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Deadlines, Programs, and Regulations Mandated by FIRRMA

Overview

On August 13, 2018, President Trump signed the Foreign Investment Risk Review Modernization Act of 2018 (FIRRMA) (Subtitle A, Title XVII, P.L. 115-232). Various provisions became effective upon implementation, while interim rules for some provisions became effective on October 11, 2018. Among other items, FIRRMA required the Committee on Foreign Investment in the United States (CFIUS) to meet certain deadlines in programs and reporting and develop new regulations. In October 2018, the Department of the Treasury published in the Federal Register preliminary rules implementing certain provisions of FIRRMA through a pilot program, which took effect on November 10. FIRRMA's implementation may raise several questions for the 116th Congress, such as the extent to which modernization of CFIUS and its review of foreign direct investment transactions for their national security implications will safeguard U.S. national security interests, particularly those related to strategic competition for leading edge technology. Proposed regulations were published September 17, 2019, on certain real estate transactions and non-controlling investments.

Deadlines

Under FIRRMA, a number of provisions became effective upon enactment to (1) expand the scope and jurisdiction of CFIUS by defining such terms as “covered transactions” and “critical technologies”; (2) refine CFIUS procedures, such as timing for reviews and investigations; and (3) require actions by CFIUS to address national security risks related to mitigation agreements, among other areas. Treasury's interim rules updated and amended existing regulations in order to implement certain provisions immediately. FIRRMA also required CFIUS to take certain actions within prescribed deadlines for various programs, reporting, and other plans. These include the following:

Recusal of CFIUS members. Within 90 days of enactment of FIRRMA, CFIUS is required to establish procedures for members of CFIUS to recuse themselves in cases where they may have a conflict of interest, prepare a report on recusal for the Senate Committee on Banking, Housing, and Urban Affairs and House Committee on Financial Services, and brief the committees on the report.

Report on Chinese investment. Within two years of enactment and every two years through 2026, the Secretary of Commerce is required to submit to Congress and CFIUS a report on foreign direct investment by Chinese entities.

Report on rail investments. Within one year after enactment, the Secretary of Homeland Security, in coordination with CFIUS, is required to submit a report to Congress assessing the national security risks related to investments by state-owned or state-controlled entities in

the manufacture or assembly of rolling stock or other assets used in freight rail, public transportation rail systems, or intercity passenger rail systems in the United States. The Secretary of Homeland Security is also required to consult with the Secretary of Transportation and any agency head not represented on CFIUS with significant relevant technical expertise.

Assessing CFIUS resources. The President is required to determine for FY2019 and each year thereafter, the extent to which the expansion of responsibilities requires additional resources for CFIUS; member departments and agencies are required to request additional resources in the budget.

Prioritization fee. Not later than 270 days after enactment, the CFIUS chair is required to complete a study of the feasibility and merits of establishing a fee or fee scale to prioritize the timing of a response by CFIUS to a draft or formal written notice during the period before the committee accepts the formal written notice. CFIUS is required to submit a report of the findings to the Senate Banking and House Financial Services Committees.

Implementation plans. Not later than 180 days after enactment, CFIUS is required to develop plans to implement FIRRMA and submit a report on the plan to appropriate congressional committees, including a description of the timeline and process for implementation, and any necessary additional staff and resources.

Annual resource needs. Not later than 1 year after enactment and annually thereafter for 7 years, each agency and department represented on CFIUS is required to submit to the appropriate congressional committees a detailed spending plan, including estimated expenditures and staffing levels for not less than the following fiscal year.

Testimony. Not later than March 31st of each year, the chairperson or designee of CFIUS is required to appear before the House Financial Services and Senate Banking Committees to provide testimony on various topics, including anticipated resource needs, the adequacy of appropriations, the expeditious nature of reviews and investigations, mitigation agreements, and transactions in which a written notification or a declaration was not provided to CFIUS.

Pilot Program

The impetus for FIRRMA emerged from concerns that “the national security landscape has shifted in recent years, and so has the nature of the investments that pose the greatest potential risk to national security....” As a result, FIRRMA directed Treasury to develop a pilot program to address concerns related to some provisions and allow time for

additional resources to be directed at developing a more permanent regulatory response. The pilot program implements authorities in two sections of FIRRMA by (1) expanding the scope of transactions subject to a CFIUS review to include certain investments involving foreign persons and critical technologies; and (2) implementing mandatory declarations for transactions within the program's scope. The pilot program is to end no later than March 5, 2020.

Mandatory CFIUS Reviews for Certain Non-Controlling Investments

FIRRMA altered the CFIUS process for reviewing foreign investment by shifting from a voluntary filing process to a mandatory filing and review process. Filings will be through declarations for some investments in certain U.S. businesses that produce, design, test, manufacture, fabricate, or develop one or more critical technologies in 28 specified industries. This applies to critical technologies that are (1) used in a U.S. business's activity in one or more specified industries, or (2) designed by the U.S. business specifically for use in those industries. The shift expands a CFIUS review to include investments in which foreign investors do not have a controlling interest. Prior to this change, a controlling interest was determined to be 10% of the voting shares of a publicly traded company, or 10% of total assets of a non-publicly traded U.S. company.

Selected Sample of 28 Industries in Pilot Program

- Aircraft Manufacturing
- Electronic Computer Manufacturing
- Guided Missile and Space Manufacturing
- Nuclear Electric Power Generation
- Petrochemical Manufacturing
- Primary Battery Manufacturing
- Broadcasting and Wireless Communications Equipment
- Research and Development in Nanotechnology
- Semiconductors Manufacturing

Declarations and Written Notices

FIRRMA expanded CFIUS notifications to include declarations of a pending transaction, in addition to written notices. Declarations and written notices are distinguished by the length of the submission, the time for CFIUS's consideration, and the committee's options for disposition of the submission. Declarations are described as short notices that do not exceed five pages. The pilot program lists information required as part of a declaration or a written notification. The parties involved could voluntarily stipulate that a transaction is a covered transaction, could result in control of a U.S. business by a foreign person, and is foreign-government controlled. CFIUS would be required to respond within 30 days to the filing of a declaration, and within 45 days for a written notification.

CFIUS can respond in one of four ways to a declaration: (1) request that the parties file a written notice; (2) inform that CFIUS cannot complete the review on the basis of the declaration and request the parties seek a written notification from CFIUS that it has completed all relevant actions; (3) initiate unilateral review of the transaction; or

(4) notify the firms that CFIUS has completed its action under statute.

Changes in Regulations

FIRRMA also changed the existing CFIUS statute through new regulations. Seven of 15 mandated regulations concern the definition of a covered transaction, or a merger, acquisition, or takeover (including joint ventures) of a U.S. firm that could result in foreign control. The changes broaden the scope of a CFIUS review by including certain real estate transactions located within, or that function as part of, an air or maritime port, or are located within "close proximity" to certain U.S. military installations. Changes in investor rights that could result in foreign control and other transactions designed to evade CFIUS review are also covered. In addition, CFIUS can now regulate investments in an unaffiliated U.S. business that (1) owns, operates, manufactures, supplies, or services critical infrastructure; (2) produces, designs, tests, manufactures, fabricates, or develops critical technologies; and/or (3) maintains or collects sensitive personal data of U.S. citizens.

CFIUS was directed to regulate critical infrastructure, or "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." In addition, the meanings of material nonpublic technical information, or "information not available in the public domain that is necessary to design, fabricate, develop, test, produce, or manufacture critical technologies," and other important determinants of covered transactions, such as indirect investment, foreign person, and substantial interest are subject to regulations. CFIUS was also directed to develop regulations concerning transfer of assets via bankruptcy or other debt default.

Regarding notice and filing procedures, CFIUS can regulate fee collection on transactions for which a written notice was submitted to CFIUS. Regarding submission of declarations, CFIUS is required to develop regulations concerning the type and extent of information investors are required to provide, and the types of transactions that must submit a mandatory declaration.

FIRRMA provisions also target international cooperation. CFIUS was directed to establish a formal process for exchanging information with governments of U.S. allies or partners to protect U.S. and other countries' national security, harmonize actions regarding trends in investment and technology that could pose risks to national security, provide for information sharing on specific technologies and entities acquiring technologies, and include recurring consultations with other governments. The final regulations will likely play a key role in determining the scope of transactions subject to CFIUS review.

For more information, see CRS In Focus IF10177, *The Committee on Foreign Investment in the United States*, and CRS In Focus IF10952, *CFIUS Reform: Foreign Investment National Security Reviews*.

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