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President Signs Legislation Reforming CFIUS & Export Controls

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- Federal Government Relations
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- Federal Government Relations
- Trade & International Affairs

Congress has continued its 57-year tradition of passing an annual defense authorization bill with the *John S. McCain National Defense Authorization Act (NDAA) for Fiscal Year 2019* finalized by Congress on August 1 and signed into law by President Trump on August 13. The NDAA makes important reforms and updates to the process by which investments in U.S. businesses by foreign persons are reviewed by the Committee on Foreign Investment in the United States (CFIUS) and updates and codifies Department of Commerce practices related to export controls.

Many of the provisions discussed below will not take effect until new regulations are promulgated. As the regulatory process unfolds over the coming weeks and months, ML Strategies will actively monitor developments and engage with key executive branch officials with responsibility for drafting and implementing the new regulatory requirements. ML Strategies has high-level relationships within the Trump Administration, including at the Commerce and Treasury Departments. We also maintain long-standing ties with leadership of the congressional committees of jurisdiction for CFIUS and export matters. We will be actively engaging with these contacts as the regulatory process unfolds.

FIRRMA

The *Foreign Investment Risk Review Modernization Act (FIRRMA)* was approved by the Senate on June 18 as an amendment to the NDAA, while the House approved its version of FIRRMA as a stand-alone measure on June 26. The two versions of FIRRMA were reconciled to address differences, and the compromise language was included in the final NDAA. The FIRRMA language, providing for the first reform and modernization of the CFIUS review process in a decade, can be found starting on page 1364 of the NDAA Conference Report **HERE**. Among other things, FIRRMA:

- Expands the type of transactions under the purview of CFIUS by adding new categories of covered transactions to include certain real estate transactions and investments related to critical infrastructure, critical technologies, and sensitive data. An earlier version of FIRRMA granted CFIUS oversight of contributions of intellectual property by American critical technology companies to foreign persons (such as through a joint venture) but this was met with opposition from the technology sector, and the final language did not grant this jurisdiction to CFIUS. (See, however, the summary of the Export Controls Act below);
- Authorizes CFIUS to undertake a review of any changes in the rights of a foreign investor with regard to a U.S. business and provides statutory authority for current CFIUS regulations regarding any attempts to evade the CFIUS process;
- Creates a new mandatory declaration process for some transactions, including transactions related to critical technologies;
- Extends the timeframe for CFIUS review from 30 calendar days to 45 calendar days;
- Limits any civil challenge to a CFIUS decision to the U.S. Court of Appeals for the District of Columbia;
- Expands the dissemination of CFIUS notification information beyond Congress and administrative and judicial action proceedings to include domestic governmental entities and foreign governmental entities as deemed appropriate with regard to national security;
- Updates and codifies current practices with regard to authorization for the President of the United States and CFIUS to act should a covered transaction have implications for national security;
- Creates a process for CFIUS pilot programs related to testing the implementation of certain FIRRMA provisions;
- Authorizes CFIUS to impose filing fees; and
- Provides a “sense of the Congress” with regard to certain factors CFIUS may take into account when undertaking a national security analysis

Export Controls Act

Also included in the NDAA is the *Export Controls Act of 2018 (ECA)*, which updates and, in some situations, codifies current practice with regard to the export controls regime by repealing and replacing the *Export Administration Act of 1979*. The ECA language can be found starting on page 1464 of the NDAA Conference Report **HERE**. Among other things, ECA:

- Requires the Commerce Secretary to establish controls on the export, reexport, or in-country transfer of “emerging and foundational technologies” essential to the national security of the United States excluding any “critical technologies” as outlined in FIRRMA. The authorization for recommending the

identification of technologies as emerging and foundational is provided for in FIRRMA;
- Creates an interagency task force charged with identifying emerging and foundational technologies, led by the President and including the Secretaries of Commerce, Defense, Energy, and State, along with heads of other relevant agencies;
- Requires that the impact on the "defense industrial base" be included in the review of any application for a license or authorization; and
- Mandates a review of licensing requirements for countries subject to a comprehensive arms embargo.

In response to the NDAA being signed into law, Treasury Secretary Mnuchin tweeted "Glad to see FIRRMA signed into law today. It will strengthen CFIUS and enhance the Government's capacity to protect critical technology while keeping the U.S. open to investment."

FIRRMA and ECA will have a significant impact on foreign persons seeking to invest in U.S. enterprises and on U.S. businesses seeking to conduct business with foreign concerns. ML Strategies stands ready to advise and assist our clients with respect to all aspects of this important and developing legislation.

Authors



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Alex Hecht is a trusted attorney and policy strategist with over 20 years of experience advising clients across a broad range of industries on how to navigate complex policy environments. His strategic insight and hands-on experience in both legislative and regulatory arenas empower clients to advance their priorities with clarity and confidence in an evolving policy landscape.



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Neal Martin brings more than two decades of experience in government and federal relations to his work, helping clients navigate a wide range of issues. He provides strategic guidance to organizations seeking to advance their legislative priorities and enhance their visibility before Congress and federal agencies.