critical technology," an area of heightened scrutiny, will now include "emerging and foundational technologies." These are newly developed technologies that are not yet regulated by existing export controls, but are found to be "essential" to national security based, in part, on information obtained from CFIUS filings. CFIUS also has the authority to "recommend technologies for identification" as emerging technologies (i.e., parties may not know they have "emerging" technologies until after a CFIUS filing). The process for determining what technologies will be deemed emerging technologies is set forth in ECRA. The legislation defines a multiagency process to identify emerging technologies and then to implement unilateral controls on the technology. Commerce is directed to make efforts to bring other countries along on multilateral controls of emerging technologies, but may retain the unilateral controls if other countries elect not to follow.

CFIUS is authorized to create special treatment for countries.

FIRRMA does not single out any countries, but it does authorize CFIUS to draft "Country Specification" regulations that would "limit the application" of the new covered transaction authorities of CFIUS "to the investments of certain categories of foreign persons," considering "how a foreign person is connected to a foreign country."

CFIUS to develop "pilot programs" to vet new authorities.

FIRRMA allows CFIUS to conduct pilot programs through March 6, 2020, to implement provisions of the legislation that are not immediately effective – such as those that require CFIUS to develop regulations to implement the statute's prerogatives. The country specification regulations and investment fund exemptions are likely to be vetted through these programs.

Procedural Changes: Declaration Filings, Increased Timelines and Filing Fees

- **Declarations.** Parties have the option (or requirement in some cases) of filing a declaration, which is described as “abbreviated notifications that would not generally exceed 5 pages in length.” CFIUS then has 30 days to either clear the transaction; initiate a unilateral review of the transaction; request the parties file a complete notice; or inform the parties that CFIUS cannot take action (i.e., clear the transaction) based on the declaration.
- **Extended timeline.** The CFIUS review period is extended from 30 days to 45 days. The investigation period remains the same at 45 days, but CFIUS now has the option to extend the investigation for another 15 days in “extraordinary circumstances” (CFIUS has stated it will not utilize this 15-day extension option until it is able to provide further guidance on its implementation).
- **Filing fee.** The new law requires a filing fee of 1% of the value of the transaction, or US\$300,000 (adjusted annually), whichever is less. CFIUS is not yet requiring a filing fee until it can provide guidance on how they will be implemented and calculated.

Key Takeaways

1. All real estate transactions by foreign persons now should be evaluated for proximity to military installations, ports, federal buildings and other facilities with potential national security implications.
2. Strategic relationships between foreign persons and US critical technology companies, including those involving emerging technologies, are covered transactions subject CFIUS review if coupled with any investment interest.
3. Sovereign wealth fund investments in businesses involved in US critical technology or infrastructure, or in businesses with access to personal information, may be subject to CFIUS review and possibly required to make a mandatory declaration, depending on their ownership structure.
4. Foreign governments should begin consultations with CFIUS for potentially preferred treatment for investors from their countries.

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