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## Overhaul of Committee on Foreign Investment in the United States (CFIUS) National Security Reviews of Foreign Acquisitions of U.S. Businesses

By Ted Posner and Timothy Welch

In November of last year, we reported on the introduction of bills in the House and Senate to overhaul the system for national security reviews of foreign acquisitions of U.S. businesses led by the Committee on Foreign Investment in the United States (“CFIUS”). That report is available [here](#). On August 13, 2018, that overhaul – known as the Foreign Investment Risk Review Modernization Act of 2018 (“FIRRMA”) – was signed into law as Subtitle A of Title XVII of the John S. McCain National Defense Authorization Act for Fiscal Year 2019 (Public Law No. 115-232). In this report, we summarize the principal ways in which FIRRMA will affect the CFIUS review process.

Most of FIRRMA’s innovations take the form of amendments to Section 721 of the Defense Production Act of 1950 (50 U.S.C. § 4565) (“Section 721”), which originally was enacted as the Exon-Florio Amendment to the Omnibus Trade and Competitiveness Act of 1988, and (as periodically amended) has governed CFIUS’s operation for the past 30 years. Certain of FIRRMA’s amendments took effect immediately upon enactment, while others will take effect after a transition period that will conclude on the earlier of (i) February 13, 2020 (*i.e.*, 18 months after FIRRMA’s enactment), or (ii) 30 days after the date on which CFIUS’s chair (*i.e.*, the Secretary of the Treasury) publishes in the Federal Register a determination that “the regulations, organizational structure, personnel, and other resources necessary to administer the new provisions are in place.” [Appended to this Alert](#) is a chart summarizing FIRRMA’s main provisions and identifying when each takes effect.

For a discussion of pre-FIRRMA law and practice, we refer to our November 2017 report. The principal innovations of FIRRMA are as follows:<sup>1</sup>

**1. Expansion of the definition of “covered transaction.”** CFIUS has authority to review the national security impact of a transaction only if it is a “covered transaction.” Prior to enactment of FIRRMA, this was defined to mean a merger, acquisition, or takeover “by or with any foreign person that could result in foreign control of any person engaged in interstate commerce in the United States.” FIRRMA tweaked that definition (substituting the term “United States business” for “person engaged in interstate commerce in the United States” and clarifying that a covered transaction may include a merger, acquisition, or takeover carried out through a joint venture), and it established four new categories of “covered transaction,” as follows:

- **Certain purchases, leases, or concessions of real estate** located within or functioning as part of an air or maritime port, or in close proximity to a U.S. military installation or other national security sensitive facility. This category will be limited to certain categories of foreign persons, to be prescribed by CFIUS in regulations;
- **Certain “other investment”** (*i.e.*, regardless of whether it results in foreign person control) in a U.S. business that “(I) owns, operates, manufactures, supplies, or services **critical infrastructure**; (II) produces, designs, tests, manufactures, fabricates, or develops one or more **critical technologies**; or (III) maintains or collects **sensitive personal data** of United States citizens that may be exploited in a manner that threatens national security.” Like the real estate category, this category of covered transaction will be limited to certain categories of foreign persons, to be prescribed by CFIUS in regulations. Moreover, this category of covered transaction is further limited by special rules, including a rule for investment funds managed by a U.S. person and an exception for investment involving an air carrier;
- **Change in the rights of a foreign person** with respect to an existing investment in a U.S. business if that change could result in (I) foreign control of the U.S. business or (II) an investment of the type described in the immediately preceding bullet;
- **“Any other transaction, transfer, agreement, or arrangement, the structure of which is designed or intended to evade or circumvent the application of [Section 721], subject to regulations prescribed by the Committee.”**

**2. Additional factors to be considered in national security analysis.** The law prior to FIRRMA set forth a list of ten factors that CFIUS should consider in analyzing the impact of a covered transaction on U.S. national security. Five of those factors were in the law as originally enacted in 1988. The Foreign Investment and National Security Act of 2007 (Pub. L. No. 110-49, known as “FINSAs”) added five new factors, together with a catch-all provision for “such other

factors as the President or the Committee may determine to be appropriate, generally or in connection with a specific review or investigation.” 50 U.S.C. § 4565(f). FIRRMA contains a “sense of the Congress” provision that identifies six further factors that CFIUS “may consider.” Pub. L. No. 115-232, § 1702(c).

These additional factors give a good indication of the kinds of concerns underlying FIRRMA’s enactment. They include, for example:

- “whether a covered transaction involves a **country of special concern** that has a demonstrated or declared strategic goal of acquiring a type of **critical technology** or **critical infrastructure** that would affect United States leadership in areas related to national security;”
- “the extent to which a covered transaction is likely to expose, either directly or indirectly, **personally identifiable information, genetic information, or other sensitive data of United States citizens** to access by a foreign government or foreign person that may exploit that information in a manner that threatens national security;” and
- “whether a covered transaction is likely to have the effect of exacerbating or creating new **cybersecurity vulnerabilities** in the United States or is likely to result in a foreign government gaining a significant new capability to engage in **malicious cyber-enabled activities** against the United States, including such activities designed to affect the outcome of any election for Federal office.”

**3. Definition of “critical technologies.”** The involvement of a U.S. business with “critical technologies” is one of the factors that CFIUS is to take into account in its national security analysis of a covered transaction. See 50 U.S.C. § 4565(f)(7); Pub. L. No. 115-232, § 1702(c)(1). As summarized above, involvement with critical technologies also may be relevant to determining whether a given transaction is a covered transaction. Pre-FIRRMA, “critical technologies” was defined in statute and regulation by reference to the principal U.S. export control regimes. FIRRMA maintains that definition but adds to it the important concept of **“emerging and foundational**

**technologies** controlled pursuant to section 1758 of the Export Control Reform Act of 2018.” The Export Control Reform Act of 2018 is Subtitle B of Title XVII of Public Law No. 115-232 (*i.e.*, the same statute that includes FIRRMA itself). Section 1758 of that Act provides for the establishment of an interagency process to identify emerging and foundational technologies that are essential to the national security of the United States. FIRRMA’s definition of “critical technologies” establishes a link to that interagency process, such that FIRRMA’s definition of critical technologies will evolve as the interagency process carries out its work.

**4. Process for notifying CFIUS.** The usual way for CFIUS to become aware of and initiate a review of a covered transaction is pursuant to a joint voluntary notice submitted by the parties to the transaction. As a matter of practice, parties ordinarily submit a notice to CFIUS in draft form, receive comments from CFIUS staff on the draft, and then submit a definitive notice to CFIUS that addresses those comments. Once CFIUS confirms that the definitive notice is complete, it formally accepts the notice, thereby initiating a review and starting the statutory “clock” for completion of that review. FIRRMA maintains that process but modifies it in several respects, as follows:

- a. Time to comment on or accept a notice.** Prior to FIRRMA, Section 721 contained no deadline for CFIUS to comment on a draft notice or to accept a complete, definitive notice. Under FIRRMA, CFIUS ordinarily will be required to provide comments on a notice or (if the notice is found to be complete) accept the notice within 10 business days of its submission, provided that the parties stipulate that the transaction is a “covered transaction” (as opposed to asserting – as parties sometimes do – that the transaction is not covered and that the parties are submitting a notice anyway, in case CFIUS considers that it is a covered transaction). This requirement does not take effect immediately, but only after a transition period.
- b. “Declaration” of a covered transaction.** Prior to FIRRMA, the only way for parties to a transaction to put the transaction formally before CFIUS was

through a full, joint voluntary notice, containing all of the elements required by the CFIUS regulations. See 31 C.F.R. § 800.402 (setting forth the required contents of a joint voluntary notice). Under the regulations, a complete notice can be quite voluminous and time-consuming to prepare. FIRRMA provides the option of submitting an abbreviated form of notice – referred to as a “declaration” – which contains “basic information regarding the transaction” and ordinarily will not be longer than five pages.

Upon receiving a declaration, CFIUS will be required to respond in one of four ways within 30 days: (A) request a full notice; (B) inform the parties that CFIUS is not able to complete action on the basis of the declaration and that they may submit a full notice; (C) initiate a unilateral review based on the declaration; or (D) notify the parties in writing that CFIUS has completed all action on the transaction (*i.e.*, in effect, that it has no national security concerns).

The declaration mechanism is likely to be useful for parties that expect that their transaction will be seen as having no impact or minimal impact on national security but want the comfort that would come from quickly bringing it to CFIUS’s attention and (hopefully) getting a reply within 30 days that CFIUS has completed all action.

- c. Mandatory declaration of certain transactions.** FIRRMA makes submission of a declaration (or full notice in lieu of declaration) mandatory for certain types of transactions. CFIUS will prescribe by regulation the types of transactions for which a declaration will be mandatory. At a minimum, these ordinarily will include (subject to exceptions) the “other investment” type of covered transaction described above, in which a foreign person acquires a “substantial interest” in a U.S. business, and a foreign government has, directly or indirectly, a “substantial interest” in the foreign acquirer. Failure to submit a declaration of a transaction for which a declaration is mandatory may result in the imposition of penalties.

**5. Timing for reviews and investigations.** CFIUS's formal acceptance of a notice triggers initiation of a first-stage "review" which, pre-FIRRMA, could last up to 30 days. If CFIUS is still analyzing a transaction at the end of the review period, the case goes to second-stage "investigation" which, pre-FIRRMA, could last up to 45 additional days. Under FIRRMA, the time period for first-stage review is extended to 45 days. The time period for second-stage investigation continues to be 45 days, but in "extraordinary circumstances," it may be extended for one 15-day period. FIRRMA also provides for a tolling of these time periods during any lapse in appropriations.

**6. Referral to the President.** Pre-FIRRMA, Section 721 provided for referral of a transaction to the President only at the conclusion of an investigation, with the President to act not later than 15 days after the conclusion of the investigation. FIRRMA authorizes CFIUS to refer a transaction to the President at any time during a review or investigation – *i.e.*, without need to wait for the conclusion of an investigation – and for the President to act within 15 days of such referral.

**7. Information sharing.** In general, information submitted to CFIUS is confidential and exempt from disclosure under the Freedom of Information Act. Pre-FIRRMA, the only exceptions were for disclosure of information relevant to administrative or judicial actions or proceedings, and disclosure of information to Congress. FIRRMA adds an exception for disclosure to domestic governmental entities and foreign governments of U.S. allies or partners "to the extent necessary for national security purposes." FIRRMA also allows CFIUS to disclose information "that the parties have consented to be disclosed to third parties."

**8. Judicial review.** Pre-FIRRMA, Section 721 provided only that actions and findings by the President under the statute would not be subject to judicial review. Section 721 did not address judicial review of actions or findings by CFIUS. FIRRMA provides that an action challenging actions or findings under Section 721 may be brought only in the U.S. Court of Appeals for the D.C. Circuit. FIRRMA also contains provisions for *ex parte*, *in camera* review of

classified and other confidential information by the court in such an action.

**9. Power to suspend transactions.** Pre-FIRRMA, CFIUS did not have the power to enjoin parties from closing a transaction prior to completion of a pending CFIUS review or investigation. Although it was usual practice for parties to wait for CFIUS to conclude action before closing a transaction, occasionally parties would close over CFIUS, taking the risk that any costs associated with action CFIUS might take (*i.e.*, in the form of measures imposed to mitigate perceived national security risks) would be less than the costs associated with delay. Under FIRRMA, CFIUS is authorized to suspend a covered transaction until CFIUS review or investigation is completed.

**10. Penalties for non-compliance with mitigation measures.** Pre-FIRRMA, CFIUS's powers to enforce national security risk mitigation measures included the power to impose penalties on parties that failed to comply with such measures. Such penalties could include civil monetary penalties as well as the reopening of CFIUS's review of the underlying transaction. FIRRMA enhances these powers, including by authorizing CFIUS to require a non-compliant party to submit a notice or declaration to CFIUS of any covered transaction over a five-year period. In other words, for the non-compliant party, notice (or declaration) to CFIUS of covered transactions that otherwise would be voluntary would instead be mandatory for a period of five years from the determination of non-compliance.

**11. Filing fees.** Pre-FIRRMA, parties paid no fee on submitting a joint voluntary notice to CFIUS. FIRRMA establishes a dedicated CFIUS Fund in the Treasury of the United States and authorizes CFIUS to assess and collect a fee on each covered transaction for which a notice is submitted. CFIUS will determine the fee amounts in regulations. FIRRMA provides that fees be based on the value of a transaction with a cap equal to the lesser of 1 percent of the value of the transaction or \$300,000 (adjusted annually for inflation).

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<sup>1</sup> This report does not summarize all of FIRRMA's innovations. It focuses on those innovations that will have the most significant impact on how CFIUS operates in the foreseeable future. It does not address provisions related to interaction

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among the CFIUS members, provisions related to interaction between CFIUS and the U.S. Congress, or minor adjustments to the CFIUS process.

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## FIRRMA's Principal Changes to Section 721 of the Defense Production Act of 1950 (50 U.S.C. § 4565)<sup>1</sup>

<u>Issue</u>	<u>Prior law</u>	<u>FIRRMA</u>	<u>Where is the new provision codified?</u> <sup>2</sup>	<u>When does the new provision take effect?</u>
<i>National security risk factors</i>	Prior law contained a list of 10 factors to be considered in analyzing national security risk, together with a catch-all clause for "such other factors as the President or the Committee may determine to be appropriate, generally or in connection with a specific review or investigation."	FIRRMA contains a "sense of the Congress" provision identifying six additional factors to be taken into account. These factors are discussed in the main body of the report preceding this table.	Pub. L. No. 115-232, § 1702(c). Although not incorporated into Section 721, these factors presumably will be taken into account by CFIUS.	Upon enactment.
<i>Covered transaction</i>	"Covered transaction" defined to mean a merger, acquisition, or takeover "by or with any foreign person that could result in foreign control of any person engaged in interstate commerce in the United States."	Definition of "covered transaction" expanded to include four additional categories: <ul style="list-style-type: none"> <li>▪ Certain real estate transactions</li> <li>▪ Certain "other investment" involving critical infrastructure, critical technologies, or sensitive personal data of U.S. citizens (regardless of whether it</li> </ul>	Subsec. (a)(4).	Provisions on (i) prior law definition as modified, (ii) change in rights resulting in control, and (iii) evasion or circumvention take effect upon enactment.  Other provisions take effect after transition period.

<sup>1</sup> This chart is not meant to be comprehensive. It focuses on those innovations that will have the most significant impact on how CFIUS operates in the foreseeable future. It does not address provisions related to interaction among the CFIUS members, provisions related to interaction between CFIUS and the U.S. Congress, or minor adjustments to the CFIUS process.

<sup>2</sup> Unless otherwise indicated, all references are to subsections of Section 721 (50 U.S.C. § 4565) as amended by FIRRMA.

<u>Issue</u>	<u>Prior law</u>	<u>FIRMA</u>	<u>Where is the new provision codified?</u> <sup>2</sup>	<u>When does the new provision take effect?</u>
		<p>results in foreign control of U.S. business)</p> <ul style="list-style-type: none"> <li>▪ Certain changes of rights of foreign person in existing investment</li> <li>▪ Transactions designed or intended to evade or circumvent application of Section 721</li> </ul>		
<b>Critical technologies</b>	“Critical technologies” defined by reference to principal export control regimes.	Definition of “critical technologies” expanded to include “emerging and foundational technologies controlled pursuant to section 1758 of the Export Control Reform Act of 2018.”	Subsec. (a)(6).	Upon enactment.
<b>Time to comment on or accept a notice</b>	No provision.	CFIUS ordinarily must comment on or accept a notice (if found to be complete) within 10 business days of submission, if parties stipulate that the transaction is “covered.”	Subsec. (b)(1)(C)(i)(II).	After transition period.
<b>Option to submit a “declaration” to CFIUS</b>	No provision.	Parties may submit an abbreviated declaration of a transaction to CFIUS, with CFIUS required to provide one of four responses	Subsec. (b)(1)(C)(v).	After transition period.

<u>Issue</u>	<u>Prior law</u>	<u>FIRMA</u>	<u>Where is the new provision codified?</u> <sup>2</sup>	<u>When does the new provision take effect?</u>
		within 30 days.		
<i>Declaration mandatory for certain transactions</i>	No provision.	Parties required to submit a declaration (or notice in lieu of declaration) for certain covered transactions, including certain covered transactions in which a foreign government would acquire a “substantial interest.”	Subsec. (b)(1)(C)(v)(IV).	After transition period.
<i>Time periods for reviews and investigations</i>	Review to be completed within 30 days of initiation (following acceptance of notice), and investigation to be completed within 45 days after completion of review.	Review to be completed within 45 days of initiation (following acceptance of notice), and investigation to be completed with 45 days after completion of review, but in “extraordinary circumstances” may be extended for one 15-day period. Time periods tolled during lapse in appropriations.	Subsecs. (b)(1)(F), (b)(2)(C), and (b)(8).	Upon enactment.
<i>Referral to the President and action by the President</i>	Transactions referred to the President at the conclusion of an investigation, with the President to act within 15 days of conclusion of the investigation.	CFIUS may refer transaction to the President at any time during review or investigation, with the President to act within 15 days of such referral.	Subsecs. (d)(2) and (l)(2).	Upon enactment.
<i>Information sharing</i>	Information submitted to CFIUS is confidential and	Exception added to allow information sharing with	Subsec. (c)(2).	Upon enactment.

<u>Issue</u>	<u>Prior law</u>	<u>FIRREA</u>	<u>Where is the new provision codified?</u> <sup>2</sup>	<u>When does the new provision take effect?</u>
	may be disclosed by CFIUS only (i) as relevant to any administrative or judicial action or proceeding, or (ii) to Congress.	domestic governmental entities and foreign governments of allies or partners “to the extent necessary for national security purposes.”		
<i>Judicial review</i>	Actions and findings by the President not subject to judicial review. No provision on review of actions and findings by CFIUS.	Any action challenging actions or findings under Section 721 may be brought only in the U.S. Court of Appeals for the D.C. Circuit.	Subsec. (e).	Upon enactment.
<i>Power to suspend transactions</i>	No provision.	CFIUS authorized to suspend a covered transaction pending completion of review or investigation.	Subsec. (l)(1).	Upon enactment.
<i>Penalties for non-compliance with risk mitigation measures</i>	CFIUS authorized to impose monetary penalties and to reopen review of underlying transaction.	In addition to pre-FIRREA powers, CFIUS authorized to require non-compliant party to submit notices (or declarations) of covered transactions over a five-year period.	Subsec. (l)(6)(D)(ii).	Upon enactment.
<i>Filing fees</i>	No provision	CFIUS authorized to assess and collect a fee based on the value of the transaction notified to CFIUS.	Subsec. (p).	Upon enactment, subject to regulations to be issued.