

The Foreign Investment Risk Review Modernization Act of 2018 (“FIRRMA” or the “Act”) contains provisions to monitor compliance with mitigation agreements.

### **FIRRMA**

The Act represents agreement on legislation giving the Committee on Foreign Investment in the U.S. (“CFIUS”) modern and broader powers to keep sensitive technology that could pose a risk to national security out of the control of foreign countries. Intense efforts by the Senate (S. 2098) and House (H.R. 5841) have resulted in this compromise package. Both bills passed their respective chambers by wide majorities. The Act states “that U.S. policy enthusiastically welcomes and supports foreign investment, consistent with protection of national security.” The Senate version of FIRRMA was added by amendment as Section 17 to H.R. 5515, the National Defense Authorization Act for Fiscal Year 2019 (“NDAA”).

### **Risk, Compliance and Monitoring Provisions**

Within FIRRMA, the provisions that affect risk, compliance and monitoring are in section 1718, which specifies the actions to be taken by the Committee to address national security risks.

These include:

1. For purposes of mitigating any risk to national security, agreements and conditions can be negotiated, entered into or imposed, and enforced by the Committee.
2. In reaching an agreement or condition, the Committee will use a risk-based analysis that includes an assessment of the threat, vulnerabilities and consequence to national security.
3. The agreement or condition needs to be reasonably calculated. This means it must be effective, must allow for compliance in an “appropriately verifiable way” and must enable “effective monitoring of compliance with and enforcement of the terms...”
4. For each covered transaction subject to an agreement or condition, the Committee needs to create a compliance plan whose elements include assignment of primary responsibility, defining how compliance will be monitored and how frequently reviews will be conducted, indicating whether an independent entity will conduct compliance reviews and anticipating consequences if parties fail to cooperate “regarding monitoring compliance.”
5. FIRRMA explicitly provides for the use of independent entities to monitor compliance with the agreement and requires monitor independence from the parties.

## **Our Outlook\***

We believe the Act will move forward with no further legislative changes. Most provisions are effective immediately upon enactment of the Act. On July 26, 2018, the House cleared the NDAA. The Senate is expected to take it up the week of July 30<sup>th</sup>.

The clearer “rules of the road” will benefit the applicants and the US. The broader definition of covered transactions and the favorable investment environment will translate to hundreds more applicants. The applicants will be subject to greater scrutiny such as in their risk mitigation processes, procedures and compliance plans.

Treasury issued proposed CFIUS regulations this Spring. As the final legislation is being implemented, there may be additional rules and regulations. In our view, foreign investors should begin now to evaluate their situation if they were applying under the new Act.

If you would like more information on CFIUS or have questions, please feel free to reach out to us.

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