



GIBSON DUNN

CFIUS Reform:
Implications for Private Equity

December 19, 2018

Agenda

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- Emerging National Security Risks
- The Foreign Investment Risk Review Modernization Act (“FIRRMA”)

II. Key Considerations for Private Equity Funds

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- Critical Technology - Pilot Program for Mandatory Declarations
- Critical Infrastructure
- Sensitive Personal Data
- Timeline
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MCLE Certificate Information

- Most participants should anticipate receiving their certificate of attendance in four weeks following the webcast.
- Virginia Bar Association members should anticipate receiving their certificate of attendance in six weeks following the webcast.
- All questions regarding MCLE Information should be directed to Jeanine McKeown (National Training Administrator) at 213-229-7140 or jmckeown@gibsondunn.com.

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Background

CFIUS Overview

- The Committee on Foreign Investment in the United States (“CFIUS” or the “Committee”) is an inter-agency committee authorized to review the national security implications of transactions that could result in control of a U.S. business by a foreign person (“covered transactions”).
- CFIUS is authorized to block covered transactions or impose measures to mitigate any threats to U.S. national security. CFIUS operates pursuant to section 721 of the Defense Production Act of 1950, as amended (section 721), and as implemented by Executive Order 11858, as amended, and regulations at 31 C.F.R. Part 800.
- The Committee was established in 1975 and last reformed in 2007.
- Over the last several years, observers pointed to an antiquated regulatory framework that hindered the Committee's ability to review an increasing number of Chinese investments in the United States. These concerns pre-date the administration of Donald Trump, who campaigned on a promise to stem foreign—particularly Chinese—investment in the United States.

Permanent CFIUS Member Agencies

1. Treasury (chair)
2. Commerce
3. Defense
4. Energy
5. Homeland Security
6. Justice
7. State
8. OSTP
9. USTR

Observer CFIUS Agencies

1. CEA
2. HSC
3. NEC
4. NSC
5. OMB

Other agencies may be added for specific reviews.

CFIUS Outcomes

1. “Clear” or approve a proposed transaction

2. Determine that a transaction is not within the Committee’s jurisdiction

3. Condition approval on mitigation

4. Suspend a proposed transaction

5. Impose restrictions during the review period

6. Recommend withdrawal pending further changes or information

7. Refer to the President, who may (i) prohibit a pending transaction, or (2) order divestiture of a completed transaction

- There has been a substantial uptick in the Committee’s workload in the past several years.
- As a result, the Committee is taking longer to review draft pre-filings and start the statutory review period “clock.”
- The number of transactions requiring the additional investigation period has increased (70% of reviews in 2017).
- There has been a concomitant increase in “withdrawals and re-filings” (although the Committee may start the new filing period in the investigation phase).

Background – National Security Risks

Recent Chinese Investments Reviewed by CFIUS - 2017

U.S. Target	Chinese Investor	Industry	Value (in mil)	Status
Novatel Wireless, Inc.	TCL Corp.	Information and Communication Technology	\$50	Withdrawn June 2017
Global Eagle Entertainment, Inc.	Beijing Shareco Technologies Co.	Multimedia	\$103	Withdrawn July 2017
Lattice Semiconductor Corp.	China Venture Capital Fund Corp.	Semiconductors	\$1,300	Rejected September 2017
HERE International (partially owned by Intel Corp.)	NavInfo Co. and Tencent Holdings Ltd.	Software	\$330	Withdrawn September 2017
Maxwell Technologies, Inc.	SDIC Fund Management Co.	Electronics	\$46.6	Withdrawn September 2017
Aleris Corporation	Zhongwang USA LLC	Aluminum	\$2,300	Withdrawn November 2017
Cowen Inc.	China Energy Company Ltd.	Financial Services	\$100	Withdrawn November 2017

Background – National Security Risks

Recent Chinese Investments Reviewed by CFIUS - 2018

U.S. Target	Chinese Investor	Industry	Value (in mil)	Status
Akrion Systems	NAURA Technology Group	Manufacturing	\$15	Cleared January 2018
MoneyGram International, Inc.	Ant Financial	Financial Services	\$880	Withdrawn January 2018
Xcerra, Inc.	Unic Capital Management Co. and China Integrated Circuit Industry Investment Fund Co.	Semiconductors	\$580	Withdrawn February 2018
Cogint, Inc.	BlueFocus Communications Group Co.	ICT	\$100	Withdrawn February 2018
Qualcomm	Broadcom	Telecommunications	\$117,000	Blocked March 2018
SkyBridge Capital	HNA Group	Financial Services	\$200	Withdrawn April 2018
Genworth Financial	China Oceanwide	Insurance	\$2,700	Cleared June 2018
Permasteelisa North America Corp (LIXIL)	Grandland Holdings	Building Exteriors/Glass	\$550	Blocked October 2018

FIRRMA: Summary of Key Developments

Expanded Scope of Review

- FIRRMA expands the scope of transactions subject to the Committee's review by granting CFIUS the authority to examine the national security implications of a foreign acquirer's non-controlling (equity) investments in U.S. businesses that deal with [critical infrastructure](#), [critical technology](#), or the [sensitive personal data](#) of U.S. citizens. FIRRMA provides a carve out for indirect investments through investment funds in such circumstances (subject to various conditions and limitations described further herein).
- FIRRMA provides CFIUS with authority to review [real estate transactions](#)—including leases, sales, and concessions—involving air or maritime ports or in close proximity to sensitive U.S. government facilities.

Other Developments

- FIRRMA extends the Committee's [initial review period from 30 to 45 days](#), and authorizes CFIUS to extend the subsequent 45-day investigation phase by 15 days “in extraordinary circumstances.”
- In lieu of the lengthy notice that is currently required in voluntary CFIUS filings, new “[light](#)” [filings](#) will be allowed for certain transactions. FIRRMA makes filing with the Committee [mandatory](#) in certain circumstances, but provides the Committee the authority to set the precise criteria for required filings.
- FIRRMA also imposes a [filing fee](#), but again authorizes the Committee to shape this requirement in implementing regulations.

FIRRMA: Non-Controlling Investments in Higher-Risk Sectors

FIRRMA will expand the scope of transactions subject to the Committee's review to include—subject to further implementing regulations—“any other investment” by a foreign person in an unaffiliated U.S. business or “change in the rights that a foreign person has” with regard to any U.S. business that:

- a. owns, operates, manufactures, supplies or services **critical infrastructure**;
- b. produces, designs, tests, manufactures, fabricates or develops one or more **critical technologies**; or
- c. maintains or collects **sensitive personal data** of U.S. citizens that may be exploited in a manner that threatens national security.

The type of non-controlling other investments that trigger the Committee's review include non-passive equity investments (including contingent equity interests) which afford a foreign person: “access to any **material non-public technical information** in the possession” of the U.S. business; “**membership or observer rights**” or “**the right to nominate an individual**” to the board of directors or equivalent governing body of the U.S. business; OR “any involvement, other than through voting of shares, in **substantive decision-making**” regarding the key areas outlined above.

FIRRMA authorizes CFIUS to implement regulations regarding:

- ✓ Types of transactions that qualify as “other investments”
- ✓ Critical infrastructure subject to review (with examples)
- ✓ Foreign Person*

* The final version of FIRRMA eliminated a proposal for heightened scrutiny for transactions involving countries of “special concern.” Instead, FIRRMA grants the Committee authority to “specify criteria to limit the application of such clauses to the investments of certain categories of foreign persons,” considering “how a foreign person is connected to a foreign country or foreign government, and whether the connection may affect the national security of the United States.”

FIRRMA: Real Estate Transactions

FIRRMA authorizes CFIUS to review the purchase or lease by, or concessions to, a foreign company of U.S. real estate that is:

- a. “located within or will function as part of, **an air or maritime port**”
- b. “in **close proximity** to a U.S. military installation or another facility or property of the United States government that is sensitive for reasons relating to national security”
- c. “could reasonably provide the foreign person the ability to collect intelligence on activities being conducted at such an installation, facility or property”
- d. “could otherwise expose national security activities at such an installation, facility, or property to the risk of foreign surveillance” and
- e. “meets such other criteria as the Committee prescribes by regulation, except that such criteria **may not expand** the categories of real estate to which this clause applies” beyond the categories described above.

FIRRMA authorizes CFIUS to implement regulations regarding:

- ✓ “Close Proximity”
- ✓ Foreign Person

Limitations:

- ✓ FIRRMA exempts the purchase of any “single housing unit” as well as real estate in “urbanized areas” as defined by the U.S. Census Bureau, except as otherwise prescribed by the Committee in regulations in consultation with the Defense Department.

FIRRMA: Streamlined Process and Mandatory “Light” Filings

“Light” Filings

- In lieu of the lengthy notice that is currently required in voluntary CFIUS filings, FIRRMA provides for “light” filings—not to exceed 5 pages—at least 45 days before the completion of a transaction. FIRRMA requires the Committee to respond to a declaration within 30 days by approving the transaction, requesting that the parties file a full written notice, or initiating a further review.
- The streamlined filing review process will go live on the earlier of 18 months after FIRRMA's enactment or 30 days after the publication of implementing regulations. FIRRMA authorizes the Committee to conduct pilot programs to implement the new review procedure.

Mandatory Requirement

- FIRRMA authorizes CFIUS to prescribe regulations specifying the types of transactions for which such declarations will be required, but specifies that declarations will be necessary for acquisitions by foreign-government-controlled entities of U.S. businesses involved in critical infrastructure, critical technology, or sensitive personal data.
- CFIUS is authorized not only to define the circumstances in which foreign government entities have a “substantial interest,” and also to waive the declaration filing requirement if the investment is not directed by a foreign government or the foreign buyer has historically cooperated with CFIUS. This provision could be used to ease the regulatory burden on a number of state-owned financial institutions, such as state-owned pension plans and investment funds, that are not controlled by a foreign government.

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Key Considerations for Private Equity Funds

FIRRMA: Non-Controlling “Other Investments”

(1) Is there an investment by a foreign person in a U.S. business that:



(2) Does the investment afford the foreign person:

- a. owns, operates, manufactures, supplies or services **critical infrastructure**;
- b. produces, designs, tests, manufactures, fabricates or develops one or more **critical technologies**; or
- c. maintains or collects **sensitive personal data** of U.S. citizens that may be exploited in a manner that threatens national security.

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- a. access to **material non-public technical information** in the possession of the U.S. business;
- b. **membership, observer or nomination rights** for the board of directors of the U.S. business; and
- c. any involvement, other than through voting of shares, in **substantive decision-making** regarding (1) a-c.

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FIRRMA: Investment Fund Carve-Out

Investment Fund Carve-Out

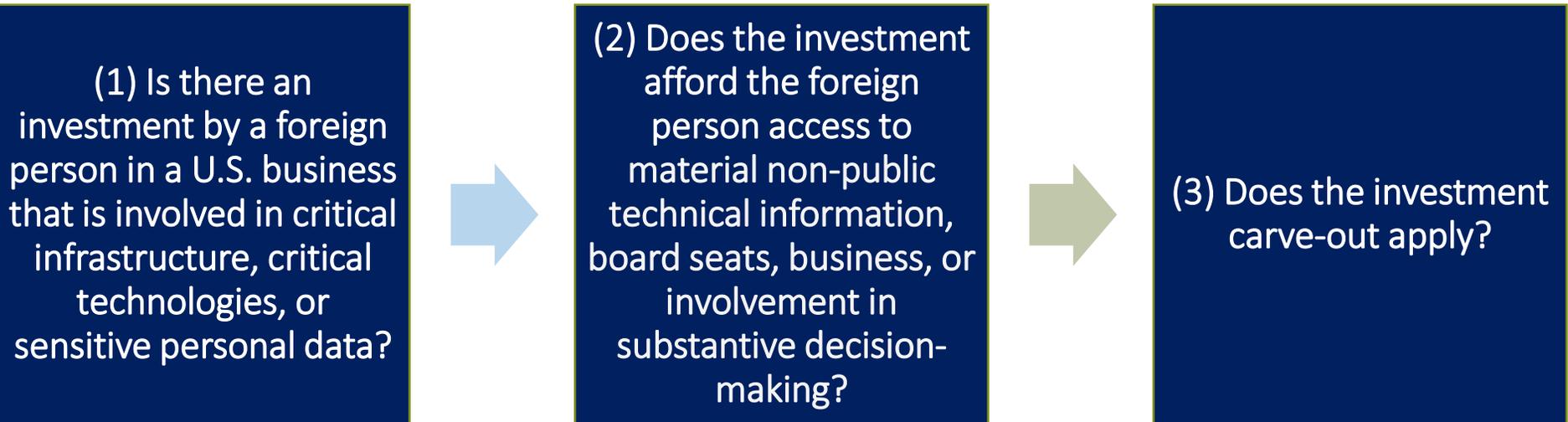
An express carve-out for indirect foreign investment through certain investment funds may prevent many transactions by private equity funds from falling into the Committee's expanded jurisdiction. Specifically, FIRRMA clarifies that an indirect investment by a foreign person *in the types of non-controlling other investments described above* through an investment fund shall not trigger CFIUS review under certain circumstances, including where:

- a. the fund is managed exclusively by a U.S. general partner, managing member, or equivalent;
- b. the advisory board does not control the fund's investment decisions or the investment decisions of the general partner, managing member, or equivalent; and
- c. the foreign person does not otherwise have the ability to control the fund or access to material non-public technical information as a result of its participation on the advisory board or committee.

In this regard, if the foreign person is a limited partner and the fund is “managed exclusively” by U.S. persons, provided that the advisory board authority is limited accordingly, indirect investments by foreign persons through such funds will not be subject to the Committee's expanded jurisdiction over non-controlling “other investments” described in the last slide (provided that the foreign limited partners do not otherwise gain access to material non-public technical information of the U.S. business or obtain rights concerning the governing body or involvement in substantive decision-making concerning the U.S. business).

FIRRMA: Investment Fund Carve-Out

Three Part Test for Investment Funds:



Pilot Program for Mandatory Declarations – Non-Controlling Investments in Critical Technologies

- On October 10, 2018, the Treasury Department released interim rules launching a temporary pilot program to implement a key piece of FIRRMA.
- As of **November 10, 2018** non-U.S. investors seeking certain types of non-controlling stakes in U.S. companies **involved in making or designing certain critical technologies related to 27 specific industries** will have to file a mandatory declaration with CFIUS at least 45 days before the expected completion date of the transaction.
- This pilot program does not implement the FIRRMA provisions pertaining to non-controlling investments in U.S. companies based on their access to the sensitive personal data of U.S. citizens or involvement in U.S. critical infrastructure.

Pilot Program Industries	
1. Aircraft Manufacturing	15. Powder Metallurgy Part Manufacturing
2. Aircraft Engine and Engine Parts Manufacturing	16. Power, Distribution, and Specialty Transformer Manufacturing
3. Alumina Refining and Primary Aluminum Production	17. Primary Battery Manufacturing
4. Ball and Roller Bearing Manufacturing	18. Radio and Television Broadcasting and Wireless Communications Equipment Manufacturing
5. Computer Storage Device Manufacturing	19. Research and Development in Nanotechnology
6. Electronic Computer Manufacturing	20. Research and Development in Biotechnology (except Nanobiotechnology)
7. Guided Missile and Space Vehicle Manufacturing	21. Secondary Smelting and Alloying of Aluminum
8. Guided Missile and Space Vehicle Propulsion Unit and Propulsion Unit Parts Manufacturing	22. Search, Detection, Navigation, Guidance, Aeronautical, and Nautical System and Instrument Manufacturing
9. Military Armored Vehicle, Tank, and Tank Component Manufacturing	23. Semiconductor and Related Device Manufacturing
10. Nuclear Electric Power Generation	24. Semiconductor Machinery Manufacturing
11. Optical Instrument and Lens Manufacturing	25. Storage Battery Manufacturing
12. Other Basic Inorganic Chemical Manufacturing	26. Telephone Apparatus Manufacturing
13. Other Guided Missile and Space Vehicle Parts and Auxiliary Equipment Manufacturing	27. Turbine and Turbine Generator Set Units Manufacturing
14. Petrochemical Manufacturing	

FIRRMA: Pilot Program Covered Transaction?

Issue	CFIUS Regulations
<p>1) Critical Technology? (31 C.F.R. § 801.204)</p>	<ul style="list-style-type: none"> (a) Defense articles or defense services included on the USML in the ITAR (b) Items included on the Commerce Control List (“CCL”) because of (1) multilateral regimes, including for national security, chemical and biological weapons proliferation, nuclear nonproliferation, or missile technology; or (2) regional stability or surreptitious listening (c) Nuclear equipment, parts and components, materials, software, and technology (d) Nuclear facilities, equipment, and material (e) Select agents and toxins (f) “Emerging and foundational technologies” (to be defined under the Export Control Reform Act) (NOTE: Department of Commerce/BIS issued ANPR to help scope the definition and categories of emerging technologies, 83 Fed. Reg. 58201 (Nov. 19, 2018).)
<p>2) Specified Pilot Program U.S. Business? (31 C.F.R. §§ 801.212, 213)</p>	<p>Any U.S. business that produces, designs, tests, manufactures, fabricates, or develops a critical technology that is:</p> <ul style="list-style-type: none"> (a) Utilized in connection with the U.S. business’s activity in one or more pilot program industries (see previous slide); or (b) Designed by the U.S. business specifically for use in one or more pilot program industries
<p>3) Pilot Program Covered Transaction? (31 C.F.R. §§ 801.209, 210)</p>	<ul style="list-style-type: none"> (a) Any <u>pilot program covered investment</u>; → (b) Any transaction by or with any foreign person that could result in foreign control of any pilot program U.S. business, including such a transaction carried out through a joint venture <div style="border: 1px solid black; padding: 5px; margin-top: 10px;"> <ul style="list-style-type: none"> (a) access to material non-public technical information; (b) membership, observer or nomination rights for the board of the U.S. business; and (c) any involvement, other than through voting of shares, in substantive decision-making regarding use, development, acquisition, or release of critical technology </div>
<p>-- <u>Mandatory Declaration</u> --</p>	

“Emerging and Foundational” Technologies

Export Controls Reform Act (“ECRA”)

- “Emerging and foundational technologies” are not specifically described in ECRA, which accompanied FIRRMA in the 2019 FY NDAA.
- ECRA requires an interagency process led by Commerce, with participation from Defense, Energy, State, and other relevant agencies, to draft implementing regulations.
- On November 19, 2018, the Bureau of Industry and Security (“BIS”) issued an advanced notice of proposed rulemaking (“ANPRM”) seeking comments, and recently extended the comment period until January 10, 2019.
- Although the ANPRM does not provide concrete examples of “emerging technologies,” BIS does provide a list of technologies currently subject to limited controls that could be considered “emerging” and subject to new, broader controls.



Types of “Emerging and Foundational” Technologies

1. Biotechnology
2. Artificial intelligence
3. Position, navigation, and timing technology
4. Microprocessor technology
5. Advanced computing technology
6. Data analytics technology
7. Quantum information and sensing technology
8. Logistics technology
9. Additive manufacturing (e.g., 3D printing)
10. Robotics
11. Brain-computer interfaces
12. Hypersonics
13. Advanced materials
14. Advanced surveillance technologies, such as faceprint and voiceprint technologies.

FIRRMA: Non-Controlling “Other Investments”

Critical Infrastructure

FIRRMA expands CFIUS jurisdiction to any “other investment” (as previously defined) by a foreign person in any unaffiliated U.S. business that “owns, operates, manufactures, supplies, or services critical infrastructure.”

For purposes of the “other investment” requirements:

- access to any material non-public technical information in the possession of the U.S. business;
- membership or observer rights on the board of directors or equivalent governing body of the U.S. business or the right to nominate an individual to a position on the board of directors or equivalent governing body; or
- any involvement, other than through voting of shares, “in substantive decisionmaking of the U.S. business regarding the management, operation, manufacture, or supply of critical infrastructure.”

CFIUS is to propose regulations that specify the critical infrastructure subject to coverage “based on criteria intended to limit application . . . to the subset of critical infrastructure that is likely to be of importance to the national security of the United States.”

As currently defined, “critical infrastructure” includes a system or asset, whether physical or virtual, so vital to the United States that the incapacity or destruction of the particular system or asset of the entity over which control is acquired pursuant to a covered transaction would have a debilitating impact on national security.

FIRRMA: Non-Controlling “Other Investments”

Sensitive Personal Data

FIRRMA also expands CFIUS jurisdiction to any “other investment” (as previously defined) by a foreign person in any unaffiliated United States business that: “maintains or collects sensitive personal data of United States citizens that may be exploited in a manner that threatens national security.”

For purposes of the “other investment” requirements:

- access to any material non-public technical information in the possession of the U.S. business;
- membership or observer rights on the board of directors or equivalent governing body of the U.S. business or the right to nominate an individual to a position on the board of directors or equivalent governing body; or
- any involvement, other than through voting of shares, in substantive decision-making of the U.S. business regarding the use, development, acquisition, safekeeping, or release of sensitive personal data of United States citizens maintained or collected by the U.S. business.

Note that FIRRMA does not define the critical term “sensitive personal data.”

CFIUS is to propose regulations that provide guidance on the types of transactions considered an “other investment” in this category.

FIRRMA: Investment Fund Carve-Out

How to Determine if the Investment Fund Carve-Out Applies:

1. Who owns the general partner and investment manager?
2. Do any non-U.S. persons hold positions at the general partner or the investment manager?
3. What are thresholds for terminating the general partner? Can the general partner be terminated without cause?
4. Who are the fund's limited partners?
5. Are any limited partners formally or informally affiliated with non-U.S. governments?
6. What rights – affirmative and negative – do limited partners have?
7. How much capital comes from non-U.S. persons?

Other Important Questions for Private Equity Fundraising:

1. What is the fund's investment focus?
2. What percentage of limited partner interests will be beneficially held by non-U.S. persons?
3. Are limited partners associated with non-U.S. governments?
4. How should CFIUS be addressed in investment documents?
5. Could any limited partner rights be understood to confer influence or leverage over the fund's investment decisions?
6. Do any limited partners have relationships with the general partner independent of their investment in the fund that could give them leverage over the general partner?

FIRRMA: Investment Fund Carve-Out

When Considering a CFIUS Filing . . .

1. Will a transaction involve co-investors or syndication? If so, would additional capital come in before or after closing?
2. What are the sources of debt financing?
3. To what extent would a request to file disadvantage the sponsor?
4. What other regulatory notifications will be required?
5. What is the universe of potential buyers for an asset?
6. Which buyers may be subject to mandatory notifications?
7. Will seller roll equity?
8. How should CFIUS risks be addressed/allocated in the purchase agreement?
9. Will the transaction require any public filings?

To Be Considered...

- ✓ CFIUS Language in Deal Documents
- ✓ Cooperation Provisions
- ✓ Efforts Standards
- ✓ Acceptance of Mitigation
- ✓ Syndication Limitations
- ✓ Outside Dates
- ✓ Reverse Break Fees

FIRRMA: Documenting/Demonstrating Investment Fund Carve-Out

Investment Fund Documentation

- Include language for FIRRMA investment fund carve-out requirements

Deal/Transaction Paperwork

- Include language to avoid triggering “other investments” coverage

U.S. Business Governance and Operations

- Establish governance, policies, training, processes, and systems/tools to prevent triggering “other investments coverage”

FIRRMA also applies to “any change in the rights that a foreign person has with respect to a United States business in which the foreign person has an investment, if that change could result in “foreign control of the United States business” or an “other investment” (as described above).

FIRRMA: Extended Formal Timeline

FIRRMA extends the initial review period from 30 to 45 days, and authorizes CFIUS to extend the subsequent 45-day investigation phase by 15 days “in extraordinary circumstances.” The combination of these measures may allow longer official review times, but will eliminate much of the uncertainty associated with the timing of the process.

How much time should we allocate for a CFIUS review?

25-35 days	Preparation of Pre-Filing
20-30 days	CFIUS Review of Pre-Filing (FIRRMA requires the Committee to respond to a draft notice within 10 days, but this provision has not yet been implemented.)
45 days	Initial Review (as of FIRRMA's date of enactment)
45 days	Investigation (if necessary)*
15 days	Investigation Extension for “extraordinary circumstances” (This measure has not yet been implemented.)
15 days	Presidential Review (very rare)
Min: 90 days Max: 185 days	In an abundance of caution, under the current practice we recommend that parties expect a CFIUS review to take 5-6 months . By extending the initial review period and limiting the time in which the Committee must respond to a draft filing to 10 days, FIRRMA could limit this timeline and add a level of predictability.

* In some cases, CFIUS may ask the parties to refile notices at the end of the official investigation period, thereby restarting the clock. It is our hope that FIRRMA will reduce the number of transactions that are forced to withdraw because the Committee has not had sufficient time or resources to review.

FIRRMA: Other Changes

- **Monitoring of Non-Notified Transactions.** FIRRMA requires the Committee to establish a formal mechanism to identify any covered transaction that has not been notified.
- **Additional Resources.** FIRRMA allocated additional resources to CFIUS to ensure appropriate staffing for the anticipated increase in the caseload.
- **Filing Fees.** FIRRMA provides for the imposition of filing fees, capped at the lesser of one percent of the value of the transaction or \$300,000 (adjusted for inflation). FIRRMA authorizes the Committee to set the fee based on certain enumerated criteria. Fees will only be assessed for transactions requiring a written notice, not the shorter declarations.

Please let us know if you have questions . . .



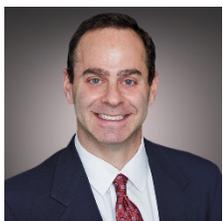
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