Updates on CFIUS and Impact of FIRRMA on Foreign Investment in the US

When tightened foreign investment becomes the “new normal”

“CFIUS Update and What FIRRMA Means for Industry” – September 6, 2018

Highlights and Key Takeaways

- Following a record year for Chinese outbound mergers and acquisitions (M&As) in 2016, Chinese investment in the US has since continued to fall.
- One reason for the plummet is the tightened scrutiny from the Committee On Foreign Investment in the United States (CFIUS), the other main reason is the ongoing trade conflicts between the US and China, which now have put many potential investors on the fence.
- Addressing national security risks from countries such as China and Russia, FIRRMA gives CFIUS more power to review a broader range of foreign investments.
- Potential CFIUS review filers should come with a problem-solving mindset.

Executive Summary

In mid-August this year, US President Trump signed into law a $717 billion defense spending bill that was named after John McCain, who was a lifetime advocate for free trade. As a crucial section attached to the bill, the Foreign Investment Risk Review Modernization Act (FIRRMA) significantly broadens CFIUS’s application to transactions that make touch on US national security. In light of the ongoing US-China trade tensions, FIRRMA further casts a shadow on the already slumped investment craze from China to the US.

CFIUS

CFIUS is an interagency committee authorized to review some transactions involving foreign investment in the US under national security reasons. Chaired by the Treasury Department, CFIUS is composed of members from eight different federal agencies, including Homeland Security, the Office of the US Trade Representatives and State Department. Other officials will also participate in certain transaction reviews on a case-by-case basis.

There are two key changes to the CFIUS process as the result of FIRRMA:
CFIUS now has the authority to review a broader range of foreign investment that would not have been captured before;

A "declaration" process has been created to make CFIUS respond to the filing parties and act within 30 days.

The timeline of the CFIUS review process entails four steps as shown below. While the CFIUS review process is confidential, the US President’s decision is made public. The filing parties have the option to withdraw before the Presidential Review.

Additionally, the existing “safe harbor” policy ensures that once CFIUS and/or the President gives a thumbs-up to a transaction, the decision will be final.

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<th>Timeline</th>
<th>Notes</th>
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<td>Preliminary Work</td>
<td>Pre-file Joint Voluntary Notice and initiate preliminary consultations with CFIUS to discuss details of the transaction.</td>
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<td>45-Day Initial Review</td>
<td>CFIUS vetting period for any potential risks imposed on national security. CFIUS can either clear the transaction, or move it towards the investigation period.</td>
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<td>45-Day Investigation</td>
<td>The investigation can either result in an approval on the transaction or for the President’s further review, given the transaction is not abandoned by the filing parties.</td>
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<td>15-Day Presidential Review</td>
<td>The President has the purview to decide the fate of the transaction which can be approved, suspended or prohibited.</td>
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**FIRRMA and China’s ties**

The necessity for FIRRMA was justified in part due to national security risks related to foreign investment emerging from countries such as China and Russia, which were viewed by members of Congress as warranting an upgrade of CFIUS’s authority. Moreover, FIRRMA (see “Section 1719 (b)”) also added a new reporting regime that is targeted at Chinese investment, especially those related to “Made in China 2025.” As a result, transactions in the areas of real estate in sensitive areas, infrastructure, technology and business with sensitive data should proceed with caution.

That said, it is important to understand that FIRRMA neither imposes additional restrictions and scrutiny on Chinese investment specifically, nor does it mean the door of US investment is closed to Chinese investors.
Suggestions

❖ Conduct due diligence for a comprehensive assessment of potential national security concerns and solutions;
❖ Consult with CFIUS prior to investing to help set the tone and direction for moving forward;
❖ Brief relevant government agencies on transaction-related issues and conduct a public relations campaign if possible;
❖ Demonstrate the transaction is free of national security concerns with a problem-solving mindset.

If you have questions about the event and or would like to join AmCham China's Outbound Investment Forum, please contact Baojian Sui.

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