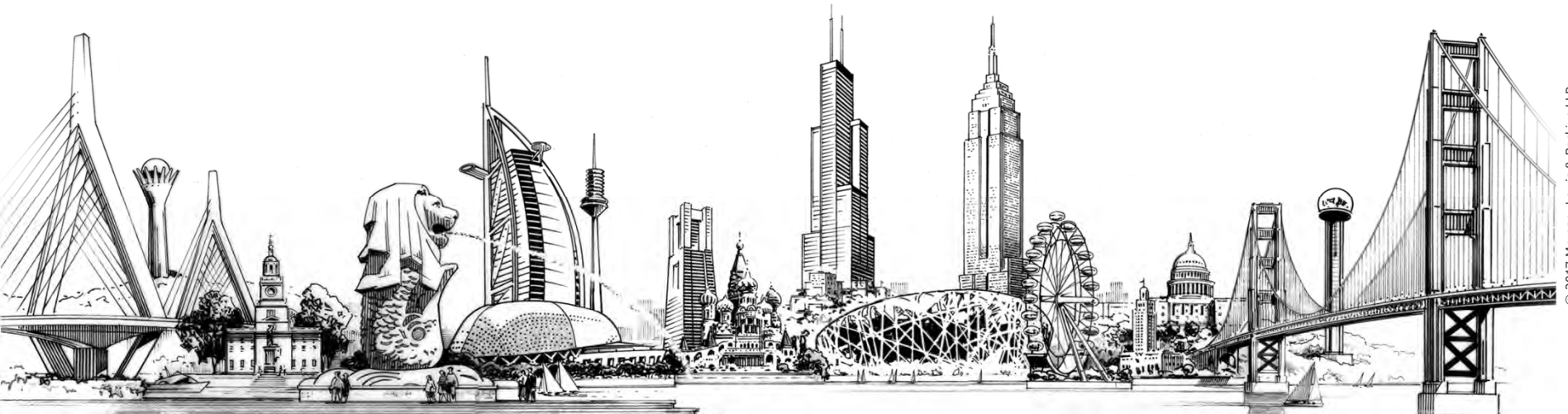


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MODERNIZING CFIUS: THE FOREIGN INVESTMENT RISK REVIEW MODERNIZATION ACT OF 2018 AND ITS IMPACT

Giovanna M. Cinelli and Kenneth J. Nunnenkamp

FIRRMA Presentation



FOREIGN INVESTMENT RISK REVIEW MODERNIZATION ACT OF 2018 (FIRRMA)

- ❖ The US Government has been reviewing the impact of foreign direct investment (“FDI”) since at least 1975, if not earlier, through the Committee on Foreign Investment in the United States (“CFIUS”)
- ❖ While the form varied – *i.e.*, informal committee under Executive Order; statutory designation – the reviews overall were designed to assess and address concerns related to foreign investments in the US by a variety of entities and individuals
- ❖ CFIUS reviews covered transactions to assess whether the transaction impacts US national security or critical infrastructure interests
- ❖ Over the course of several years, the US’s views regarding national security concerns adjusted to accommodate changed geopolitical factors, shifts in economic trends, and adjustments for revolutionary, emerging and disruptive technologies

FOREIGN INVESTMENT RISK REVIEW MODERNIZATION ACT OF 2018 (FIRRMA)

Why Now?

- ❖ Since 1975, the FDI national security review process has been amended 3 times (1988, 1993, and 2007)
- ❖ In approximately 2011, changes in the global business and government environments, as well as geopolitical circumstances arising, in part, from a more assertive posture by China regarding technology acquisition resulted in a deeper study of whether the CFIUS process remained effective
- ❖ That deeper dive – through Congressional hearings, GAO and CRS studies, and reports from the US-China Economic and Security Review Commission – raised the questions regarding the need to update or change the CFIUS process to address potential gaps

FOREIGN INVESTMENT RISK REVIEW MODERNIZATION ACT OF 2018 (FIRRMA)

Results of the Deeper Dive

- ❖ The more detailed study identified gaps in the CFIUS review process that were considered potentially damaging to US national security interests, including:
 - Inadequate insight into cross-border transactions
 - Insufficient notice of investments in emerging, disruptive or revolutionary technologies
 - Challenges in collecting information through the CFIUS review process
 - Incomplete information regarding parties to the transaction
 - Inadequate resources to conduct the necessary analyses within the statutorily constrained time period
 - Ongoing tensions between the “open investment posture” and national security
- ❖ This resulted in passage of Foreign Investment Risk Review Modernization Act of 2018 (“FIRRMA”)

LEGAL AUTHORITY FOR CFIUS

- ❖ Exon-Florio Amendment to the Defense Production Act of 1950 (1988)
- ❖ 1993 Byrd Amendment
- ❖ Foreign Investment and National Security Act of 2007 (“FINSA”)
- ❖ Foreign Investment Risk Review Modernization Act of 2018 Executive Orders
 - Executive Order No. 11858 (May 7, 1975)
 - Executive Order No. 12261 (December 27, 1988)
 - Executive Order No. 13456 (January 23, 2008)
 - Expect further Executive Orders for FIRRMA
- ❖ Regulations pertaining to Mergers, Acquisitions and Takeovers by Foreign Persons, 31 C.F.R. Part 800 (November 20, 2008)
- ❖ Guidance on CFIUS’ approach, review process, and authorities found at www.treasury.gov/cfius

FOREIGN INVESTMENT RISK REVIEW MODERNIZATION ACT OF 2018 (FIRRMA)

- ❖ What generally remains the same under FIRRMA
 - CFIUS membership
 - Coverage of mergers, acquisitions and takeovers (§ 1703(a)(4)(B)(i))
 - Lead agency concept
 - Director of National Intelligence (“DNI”) threat assessments
 - Concept of “US Business”
 - Concept of “Control”

FOREIGN INVESTMENT RISK REVIEW MODERNIZATION ACT OF 2018 (FIRRMA)

- ❖ What has generally changed
 - The scope of “covered transactions” (§ 1703(a)(4))
 - What is exempt from CFIUS review and/or the “covered transactions” definition
 - Identifying critical technologies (§ 1703(a)(6) and the Export Control Reform Act of 2018 (“ECRA”))
 - Mitigation agreements
 - Time periods for reviews
 - Filing fees (§ 1723(p)(3)(B))
 - Effective dates (§ 1727)

CFIUS MEMBERSHIP

❖ Current Composition (from combined FINSA and Executive Orders)

➤ FINSA Required – FIRRMA maintains

- ◆ Department of the Treasury (chair)
- ◆ Department of Justice
- ◆ Department of Homeland Security
- ◆ Department of Commerce
- ◆ Department of Defense
- ◆ Department of State
- ◆ Department of Energy
- ◆ Office of the US Trade Representative (by Executive Order)
- ◆ Office of Science & Technology Policy (by Executive Order)

❖ Current Composition (from combined FINSA and Executive Orders)

➤ The following offices also observe and, as appropriate, participate in CFIUS' activities

- ◆ Office of Management & Budget
- ◆ Council of Advisors
- ◆ National Security Council
- ◆ National Economic Council
- ◆ Homeland Security Council

CFIUS MEMBERSHIP

❖ Lead Agency or Agencies

- Determined by transaction based on Government agency interest or equities
- Negotiate(s) and enter(s) into or imposes mitigation agreements
- Retain(s) responsibility to monitor and enforce mitigation agreements
- Mitigation is designed to address threats to national security posed by the transaction
- FIRRTA enhances the role of lead agencies
 - ◆ Can request an extra 15-day period for investigation
 - ◆ Can request DNI updates
 - ◆ Can act on Committee's behalf with respect to conditions for withdrawal

CFIUS PROCESS

❖ Timeline – FINSA

- Thirty (30) calendar days for Review (from acceptance of notice)
- If not cleared in the 30-day period, CFIUS can initiate an investigation for an additional 45 calendar days

❖ Timeline – FIRRMA (§ 1709)

- Forty-five (45) calendar days for Review (from acceptance of notice)
- Investigations remain 45-days. Additional 15-day extension will eventually be available in “extraordinary circumstances” – to be defined in regulations

CFIUS REQUIREMENTS – “SUBMISSIONS”

- ❖ Parties decide whether to notify CFIUS by submitting a voluntary notification
 - If parties decide not to submit, CFIUS can “request” a submission
 - ◆ 31 C.F. R. § 800.401(b): If CFIUS determines that a transaction “may” be a “covered transaction” and may raise national security concerns, the Committee requests that the parties submit the information necessary to determine whether the transaction is “covered”
 - FIRRTA adds “Voluntary Declarations” and “Mandatory Declarations”
 - ◆ Voluntary declarations (*aka* “abbreviated notifications”) – maximum 5 pages in length (form to be prescribed by regulations)
 - ◆ Mandatory declarations – acquisition of a “substantial interest” in a US business by a foreign person in which a foreign government has a “substantial interest”
 - Terms to be defined in regulations – not effective until regulations promulgated
 - Can be waived upon certain findings

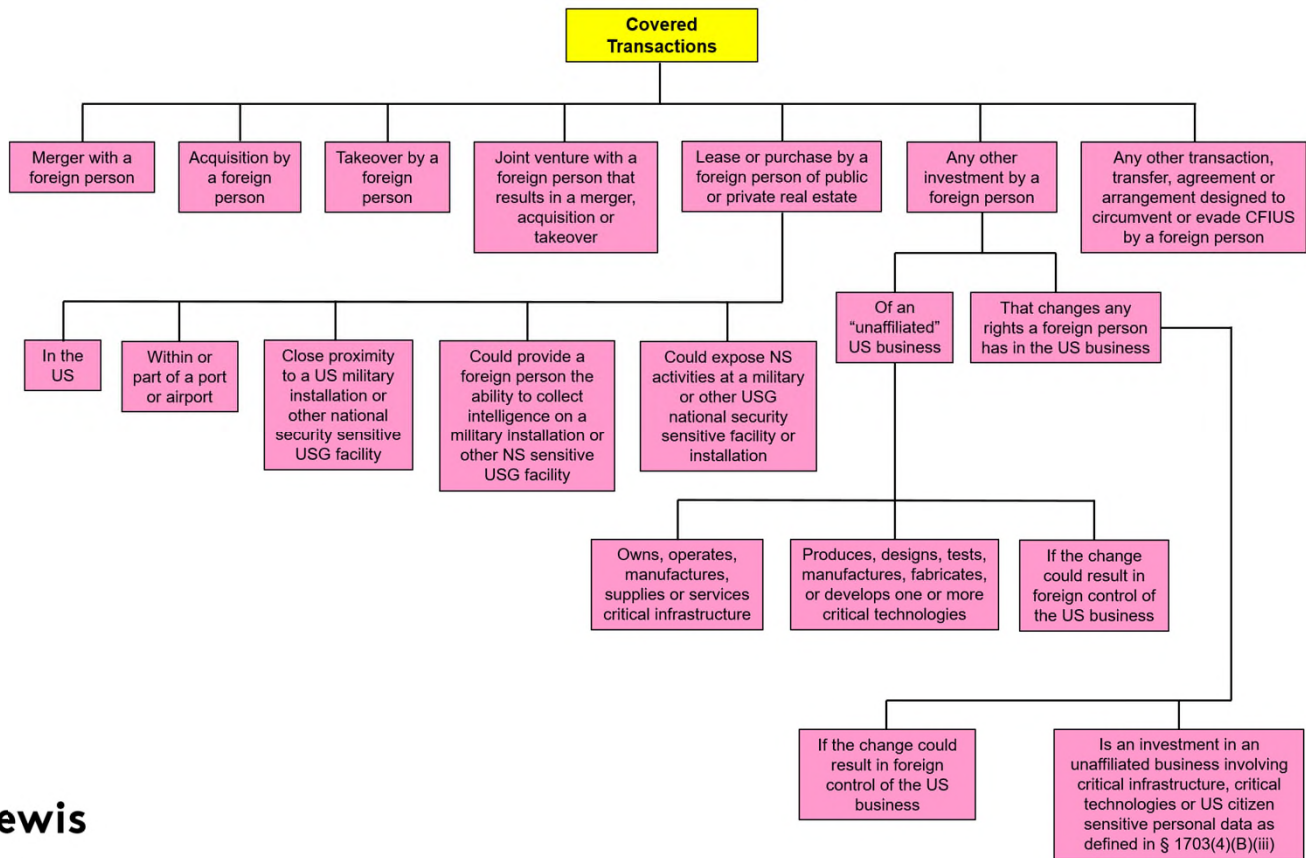
FIRRMA'S IMPACT

- ❖ FIRRMA resulted in 3 types of changes to CFIUS jurisdiction
 - FIRRMA codified and formalized certain existing practices and CFIUS jurisdiction
 - FIRRMA narrowed CFIUS' jurisdiction in several areas
 - FIRRMA expanded CFIUS' jurisdiction regarding certain types of transactions

FIRрма

- ❖ Key elements of CFIUS reviews under FIRрма
 - Covered transactions
 - Control or ownership
 - Critical infrastructure
 - Critical technologies
 - US citizen sensitive personal information/“big data”
 - Foreign parties
 - National security concerns
 - US business
 - Mitigation (interim and final)
 - Fees
 - Timelines

FIRRMA § 1703(4)(A) and (B)



FIRRMMA'S CHANGES TO CFIUS JURISDICTION

- ❖ FIRRMMA **codified** existing CFIUS jurisdiction, such as
 - CFIUS review of bankruptcy transactions involving foreign parties (§1703(a)(4)(F))
 - CFIUS review of real estate transactions, including those in close proximity to sensitive US Government installations (§ 1703(a)(4)(C)(ii)) and (§ 1703(a)(4)(b)(ii))
 - Outreach to parties 'inviting them to file' – e.g., non-notified transactions (§ 1706)
 - Transactions involving ports, transportation facilities and other critical infrastructure (§ 1703(a)(4)(B)(ii)(I)(aa))

FIRRMMA'S CHANGES TO CFIUS JURISDICTION

- ❖ FIRRMMA **codified** existing CFIUS jurisdiction, such as
 - Focus on critical technologies (§1703(a)(4)(B)(iii)(II))
 - Authority to enter into mitigation agreements, issue interim mitigation orders, suspend or unwind transactions and condition withdrawals of notices (§ 1718)
 - Transactions related to sensitive US citizens sensitive personal information (§ 1703(a)(4)(B)(iii)(III))
 - Transactions designed to evade CFIUS review (§ 1703(a)(4)(B)(v))

FIRRMMA'S CHANGES TO CFIUS JURISDICTION

- ❖ FIRRMMA **narrowed** CFIUS' jurisdiction
 - CFIUS jurisdiction no longer includes
 - ◆ Certain investment transactions (most frequently associated with investment funds and similar investment mechanisms)
 - ◆ Certain real estate transactions related to urbanized areas
 - ◆ Critical infrastructure that does not relate to national security interests
 - FIRRMMA “micromanages” covered transactions divesting CFIUS of jurisdiction related to defined investments and real estate transactions
 - ◆ Designed to maintain limited insight into investments related to emerging and foundational technologies not designated as critical technologies
 - ◆ Designed to divest CFIUS of jurisdiction to identify and define emerging and foundational technologies

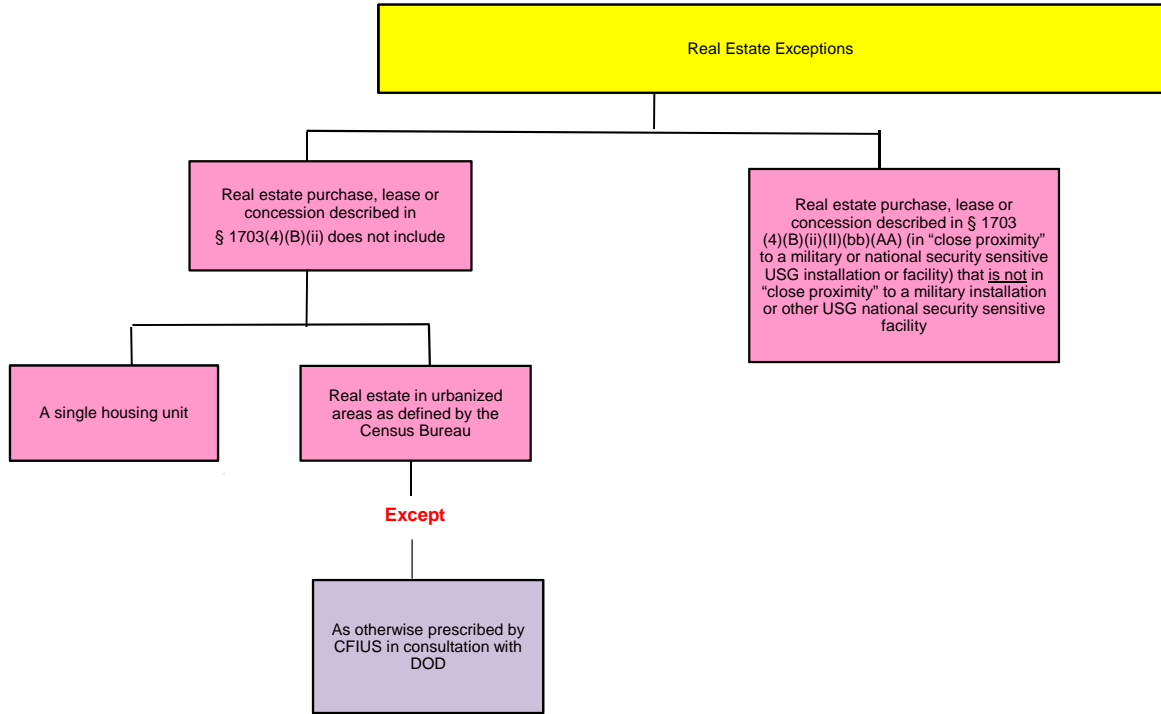
FIRRTA'S CHANGES TO CFIUS JURISDICTION

- ❖ FIRRTA **expanded** CFIUS jurisdiction
 - Certain types of investments
 - Transactions designed to evade CFIUS jurisdiction
 - Addition of leases related to certain real estate transactions
 - Report on Chinese investments (§ 1719(b))

EXCEPTIONS TO “COVERED TRANSACTIONS”

- ❖ Divests CFIUS of jurisdiction unless other provisions of FIRRMA provide the Committee with the discretionary authority to review a transaction
 - § 1703(a)(4)(C)(i)-(ii): Real Estate Exceptions
 - § 1703(a)(4)(D)(iv): Specific “Clarification” for Investment Funds

FIRMA § 1703(4)(c)



THE NEW LIMITS ON CFIUS REVIEWS OF REAL ESTATE TRANSACTIONS

- ❖ FIRRMA narrows CFIUS jurisdiction over real estate transactions, for example, to the following
 - Real estate within or that functions as part of an air or maritime port, provided the following are also met
 - ◆ It is within the US
 - ◆ It is “in close proximity” to a US military installation or another US government facility or property that is “sensitive” for national security reasons
 - ◆ Could reasonably provide the foreign person the ability to collect intelligence on activities being conducted at such an installation, facility, or property AND
 - ◆ Meets other criteria set by regulation
 - ◆ BUT the regulations cannot expand the categories of real estate to which this applies

THE NEW LIMITS ON CFIUS REVIEWS OF REAL ESTATE TRANSACTIONS

- ❖ “Close Proximity” for purposes of real estate transactions will be defined in the regulations CFIUS promulgates as
 - A distance or distances within which the purchase, lease, or concession of real estate could pose a national security risk in connection with a United States military installation or another facility or property of the United States Government
- ❖ FIRREA also creates a broad “exception for certain real estate transactions”
 - CFIUS jurisdiction now EXCLUDES a purchase, lease, or concession of
 - ◆ A single ‘housing unit’, as defined by the Census Bureau; or
 - ◆ Real estate in ‘urbanized areas’, as defined by the Census Bureau in the most recent census, except as otherwise prescribed by the Committee in regulations in consultation with the Secretary of Defense

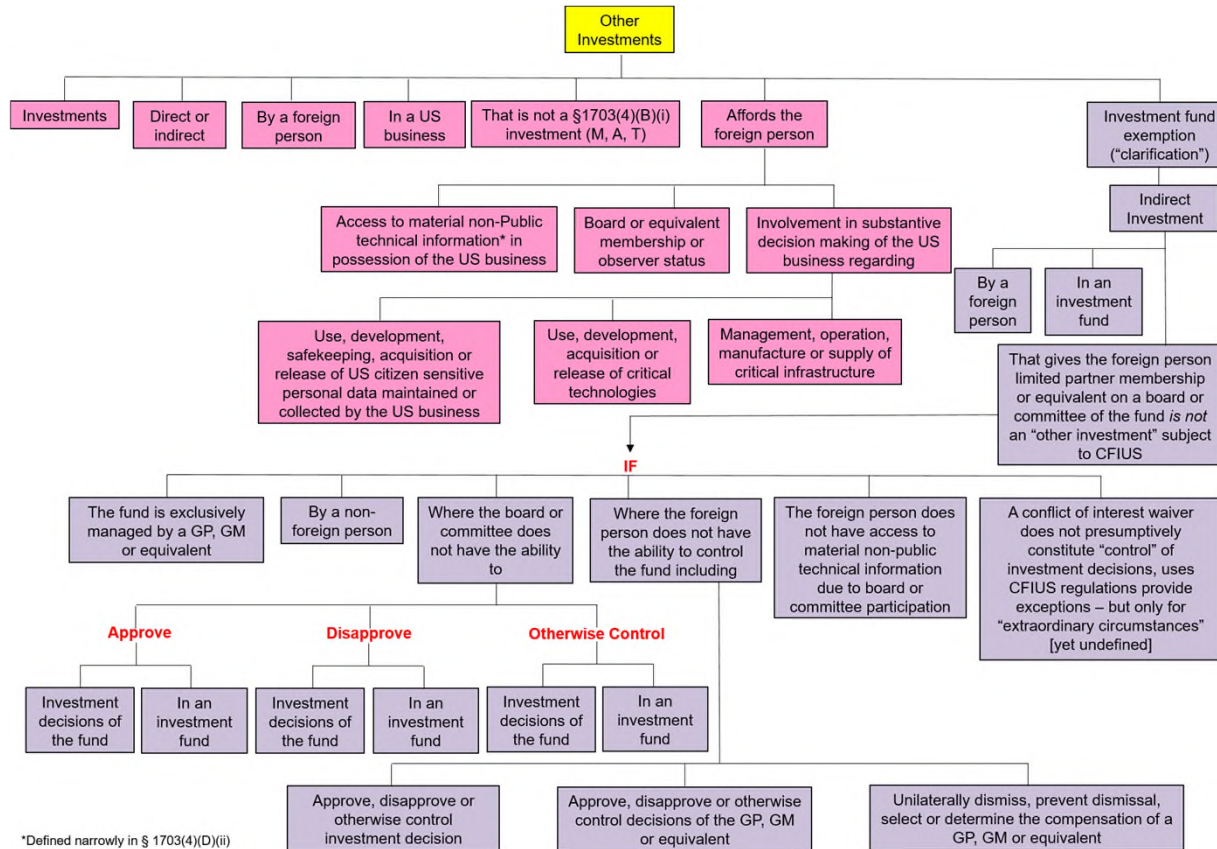
THE NEW LIMITS ON CFIUS REVIEWS OF REAL ESTATE TRANSACTIONS

- ❖ Also applicable to real estate transactions
 - The Committee shall prescribe regulations that further define the term ‘foreign person’ for purposes of and shall specify criteria to limit the application of such clauses to the investments of certain categories of foreign persons. Such criteria shall take into consideration how a foreign person is connected to a foreign country or foreign government, and whether the connection may affect the national security of the United States

THE NEW LIMITS ON CFIUS REVIEWS OF INVESTMENT FUND TRANSACTIONS

- ❖ Pre-FIRRMA, CFIUS jurisdiction was not limited as to transactions involving investment funds, except insofar as the regulations limited transactions generally
 - Passive investments
 - Certain types of financing
 - Certain types of convertible instruments

FIRREA § 1703(4)(D)



*Defined narrowly in § 1703(4)(D)(ii)

THE NEW INVESTMENT FUNDS LIMITATION ON CFIUS JURISDICTION

- ❖ FIRRMA now limits CFIUS jurisdiction over transactions involving investment funds
 - The new Investment Funds Exemption (“clarification”) applies to investments in a business that
 - ◆ Owns, operates, manufactures, supplies, or services critical infrastructure;
 - ◆ Produces, designs, tests, manufactures, fabricates, or develops one or more critical technologies; or
 - ◆ Maintains or collects sensitive personal data of United States citizens that may be exploited in a manner that threatens national security
 - Indirect investments by foreign persons through an investment fund that affords the foreign person (or a designee of the foreign person) membership as a limited partner or equivalent on an advisory board or a committee of the fund

THE NEW INVESTMENT FUNDS LIMITATION ON CFIUS JURISDICTION

- ❖ FIRRMA now limits CFIUS jurisdiction over transactions involving private equity venture capital/other investment funds
 - Where all of the following additional conditions are met
 - ◆ The fund is managed exclusively by a US general partner, a managing member, or an equivalent; and
 - ◆ If the foreign person is on it, the advisory board or committee does not have the ability to approve, disapprove, or otherwise control
 - 'Investment decisions of the fund'
 - Decisions made by the general partner, managing member; or equivalent related to entities in which the fund is invested

THE NEW INVESTMENT FUNDS LIMITATION ON CFIUS JURISDICTION

- The foreign person does not otherwise have the ability to “control the fund”
 - ◆ Ability to control the fund exists where any of the following are in place – the ability to:
 - Approve, disapprove, or otherwise control investment decisions of the fund
 - Approve, disapprove, or otherwise control decisions made by the general partner, managing member, or equivalent related to entities in which the fund is invested; or
 - Unilaterally dismiss, prevent the dismissal of, select, or determine the compensation of the general partner, managing member, or equivalent
- The foreign person does not have access to material nonpublic technical information as a result of its participation on the advisory board or committee

CRITICAL INFRASTRUCTURE ISSUES

- ❖ Potential limit to critical infrastructure review
- ❖ FIRRMA defines critical infrastructure as: “[S]ystems 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”
(§ 1703(a)(5))
 - CFIUS regulations shall “specify the critical infrastructure” subject to review
 - Transactions include “any investment by a foreign person in an unaffiliated” US business that
 - ◆ Owns, operates, manufactures, supplies, or serves critical infrastructure
 - The definition of critical infrastructure that CFIUS adopts must limit jurisdiction to “the subset of critical infrastructure that is likely to be of importance to” US national security

LEGAL FRAMEWORK

FIRRMA EFFECTIVE DATES

Effective Date	FIRRMA §	FIRRMA Language
August 13, 2018	1703 (a)(1), (2), (3), (4)(A)(i), (4)(B)(i), (4)(B)(iv)(I), (4)(B)(v), (4)(C)(v), (5) to (13)	Definitions
	1705	Inclusion of partnership and side agreements
	1707	Stipulations regarding transactions
	1708	Unilateral initial reviews
	1709	Timing for reviews
	1710	Identification of non-notified and non-declared transactions
	1712 (except for 721 (b)(4)(A))	DNI Analysis
	1713	Information Sharing (public disclosure and sharing with Allies)
	1714	Action by the President
	1715	Judicial review
	1716	Consideration for regulations
	1717	CFIUS Membership & Staff (new Assistant Secretary)
	1718	CFIUS Actions to address national security risks
	1719 (except for (a)(3) [(ii)-(v)])	Annual reports and other reports (e.g.,) Department of Commerce reports on PRC) (Inclusion of unclassified version elements delayed)
	1720	Certifications of Notices & Information
	1721	Implementation Plans
	1722	Assessment of Additional Resources
	1723	Funding
	1724	Centralization of Certain CFIUS Functions
	1725	Conforming Amendments
	1727	Effective Date

QUESTIONS?

Speakers



Giovanna M. Cinelli
Washington, DC
T +1.202.739.5619
F +1.202.739.3001
giovanna.cinelli@morganlewis.com

Giovanna M. Cinelli is the Firm's leader of the International Trade and National Security Practice. Throughout a career spanning over 30 years, she has represented and counseled defense, aerospace and high technology companies on a broad range of issues affecting national security, including export investigations (civil and criminal), due diligence, post-transaction cross-border compliance, Committee on Foreign Investment in the United States (CFIUS) reviews, government contracts, export policy, and licensing. She has conducted over 250 civil and criminal investigations (both unclassified and classified), addressed transactional due diligence matters in hundreds of investments, and counseled clients through the complexities of export control changes from 1992 through the present. She has negotiated complicated export enforcement settlements with the Department of State and successfully closed (without penalties) a range of directed and voluntary disclosures before the Departments of Commerce and Treasury (Office of Foreign Assets Control), as well as the Department of State.

Biography



Kenneth Nunnenkamp

Washington, D.C.

T +1.202.739.5618

F +1.202.739.3001

kenneth.nunnenkamp@morganlewis.com

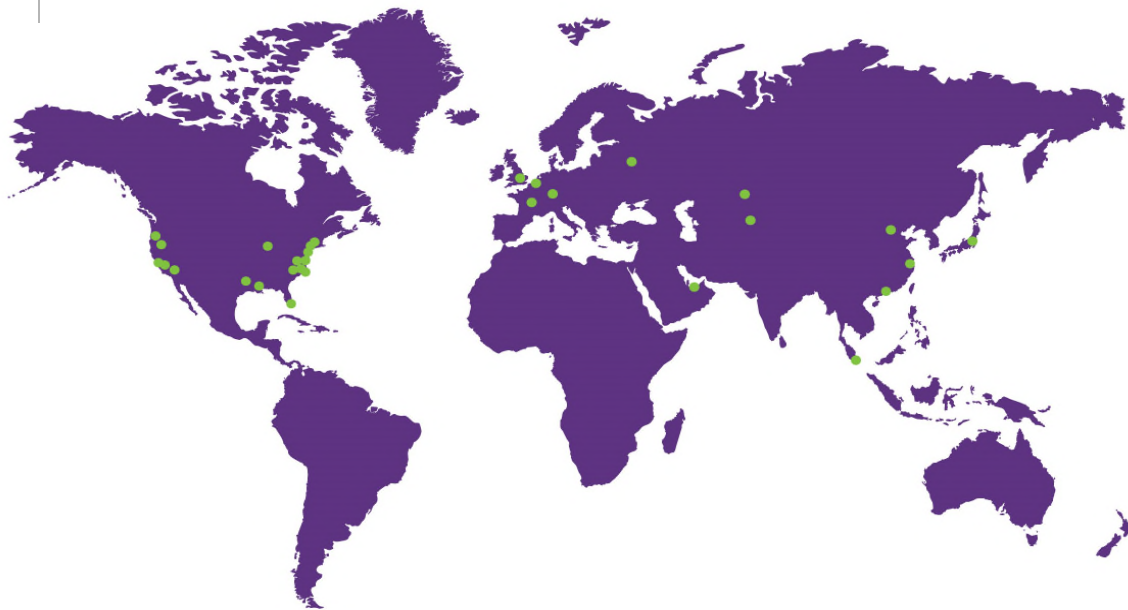
Kenneth J. Nunnenkamp represents buyers and sellers in transactions before the Committee on Foreign Investments in the United States (CFIUS), and counsels parties to transactions regarding CFIUS risks, applicability and solutions. His experience includes representation of buyers and sellers in public and private transactions in all value ranges, from small transactions in the millions to large matters in the billions, public and private. Ken's experience with CFIUS includes almost every industry and transactions involving entities from more than 35 countries, including Japan, China, Germany, the United Kingdom, Canada, Switzerland, Norway, Sweden, Indonesia, Australia, South Korea, Luxembourg, France, and many more. Ken chairs the Morgan Lewis CFIUS Working Group, which brings together the Firm's attorneys who practice in the area and who are interested in its developments. Ken's expertise encompasses trade and regulatory fields dealing with or implicating national security issues, including: US economic sanctions; Trade remedies (§§ 201, 232 and 301, and related matters, including exclusion requests, hearing testimony and Congressional involvement); Export controls and compliance/investigations under the ITAR, EAR and other regulations; US Customs regulations governing imports and exports; Customs and Census issues arising under the Foreign Trade Regulations, Endangered Species Act and Lacey Act issues with imports and exports of exotic and controlled items; C-TPAT; and Trade Agreements/Buy American issues. Ken also represents clients in matters relating to classified activities and before the Justice Department's Foreign Agent Registration Act (FARA) division. He brings more than 30 years of litigation and investigation experience, including time as a JAG Officer in the US Marine Corps. As an experienced entrepreneur, Ken applies business acumen to legal solutions, while assessing risk in user-friendly terms. He serves on the Wake Forest University Business School Board of Visitors, and publishes and presents frequently on topics relating to national security law, trade and business.

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