

## CFIUS Reform Becomes Law: What Private Equity Investors Need to Know

### PENpoints

*FIRRMA broadly empowers CFIUS to advance its national security mission largely irrespective of a foreign investor's national pedigree.*

On August 13, 2018, President Trump signed into law the Foreign Investment Risk Review Modernization Act (“FIRRMA”) which, among other things, radically expands the universe of transactions subject to CFIUS’ jurisdiction, makes important procedural changes to the CFIUS review process, and codifies recent CFIUS agency practice with respect to the national security risk-rating of transactions.

While much of the discourse around FIRRMA has focused on mitigating perceived threats arising from Chinese investments, FIRRMA broadly empowers CFIUS to advance its national security mission largely irrespective of a foreign investor’s national pedigree.

*Eight FIRRMA Take-Aways for the Private Equity Community*

**1. A greater universe of transactions — including certain minority investments with limited governance or other rights — will now be subject to CFIUS’ jurisdiction.**

FIRRMA demonstrates an evolution in the U.S. government’s thinking about national security risk from a focus on “control” to an assessment of whether an investment is “non-passive.” Accordingly, FIRRMA broadens CFIUS’ jurisdictional ambit to cover four types of transactions that have not historically been subject to CFIUS review:

- Non-passive investment by a foreign person in “critical infrastructure” and “critical technology” companies, as well as companies that maintain or collect personal data of U.S. citizens (including, for example, many e-commerce companies).
- The purchase, lease or concession by or to a foreign investor of real estate that is in “close proximity” to U.S. military sites or other sensitive facilities.
- Any change in a foreign investor’s rights regarding a U.S. business.
- Any transaction or arrangement designed to circumvent or evade CFIUS’ jurisdiction.

**2. For the first time in CFIUS’ history, certain transactions will be subject to a mandatory CFIUS notification obligation.**

While the CFIUS review process has historically been initiated voluntarily by transaction parties (absent an agency request to file), FIRRMA makes certain investments subject to mandatory notification requirements:

- FIRRMA will require transaction parties to submit “light” notifications of transactions that will result in the acquisition of a “substantial interest” in certain U.S. businesses by a foreign person in which a foreign government holds a “substantial interest.” This provision may have an outsized impact on sovereign wealth funds, pension funds and other investment vehicles affiliated with foreign governments.
- FIRRMA provides that CFIUS may prescribe regulations providing for mandatory notifications of non-passive investments by any foreign person in certain U.S. “critical technology” companies.

**3. A U.S. private equity fund’s investments in U.S. businesses may be subject to CFIUS’ jurisdiction by virtue of foreign limited partners’ participation in the fund’s decision-making, receipt of certain information about investments and/or other factors.**

FIRRMA sets boundaries on the nature and scope of involvement that foreign investors may have in a U.S. private equity fund and its investments in order to avoid a judgment that CFIUS could review the fund’s investments. For example, while foreign limited partners may receive ordinary-course financial information about the performance of a U.S. target in connection with their investment, a foreign limited partner’s

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receipt of “material nonpublic technical information” about a U.S. business may create grounds for CFIUS to review the fund’s investment in such business.

#### **4. Foreign investments in “critical technology” companies will garner greater scrutiny.**

FIRRMA retains as a clear focal point the objective of addressing risks arising from investments in U.S. “critical technology” companies, specifying a wide range of investments that could be subject to CFIUS’ review. Notably, this includes companies in industry sectors that were not historically considered “sensitive,” and may include companies positioned at virtually any point in the value chain (e.g., as a designer, manufacturer, developer or provider of testing services).

#### **5. Information-sharing with non-U.S. national security regulators will increase.**

CFIUS may now share information important to its national security analysis or CFIUS’ actions with foreign allies and partners, subject to appropriate confidentiality and classification requirements, in furtherance of “national security purposes.” As France, the United Kingdom, Germany, Canada and other countries [continue to strengthen their own national security review regimes](#), the likelihood that information provided to one national security regulator will be shared with another seems poised to increase.

#### **6. CFIUS filings will take longer.**

Effective immediately, FIRRMA extends the current initial 30-day review period to 45 days, followed by a 45-day investigation phase. In “extraordinary circumstances,” CFIUS may extend an investigation by 15 days.

#### **7. Non-notified deals will be subject to an increased risk of a CFIUS-initiated investigations and reviews.**

To date, CFIUS member agencies have taken different approaches to evaluating and raising non-notified transactions that may touch on an agency’s equities. FIRRMA directs CFIUS to create a formal systematic process to identify non-notified transactions.

#### **8. Filing fees will attach to CFIUS’ reviews of joint voluntary notices.**

Following adoption of implementing regulations, CFIUS will be authorized to collect filing fees from transaction parties. Importantly, these fees will not apply to “light” notifications, and will be imposed only in connection with submission of a formal joint voluntary notice.

#### ***Recommended Next Steps***

- U.S. private equity sponsors should carefully assess whether, by virtue of their foreign limited partner base, any foreign participation in the carry and other factors, FIRRMA would give CFIUS jurisdiction to review their funds’ investments in U.S. businesses. This analysis is highly fact-specific and not entirely prescriptive, and should be undertaken with assistance from experienced advisers.
- Capital raised now will likely be subject to FIRRMA upon deployment. Sponsors should ensure that limited partnership agreements, private placement memoranda and other fund documents account for FIRRMA’s changes to CFIUS.
- A transaction’s national security profile should be assessed in light of the national security policy priorities expressed in FIRRMA. In many respects, FIRRMA simply codifies existing agency practice, and investors should not assume that the provisions in FIRRMA with delayed applicability are not relevant to near-term transactions or long-term enterprise strategy.

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## PENbriefs

## Second Circuit Rules that DOJ Cannot Use the Conspiracy and Complicity Statutes to Expand the FCPA's Extraterritorial Reach

Last week, the U.S. Court of Appeals for the Second Circuit issued an opinion that clarified the application of the Foreign Corrupt Practices Act (FCPA) to non-U.S. persons. The court ruled that the FCPA defines precisely which categories of defendants can be liable for violating its provisions, and that these explicit categories necessarily restrict the application of the conspiracy or complicity statutes. However, the court left open a significant exposure avenue for foreign nationals who are not directly employed by U.S. companies. To learn more, see our recent [Alert](#).

## EPA Designates Bexar County, TX, as “Nonattainment” for Air Quality

The U.S. Environmental Protection Agency (EPA) has finalized area designations for eight counties in metropolitan San Antonio for the 2015 ozone National Ambient Air Quality Standards. EPA designated Bexar County as “Marginal” nonattainment; as a result of this designation, major sources (including certain oil and gas operators) in Bexar County will be subject to additional air permitting and emissions reporting obligations. To learn more, see our recent [Alert](#).

## PENnotes

### Client Call: CFIUS Reform Becomes Reality September 6, 2018, at 11:00 a.m. ET

On August 13, 2018, President Trump signed the Foreign Investment Risk Review Modernization Act (FIRRMA) into law. FIRRMA is the most significant reform of the Committee on Foreign Investment in the United States (CFIUS) in its history. Join Mario Mancuso, leader of Kirkland's International Trade and National Security Practice, for an interactive discussion of FIRRMA and its impacts on dealmaking. Click [here](#) for more information or to register.

### Thomson Reuters Annual Loan and CLO Conference New York, NY, September 12, 2018

Kirkland is a sponsor of this event, which has a comprehensive program exclusively devoted to the latest trends across the credit markets with a focus on the global loan market. Kirkland partner Eric Wedel will moderate a panel on the “Private Equity Perspective: Sponsored Leveraged Finance in 2018.” Click [here](#) for more information.

### Kirkland Registered Adviser Seminar & CCO Summit New York, NY, September 25, 2018 Boston, MA, September 27, 2018 Chicago, IL, October 2, 2018 Houston, TX, October 9, 2018 San Francisco, CA, October 18, 2018 Los Angeles, CA, November 13, 2018

Designed specifically for private fund manager CCOs, general counsel and other senior executives, this annual event enables firms to navigate the evolving regulatory landscape and get timely updates about SEC policy and enforcement developments affecting private fund managers. Click [here](#) for more information.

### Advancing Microfinance: Fireside Chat with Dr. Amjad Saqib Boston, MA, October 2, 2018

Kirkland will host a discussion with Dr. Amjad Saqib, founder and executive director of Akhuwat, the world's largest interest-free microfinance program. Dr. Saqib will tell the story of Akhuwat and discuss social entrepreneurship, development and private-sector altruism in Pakistan. Click [here](#) for more information.

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Kirkland & Ellis' nearly 500 private equity attorneys handle leveraged buyouts, growth equity transactions, recapitalizations, going-private transactions and fund formations on behalf of more than 400 private equity firms and hedge funds around the world.

Kirkland has been widely recognized for its preeminent private equity practice. The Firm was named "Private Equity Group of the Year" in each of the last seven years by *Law360* and was commended as being the most active private equity law firm of the last decade in *The PitchBook Decade Report*. U.S. News Media Group and Best Lawyers have ranked Kirkland as a Tier 1 law firm for Leveraged Buyouts and Private Equity Law for seven consecutive years and as a top-tier firm for Private Funds/Hedge Funds Law since 2012. The Firm was recognized as the #1 law firm for private equity in the 2018 Vault 100 rankings, and, in 2016, Private Equity International named the Firm "Law Firm of the Year in North America: Fund Formation" for the third year in a row.

In 2012-2017, Chambers and Partners ranked Kirkland as a Tier 1 law firm for Investment Funds in the United States, United Kingdom, Asia-Pacific and globally. The Firm was ranked as the #1 law firm for both Global and U.S. Buyouts by deal volume in Mergermarket's *League Tables of Legal Advisors to Global M&A for Full Year 2011-2017*, and has consistently received top rankings among law firms in Private Equity by The Legal 500, the Practical Law Company and IFLR, among others.

*The Lawyer* magazine has recognized Kirkland as one of its "Transatlantic Elite," having noted that the Firm is "leading the transatlantic market for the provision of top-end transactional services ... on the basis of a stellar client base, regular roles on top deals, market-leading finances and the cream of the legal market talent."

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