

Foreign Investment and Acquisitions: CFIUS Considerations for Deals in 2018

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Foreign companies considering investments in U.S. businesses, and U.S. companies soliciting such interest, must balance an array of considerations on any deal. While it may have been overlooked in the past, U.S. national security implications are becoming an increasingly prominent factor. In 2017, high-profile deals that struggled to close or ultimately fell through due to national-security concerns raised the profile of the CFIUS process. And now, legislation introduced in November 2017 that would expand the scope of CFIUS has further heightened attention to these issues.

What is CFIUS?

CFIUS is an inter-agency governmental committee that is authorized to evaluate the national security implications of foreign acquisitions of, and investments in, U.S. businesses. The national security reviews allow CFIUS to identify and address any national security risk that might arise as a result of a covered transaction. After a review, CFIUS may request that the President prohibit or unwind the subject transaction. To obtain a “safe harbor” for covered transactions, parties may voluntarily engage the CFIUS review process by submitting a notice (i.e., a report) of the transaction. A more detailed overview of the current CFIUS process may be found [here](#).

To this point, submission to CFIUS has been a “voluntary” process, in that no law or regulation required companies to file. However, companies that did not submit ran the risk of CFIUS initiating its own investigation, which could lead to a recommendation that the President unwind the deal. The proposed legislation, discussed below, would make certain filings mandatory where a foreign government would ultimately own 25% or more of the interest in a U.S. business.

Proposed CFIUS Legislation: FIRRMA

Proposed bipartisan legislation, the Foreign Investment Risk Review Modernization Act, or “FIRRMA,” is gaining steam, and, for the first time in decades, stands to significantly affect CFIUS’s jurisdiction, filing requirements, and timetables. It is not clear when, or if, this bill will pass, but it could happen in early 2018.¹

Expanded Scope of Covered Transactions Subject to CFIUS Review

Most significantly, FIRRMA would expand the definition of “covered transaction” to include not only the foreign acquisition of control of a U.S. business but also:

- Any “non-passive” investment by a foreign person in “critical technology” or “critical infrastructure” companies (meaning, control would no longer be the threshold).
 - The term “critical technologies” would hopefully be refined in the rule-making process, but is currently proposed to mean “technology, components, or technology items that are essential or could be essential to national security,” and includes defense articles, certain export-controlled items, certain nuclear equipment and facilities, and certain chemicals. It would also include “other emerging technologies that could be essential for maintaining or increasing the technological advantage of the United States over countries of special concern with respect to national defense, intelligence, or other areas of national security, or gaining such an advantage over such countries in areas where such an advantage may not currently exist.”
 - The term “critical infrastructure” would mean, subject to regulations prescribed by the Committee, “systems and assets, whether physical or virtual, so vital to the United States that the incapacity or destruction of such systems or assets would have a debilitating impact on national security.”
 - A “passive” investment would mean one that is non-controlling, does not afford the foreign person any non-public technical information or access to nontechnical information that is not available to all investors, does not include board membership or observer rights, or provide for involvement in substantive decision-making pertaining to any matter involving the U.S. business.
- A real estate purchase or lease near military facilities or other sensitive government locations.
- A contribution by a U.S. critical technology company of intellectual property and associated support to a foreign person through business arrangements like joint ventures (as opposed to commercial transactions).
- Any transaction or agreement designed to evade or circumvent CFIUS review.

These changes would greatly increase the number of transactions that could be reviewed under CFIUS’s authority. It remains to be seen whether the rulemaking process will introduce greater clarity as to the meaning of “critical technology” or “critical infrastructure,” which would allow companies to more easily assess whether their business would be covered. Because the new rules would apply not only to controlling acquisitions but also to “non-passive investment” in such businesses, U.S. businesses may increasingly require foreign investors to make CFIUS notifications, as opposed to the past when a measure of deference was ceded to the risk tolerance of foreign investors.

Expanding the scope of CFIUS to include transfer of intellectual property also stands to introduce substantial uncertainty and burdens on technology companies who partner with foreign companies to develop or produce goods or services. As those following CFIUS last year so pointedly saw, critical technologies have already been considered to include items like semiconductors, autonomous vehicles, biometrics, and telecommunication technologies that are developing and changing rapidly and involve frequent IP transfers.

“Light” Filings in Lieu of Full Notice

FIRRMA would also create a new CFIUS “declaration” process, which would consist of an abbreviated filing containing only basic information about the transaction, as opposed to the more comprehensive information required for a full Notice. CFIUS could then respond to a “declaration” by: (1) initiating a unilateral review; (2) requesting that a Notice be filed; (3) notifying the parties that the Committee has completed all action (i.e., clearing the transaction); or (4) informing the parties that it cannot make a determination based on the declaration.

Declarations would be voluntary in most cases. However, even though CFIUS would “endeavor” to take action on a declaration within 30 days, it would not be required to do so. In practice, unless CFIUS would consistently follow through with its endeavor and clear a substantial number of declared transactions within 30 days, it is unknown how frequently voluntary declarations would be used.

Additionally, there are occasions when filing a declaration would be mandatory. FIRRMA would impose such a requirement on transactions where a foreign government would acquire 25% or more of an interest in a U.S. business. FIRRMA could also allow CFIUS to make declarations mandatory in other circumstances, which it could later set.

FIRRMA would also grant CFIUS the authority to suspend a proposed or pending transaction during its review or investigation.

Note, FIRRMA would allow CFIUS to exempt foreign persons and companies from allied nations (e.g., as shown in mutual defense treaties) from some of the filing requirements.

Changes to Filing Timelines and Requirements

CONDITION/EVENT	CURRENT PROCESSES	NEW FIRRMA PROPOSAL
Initial Review Period	30 days	45 days
Statutory Investigation	45 days	45 days CFIUS could elect to extend this investigation period by 30 more days.
Filing Requirement	None. Filing is voluntary.	Certain transactions would require a “declaration,” including where a foreign government would acquire 25% or more of the interest in a U.S. business. Other filings would continue to be voluntary.
Filing Fee	None	Filing fee of up to 1% of the value of the transaction, capped at \$300,000.

Continued Emphasis on Critical Technologies

Regardless of when or if FIRRMA becomes law, 2018 will likely see a continued focus by CFIUS on foreign investment in critical technologies. The last year saw extensive CFIUS activity regarding critical technologies and several deals that were either formally blocked or abandoned due to CFIUS concerns. Every indication is that this focus will continue for the foreseeable future.

- In December 2016, President Obama blocked Chinese-owned Grand Chip Investment GMBH’s plan to buy German semiconductor maker Aixtron (by blocking the acquisition of the U.S. business portion of Aixtron).
- In September 2017, the President blocked Chinese-backed Canyon Bridge from buying Lattice Semiconductor.

- Throughout 2017, several deals for U.S.-based critical technologies were also withdrawn or abandoned after adverse feedback from CFIUS:
 - The acquisition of Netherlands-based digital mapping company HERE International B.V. by China-based NavInfo Co., Ltd. The digital-mapping technologies are used for location services and autonomous vehicles.
 - The acquisition of Inseego Corp.'s Novatel Wireless MiFi business by a Hong Kong- and China-based T.C.L. Industries Holdings (H.K.) Limited and Jade Ocean Global Limited. The MiFi business included mobile broadband business, which includes its MiFi branded hotspots and USB modem product lines.
 - The acquisition of 9.9% of the stock of Global Eagle Entertainment by a subsidiary of China-based HNA Group as part of a joint-venture plan to provide inflight entertainment and connectivity in China and exclusively service aircraft operated by HNA airlines. Global Eagle provides media, content, connectivity and data analytics to markets across air, sea and land.
- Other deals were subject to extended reviews, including refilings, but eventually were cleared in 2017:
 - The acquisition of U.S.-based NeuStar, Inc., by a consortium including Singapore-affiliated GIC Pte. Ltd. was approved after refiling. NeuStar provides various services, such as data sets and proprietary real-time analytics; proprietary cloud-based platforms; and IT security solutions.
 - The acquisition of Brocade Communications Systems, Inc., a California network and data-storage solutions company, by Broadcom Limited, a Singapore company co-headquartered in San Jose, California, was cleared in November 2017. It was originally announced in November 2016.
- There are several deals filed earlier in 2017 that are still pending CFIUS clearance.

Key Considerations for 2018

Companies considering making or receiving foreign investments should be acutely aware of key takeaways:

- Investment by certain nations, including China, will continue to see enhanced scrutiny.
- Investments in critical technologies will be highly scrutinized whether or not FIRRMA or other CFIUS legislation becomes law.
- If FIRRMA passes, the scope of transactions subject to CFIUS review will expand.
- “Light” filings regarding certain investments by foreign governments will become mandatory if FIRRMA passes.
- The current timeline for CFIUS review continues to be slower than in past years. FIRRMA would codify a longer timeline. In the coming year, parties should anticipate CFIUS reviews to continue to run on a longer timeline.
- If FIRRMA passes, many details will be finalized through the rule-making process. Parties interested in providing comments on the legislation should be attentive to the rulemaking schedule.

Although CFIUS appears to have grown more active and assertive, the vast majority of foreign investment in the United States continues to be approved. Some elements of FIRRMA appear designed to allow CFIUS to focus on areas of real concern and move less-concerning transactions forward more quickly. Nevertheless, the uncertainties around CFIUS in 2018 make it incumbent on parties to plan proactively, so that they may move through the review process as quickly and smoothly as possible.

¹. Other legislation that would expand CFIUS review to include economic impact was introduced in October 2017. However, that legislation does not appear to have as much support or momentum as FIRRMA.

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