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Cross-Border Regulatory & National Security Practice Group Client Alert: President Signs Legislation Directing Significant Changes to CFIUS National Security Review Jurisdiction and Process

On August 13, 2018, the President of the United States of America (the “President”) signed the John S. McCain National Defense Authorization Act for Fiscal Year 2019 (the “2019 NDAA”), which includes the Foreign Investment Risk Review Modernization Act of 2018 (“FIRRMA”). FIRRMA directs significant changes to jurisdictional and procedural elements of the national security regulatory regime managed by the Committee on Foreign Investment in the United States (“CFIUS”), an interagency body chaired by the U.S. Department of the Treasury (the “Treasury Department”) with broad authority to review the national security implications of inbound investment transactions.

Some of the changes directed by FIRRMA came into effect immediately upon the President’s signature of the 2019 NDAA. Other changes directed by FIRRMA will not come into effect until the earlier of: (a) 18 months after the enactment of FIRRMA; and (b) 30 days after promulgation of implementing regulations by the Treasury Department. We have set forth below a summary of the key changes to CFIUS jurisdiction and to the CFIUS review process, as prescribed by FIRRMA.

Changes Effective as of Enactment

- **Evasion of CFIUS Jurisdiction:** Under the prior CFIUS regulatory framework, CFIUS applied a rebuttable presumption that foreign ownership, control or influence may exist in any transaction where a foreign individual or entity acquires a 10% ownership interest (equity or equivalent) in a U.S. entity. Historically, as a way to avoid CFIUS jurisdiction, parties to a contemplated foreign investment transaction could structure such transaction so that the level of any resulting foreign ownership would not meet or exceed such threshold (*e.g.*, a 9.8% equity interest). FIRRMA gives CFIUS jurisdiction over transactions that are structured in a manner that reflects an intention to evade

CFIUS review, including transactions resulting in less than 10% foreign ownership.

- **Extension of Initial Review Period:** FIRRMA changes the initial review period for CFIUS notices. Under the prior CFIUS regulatory framework, this period was set at 30 days; pursuant to FIRRMA, it is now set at 45 days.
- **Challenges to CFIUS Determinations:** As a result of FIRRMA, parties may challenge CFIUS actions and decisions by commencing a civil proceeding against CFIUS in the D.C. Circuit.

Changes Pending Promulgation of Regulations

FIRRMA requires the Treasury Department to promulgate regulations, as necessary, to implement the following changes by no later than the date that is 18 months after enactment of FIRRMA:

- **New Categories of Covered Transactions:** FIRRMA expands CFIUS jurisdiction to cover: (a) investments in distressed assets; (b) non-controlling investments by individuals and entities from certain countries of concern, as may be identified in the forthcoming regulations, in U.S. assets involving critical technology, critical infrastructure or personal data of U.S. citizens; and (c) investments in U.S. real estate not involving an existing U.S. business, including real estate leases and acquisitions of vacant land.
- **New Short-Form CFIUS Notification:** FIRRMA establishes a new streamlined process for foreign investors seeking to consummate transactions that are less sensitive for national security purposes. Specifically, such investors will have the option of filing a short-form CFIUS notice called a “declaration.” CFIUS is required to review and respond to each declaration within 30 days, either: (a) to provide its approval with respect to the relevant contemplated transaction; or (b) to request or suggest that the filing parties submit a full notice to CFIUS or, if the filing parties fail to do so, to launch a review of the contemplated transaction on its own accord. Parties filing a declaration will not be required to pay a filing fee.
- **Mandatory Filings:** Historically, submission of a notice to CFIUS was voluntary. Under FIRRMA, however, a declaration or full notice to CFIUS is required in certain cases. Specifically, parties to a contemplated transaction where a foreign government holds a “substantial interest” in the foreign investor and the transaction would result in the foreign investor having a “substantial interest” in a U.S. asset involving critical technology, critical

infrastructure or personal data of U.S. citizens, are required to file a full notice or declaration at least 45 days before closing.

- **Formal Process for Review of Draft Notifications:** FIRRMA provides for a formal submission and review process for draft notifications, requiring CFIUS to provide comments on such draft notifications within 10 days.
- **Investment Fund Exception:** FIRRMA codifies an exception to CFIUS jurisdiction for acquisitions by certain U.S.-controlled investment funds with foreign-based stakeholders, such as investment funds ultimately controlled by a U.S. general partner but funded through the contributions of non-controlling foreign-based limited partners, subject to conditions relating to fund management and information access rights.
- **Extension of Review Period:** FIRRMA permits CFIUS to extend the 45-day second stage (investigation stage) of the review period for CFIUS notices by an additional 15 days under extraordinary circumstances, as may be defined in the forthcoming regulations.
- **Filing Fee:** FIRRMA authorizes CFIUS to charge a filing fee for each full notice. Such filing fee will be calculated on a case-by-case basis in accordance with the forthcoming regulations, but may not exceed a statutory cap equal to the lesser of \$300,000 (as adjusted annually for inflation) or 1% of the applicable transaction value.

FIRRMA also directs CFIUS to disclose in its annual report additional details regarding CFIUS reviews, including basic information on the parties to each full notice, the result of CFIUS review of each full notice and aggregated information with respect to declarations.

This Client Alert provides a summary of certain key elements of FIRRMA; it is not comprehensive as to the full scope of FIRRMA or the CFIUS regulatory framework.

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