

**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS  
INVESTMENT COMMITTEE**

**Investment policy related to national security**

**Notification by the United States**

**23 October 2018.**

On 4 October 2018, the United States notified the OECD of a change in its investment policies related to national security pursuant to its obligations under the Codes of Liberalisation and the National Treatment instrument. This document reproduces the notification, which will support discussions of the measure at Freedom of Investment Roundtable 29 on 23 October 2018.

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## *Investment policy related to national security Notification by the United States*

### 1. Substance and rationale of the change of the United States policy

On 13 August 2018, the Foreign Investment Risk Review Modernization Act of 2018, or FIRRMA, was signed into law. FIRRMA strengthens and modernizes the Committee on Foreign Investment in the United States, or CFIUS, which is a multi-agency government body chaired by the Secretary of the Treasury that reviews foreign investment for national security risks and has been in existence for over 40 years.

FIRRMA expands the jurisdiction of CFIUS to address growing national security concerns over foreign exploitation of certain investment structures which traditionally have fallen outside of CFIUS jurisdiction.

Additionally, FIRRMA modernizes CFIUS's processes to better enable timely and effective reviews of covered transactions.

FIRRMA achieves this through six key provisions:

**1. Expanded scope of covered transactions:** FIRRMA broadens the purview of CFIUS by explicitly adding **four** new types of covered transactions:

- a purchase, lease, or concession by or to a foreign person of real estate located in proximity to sensitive government facilities;
- “other investments” in certain U.S. businesses that afford a foreign person access to material non-public technical information in the possession of the U.S. business, membership on the board of directors, or other decision-making rights, other than through voting of shares;
- any change in a foreign investor's rights resulting in foreign control of a U.S. business or an “other investment” in certain U.S. businesses; and
- any other transaction, transfer, agreement, or arrangement designed to circumvent CFIUS jurisdiction.

**2. Declarations:** FIRRMA provides for an abbreviated filing or “light filing” process through a new “declarations” procedure that could result in shorter review timelines. It also allows CFIUS some discretion to require parties to file with CFIUS before closing a transaction.

**3. Expanded timelines:** FIRRMA expands CFIUS's review period from 30 to 45 days and allows an investigation to be extended for an additional 15-day period under extraordinary circumstances.

**4. Mitigation:** FIRRMA strengthens requirements on the use of mitigation agreements, including the addition of compliance plans to inform the use of such agreements.

**5. Special hiring authority and funding:** FIRRMA grants special hiring authority for CFIUS agencies and establishes a mechanism for the collection of new CFIUS filing fees from investors.

**6. Effective dates and pilot programs:** Certain provisions of FIRRMA take effect immediately while others, including some related to the expanded scope of CFIUS, will take effect at a later date. FIRRMA provides for the delay of some of the bill's most significant provisions until 18 months following enactment of the legislation, or 30 days after the Secretary of the Treasury publishes in the Federal Register a determination that the necessary regulations, organizational structure, personnel, and other resources are in place to administer those provisions, whichever is sooner.

In the meantime, CFIUS has the authority to conduct pilot programs, and may also issue interim regulations and guidance.

CFIUS remains focused exclusively on national security, not broader economic or policy interests.

Like prior CFIUS legislation, FIRRMA does not single out any specific country. CFIUS's authorities may be applied to address the national security risks posed by foreign investment in the United States, regardless of where the investment originates.

The United States has a longstanding open investment policy, and we maintain strong relationships with our allies and partners on investment. FIRRMA allows us to strengthen these relationships by enabling the United States to work more closely with allies on sensitive national security issues related to particular investments. This will enhance confidence in investments originating from those partners.

The United States welcomes foreign investment, and maintains a strong commitment to the rule of law and the protection of intellectual property. The United States provides unique opportunities to tap into advanced research and innovation. FIRRMA does not change this. CFIUS will continue to assess, on a case-by-case basis, whether a particular transaction (regardless of industry) poses a risk to U.S. national security.

CFIUS was last updated more than a decade ago and its jurisdiction has remained unchanged in the 30 years since Congress first passed the Exon-Florio Amendment, which created Section 721 of the Defense Production Act of 1950, the statutory cornerstone of CFIUS. Both the nature of foreign investments in the United States and the national security landscape have shifted significantly since then.

In summary, FIRRMA delivers much-needed reforms that will ensure CFIUS has the tools necessary to identify, examine, and address national security concerns arising from foreign investment. America is a vibrant place to invest, and better protecting critical U.S. technology and infrastructure will ensure it stays that way.

Further information is available from the U.S. Treasury Department's website: <https://www.treasury.gov/resource-center/international/Pages/Committee-on-Foreign-Investment-in-US.aspx>

## 2. Proposed amendment to the entry in the list of measures reported for transparency under the National Treatment instrument

**Trans-sectoral:** Under the US Defense Production Act of 1950, the President has the power to block certain foreign investments that threaten to impair the national security. The President may use this power only if the President finds, after an investigation, that: 1) there is credible evidence leading him to believe that the foreign interest might take action that threatens to impair the national security, and 2) other provisions of law (e.g., antitrust laws,

Export Administration Act, Defense Production Act, International Trade in Armaments Regulations) other than the International Emergency Economic Powers Act do not in his judgment provide adequate and appropriate authority to protect the national security.

**Authority:** Defense Production Act (1950), § 721, as added by § 5021 of the Omnibus Trade and Competitiveness Act (1988), and amended by § 837 of the National Defense Authorization Act for Fiscal Year 1993; by the Foreign Investment and National Security Act (2007), Pub. L. 110-49; and by the Foreign Investment Risk Review Modernization Act (2018), Subtitle A of Title XVII of Pub. L 115-232; at 50 U.S.C. § 4565.

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