

Insights

WHILE THE U.S. REMAINS OPEN TO FOREIGN INVESTMENT, CERTAIN INVESTMENTS ARE LIKELY TO FACE ENHANCED SCRUTINY

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SUMMARY

Investors be warned. In 2020 the U.S. Department of the Treasury issued comprehensive new regulations to implement the Foreign Investment Risk Review Modernization Act (“FIRRMA”). These include provisions that address the treatment of indirect investments through investment funds that should be carefully considered by anyone contemplating such an investment in a U.S. business.

The Committee on Foreign Investment in the United States (“CFIUS”) is a multi-agency group that reviews foreign investments in certain U.S. entities and assets to determine whether they present a national security concern and, if so, whether that concern can be mitigated. If such concerns cannot be mitigated, or the parties are unwilling to agree to the mitigation proposed, CFIUS may recommend that the President prevent or reverse the transaction or take other steps to alleviate the potential threat to the country. In a year that has seen other jurisdictions introduce new foreign direct investment oversight, the U.S. government implemented FIRRMA, which contains the first significant revisions to CFIUS’s process and jurisdiction in more than a decade.

Perhaps most notably, while participation in the CFIUS review process historically has been voluntary, pursuant to FIRRMA parties to certain transactions are obliged to file a declaration or notice to CFIUS in advance of completing their transaction.

Parties considering cross-border transactions, as well as those who provide capital or insurance for such transactions, should consider potential national security concerns both in the selection of transaction partners and in structuring proposed transactions. A review by CFIUS is a fact-specific inquiry, and early planning may minimize risk and time delays.

Jennifer Kies Mammen wrote about this in our Emerging Themes in Financial Regulation 2021 publication.

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