

New CFIUS Law Should Quicken and Improve Reviews of Foreign Investments in the U.S.

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Businesses want to grow. The federal government wants to protect our national security. Sometimes these two interests collide. A little-known but powerful federal body, the Committee on Foreign Investment in the United States, is charged with monitoring and reviewing any transaction involving the foreign takeover of a U.S. business that could negatively affect the country's national security.

Comprised of the heads of nine cabinet agencies and executive branch offices, the Committee, known by its acronym CFIUS ("siff-ee-us"), has authority to conduct a detailed review of foreign investments – clearing most,

scuttling many and recommending to the President that he block or suspend those that cannot be reshaped to resolve the security concerns. And now CFIUS may just have gotten a lot more fuel.

A new law, the Foreign Investment Risk Review Modernization Act (FIRRMA), was signed by the President on August 13, 2018. It expands the types of investments that may be examined by CFIUS, increases funding, and introduces new procedures for review of pending transactions. Given how the Treasury Department (which chairs and staffs the interagency process) is starting to implement these new authorities, the process promises to be more robust, faster, and in many cases, applied with more bite.

"FIRRMA changes important aspects of CFIUS's procedures, expands its powers in meaningful ways and provides the Committee with more resources to handle an increased caseload," says Scott Flicker, a partner in the litigation department of Paul Hastings LLP. "In some ways, the law is not the game changer it could have been, but the Committee has begun to signal that it will apply its new authority aggressively."

CFIUS was created in 1975. It has received more attention recently due to fears that Chinese companies may obtain access to sensitive technologies through investments into and purchases of American companies. Last year, on a recommendation from CFIUS, President Trump rejected the acquisition of computer chipmaker Lattice by Canyon Bridge, an investment fund sponsored by a Chinese government-owned asset manager.

With the release recently of initial "interim" regulations, the Committee's regime is changing for the first time in a decade. "With the exception of certain mandatory filing requirements, most changes are evolutionary, not revolutionary," explains Flicker. "Some will make official the Committee's past practices. Others should bring needed clarity to

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CFIUS's process."

The evolution of FIRRMA

When first introduced more than a year ago, FIRRMA proposed much greater power for the Committee. In addition to its traditional role of safeguarding inbound investment, an early draft of the legislation would have tasked CFIUS with reviewing and clearing offshore joint ventures and outbound technology licensing agreements. That expanded reach was dropped after lobbying by prominent U.S. businesses, which complained that it would stifle technological development and imperil important sources of income. Policing outbound technology transfers and export controls, outside the realm of military technology, remains the job of the U.S. Commerce Department, which has also been granted new powers to regulate exports of so-called "emerging and foundational technologies."

Much of FIRRMA codifies CFIUS's existing practice of broadly interpreting its own jurisdiction. For years, the Committee has ventured to apply its review authority to transactions in areas not typically seen as posing national security concerns, including real estate deals, minority investments in energy companies and takeovers of businesses holding large pools of personal data. FIRRMA now makes many of these practices official, confirming in the statute those powers that CFIUS exercised all along. But that's not to say the statute is just window dressing – it also increases the review timelines in meaningful ways, and stretches the Committee's role beyond transfers of outright control, to encompass even the acquisition by foreign investors of small minority stakes that might carry special management or access rights in sensitive U.S. businesses.

In addition:

- For the first time, some foreign investments will require CFIUS notification, including those where a foreign government holds a substantial interest and (under a new "pilot program") those involving foreign investment in U.S. companies that design or produce critical technologies in key industries.
- An abbreviated review process promises to streamline many reviews that currently take many months to complete.

Given the issue is national security, it should come as no surprise that how foreign investments are regarded by the U.S. government can depend in large measure on which foreign nations are involved. The more robust process under FIRRMA will result in positive outcomes for some categories of investors and negative ones for others.

- For some investors (especially those from traditional U.S. allies), the abbreviated process under FIRRMA could enable an earlier clearance.
- But FIRRMA allows CFIUS to cast a wider net by requiring mandatory declarations of transactions involving foreign government controlled entities.
- Moreover, the statute gave CFIUS the power to extend mandatory filings to other transactions, and the Committee has seized on that authority to roll out a new "pilot program" that will mandate notifications in the case of certain types of foreign investment in 27 enumerated "pilot program" industries, including aerospace, semiconductors, computers and nanotechnology and acquisitions of critical technologies – resulting in more transactions involving strategic U.S. rivals that will be brought to the Committee's attention.

Beneficial changes

Reviews generally should proceed faster and their quality should improve as a result of FIRRMA.

- The Committee will receive increased funding, including through fees paid by the parties to transactions.
- CFIUS's nine member agencies must designate dedicated personnel to perform certain functions.
- If a member agency dissents from an approval, it must justify that dissent in writing to the other Committee members (but not to the parties).
- The period for initial review is increased from 30 to 45 days. Follow-on investigations, when needed, can be extended from 45 to 60 days.
- CFIUS must respond to and provide comments on initial filings and accept formal written notices within 10 business days if they are otherwise deemed "complete."

Many of the potentially ground-shifting provisions won't go into effect until CFIUS fully implements the statute. "It will take time before the impact of many of FIRRMA's more important provisions are felt," says Flicker. "But the launch of the new 'pilot program' means that some significant changes are already here for investments involving critical technology in the identified industries."

That development – which came faster than some expected – has investors and advisors scrambling to determine if a CFIUS review has now become mandatory for some of their deals.

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