CFIUS - DRAFT
Major Issues & Context for Inbound Investment
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CFIUS Overview
Citations

• CFIUS Reform Enacted as part of Defense Authorization Bill


• Title XVII, Subpart A, amending 50 U.S.C. 4565, Section 721 of the Defense Production Act of 1950

• Short Title: Foreign Investment Risk Review Modernization Act of 2018 (FIRRMA)
Background

- CFIUS first adopted 1988
- Allows review of mergers, acquisitions, or takeovers of US businesses by foreign persons
- Ability to mitigate, suspend, or block such transactions for national security purposes
- Interagency committee
Changes in CFIUS

- Foreign Investment and National Security Act of 2007 passed due to the post-9/11 national security concerns that the Dubai Ports controversy in 2006
- Broadened review to include:
  - Critical infrastructure and critical technology transactions
  - Increasing focus on potential foreign government control of US entities
  - Broadened the definition of national security and the length and scope of review
Changes Under FIRRMMA
FIRRMA Overview (2018)

- Broadens transactions subject to review where foreign investment occurs
  - Technology investments (not just control of entity)
  - Real estate acquisition (including leases)
  - Access to personally identifiable information
- Significant procedural changes aimed at making process more effective
- Clarification that certain foreign indirect investments are NOT covered transactions
FIRRMA – Real Estate

- Committee had previously started looking at real estate acquisitions of property in close proximity to sensitive US government installations and military bases.

- Legislation expressly authorizes CFIUS review of real estate acquisition by foreign parties where:
  - proximate to US military or defense installations
  - part of an airport or seaport
  - could expose the national security activities at the facility or subject the property to risk of foreign surveillance
FIRRMA – Real Estate (cntd.)

- Covers the purchase or lease by, or concession of land to, foreign persons
- Exemptions (except as otherwise prescribed by regulation):
  - The purchase of a “single housing unit”
  - Real estate in “urbanized areas” (as defined by US Census Bureau)
- CFIUS has the authority to limit the review of real estate transactions to certain categories of foreign persons
FIRRMA – “Other Investments”

- Expands the scope of CFIUS to include “any other investment” or changes in the rights of foreign persons with regard to US businesses that:
  - Own, operate or service critical infrastructure
  - Produce, test or develop critical technology
  - Maintain or collect sensitive data of US citizens
“Any other investment” includes both direct and indirect investments by foreign persons.

Investments that afford the foreign person:

- access to material nonpublic business information,
- membership or observer rights in the business’ governing body, or
- any involvement (other than voting shares) in substantive decision-making of the business.
FIRRMA – Critical Infrastructure and Technology

- Critical Infrastructure
  - So vital to the US that its incapacity or destruction would have debilitating impact on national security

- Critical Technology
  - ITAR defense articles and services; certain items controlled under EAR
  - Nuclear facilities, equipment and material
  - Special agents and toxins
FIRRMA – Sensitive Data

- Transactions likely to expose:
  - personal identifiable information
  - genetic information, or
  - other sensitive data of US citizens to access by foreign governments in a manner that threatens national security
- Transactions likely to create or worsen cyber security vulnerabilities
FIRRMA – Review Process

• Short form declaration (5 page) with 30 day turnaround
• Long form time for review now 45 days
• Mandatory filing requirement where foreign government has a “substantial interest” and pilot program for critical technologies
• Specific judicial review provision in DC Circuit Court
• Filing fee authorized, smaller of 1% of transaction value or $300K
FIRRMA – Indirect Investments

- Establishes a carve-out for indirect foreign investment through certain investment funds where:
  - Fund managed exclusively by a US general partner, managing member or the equivalent
  - The advisory board does not control investment decisions; and
  - Foreign person does not have the ability to control the fund or access material non-public technical information
Mitigation Instruments

- Adds language expressly allowing CFIUS to suspend a proposed or pending covered transaction during review
- Mitigation agreements required to be effective, verifiable, and to enable effective compliance monitoring
  - Allows lead agency to impose penalties for violation of mitigation agreements
  - Use of independent monitors and reporting requirements
  - Possible review of business decisions by the US government
  - Limiting access to facilities and information to authorized US citizens
Export Control Reform Act of 2018
ECRA Overview

- Requires the president to establish an ongoing interagency process to identify “emerging and foundational technologies” essential to national security but NOT “critical technologies” subject to CFIUS review

- Once identified, Commerce to impose stringent control on exports, re-exports, and in-country transfers of such technologies
ECRA – Countries Subject to US Embargo

• Commerce to require a license for transactions to or in any country subject to an embargo or sanctions
  • Would include China and other countries in EAR Country Group D:5

• Mandatory interagency review of all license requirements for countries subject to an embargo

• Possible future restrictions on technologies to these countries post-review
ECRA

- US inbound investment targets must continue to be aware of how their products and services are classified under applicable export control regimes
- ECRA’s mandate to monitor and control emerging technologies and CFIUS' mandate to consider emerging technologies as part of its review process to add both challenges and risks regarding export classification
DDTC Notification

- ITAR registered entities to provide 60 days prior notice for transactions resulting in a foreign person owning or controlling the registrant
  - “Foreign ownership” means more than 50% of the outstanding voting securities
  - “Foreign control” means one or more foreign persons have the authority/ability to establish or direct the general policies or day-to-day operations
- CFIUS filings do NOT satisfy the notification requirement under ITAR
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