

Understanding the Impacts of CFIUS Reform and Emerging Technologies

深入解读CFIUS改革

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 the CFIUS' authority to review investment in U.S. businesses and expand the scope of controlled technologies to include emerging technologies not currently controlled.

2018年8月14日，改革美国外国投资委员会（Committee on Foreign Investment in the United States，以下简称“CFIUS”）的《外国投资风险评估现代化法案》（Foreign Investment Risk Review Modernization Act，以下简称“FIRRMA法案”）和管制军民两用商品出口的出口管制改革法案（Export Controls Reform Act，以下简称“ECRA法案”）作为2019财年国防授权法案（John S. McCain National Defense Authorization Act for Fiscal Year 2019，以下简称“NDAA”）的一部分，由美国总统签署生效。FIRRMA法案扩大了CFIUS对外国资本投资美国敏感行业进行审查的权利以及将现有出口管制体系未覆盖的新技术纳入管控范围。

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 U.S. for potential national security concerns. With the passage of FIRRMA, CFIUS authority now extends beyond “controlling” investments in U.S. businesses, and includes with the following areas of coverage:

日后越来越多的投资将会成为受监管交易。 CFIUS是一个财政部下辖的跨部门机构，其基于国家安全的考量负责审查某些“受监管的”的外国投资。随着FIRRMA法案的通过，即便是不会导致外国投资者控制美国公司的投资也被纳入了CFIUS的审查范围，其中包括以下领域：

1. acquisitions or leases of real property in proximity to facilities sensitive to national security interests; and 购买或者租赁临近具有国家安全敏感性设施的房地产
2. minority investments (e.g., strategic or certain passive investments) in any U.S. business that is involved in critical technologies, critical infrastructure, or has access to sensitive personal data of United States citizens. (But, see the limited investment fund exemption to this authority below.)

对于涉及关键技术、关键基础设施或有权接触到美国公民个人敏感信息的业务进行非控股性的股权投资（例如战略投资或某些被动投资）（下文所提及的投资基金有限豁免除外）

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.” 待CFIUS发布实施细则后，这些新的规定就会在不久的将来生效。与此同时，CFIUS发表声明称，“目前，各方应继续按CFIUS现行的规定来通知CFIUS审查交易。”

Limited exemption for non-controlling investments by investment funds. There is a limited exemption for investment funds that have a U.S. 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 nonpublic and non-financial information.

对投资基金进行非控制性投资的有限豁免。 当某项投资基金的普通合伙人是美国人、其对投资基金的决策有绝对控制权、且有限合伙人无法控制投资或获取某些非公开和非财务信息之时，该投资基金所进行的非控制性投资便不属于审查范围。

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”) which is a new procedure under FIRMER that will become effective in the near future, 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.

对具有“实质性”外国政府利益的投资者提出强制申报的要求。 按照FIRRMA法案，CFIUS有权规定某项“受监管交易的类型”需要进行强制简化申报 (mandatory abbreviated filing), 或称之为“声明” (declaration), 这是FIRRMA规定的一种新的申报流程，在实施细则出台后将正式施行。其中，FIRRMA明确规定了，当外国政府在某一外国投资者中持有直接或者间接“实质性利益”（具体将由CFIUS定义），该投资者对于受监管交易进行的非控制性投资，必须进行上述强制简化申报（声明）。该规定可能使国家控制的养老基金、财富基金或是由政府持有少数股权的公司受到强制申报条款的约束。但是，目前CFIUS还尚未开始实施上述强制申报要求，估计会待实施细则出台后实施。

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) if the investor would fall within the exemption for non-controlling investments by investment funds – noted above; or (2) if 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.”

强制简化申报（声明）的例外和豁免。 FIRRMA规定了两项强制申报的例外，同时也规定了获得豁免的条件。外国投资者可以免于强制申报：如果（1）投资者是通过符合上文豁免条件的投资基金进行非控制性的投资；或者（2）外国政府所控制的权益低于外国投资者总投票权益的10%。另外，如果外国投资者能证明其投资“并非根据外国政府指示进行”，并且该外国投资者“与委员会（即CFIUS）有合作历史”，则可申请豁免强制申报。

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.

关键技术现在包括了新兴技术。 美国外国投资委员会对“关键技术”的定义受到各方的高度关注。在FIRRMA法案的框架下，“新兴和基础的技术”都被认为是“关键技术”。这些新开发的技术未受到现有出口管制的监管，但在某种程度上这些技术对国家安全来说是“关键的”。CFIUS还有权“建议将某种待定性技术”定义为新兴技术（换言之，在向CFIUS申报之前，各方可能都不知道他们事实上拥有“新兴”技术）。ECRA法案中规定了确定新兴技术的步骤。该法规定多个机构协同配合认定新兴技术，然后单方面的对新兴技术进行控制。法案要求美国商务部努力使其他国家参与新兴技术的多边控制，但如果其他国家选择不这样做的话，美国将仍然进行单边控制。

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可以针对不同国家创设特殊待遇。 FIRRMA法案没有将某一国家排除在外，但它确实授权CFIUS基于“外国投资者与外国国家之间的关系”而制定“针对不同国家的细化规则”，从而将受监管的交易“限定于”“某一类外国投资者的投资”。

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.

CFIUS将设计“试点项目”以检验新规。 FIRRMA法案允许CFIUS在2020年3月6日之前针对那些并非立刻生效的条款实施试点项目，例如那些需要CFIUS制定配套的规章制度才能得以践行的特权性规定。针对不同国情的细化规则以及投资基金的审查豁免可能会通过这些项目来进行评估。

Procedural changes: Declaration filings, increased timelines, and filing fees.

程序性变更：声明性申报、延长期限以及申报费用

- **Declarations.** Parties have the option (or requirement in some cases) of filing a declaration, which are 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. **声明（简化申报）。** 当事人可以选择（或在某些情况下被要求）进行声明（简化申报），即“简略版的申报且通常不超过5页。”声明提交后，CFIUS有30天时间来选择做出以下决定：批准该交易；对交易进行单方面审查；要求各方提交完整申报；或告知当事人CFIUS尚不能根据声明而采取行动（即批准交易）。

- **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).

延长期限。CFIUS的审查期限从30天延长至45天。调查期限保持45天不变，但CFIUS现在可以选择在“特殊情况”下将调查期限延长15天（CFIUS表示在发布实施细则之前不会运用调查期限延长15天的权利）。

- **Filing Fee.** The new law requires a filing fee of 1 percent of the value of the transaction; or \$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.

申报费用。新法规定申报费为交易额的1%，如果交易额的1%超过30万美元（会进行年度调整），则手续费即为30万美元。由于关于申报费的收取和计算的实施细则仍未发布，现阶段CFIUS并不会收取申报费。

Key Takeaways

投资人需要注意的关键点：

1. All real estate transactions by foreign persons now should be evaluated for proximity to military installations, ports, federal building and other facilities with potential national security implications.
对于外国投资者投资房地产的交易，如果涉及的房地产临近军事设施、机场或海运港口、联邦政府建筑或其他可能产生国家安全风险的设施，需事先进行CFIUS风险评估。
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.
外国投资者与掌握关键技术（包括新兴技术）的美国公司之间的战略伙伴关系，倘若存在投资利益的，也属于受CFIUS监管的对象。

3. Sovereign wealth fund investments or investments by state-owned entities in certain U.S. businesses may be subject to CFIUS review and possibly required to make a mandatory declaration, depending on their ownership structure.

外国主权基金或国有企业的投资（取决于其投资的股权比例）更可能成为受监管的交易对象并可能被要求强制申报。

4. Foreign governments should begin consultations with CFIUS for potentially preferred treatment for investors from their countries. 外国政府应该展开与CFIUS的协商讨论从而为本国投资者争取可能的优惠待遇。

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