

CFIUS/FIRRMA

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The United States prides itself on its openness to investment by foreigners, and in principle its laws accord foreign investors the same treatment as domestic economic actors. There is, however, one important exception for foreign investments that may affect U.S. national security. The Committee on Foreign Investment in the United States (“CFIUS” or “Committee”) is responsible for managing the political tension in US economic policy between broad access to open markets on the one hand, and the U.S. national security risks that certain foreign investments may raise on the other.

CFIUS is an interdepartmental committee of the U.S. government created in 1975 and charged with monitoring foreign investments in the United States to assess their possible effects on the country's national security. The organization is overseen by the Treasury Department, which has become the main interlocutor for investing parties when declaring a transaction. CFIUS is composed of representatives from nine US government departments, five representatives of the President and two non-voting *ex-officio* members. Decisions of the Committee are made by unanimous vote.

Powers of CFIUS

CFIUS has the authority to review the national security impact of investments that fall within the scope of the Act, i.e., any investment transaction that may transfer control of a U.S. business, in any industry, to a foreign person or entity.

Over the years, CFIUS' authority has been expanded by new regulations. The most notable change occurred in 1988 with the “Exon-Florio” amendment, by which the U.S. Congress authorized the President of the United States to block the acquisition by foreign interests of a U.S. business.

More recently, in 2018 the Foreign Investment Risk Review Modernization Act (“FIRRMA”) strengthened CFIUS's powers through a further expansion of its jurisdiction and made certain previously optional filings mandatory.

In addition, FIRRMA allowed for the monitoring of foreign investments and other transactions that do not involve a foreign takeover of a U.S. business, which was the only factor considered prior to 2018.

FIRRMA confirms the continued CFIUS jurisdiction over such transactions (called "covered transactions") and additionally gives CFIUS two new bases of jurisdiction over: (1) investments without a change in control in certain U.S. companies involved in "critical technology," "critical infrastructure," or "sensitive personal data" (called "U.S. TID companies" for technology, infrastructure, and data), and (2) certain real estate transactions in sensitive geographic areas, such as near military bases.

FIRRMA does not change CFIUS's basic risk-based analysis of each transaction; assessing the "threat" posed by the foreign investor, the "vulnerability" to which the U.S. company is exposed, and the national security implications of the combination of that threat and vulnerability. Each case is different and requires a thorough investigation in order to assess the risk presented.

The declaration of an investment transaction

When the parties engage in a transaction that falls within the scope of the regulations, they must decide whether a declaration of their transaction to CFIUS is necessary. Notification is only required in certain circumstances defined by FIRRMA, including, as noted, if the investment allows the foreign investor to control the company's use of "critical technology," "critical infrastructure," or the "dissemination of sensitive personal data".

The process of notifying CFIUS of an investment is initiated by a joint statement from the foreign investor and its U.S. partner, the content of which is prescribed by the CFIUS regulations and which require a full description of the transaction, the parties involved and information on their respective business activities.

Importantly, even in the absence of a notification, CFIUS has the authority to initiate a review of a transaction under its jurisdiction at any time, even after the transaction has closed.

The fact that a declaration is not mandatory is not necessarily a sign of investment liberalization insofar as CFIUS may initiate an investigation at any time on its own initiative. Also, parties are strongly encouraged to declare their investment to ensure that their transaction cannot later be undone by the government. Accordingly, it is often in an investor's best interest to voluntarily submit to CFIUS scrutiny if there is uncertainty as to whether the transaction falls within the scope of the regulations.

However, some investors under the new FIRRMA regime are exempt from reporting requirements, particularly if they fit the "white list" of investors with sufficient links to "exempt foreign states". The first exempted foreign states -

Australia, Canada and the United Kingdom - are close allies of the United States with which they have deep and long-standing partnerships in the areas of defense, intelligence sharing and trade policy. It is anticipated that the list of exempted countries may evolve as diplomatic negotiations proceed.

The assessment of an investment transaction

CFIUS has 45 days from the notification of a declaration by an investor to review the file. If CFIUS identifies problems during the initial investigation period, it may conduct a full 45-day investigation and temporarily impose sanctions or even suspensions pending the outcome of the investigation. Once the investigation is complete, and based on a final recommendation from CFIUS, the U.S. President either approves, denies, or conditionally approves the transaction within 15 days of the completion of the investigation.

However, despite the relatively short deadlines referred to in the texts, in practice the investigation conducted by CFIUS can last more than 105 days. The obvious benefit of filing a declaration, and submitting to a thorough CFIUS investigation, is that passing CFIUS scrutiny confers safe harbor immunity from any subsequent challenge or review by the government unless it turns out that information relevant to the investigation had not been submitted.

Factors Considered

CFIUS considers the following factors when evaluating a transaction:

- Whether the U.S. company has contracts with U.S. government agencies with national security responsibilities;
- Whether the U.S. company possesses "critical technologies," including technologies controlled by U.S. export control laws;
- Whether the transaction will give a foreign national control of a "critical infrastructure"; and
- Whether the U.S. company has offices or facilities near sensitive government facilities (e.g., military bases, national laboratories, etc.).

While the CFIUS declaration is jointly notified by the foreign investor and its U.S. partner, in practice, these two parties face enormously different risks with respect to CFIUS review. As a general rule, the foreign investor is more exposed than the U.S. target because the U.S. President could require divestiture or impose other burdensome conditions even after the transaction has been

completed, i.e., at a time when the former owners of the U.S. company have left or retain only a small stake. Even if the former owners remain as shareholders in the target US company, CFIUS approval may be subject to conditions that have a disproportionate impact on the foreign investor (e.g., limiting the foreign investor's access to information held by the company, or the ability of the foreign investor to influence certain important corporate decisions).

CFIUS in practice

In practice, the CFIUS regulation has been far from a dead letter. The President has in recent years blocked several investments in U.S. companies:

- In September 2017, the President opposed the acquisition of the American semiconductor manufacturer "Lattice" by the investment fund "Canyon Bridge" on the grounds that this fund is majority-owned by a Chinese state-owned group, which posed a risk to the national security of the United States.
- In March 2018, the President opposed the merger between U.S.-based Qualcomm and Broadcom, a U.S. microprocessor manufacturer based in Singapore. According to CFIUS, the merger would have made Qualcomm less competitive in the 5G telecoms market compared to Chinese competitors because of Qualcomm's increased debt load and changes to long-term R&D investment plans.

More recently, the President attempted to block the Tik Tok social media platform from the U.S. in 2020, following the acquisition by its Chinese parent company ByteDance of the U.S. company "Musical.ly", which had access to the personal data of its 100 million users in the United States, on the ground that this personal data could be transferred overseas. Despite a CFIUS review and announced sanctions by President Trump, the possible divestment of Tik Tok was still pending in the US courts after the 2020 presidential election, and in June 2021 the Biden administration announced that CFIUS would engage a new, "fact-based", investigation into Tik Tok while

removing the executive order sanctions of the previous administration.

Importantly, these examples do not include transactions withdrawn by investors after filing, due to reservations and conditions imposed by CFIUS. In 2019, eight transactions were withdrawn and not refiled due to CFIUS action alone.

The Treasury Department regularly informs the U.S. Congress of CFIUS activities. These reports show a steady increase in the number of filings made by parties from 2008 to the present, as well as the number of cases investigated by CFIUS.

According to the published data, from 2011 to 2020, there were a total of six Presidential blocking decisions.

In 2021, CFIUS received 272 filings, 130 of which were investigated; 74 of these were withdrawn by filers during the course of the investigation, though a majority of these were refiled in 2021 or 2022. No notices were rejected in 2021 ; neither were there any presidential decisions.

The sectors most concerned by the declarations made to CFIUS between 2012 and 2021, during which a total of 1,823 notices were filed, are the following

- manufacturing: 38%
- the financial, IT and services sector: 40%
- mining and construction: 14%; and
- the trade and transportation sector: 8%.

It is possible, even likely, that the nativist impulses that underpinned economic and trade policy under the previous administration will diminish under the Biden administration. However, the administrative apparatus in charge of investment control will continue to operate with significantly expanded powers and will continue to scrutinize closely investments from countries not on the exempt "white list". Accordingly, it is more important than ever for foreign investors to conduct due diligence on the potential impact of CFIUS regulations on their investment, regardless of which political party is in power.