



Congress passes CFIUS reform

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On August 1, 2018, the U.S. Senate (the Senate) passed the Foreign Investment Risk Review Modernization Act (FIRRMA), which significantly reforms the Committee on Foreign Investment in the U.S. (CFIUS) review process. The Senate initially passed its version of FIRRMA on June 18, 2018. The U.S. House of Representatives (the House) then passed a slightly different version of FIRRMA on June 26, 2018, setting up a Conference Committee to reconcile the two versions. On July 23, 2018, the conferees from the House and Senate reached an agreement on FIRRMA, which was included as part of the National Defense Authorization Act for 2019 (NDAA). The House passed the reconciled version of FIRRMA as part of the conference report to the NDAA three days later. The Senate passed the NDAA on August 1, sending the bill to the White House for the president to sign into law. The White House has signaled its support for the legislation and is expected to sign it this month.

Although certain national security safeguards that were initially included in the Senate version of FIRRMA were eliminated in the reconciled version that came out of the Conference Committee, the legislation expands the authority of CFIUS in several key ways.

- **Covered transactions:** While CFIUS currently can review any “covered transaction” that may result in a foreign person having “control” of a U.S. business, FIRRMA expands the definition of “covered transaction” as used in 31 C.F.R. 800.207 to include (i) **non-controlling** investments by a foreign person in U.S. businesses that provide **critical technologies**, are involved in **critical infrastructure**, or maintain **sensitive personal data**; (ii) changes in a foreign investor’s voting rights with respect to a U.S. business; (iii) the purchase, lease, or concession of real estate that is in close proximity to air or maritime ports, military installations, or certain other national security facilities (not to include real estate in urban areas); and (iv) any transaction, transfer, agreement, or arrangement if its structure is designed or intended to circumvent CFIUS review.
- **Review timeline:** FIRRMA extends the initial CFIUS review period from 30 days to 45 days, with the possibility of an additional 15-day extension in the event of “extraordinary circumstances.”
- **Abbreviated submission:** Currently, the CFIUS review process is voluntary; however, FIRRMA enables parties to a transaction to file an abbreviated or executive “declaration” of

five pages or less. Within 30 days of submission of the declaration, CFIUS must either clear the transaction, request that the parties to the transaction submit a full notice, or initiate its own unilateral review. This opens the opportunity for certain transactions to receive CFIUS clearance relatively quickly and with minimal costs.

- **Mandatory declarations:** If a transaction results in the acquisition by a foreign person of a “substantial interest” in a U.S. business that provides “critical technologies,” is involved in critical infrastructure, or maintains sensitive personal data, the parties **must** submit a mandatory declaration to CFIUS if a foreign government holds a “substantial interest” in the foreign person. The term “substantial interest” will be defined through CFIUS regulations, but FIRRMA specifies that an interest that is a passive investment or that is less than a 10% voting interest will not be considered a substantial interest. “Critical technologies” includes (i) defense articles or defense services subject to the International Traffic in Arms Regulations; (ii) items included in the Commerce Control List for reasons relating to national security, chemical and biological weapons proliferation, nuclear nonproliferation, missile technology, surreptitious listening, or for reasons relating to regional stability; (iii) certain nuclear-related parts, equipment, materials, components, or software; (iv) certain controlled agents and toxins; and (v) “emerging and foundational technologies,” as discussed in more detail below.
- **Suspension power:** Currently, only the U.S. president can suspend or prohibit a transaction. FIRRMA empowers CFIUS to take certain steps, including suspending a pending transaction or implementing mitigation plans, if it determines that the consummation of the transaction may pose a risk to U.S. national security.
- **Emerging and Foundational Technologies:** The initial Senate version of FIRRMA proposed expanding CFIUS’s jurisdiction to include joint ventures and agreements that could result in the transfer of U.S. emerging and foundational technologies. While this was not included in the reconciled version approved by the Conference Committee and ultimately passed by Congress, a similar provision was incorporated into the Export Controls Act of 2018 (the ECA). The ECA requires the U.S. Department of Commerce to incorporate controls under the Export Administration Regulations on the export, reexport, or in-country transfer of “emerging and foundational technologies.” The ECA also sets up a White House-led interagency review panel to identify “emerging and foundational technologies.” The ECA was passed by Congress as part of the reconciled NDAA.

Under FIRRMA, CFIUS’s authority will be subject to limited judicial review. Parties may challenge a CFIUS action or finding by filing a civil lawsuit in the U.S. Court of Appeals for the District of Columbia Circuit. Most provisions of FIRRMA will take effect on the date the law is enacted. However, certain provisions, including the expansion of the term “covered transaction” and the abbreviated and mandatory declaration concepts, will not go into effect until the earlier of (i) 18 months from the date of enactment, or (ii) 30 days after publication of the law in the *Federal Register*.

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