ALERT MEMORANDUM

Congress Passes CFIUS Reform Bill

August 7, 2018

On August 1, 2018 the U.S. Senate joined the U.S. House of Representatives in agreeing to a conference report that sent the National Defense Authorization Act for Fiscal Year 2019 ("NDAA"), which incorporated a version of the Foreign Investment Risk Review Modernization Act of 2018 ("FIRRMA"), to the U.S. President for his signature.[1] The President is expected to sign the NDAA.

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FIRRMA updates the statute authorizing reviews of foreign investment by the Committee on Foreign Investment in the United States ("CFIUS") to reflect changes in CFIUS's practice over the ten years since the last significant reform, expands CFIUS's jurisdiction, and makes significant procedural alterations to the CFIUS process. Introduced to "modernize and strengthen" review of foreign investment in the United States, FIRRMA cements a relatively aggressive approach to foreign investment review. However, ultimately, FIRRMA's changes to current CFIUS practice are modest, and many of the changes merely codify practices in place since the later years of the Obama Administration.

FIRRMA:

- Expands the scope of transactions covered by CFIUS to include:
    - a broader range of non-controlling foreign investment involving sensitive personal data of U.S. citizens, U.S. critical technology, and U.S. critical infrastructure (bearing in mind that CFIUS already routinely reviews investments falling far short of majority control);

[1] H.R. Rep. No. 115-874, at 540-608 (2018) (Conf. Rep.) [hereinafter NDAA]. For prior iterations of the bill *see, e.g.*, John S. McCain National Defense Authorization Act for Fiscal Year 2019, H.R.5515, 115 Cong. §§ 1701-33 (2018) [hereinafter Pre-Conference NDAA]; Foreign Investment Risk Review Modernization Act of 2018, H.R. 5841, 115 Cong. (2018) [hereinafter House 2018 FIRRMA]; Foreign Investment Risk Review Modernization Act of 2018, S. 2098, 115 Cong. (2018) [hereinafter Senate 2018 FIRRMA]; Foreign Investment Risk Review Modernization Act of 2017, H.R. 4311, 115 Cong. (2017) [hereinafter House 2017 FIRRMA]; Foreign Investment Risk Review Modernization Act of 2017, S. 2098, 115 Cong. (2017) [hereinafter Senate 2017 FIRRMA].

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  - most transactions involving real estate at (or functioning as part of) sea ports and airports in the United States or proximate to (or otherwise permitting surveillance of) military or sensitive government facilities located in the United States;
  - any change in rights of an existing investment that triggers a standard of review;
  - bankruptcy proceedings and other defaults on debt; and
  - transactions structured to "evade" CFIUS review;

- Provides for a short-form "declaration" procedure for less problematic transactions;
- For the first time, creates mandatory filings of declarations prior to investments involving sensitive personal data of U.S. citizens, U.S. critical technology, and U.S. critical infrastructure by non-U.S. persons in which non-U.S. governments have a "substantial interest";
- Extends the official time allotted for CFIUS reviews and investigations (but limits the time available for pre-notification review);
- Authorizes CFIUS to impose filing fees, which will be used to fund CFIUS's staff and operations;
- Updates CFIUS enforcement powers, including with respect to mitigation agreements;
- Adds additional national security factors for CFIUS to consider;
- Slightly adjusts the available judicial review of CFIUS decisions; and
- Provides for information-sharing with U.S. allies in connection with a transaction.

Equally importantly, FIRRMA does not incorporate earlier proposals to give CFIUS broader authority over export controls, technology joint ventures, and other non-equity transactions.[2] Earlier proposals to do so, strongly resisted by U.S. technology companies, were dropped, as were proposals to "blacklist" or "whitelist" certain jurisdictions.

1. Background

The Exon-Florio amendments to the Defense Production Act of 1950 (50 U.S.C. § 4565) and their implementing regulations (31 C.F.R. part 800) (together, "Exon-Florio") authorize the President to suspend or prohibit foreign acquisitions, mergers, or takeovers of U.S. businesses that threaten to impair the national security of the United States. CFIUS, which conducts reviews of transactions under

[2] *See* Senate 2017 FIRRMA § 3 (covering "the contribution (other than through an ordinary customer relationship) by a United States critical technology company of both intellectual property and associated support to a foreign person through any type of arrangement, such as a joint venture"); House 2017 FIRRMA § 3. FIRRMA includes provisions to establish an interagency process to define emerging and foundational technologies and generally expand the authority of the United States to impose unilateral measures to control the export of such technologies. NDAA § 1758. Following House 2018 FIRRMA, FIRRMA also enacts the Export Control Reform Act of 2018 to replace the Export Administration Act of 1979. NDAA §§ 1741-42, 51-68.

Exon-Florio, is an inter-agency committee of representatives from various government agencies and offices that may approve the transaction, clear a transaction subject to conditions, or recommend that the President issue an order to block the transaction (or require divestment if the transaction already has occurred).[3]

FIRRMA addresses long-term, bipartisan trends in foreign investment review. Although the Trump Administration's trade-related conflicts have captured recent headlines, most of the proposals in FIRRMA reflect shifts in CFIUS practice and areas of concern that began in the Obama administration or earlier. In particular, the primary sponsors of FIRRMA have focused on the nature of Chinese outbound investment to the United States, which reached a record $65 billion in 2016:[4] Senator John Cornyn has described Chinese investment as "weaponize[d],"[5] and Representative Robert Pittenger has called it "a strategic, coordinated, Chinese government effort to target critical American infrastructure."[6] This focus on China, however, is not new. FIRRMA's updated catalog of potential national security issues is also consistent with issues identified by CFIUS reviews in recent years. Finally, FIRRMA's procedural provisions attempt to address longstanding issues with the CFIUS process, timing, and funding.

2. Primary Changes to CFIUS Review

a. Expanding CFIUS Jurisdiction

Exon-Florio nominally applies to potential acquisitions of "control" (defined in part as "the power, direct or indirect . . . to determine, direct, or decide important matters affecting an entity")[7] of a "U.S. business."[8] However, CFIUS has long examined transactions in which a foreign party acquires some governance rights falling well short of affirmative control. CFIUS's existing regulations provide a presumptive (not absolute) "safe harbor" for transactions in which a foreign person acquires less than 10% of the voting interest in a U.S. business solely for the purpose of passive investment (including, *inter alia*, an absence of board representation);[9] in practice, CFIUS has tended to treat any transaction not meeting those criteria (as well as any transaction providing a foreign person with any form of contractual veto or *de facto*

[3] To learn more about CFIUS, see our alert memorandum, Recent Revisions to Exon-Florio "National Security" Reviews of Foreign Investment in the United States (Dec. 22, 2008).

[4] Nicholas Farfan and Karl But, New Hurdles Trip Up China-US M&A. How Has Growing Regulatory Scrutiny Affected Cross-border Activity?, Dealogic Research (Aug. 8, 2017).

[5] Foreign Investments and National Security: A Conversation with Senator John Cornyn, Council on Foreign Relations (June 22, 2017).

[6] Press Release, U.S. Congressman Robert Pittenger, Taking Aim at China: Pittenger and Cornyn Introduce Legislation to Enhance National Security Review of Foreign Investment in the United States (Nov. 8, 2017).

[7] 31 C.F.R. § 800.204(a).

[8] The current regulatory definition of "United States business" is "any entity, irrespective of the nationality of the persons that control it, engaged in interstate commerce in the United States, but only to the extent of its activities in interstate commerce." 31 C.F.R. § 800.226. FIRRMA adds a statutory definition of "United States business" as "any person engaged in interstate commerce in the United States," which tracks the existing Exon-Florio language in the pre-FIRRMA statutory definition of "covered transaction" ("any merger, acquisition, or takeover…by or with any foreign person which could result in foreign control of any person engaged in interstate commerce in the United States"). NDAA § 1703; 50 U.S.C. §4565(a)(3). In our view, the statutory language neither demands nor precludes the regulatory gloss of "to the extent of its activities in interstate commerce"; as nothing in the statements of the sponsors or the congressional summaries of FIRRMA indicates an intent to expand CFIUS's jurisdiction beyond operations physically located in the United States, we think it unlikely that any such change was intended.

[9] 31 C.F.R. § 800.302(b).

approval right over significant decisions) as potentially subject to review. In addition, historically CFIUS has not had jurisdiction over purchases of assets that do not in the aggregate constitute an operable business, such as raw real estate.

FIRRMA confirms and builds upon existing practice by formally expanding CFIUS's jurisdiction to include:

- investments involving "sensitive personal data," "critical technology," or "critical infrastructure" that, if exploited, could threaten national security, unless the investment meets strict standards of passivity;
- purchases or leases of, or concessions regarding real estate that is—
    - located in or part of airports or sea ports; or
    - proximate to (or otherwise permitting surveillance of) military or sensitive government facilities located in the United States;
- any change in rights of an existing investment that would result in foreign control of a U.S. business or trigger the "sensitive personal data," "critical technology," or "critical infrastructure" tests above; and
- any transaction designed to evade or circumvent CFIUS review.[10]

In addition, under FIRRMA, "covered transaction" includes any transaction that otherwise fits the definition but "arises pursuant to a bankruptcy proceeding or other form of default on debt."[11] Most of these transactions were, in practice, already subject to CFIUS review; the major change is in real estate acquisitions, which, standing alone, have been treated as non-reviewable acquisitions of assets rather than of a "U.S. business."

i. "Other Investments"

FIRRMA gives CFIUS jurisdiction to review non-controlling "other investments" in companies that:

(i) own, operate, manufacture, supply, or service critical infrastructure;[12]

(ii) produce, design, test, manufacture, fabricate, or develop one or more critical technologies (defined as a wide range of export-controlled technologies);[13] or

[10] NDAA § 1703.
[11] *Id*.
[12] "Critical infrastructure" is defined, subject to regulation, as "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." *Id*.
[13] "Critical technologies" is defined to include:
"(i) Defense articles or defense services included on the United States Munitions List set forth in the International Traffic in Arms Regulations under subchapter M of chapter I of title 22, Code of Federal Regulations.

(iii) maintain or collect sensitive personal information of United States citizens that may be exploited in a manner that threatens national security.[14]

An investment in one of the companies above is a non-controlling "other investment" subject to review—regardless of percentage ownership—if it is a direct or indirect investment by a foreign person that affords that foreign person:

(i) access to any material nonpublic technical information;[15]

(ii) membership or observer rights on the board of directors or equivalent of the U.S. business, or the right to nominate a director; or

(iii) any involvement (other than through the voting of shares) in substantive decisionmaking related to sensitive personal data, critical technologies, or critical infrastructure.[16]

However, FIRRMA permits a foreign investor to maintain certain consultation rights with respect to indirect investments through a fund managed exclusively by a U.S. general partner, managing member, or equivalent (each, a "US GP Equivalent") without triggering the "other investment" rules. A foreign investor may participate in an advisory committee or other body of such a fund (at fund level, not portfolio company level), so long as:

(i) the committee does not have the ability to approve, disapprove, or otherwise control investment decisions of the fund or of the US GP Equivalent with respect to any portfolio company, and

(ii) the foreign investor itself cannot otherwise approve, disapprove, or otherwise control investment decisions of the fund, decisions of the US GP Equivalent with respect to any portfolio fund, unilaterally decide (or, crucially, block) the appointment, removal, or compensation of the

(ii) Items included on the Commerce Control List set forth in Supplement No. 1 to part 774 of the Export Administration Regulations under subchapter C of chapter VII of title 15, Code of Federal Regulations, and controlled—
(I) pursuant to multilateral regimes, including for reasons relating to national security, chemical and biological weapons proliferation, nuclear nonproliferation, or missile technology; or
(II) for reasons relating to regional stability or surreptitious listening.
(iii) Specially designed and prepared nuclear equipment, parts and components, materials, software, and technology covered by part 810 of title 10, Code of Federal Regulations (relating to assistance to foreign atomic energy activities).
(iv) Nuclear facilities, equipment, and material covered by part 110 of title 10, Code of Federal Regulations (relating to export and import of nuclear equipment and material).
(v) Select agents and toxins covered by part 331 of title 7, Code of Federal Regulations, part 121 of title 9 of such Code, or part 73 of title 42 of such Code.
(vi) Emerging and foundational technologies controlled pursuant to section 1758 of the Export Control Reform Act of 2018." *Id.*

[14] *Id.*

[15] "Material nonpublic technical information" is defined as information that "provides knowledge, know-how, or understanding, not available in the public domain, of the design, location, or operation of critical infrastructure; or . . . is not available in the public domain, and is necessary to design, fabricate, develop, test, produce, or manufacture critical technologies, including processes, techniques, or methods." NDAA § 1703. Financial information on the performance of the U.S. business is specifically excluded.

[16] *Id*.

US GP Equivalent, or obtain access to material nonpublic technical information via the advisory committee.

The investment must also otherwise comply with the rules above.[17] The right (pursuant to terms of an agreement) of a foreign person investor or an advisory board or committee to waive potential conflicts of interest, waive allocation limitations, or engage in "a similar activity" would not be deemed to be control of the investment decisions of the fund or decisions relating to entities in which the fund is invested.[18] Further conditions could be adopted by regulation.

Perhaps most importantly, as discussed below in Section 2.c, investments by entities in which a foreign government holds a "substantial" interest are exempted from the mandatory filing of a declaration if they are made via a fund directed by a U.S. GP Equivalent meeting the criteria above.

ii. Real Estate.

FIRRMA expands CFIUS jurisdiction to include acquisitions of interests in real estate proximate to seaports, airports, and military or other sensitive government facilities, but it excludes single housing units and, except as specified by CFIUS in regulations, real estate in urban areas from CFIUS's expanded jurisdiction.[19] Under prior rules, acquisitions of real estate were not considered covered transactions unless enough other assets were acquired to constitute an operating business. FIRRMA does not include language from the pre-conference Senate version of the bill that would have extended a carve out for investors from whitelisted jurisdictions to the Committee's expanded jurisdiction over real estate transactions.[20]

b. Short-Form "Declarations".

FIRRMA creates a new short-form filing, or "declaration," that would permit the parties to file an abbreviated notice (targeted for five pages or less) describing basic information regarding the transaction.[21] Based on the declaration, CFIUS could (1) clear the transaction, (2) request that the parties file a full notice, (3) inform the parties that CFIUS is unable to conclude action under Exon-Florio on the basis of the declaration (in which case, parties could voluntarily file a full notice to have the transaction cleared by CFIUS), or (4) initiate a unilateral review of the transaction.[22] CFIUS will be required to reach one of the four decisions listed above within 30 days of receipt of a declaration, and it is not permitted to request that the parties withdraw and refile a declaration except in cases of material inaccuracy.[23]

It remains to be seen whether declarations will be a useful tool. Although Congress appears to be acknowledging that some transactions are less sensitive than others and do not warrant a full filing, one might reasonably ask whether there is much point to making a voluntary filing at all in cases that do not raise significant issues. However, some parties may be interested in making such filings to try to obtain

[17] *Id*.
[18] *Id*.
[19] *Id*.
[20] *Id*.
[21] NDAA § 1706.
[22] *Id*.
[23] *Id*.

the safe harbor of a clearance. However, unless it is obvious that there are no national security issues (or that CFIUS lacks jurisdiction, a finding it rarely makes), it seems unlikely that CFIUS will clear many transactions on the basis of a 5-page declaration, and if CFIUS proceeds to a full examination of the transaction, the filing of a short-form declaration merely adds another 30 days to the process.

c. Mandatory Filing of Declarations.

Although CFIUS has the authority to initiate reviews and subpoena information in the absence of a voluntary filing, at present the CFIUS process is voluntary in the first instance.[24] Under FIRRMA, filing of a declaration will be mandatory for acquisition, directly or indirectly, of a "substantial interest" in a U.S. business that (1) owns, operates, manufactures, supplies or services critical infrastructure,[25] (2) produces, designs, tests, manufactures, fabricates, or develops one or more critical technologies,[26] or (3) maintains or collects sensitive personal data by a foreign person in which a foreign government owns, directly or indirectly, a "substantial interest."[27] FIRRMA leaves "substantial interest" to be defined by regulation but prohibits CFIUS from considering investments of less than a 10 percent voting interest or non-controlling investments that would not be reviewable as "other investments" under FIRRMA to be "substantial."[28] FIRRMA also permits CFIUS to issue regulations requiring filings of transactions involving critical technology irrespective of interests held by foreign governments.[29] The parties can instead opt to submit a full filing, which would be sensible if a full review is anticipated (as a declaration would simply add 30 days to the process).

FIRRMA permits CFIUS to waive the requirements for mandatory declarations "if the Committee determines that the foreign person demonstrates that the investments of the foreign person are not directed by a foreign government and the foreign person has a history of cooperation with the Committee."[30] In practice, establishing the requisite elements for the waiver is unlikely to be materially less burdensome than producing a mandatory declaration; however, the waiver process is left for later regulations and is unclear.

Together with mandatory declarations, FIRRMA introduces mandatory waiting periods for closing. At present, parties are able to close transactions (subject to the ability of CFIUS to issue interim orders and at the parties' risk) despite the pendency of a CFIUS review. FIRRMA requires parties to submit mandatory declarations by a date set by CFIUS that can be no earlier than 45 days prior to closing.[31]

[24] *See, e.g.*, 31 C.F.R. § 800.701(a).
[25] *See supra* n. 12.
[26] *See supra* n. 13.
[27] *See* NDAA § 1706.
[28] NDAA § 1706.
[29] *Id*. The pre-conference Senate version of FIRRMA would have also empower CFIUS to designate additional areas that would be subject to mandatory declarations but would have require that they be based on the following factors: (1) the sector involved, (2) difficulty remedying any harm to national security post-closing of the transaction, or (3) difficulty of otherwise obtaining information about a particular type of transaction. Pre-Conference NDAA § 1706.
[30] *Id*.
[31] NDAA § 1706.

d. Reforms to the CFIUS Timeline.

FIRRMA includes provisions meant to reform the timetable for CFIUS review. Under current law, the CFIUS timeline is nominally 30 days for an initial review, 45 days for a second-stage investigation, and (rarely) 15 days for a presidential determination.[32] However, the statutory timetable only commences after CFIUS accepts the parties' notice; in recent years, CFIUS has expanded an informal review originally intended to determine whether a filing was complete to take ever-increasing amounts of time. CFIUS has also with increasing frequency pressured parties to "voluntarily" withdraw and resubmit notices to re-start the review periods. Taking into account the pre-acceptance period and the ability of CFIUS to request that parties withdraw and resubmit notices, the statutory review period has become increasingly illusory.

FIRRMA extends, but attempts to firm, the statutory timeline for CFIUS proceedings. FIRRMA attempts to add certainty to the pre-filing period, requiring CFIUS to either accept a CFIUS notice or provide comments explaining why the notice is materially incomplete within 10 business days after submission of a draft, so long as the parties stipulate that a transaction is a "covered transaction" within CFIUS jurisdiction.[33] The initial review is extended from 30 to 45 days, under FIRRMA, followed by, if necessary, a 45-day investigation that can be extended by an additional 15 days by the Secretary or Deputy Secretary (or equivalent) of the Department of Treasury or the lead agency in "extraordinary" circumstances.[34] Finally, FIRRMA addresses government shutdowns, tolling CFIUS's statutory deadlines during any lapse in appropriations.[35]

These changes to the formal timetable may reduce the frequency of CFIUS's bending its rules to extend that timetable, but their impact obviously remains to be seen. Nothing in FIRRMA prohibits CFIUS's practice of asking parties to withdraw and refile notices (backed by the implicit or explicit threat of a prohibition if the notice is not withdrawn) if the review runs past the statutory timetable.

e. CFIUS Filing Fees.

The U.S. government does not currently charge fees for CFIUS filings. FIRRMA permits CFIUS to collect filing fees for notifications; this dedicated funding source is intended to provide additional CFIUS staff to address current delays and anticipated increased future volume of notifications.[36] The act authorizes CFIUS to charge filing fees that do not exceed an amount equal to the lesser of 1 percent of the value of the transaction or $300,000, as adjusted annually for inflation, so long as the total fees collected do not exceed the cost of administering CFIUS.[37] FIRRMA also instructs CFIUS to study the feasibility and merits of a supplemental filing fee for expedited treatment of draft notices.[38] FIRRMA requires CFIUS to

[32] 50 U.S.C. § 4565(b)(1)(E), (2)(C).
[33] NDAA § 1704.
[34] NDAA § 1709.
[35] NDAA § 1709.
[36] NDAA § 1723.
[37] *Id*.
[38] *Id*. The pre-conference Senate bill would have implemented a prioritization fee with the enactment of FIRRMA. Pre-Conference NDAA § 1722.

periodically updated the filing fee and, in setting the fee, consider factors such as (1) the effect on small business, (2) CFIUS's expenses, and (3) the effect on foreign investment.[39]

f. Side Agreements.

FIRRMA authorizes CFIUS to issue regulations formalizing the requirement that parties submit all partnership agreements, integration agreements, and other side agreements relating to a transaction.[40]

g. Updated Enforcement Powers.

FIRRMA codifies existing practice and, in some cases, gives CFIUS additional tools to enforce remedies addressing national security issues identified with respect to covered transactions. Additional enforcement authority under FIRRMA includes:

- Explicit authority at the Committee level to order the parties to suspend a transaction during CFIUS review;
- The ability to refer a transaction to the President for action even before CFIUS review is complete;
- Greater oversight power over mitigation agreements, including the power to initiate an enforcement action for unintentional breaches of mitigation agreements; and
- The power to impose mitigation conditions on a party that has abandoned a transaction.[41]

Reflecting issues raised by a recent GAO report on the challenges confronting the Department of Defense's efforts to oversee an ever increasing docket of mitigation agreements,[42] FIRRMA provides statutory authority for CFIUS to "terminate, phase out, or otherwise amend" mitigation agreements or conditions and requires the lead agencies to develop and maintain an explicit plan to monitor and enforce any mitigation agreement imposed.[43]

h. Judicial Review.

FIRRMA makes adjustments to the available judicial review of CFIUS decisions. The U.S. Court of Appeals for the D.C. Circuit will have exclusive jurisdiction over civil actions challenging an action or finding of the committee; the court will have an opportunity for *ex parte* and *in camera* review of the classified record, if the court determines that the use of such information is necessary; and the government will be able to use information obtained pursuant to the Foreign Intelligence Surveillance Act.[44] Exon-

[39] NDAA § 1723.
[40] NDAA § 1705.
[41] NDAA § 1718.
[42] *See, e.g.*, U.S. GOV'T ACCOUNTABILITY OFF., GAO-18-494, COMMITTEE ON FOREIGN INVESTMENT IN THE UNITED STATES: ACTION NEEDED TO ADDRESS EVOLVING NATIONAL SECURITY CONCERNS FACING THE DEPARTMENT OF DEFENSE 18 (2018).
[43] NDAA § 1718.
[44] NDAA § 1715. Foreign Intelligence Surveillance Act of 1978 use of information provisions would not apply in a civil action brought against the committee. *Id*.

Florio's existing bar against judicial review of the President's substantive determination of whether a transaction threatens national security and what action is necessary to address the threat remains in place.[45]

i. Information Sharing with Foreign Governments.

FIRRMA permits CFIUS to share information with any domestic or foreign governmental entity of a U.S. ally or partner to the extent necessary for national security purposes and subject to appropriate confidentiality and classification requirements, highlighting a trend in recent transactions toward international consultation regarding perceived threats (and the increasing prevalence of foreign investment reviews related to national security).[46] FIRRMA instructs CFIUS to set up a formal information sharing process between the United States and its allies and partners.[47]

j. Additional National Security Considerations

FIRRMA contains "sense of Congress" language listing national security considerations CFIUS may wish to take into account (most of which are consistent with existing CFIUS practice), including:

- whether a covered transaction involves a country of special concern that has a demonstrated or declared strategic goal of acquiring a type of critical technology or critical infrastructure that would affect United States leadership in areas related to national security;

- the potential national security-related effects of the cumulative control of, or pattern of recent transactions involving any one type of critical infrastructure, energy asset, critical material, or critical technology by a foreign government or foreign person;

- whether any foreign person engaging in a covered transaction with a U.S. business has a history of complying with U.S. laws and regulation;

- the control of U.S. industries and commercial activity by foreign persons as it affects the capability and capacity of the United States to meet the requirements of national security, including the availability of human resources, products, technology, materials, and other supplies and services, and in considering the availability of human resources, should construe that term to include potential losses of such availability resulting from the reductions in the employment of U.S. persons whose knowledge or skills are critical to national security;

- the extent to which the transaction is likely to release, either directly or indirectly, sensitive personal data of U.S. citizens to a foreign person that may exploit that information in a manner that threatens national security; and

- whether the transaction is likely to exacerbate cybersecurity vulnerabilities or are likely to result in a foreign government gaining a significant new capability to engage in malicious cyber-enabled

[45] 50 U.S.C. § 4565(e).
[46] NDAA § 1713.
[47] *Id*.

activities against the United States, including such activities designed to affect the outcome of any election for federal office.[48]

3. Effective Dates

The following significant substantive provisions of FIRRMA are immediately effective:

- Expansion of CFIUS jurisdiction to cover changes in rights that could result in acquisitions of control of a U.S. business by a foreign person and any transactions designed or intended to evade or circumvent the definition of covered transaction;
- Amendment of the CFIUS timetable to provide for a 45-day initial review and a 15-day extension of the investigation phase in extraordinary circumstances;
- Imposition of a filing fee (though the amount of the fee must be set by regulation);
- Expansion of authority to impose, enforce, and monitor mitigation agreements and suspend transactions pending review;
- Clarification of CFIUS authority to require notice submissions to include partnership, integration, and side agreements;
- Provision for information sharing with allies; and
- Modifications to judicial review.[49]

The remaining provisions, including review of real estate transactions, expansion of review of non-controlling investments in critical infrastructure, critical technology, and sensitive personal data, introduction of short-form notifications, and mandatory filings for state-linked transactions, will not be effective until the earlier of 18 months after adoption of the statute or 30 days after adoption of implementing regulations (and certification by the Secretary of the Treasury that the necessary resources are in place). CFIUS also has authority to implement pilot programs for the remaining provisions on at least 30 days' notice. Although the timetable is uncertain, we would expect the adoption of final implementing regulations to take at least approximately a year.

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[48] NDAA § 1702(c).
[49] *Id*.