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Private Fund Adviser Alert:

National Security Reviews of Investments by Foreign Persons in Sensitive U.S. Industries — What You Must Know

by Nicole Y. Lamb-Hale

On August 13, 2018, President Trump signed into law the Foreign Investment Risk Review Modernization Act of 2018 (“FIRRMA”). FIRRMA significantly expands the universe of transactions subject to review by the Committee on Foreign Investment in the United States (“CFIUS” or the “Committee”) to include investments in U.S. companies in specified industries by foreign persons. CFIUS reviews transactions by or with foreign persons that could result in foreign control of a U.S. business to determine their impact on the national security of the United States.

Why Does FIRRMA Matter to Private Fund Advisers?

FIRRMA matters because effective now, in progress and upcoming investments with foreign persons in U.S. critical technologies companies, critical infrastructure companies, companies that maintain or collect sensitive, personally identifiable information (“PII”) on U.S. citizens or in real

estate in close proximity to sensitive U.S. government facilities (collectively “Sensitive Industries”) are subject to review by CFIUS if such foreign persons are deemed to have “control” over the U.S. business.

How Do You Mitigate Your CFIUS risk?

Know Your Foreign Investor/Limited Partner

a.

Because CFIUS will evaluate, among other things, how your foreign investor or limited partner is connected to a foreign country or foreign government, whether such connection may affect the national security of the U.S., and the extent to which your foreign investor or limited partner has a history of complying with U.S. laws and regulations, conducting robust due diligence on their ties to a foreign country or foreign government is prudent to determine whether to go forward with a new investment or to modify a current investment. Because the Committee will do its own threat assessment on your foreign investor or limited partner, learning what you can in advance will be helpful to your transaction planning and timeline.

Know the Business

b.

What is clear from the expansion of the scope of covered transactions under FIRRMA is the concern of the U.S. government that investments by foreign persons in the Sensitive Industries pose a potential threat to the national security of the United States. As such, proactively understanding the extent to which the U.S. business in which you are investing with a foreign person has connectivity to the Sensitive Industries is critical as you consider transactions with foreign investors or limited partners that may be subject to review by CFIUS.

Structure the Transaction to Minimize the Risk

c.

Armed with an understanding of both your existing or proposed foreign investor or limited partner and the type of U.S. business that is of concern to the Committee, you will be better positioned to mitigate your CFIUS risk. For example, you may structure your transaction to take advantage of the carve out of CFIUS jurisdiction under FIRRMA, which may result in your transaction being exempt from CFIUS review. If, however, the transaction with your existing or proposed foreign investor or limited partner must be structured in such a way that control by the foreign person is unavoidable, you may develop and propose to the Committee strategies to mitigate the national security risk such as limiting the foreign person's access to sensitive data or carving out of the transaction assets with connectivity to the Sensitive Industries.

Now is the time for private fund advisers to proactively review pending and upcoming investments and deals involving foreign persons to ensure that CFIUS risks are identified and that steps are taken to comply with FIRRMA.



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