

New CFIUS Law: Key Issues Affecting the Energy Sector

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Key Points

- FIRRMA broadens the scope of a CFIUS review beyond transactions that could result in a foreign person gaining the ability to control a U.S. business. Consequently, more energy deals could be captured through expanded authorization to review (1) foreign investments in real estate located in sensitive locations even when no U.S. business is acquired, (2) certain non-controlling foreign investments in U.S. companies involved in “critical infrastructure,” “critical technologies” and “sensitive personal data,” and (3) changes in investor rights that could lead to foreign control or covered non-controlling investments.
- Under the current law, CFIUS filings are voluntary unless the Committee requests or initiates a review in a specific case. FIRRMA will require filings in deals where a foreign government will obtain a “substantial interest” in a U.S. business, and potentially in transactions involving certain critical technology. As a result, CFIUS filings may become mandatory for certain energy deals.
- The most significant provisions will not go into effect until February 2020 or 30 days after CFIUS publishes a determination that the regulations and necessary resources to administer FIRRMA are in place, whichever is sooner. In the meantime, energy companies and other affected parties will have an opportunity to comment on the scoping of key issues in the regulations including (i) the limits of what is included in the term “critical infrastructure,” (ii) the scope of the real estate provision, and (iii) the thresholds for the mandatory reporting requirements, among other things.

The Committee on Foreign Investment in the United States (“CFIUS”) is an interagency committee that conducts national security reviews of investments that could result in a foreign person’s gaining the ability to control a U.S. business—a “covered transaction.” CFIUS has the authority to initiate reviews of transactions, impose mitigation measures to address national security concerns and recommend that the President block pending transactions or order divestitures of completed transactions. To mitigate against such risks, parties may file a voluntary notice with CFIUS seeking clearance (or “safe harbor”) for the transaction to proceed.

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On August 13, 2018, President Trump signed the Foreign Investment Risk Review Modernization Act (“FIRRMA”), a bipartisan bill that reforms the CFIUS process to address perceived gaps in the existing CFIUS review process. While the bill sponsors were primarily concerned about issues surrounding technology transfers to China, the new law has broader implications for foreign investment as we discussed in our [previous alert](#) in August 2018.

This alert is focused on how this legislation will impact the energy sector, including investments in oil and gas, renewable energy and utilities.

I. Expanded CFIUS Jurisdiction over Transactions in Energy Sector

FIRRMA expands CFIUS’ jurisdiction to include four new types of “covered transactions,” three of which are most likely to affect foreign investments in the energy sector, which are discussed below.

A. Purchases, Leases, Concession of U.S. Real Estate

Previously, foreign investments in real estate were only subject to CFIUS’ jurisdiction if they allowed a U.S. person to gain control over a “U.S. business,” which meant “any entity engaged in interstate commerce in the United States.” Under FIRRMA, the purchase, lease or concession of U.S. real estate to a foreign person will be subject to CFIUS review when the real estate (1) is in “close proximity” to a U.S. military or other sensitive U.S. government location if such property could reasonably allow for the collection of intelligence or otherwise expose national security activities at a U.S. government site; or (2) is located within, or will function as part of, an air or maritime port. FIRRMA excludes single housing units and real estate in “urbanized areas” and requires CFIUS to define “close proximity” in further detail in the regulations.

This provision is likely to capture energy deals that may not be currently subject to CFIUS jurisdiction. For instance, if a non-U.S. company acquires or leases a parcel of land to develop wind or solar assets or to extract oil and gas, that transaction may be subject to CFIUS jurisdiction if the parcel is located in proximity to U.S. military facilities or an air or sea port. Currently, such a transaction would likely fall within the “greenfield” exemption since it does not involve the acquisition of a U.S. business. Consequently, the parameters of the real estate provision established in the regulations will be a key issue for energy companies.

B. Noncontrolling Investments in U.S. Businesses Involving Critical Infrastructure

Prior to FIRRMA, CFIUS was only authorized to review transactions in foreign investments that gave a foreign person “control” over a U.S. business. FIRRMA expands CFIUS’ jurisdiction to cover non-controlling foreign investments in an unaffiliated U.S. business that involves critical infrastructure, critical technology or sensitive personal data of U.S. citizens. Such investments will only be covered if they provide the foreign person with access to any “material nonpublic technical information” possessed by the U.S. business; membership, observer or nomination rights for the board (or equivalent body) of the U.S. business; or any involvement,

other than through voting of shares, in substantive decision making related to sensitive personal data, critical technologies or critical infrastructure. Material non-public technical information involves (i) background to the design, location or operation of critical infrastructure; or (ii) that which is necessary to develop or produce “critical technologies.”

The most relevant issue for the energy sector is that this provision allows CFIUS to review noncontrolling investments in a U.S. business that owns, operates, manufactures, supplies or services “critical infrastructure,” which is broadly defined as “systems or assets, whether physical or virtual, so vital to the United States that incapacity or destruction . . . would have a debilitating impact on national security.” Although CFIUS will issue regulations to clarify this definition and specify types and illustrative examples of such infrastructure, this provision is likely to impact investments that affect domestic energy infrastructure, such as the U.S. power transmission grid or strategic petroleum reserves. Consistent with the above, the scoping of what constitutes “critical infrastructure” in the regulations will be a key issue for the energy sector.

C. Changes in Rights

While this authority has existed in practice with respect to controlling transactions, FIRRMA explicitly provides for jurisdiction over the change in a foreign person’s rights with respect to a U.S. business if it could lead to (i) foreign control, or (ii) a noncontrolling investment discussed above. For instance, if a foreign company establishes a joint venture in the United States to develop energy resources and thereafter negotiates an adjustment to its rights (e.g., changing the board representation or decision making process), those changes could result in a CFIUS review.

II. Mandatory Filings

Under the current law, CFIUS filings are voluntary unless the Committee requests or initiates a review in a specific case. FIRRMA will require filings in deals where a foreign person, in which a foreign government has a “substantial interest”, will obtain a “substantial interest” in a U.S. business and potentially in transactions involving certain critical technology. Depending on how the regulations are finalized, CFIUS filings may become mandatory for certain energy deals.

III. National Security Considerations

FIRRMA states that CFIUS should consider the potential national security-related effects of a foreign person or foreign government’s “cumulative control of, or pattern of recent transactions involving any one type of critical infrastructure, energy asset, critical material or critical technology.” In other words, even if a standalone investment in the energy sector would appear not to have a significant national security impact, CFIUS could still block or apply mitigation measures where overall foreign ownership of that sector would present a national security concern. This consideration already was factored into the national security analysis, to some extent, but FIRRMA has drawn focus on this issue.