



## Congress finalizes CFIUS reform bill to broaden national security reviews of foreign investments

### Government Affairs Alert

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Congress has released the final version of the Foreign Investment Risk Review Modernization Act of 2018 (FIRRMA) – a bill to modernize and strengthen the Committee on Foreign Investment in the United States (CFIUS) to more effectively guard against the risk to US national security posed by certain types of foreign investments. FIRRMA is incorporated into the must-pass National Defense Authorization Act for FY19, which Congress expects to pass this week.

The House and Senate passed parallel versions of the bill in June and recently completed conference negotiations to resolve various differences between the two bills. House and Senate negotiators have agreed on new provisions that would broaden the jurisdiction of CFIUS in order to address national security concerns associated with foreign investment in US critical technology and other types of foreign transactions.

Most notably, FIRRMA creates four new types of "covered transactions," expands the definition of "critical technology" to include "emerging and foundational technologies," imposes a deadline on the CFIUS response to written notices, extends the Committee's timeframe for review, creates the option for (and in some cases mandates) a written declaration, imposes a CFIUS filing fee and establishes a process to identify non-notified transactions.

It is expected that President Trump will sign the agreed-upon bill into law in the next few weeks.

Congressional efforts to amend the process governing CFIUS often have been driven by national security concerns over certain foreign investments. The current CFIUS process reflects changes that Congress initiated as part of the Foreign Investment and National Security Act of 2007, following concerns about the proposed acquisition of Dubai Ports World. Similarly, the Foreign Investment Risk Review Modernization Act of 2018 was driven by congressional focus on an increase in foreign investments in US critical technology and other sensitive areas, particularly by Chinese state-owned entities, as well as a broader debate about the impact of foreign investments on the economy and national security.

The following provides a summary of the major changes that FIRRMA presents to the CFIUS review process.

## UPDATED DEFINITIONS

**Expansion of covered transactions:** FIRRMA adds four new types of "covered transactions":

- (1) the purchase, lease, or concession by or to a foreign person of **certain real estate in close proximity** (a distance within which the transaction could pose a national security risk) to US military or other sensitive national security facilities
- 2) any **"other investment"** <sup>1</sup> (generally, non-passive) by a foreign person in any US business that:
  - a. owns, operates, manufactures, supplies or services **critical infrastructure**
  - b. produces, designs, tests, manufactures, fabricates, or develops **critical technologies** or
  - c. maintains or collects sensitive **personal data**
- (3) any **change in a foreign investor's rights** regarding a US business if that change could result in an otherwise "covered transaction" and
- (4) any other transaction or agreement designed to **circumvent or evade CFIUS**.

CFIUS shall prescribe regulations further defining the term "foreign person" for purposes of covered transactions involving "other investments" and real estate, taking into consideration how a foreign person is connected to a foreign country or government and whether the connection may affect US national security.

**"Critical technologies" further defined:** In addition to the current definition of "critical technologies," FIRRMA defines the term as **"emerging and foundational technologies"** controlled pursuant to section 1758 of the Export Control Reform Act of 2018 (to be identified by a regular, ongoing interagency process).

## MODIFICATIONS TO TIMING OF CFIUS REVIEW PROCESS

**Deadline for CFIUS response:** Where parties stipulate that a transaction is covered, FIRRMA requires CFIUS to provide comments on a draft or formal written notice, or to accept a formal written notice, no later than 10 business days after submission.

**Extension of CFIUS review period:** FIRRMA extends the CFIUS **review period from 30 to 45 days**, with an optional **15-day period extension** after the Committee's investigation for "extraordinary circumstances" (to be defined in the CFIUS regulations).

## DECLARATIONS FOR CERTAIN COVERED TRANSACTIONS

**Alternative written declarations:** As an alternative to a formal written notice, FIRRMA **allows a party to a covered transaction to submit a written declaration** (generally no longer than 5 pages) with basic information regarding the transaction, to which CFIUS must respond within 30 days by:

- (1) requesting a formal written notice
- (2) informing the parties that CFIUS is unable to complete action on the basis of the declaration and the parties may file a written notice
- (3) initiating a unilateral review or
- (4) notifying the parties that it has completed all action with respect to the transaction.

**Mandatory written declarations:** If a transaction results in the **acquisition of a substantial interest in a US business, as described in the "other investment" provision above, by a foreign person in which a foreign**

**government has (directly or indirectly) a "substantial interest,"** FIRRMA requires that the parties submit a written declaration (as described above) no more than 45 days before closing. CFIUS shall prescribe regulations defining the term "substantial interest," taking into consideration the means by which a foreign government could influence the foreign person (*ie*, through board membership, ownership interests, or shareholder rights), and **excluding investments with a less than 10 percent voting interest**. CFIUS also has discretion to **require a written declaration for any covered transactions that involve critical technologies**. If a declaration is required, parties may elect to file a written notice instead. CFIUS may impose penalties on parties that fail to comply with the mandatory declaration requirement. CFIUS may waive this requirement if (1) it determines that the foreign person demonstrates that the investment is not directed by a foreign government, and (2) the foreign person has a history of cooperation with CFIUS.

## FEES, FUNDING AND RESOURCES

**CFIUS filing fee:** FIRRMA authorizes CFIUS to **assess and collect a filing fee**, as determined by the Committee in its regulations (and taking into account the effect of the fee on small business concerns, among other factors), for each covered transaction that **may not exceed the lesser of 1 percent of the value of the transaction, or \$300,000**.

**Establishment of a CFIUS fund:** FIRRMA establishes a CFIUS fund and authorizes \$20 million for each of the fiscal years 2019 through 2023 – demonstrating congressional commitment to fund the Committee's activities.

**Study on a prioritization fee:** No later than 270 days after FIRRMA's enactment, CFIUS must complete a study on the feasibility of establishing a fee or fee scale to prioritize the Committee's response to a draft or formal written notice. Payment of the fee (which would be made in addition to the filing fee) would require the Committee to prioritize its response if the Committee is unable to respond to notices within 10 business days (as otherwise required) due to a large influx of notices, or for other reasons.

## ADDITIONAL TOOLS FOR CFIUS REVIEW

**Identifying non-notified transactions:** FIRRMA requires CFIUS to establish a process to identify covered transactions that were not notified to the Committee.

**Additional options to address risks:** FIRRMA grants CFIUS authority to (based on a risk-based analysis):

- (1) suspend a transaction during review or investigation
- (2) use mitigation agreements / conditions to address situations where the parties have chosen to abandon a transaction and
- (3) impose interim mitigation agreements / conditions on completed transactions that are undergoing CFIUS review.

**Compliance plan requirement:** FIRRMA requires CFIUS to formulate and adhere to a **compliance plan for any mitigation agreement** that it imposes on a covered transaction and authorizes CFIUS to impose penalties on and unilaterally review any covered transaction if the parties fail to comply. If the parties contract with an independent, non-governmental entity to monitor compliance, CFIUS must take action as necessary to prevent a conflict of interest.

**Enhanced information sharing:** FIRRMA broadens CFIUS' ability to **disclose information to any domestic governmental entity, or foreign governmental entity of a US ally or partner**, to the extent necessary for national security purposes and subject to confidentiality and classification requirements. FIRRMA also directs CFIUS to establish a formal process for exchanging information with US allies and partners.

## ENHANCED REPORTING REQUIREMENTS

**Chinese investment report:** Every two years (through 2026), the Secretary of Commerce shall submit to Congress and CFIUS a **report on Chinese foreign direct investment (FDI)** in the United States, including information on total FDI and a breakdown of FDI by value, NAICS code, type and government control. The report shall also include an analysis on the patterns of Chinese investment and the extent to which those patterns align with the Made in China 2025 plan, as well as an identification of any limitations on collecting comprehensive information about Chinese investments.

**SOE rail investments report:** Within one year of FIRRMA's enactment, the Secretary of Homeland Security shall submit

to Congress a report assessing any national security risks related to **foreign government-owned or -controlled entity investments in the US rail industry**, including the manufacturing or assembly of assets used in freight rail, public transportation systems, or intercity passenger rail systems.

**Congressional annual report:** FIRRMA creates additional categories of information to be included in CFIUS' annual report to Congress (such as statistics on compliance, declarations, non-notified transactions and the average number of days that elapse between a submission and the response from CFIUS).

**Additional DNI analysis:** FIRRMA requires the Director of National Intelligence to carry out a national security threat analysis posed by any covered transaction, identify any recognized intelligence collection gaps relevant to the analysis, update the analysis upon request by a lead agency for any past cleared transaction involving a mitigation agreement and submit the analysis to Congress after conclusion of action by CFIUS.

## FIRRMA IMPLEMENTATION

**Implementation plan:** No later than 180 days after FIRRMA's enactment, CFIUS must develop an implementation plan and submit to Congress a report on the timeline, process and additional staff and resources necessary for the plan. For the following 7 years, every CFIUS member must submit an annual detailed spending plan to meet its CFIUS obligations, and the CFIUS chairperson (or designee) must testify to Congress annually on the Committee's resources, management and activities.

**Effective date:** FIRRMA shall broadly take effect on the date of its enactment and shall apply with respect to any covered transaction the review or investigation of which is initiated after the enactment date. However, a select few provisions (including the newly-defined real estate and "other investment" covered transaction provisions described above and the provisions governing declarations) will take effect on the earlier of 18 months after FIRRMA's enactment date, or 30 days after the Federal Register publication.

## OTHER MODIFICATIONS TO THE CFIUS REVIEW PROCESS

**Disclosure of partnership/side agreements:** FIRRMA permits CFIUS to require that a written notice include a copy of any partnership, integration or other side agreements related to the transaction.

**Consideration of national security factors:** FIRRMA instructs CFIUS to prescribe regulations that require the Committee to consider the national security factors enumerated in 50 U.S.C. § 4565(f) and mandate parties to provide CFIUS with the information necessary to consider these factors.

**Modified certification requirement:** FIRRMA prohibits CFIUS from completing its review of a covered transaction if a party to the transaction has not submitted its certification. If the party fails to submit its certification or if CFIUS finds that the party included false or misleading information in, or omitted material information from, its notice, the Committee may recommend that the President suspend or prohibit the transaction.

**Limitation on judicial review:** FIRRMA provides that civil action challenges against CFIUS actions or findings may only be brought in the US Court of Appeals for the District of Columbia Circuit.

If you have any questions about these changes or any other CFIUS-related matters, please contact Ignacio Sanchez, Christine Daya or Lawrence Levinson.

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<sup>1</sup> "Other investment" means an investment that affords a foreign person (i) **access to any material non-public technical information** in the US business' possession (excluding the US business' financial information), (ii) **membership or observer rights on, or the right to nominate an individual to, the board of directors** or equivalent governing body of the US business, or (iii) any involvement (other than through voting shares) in **substantive decision making** regarding the use, development, acquisition, safekeeping, or release of US citizens' sensitive personal data, the use, development, acquisition, or release of critical technologies, or the management, operation, manufacture, or supply of critical infrastructure. "Other investment" excludes an investment involving an air carrier and a foreign person's indirect investment through an "investment fund" that affords the foreign person membership as a limited party or equivalent on an advisory board or committee of the fund under certain circumstances. CFIUS shall prescribe regulations providing additional guidance on these types of transactions.

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