



**Tougher controls  
for foreign investment:  
the new normal?**



Changes in the foreign investment (FI) review space have continued at a rapid pace, both as reform efforts initiated several years ago are maturing and as countries have adopted changes in response to COVID-19.

At this point, the recent period of unprecedented international focus on FI issues and geopolitical change has led to major legislative changes or proposals in most major economies.

While the type of risks covered by these regimes are similar at a general level and the scope of sectors covered by FI rules is increasingly harmonized across jurisdictions, the importance of various types of risks varies from jurisdiction to jurisdiction, and the thresholds for review can vary considerably.

As a result, and given that an increasing number of regimes have mandatory and suspensory elements, transactions involving a target company with global operations require careful analysis of the implications of FI regimes on a jurisdiction-by-jurisdiction basis.

## Three general trends in foreign investment law and enforcement



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## Changes to jurisdiction and timing due to COVID-19

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Jurisdictions have varied in their responses to COVID-19 with some extending timelines, expanding the scope of their FI laws, or increasing the scrutiny applied to certain transactions.

- *Timing:* Most jurisdictions are processing FI applications normally and in many countries we no longer see major delays. In any event, authorities face some of the same operational challenges as other businesses due to working-from-home requirements and other health-related precautions, making process delays inevitable.
- *Scope:* Expansion of jurisdiction to deal with FI has been most necessary in jurisdictions where the scope of government authority is defined by positive lists of industries or by monetary thresholds, or indeed in countries where no or minimal FI controls were in place.
- *Scrutiny:* Many jurisdictions have increased scrutiny of transactions in the healthcare and health technology sectors, critical industries, or other industries relevant to battling the pandemic.

While some of these changes were intended to be temporary, many are likely to persist post-pandemic.

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## Major reforms

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Several jurisdictions have introduced or implemented major reforms to their foreign investment laws.

The UK proposed comprehensive legislative changes, likely to come into force in Spring 2021, that would introduce a new mandatory, suspensory national security regime in 17 strategic sectors.

Significant reforms to Australia's foreign investment regime will come into effect on 1 January 2021. These changes include, *inter alia*, a mandatory notification requirement for interests of 10% or more in "national security businesses" (which is very broadly defined) and "national security land", regardless of value.

In Europe, the EU and member states have introduced new measures, including the EU's FDI Screening Regulation that covers investments in a range of critical infrastructure, critical technology, critical inputs, sensitive data and media, but has no specific trigger threshold (leaving member states free to review almost any investment by a non-EU entity).

In the US, CFIUS introduced regulations that continued to implement aspects of FIRRMA, including an updated mandatory filing threshold and filing fees.

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## Increased coordination

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Coordination among jurisdictions has continued to increase. This coordination has occurred through both formal mechanisms, such as the EU FDI screening regulation, and informal exchange among like-minded countries. This coordination is likely to increase harmonization and sharing of best practices, as well as the likelihood that a transaction reviewed in one jurisdiction will come to the attention of a broader group of countries.

Despite increasing coordination among jurisdictions, the risk of divergent outcomes remains given differences in rules, thresholds and geopolitical considerations across FI regimes.

Dealmakers should closely monitor ongoing regime changes as even 'in-flight' deals can be affected. Updates from our leading global FI practice, including our *StrongerTogether* partner firms\*, are set out below. For ongoing updates, please visit our [Coronavirus Hub](#) or speak to your antitrust and FI contacts.

\*Clayton Utz for Australia, Blake Cassels & Graydon for Canada, and Touchstone Partners for India.

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**01**

Australia



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**02**

Canada



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**03**

China



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**04**

France



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**05**

Germany



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**06**

India



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**07**

Italy



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**08**

Japan



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**09**

The Netherlands



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**10**

Russia



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**11**

Spain



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**12**

United Kingdom



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United States



# 01 | Australia

## Timing (statutory)

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30 calendar days (unless an extension is applied). From 1 January 2021 the Foreign Investment Review Board (FIRB) can, in its discretion, request an extension of up to 90 days.

We understand that FIRB is, at present (as a result of COVID-19), routinely requesting applicants to agree to a six-month review period to avoid seeking multiple extensions throughout the process (but the actual review period is currently averaging 30-60 days).

## Timing/process changes?

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Yes.

FIRB is still accepting filings but requires e-filings rather than in hard copy. A suite of new reforms take effect from 1 January 2021.

These reforms (which will increase the number of applications) may potentially extend the total review period from the statutory 30 days.

## Change in law?

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Yes. All relevant monetary filing thresholds were temporarily reduced to zero in light of COVID-19. The thresholds will return to normal from 1 January 2021.

Separately a suite of significant reforms under the auspices of protecting “national security” will take effect from 1 January 2021. These reforms are extensive and include *inter alia*:

- mandatory notification of interests of 10% or more in “national security businesses” (which is very broadly defined) and “national security land”, regardless of value
- an ability for the Treasurer to “call in” transactions not otherwise requiring approval or (in certain circumstances) to unwind approvals previously given, in order to protect “national security”
- broadening the circumstances in which offshore M&A transactions may require mandatory pre-approval

## Change in policy?

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From 1 January 2021, extensive reforms will commence, as previously described.

# 02 | Canada

## Timing (statutory)

**Post-closing notification:** the vast majority of investments subject to the Investment Canada Act (ICA) only require a short-form notice, which can be made before, or within 30 calendar days of, closing.

**Reviewable transactions (ie those that trigger a pre-closing review):** have an initial review period of 45 calendar days, which may be extended up to 75 calendar days (and may further be extended with investor consent).

**National security reviews** have a review period of 260 days, or longer with investor consent. National security reviews can be initiated even if there is no acquisition of control and therefore no notification filing requirement.

## Timing/process changes?

Yes. Formal extension for national security review of controlling or non-controlling investments in place until at least 31 December 2020. Government now has:

- an initial 60 days and possible further 90 days (both up from 45 days each) following receipt of notification to conduct national security screening and issue formal Cabinet order for a full national security review
- for non-controlling investments, 180 days (up from 45 days) post-implementation to take action under the ICA national security provisions

Both the Investment Review Division (IRD) and the Cultural Sector Investment Review Division (CSIRD) continue to operate during the COVID-19 pandemic. However, IRD's policy statement strongly encourages foreign investors to consider the ICA review process in the early stages of investment planning (including engaging with IRD before implementation of the investment).

To obtain regulatory certainty, foreign investors should file a notification under the ICA at least 60 days before closing.

## Change in law?

No substantive changes. Timing extensions were effected by legislative amendment and Ministerial Order.

Enhanced scrutiny of foreign investments under the ICA will apply until the Canadian economy recovers from the effects of the pandemic.

## Change in policy?

Pursuant to IRD's policy statement of 18 April 2020, the government will closely scrutinise foreign direct investments of any value (controlling or non-controlling) in Canadian businesses that are related to public health or involved in the supply of critical goods and services to Canadians or to the government, and will subject all FIs by state-owned enterprises to enhanced scrutiny under the ICA, which may involve additional information requests or extensions of timelines for review. This enhanced scrutiny will apply until the economy recovers from the effects of the COVID-19 pandemic.

# 03 | China

## Timing (statutory)

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For **National Security Review** (NSR), it depends on whether the FI would raise any substantive concern - the statutory review period can take 30 working days if cleared in phase 1 and 90 working days if cleared in phase 2. If the FI invites too much concern that a conclusion cannot be reached at the ministry level, the case will be referred to the State Council for final decision, for which there is no time limit.

## Timing/process changes?

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No.

On 30 April 2019, the National Development and Reform Commission (NDRC) replaced the Ministry of Commerce of the People's Republic of China (MOFCOM) to be the lead coordinator for the inter-ministerial review. Since then, all filings for national security review shall be submitted to the NDRC and then reviewed by the inter-ministerial committee, consisting of various relevant ministries.

## Change in law?

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No.

## Change in policy?

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No.

However, we are seeing a trend that NDRC is getting more active by proactively requesting companies to file their transactions for NSR review.

# 04 | France

## Timing (statutory)

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**Phase 1 review:** 30 working days from the submission of the complete notification for the Minister of the Economy to:

- clear the transaction unconditionally;
- declare that the transaction falls outside the scope of the foreign direct investment regime; or
- open an in-depth Phase 2 review.

**Phase 2 review:** if the Ministry decides to open an in-depth review, it has another 45 working days to clear the transaction, with or without conditions, or to prohibit the transaction.

This means that the review process can last between one and a half and five months.

## Timing/process changes?

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No.

Despite the second French lock-down and current state of health emergency, the Minister of Economy is expected to operate as usual and must respect the deadlines of the statutory process.

## Change in law?

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Yes. Legislative changes introduced last December, which came into force for filings submitted as of 1 April 2020 are permanent.

In the context of the pandemic crisis, the French government decided to add biotechnologies to the list of strategic sectors. In addition, the government has lowered the review threshold for minority acquisitions to 10 per cent (from 25 per cent) of voting rights in a French listed entity for non-European investors only. In this case however, there is a specific and accelerated review procedure. After a simplified notification, the Minister of Economy has 10 days to allow the transaction or, on the contrary, to send the parties back to the standard procedure. Although this rule was supposed to be applicable until 31 December 2020, it is very likely to be renewed for 6 additional months.

## Change in policy?

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Yes.

Due to the sanitary crisis, transactions relating to the sensitive sectors, in particular in the health sector are being reviewed with particular scrutiny.

# 05 | Germany

## Timing (statutory)

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Review periods:

- Phase I: two months; and
- Phase II: four months.

A suspension of the Phase II period is provided for in the case of subsequent requests for documents or negotiation of remedies.

In addition, the Federal Ministry for Economic Affairs and Energy may extend the Phase II period by three months if the review procedure presents particular difficulties of a factual or legal nature and by an additional month if the transaction particularly affects German defence interests.

## Timing/process changes?

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Yes. Rules on timing were harmonized across different types of review.

## Change in law?

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Yes.

In June, July and October 2020, amendments to the German FI screening regime entered into force which

- led to more transactions being caught (in particular in the health sector);
- set a stricter standard of review -- “likely to affect” public order or public security of Germany or an EU Member State);
- introduced a standstill obligation for reportable transactions.

A further update of the regulation is expected in H1 2021. This update will further extend the scope of application in the area of critical technology.

## Change in policy?

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Yes.

Transactions relating to the health sector are being reviewed with particular scrutiny.

# 06 | India

## Timing (statutory)

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Typically, eight to 12 weeks to process government FI approvals. Note that it is difficult to say definitively what the time period for getting approvals under the new regime relating to investments from countries sharing land borders with India (see section on “Change in law”) would be as there are no known instances as yet of approvals having been granted even though several applications have been filed since the introduction of the regime in April 2020.

## Timing/process changes?

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Yes.

Given the work-from-home environment and frequent shutting down of offices on account of COVID-19 cases, delays in the processing of applications should be expected. But the Foreign Investment Facilitation Portal is accepting filings.

## Change in law?

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Yes. The government announced that investments from an entity based in a country that shares a land border with India, or where the beneficial owner of the investment in India is situated in a country that shares a land border with India, will require prior approval. This requirement would also apply to secondary transfers of existing FI in an Indian entity to an acquirer that meets this condition. The announcement makes no reference to a sunset clause so until the government amends it by a further decision, this restriction will continue to apply. The announcement would cover Chinese investment, which has been active in a number of sectors (including technology, pharmaceuticals and financial services).

Recent press reports suggest that investments of up to 26% in sectors within the automatic route (i.e. for which prior government approval is not required under the “sectoral test”) may be exempt from the new regime. The beneficial ownership threshold is also being contemplated to be set at 25%. It is recommended to keep an eye on these developments.

## Change in policy?

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None.

# 07 | Italy

## Timing (statutory)

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45-calendar-day standard review period; plus up to a further 30-day extension for information requests (ie up to a total of 75 days; may be extended further through stop the clock and for consultations with the EC and/or other EU Member States so that the total review period can increase up to approx. 115 days).

## Timing/process changes?

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The timeline for review was already extended in 2019 and has been further amended in October 2020 as a result of the entry into force of the EU FDI regulation

## Change in law?

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Yes.

Most importantly, a broadening of sectors subject to FI review, including insurance, financial, banking, foodstuff, critical data and health. Moreover, a temporary extension of FI (for 2020, but potentially subject to further extension) in all covered sectors to:

- acquisitions by EU purchasers; and
- minority non-controlling investments by non-EU parties.

## Change in policy?

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Yes.

Wider scope of industries, transactions and acquirers potentially subject to review. Overall, these changes (some of which are envisaged to only last until the end of 2020, ie an ‘emergency’ intervention), including:

- the express indication of the PMO’s power to begin investigations *ex officio*; and
- the fact that the influence of a foreign government over an acquirer can be expressly considered even if it involves another EU state,

signal a likely greater focus on, and arguably an even stricter approach in, Golden Power proceedings.

# 08 | Japan

## Timing (statutory)

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Suspensory prior notifications must be filed within the six months prior to closing and the statutory waiting period is 30 days (unless extended by the authority).

In practice, the review period is commonly significantly shorter (around 90 per cent of reviews are completed within five days).

Investments likely to impact national security can be extended by up to five months.

## Timing/process changes?

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None so far for suspensory prior notification.

To note, for ex post facto report, in February 2020, the government introduced a moratorium for ex post facto reports obligation for FI. If a foreign investor cannot file a required report due to unavoidable circumstances arising from the COVID-19 infection, the reporting obligation is postponed. The investor must file the report without delay after the relevant circumstances cease.

## Change in law?

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No changes due to COVID-19 impact.

But the Foreign Exchange and Foreign Trade Act has been amended to lower the shareholding threshold for mandatory filings from 10 per cent to 1 per cent.

The new regime was introduced independently of COVID-19 and is permanent.

## Change in policy?

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Due to COVID-19 impact, drug medicines and medicinal equipment have also been added to designated sectors requiring pre-screening notification for foreign investments.

# 09 | The Netherlands

## Timing (statutory)

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Specific rules apply in relation to FI into the energy, healthcare and telecoms sectors, and those investments can be subject to industry/sector regulator review.

A general FI regime applicable to investments in critical infrastructure and sensitive technology is expected to enter into effect in 2021. The government may however retroactively call in transactions completed since 2 June 2020.

## Timing/process changes?

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The general FI regime is not expected to come into force until Q1-Q2 2021 at the earliest, depending on the duration of the parliamentary process.

Although expected to be used rarely, the Minister will be able to retrospectively call in transactions that: (i) complete between 2 June 2020 and the date the general FDI regime begins; (ii) give rise to national security concerns; and (iii) have not been subject to a public interest intervention under the current sector-specific regimes.

If called in, transactions will have to be notified and will be subject to substantive review. In addition, deals that have not completed by the time the new FI regime comes into force and satisfy the mandatory notification requirements will need to be notified and cleared before closing.

## Change in law?

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Pending legislative proposal introducing a mandatory pre-investment FI screening mechanism, applicable to both EU and non-EU investors.

In Q1 2021, a legislative proposal will be presented for consultation introducing an investment screening policy specifically for the defence industry.

## Change in policy?

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Although the Netherlands continues to advocate free trade, it has indicated that it intends to present additional FI screening legislation (outlined above).

# 10 | Russia

## Timing (statutory)

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3 and 6 months, but in practice the process may take longer. The driving factor in terms of timing is when the Government Commission (which is the decision maker) meets, and it meets on an 'as necessary' basis; no fixed schedule exists.

In our experience, average review periods are:

- around one month where the Russian target is not a strategic entity; and
- four to five months where the target is a strategic entity.

## Timing/process changes?

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Yes.

The review process now takes longer than usual because the Commission's members have other priorities at the moment. While the Commission would normally meet 3-4 times a year, in the current COVID-19 situation the Commission has not met since 14 November 2019.

Also, decisions are currently sent by regular post. That may add another week or so to the overall timeline.

## Change in law?

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No, but amendments to FIR are pending.

It is not clear what they will ultimately look like and whether they will be enacted within the upcoming six months or not, but to the extent relevant to our clients, the amendments are expected to permit a government-controlled foreign investor to acquire control of a 'strategic' entity where its 'strategic' status stems from some technical, rather than substantive, grounds.

## Change in policy?

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None.

# 11 | Spain

## Timing (statutory)

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Review period ranges from 30 days to six months, depending on the sector.

30-working-day reviews for transactions qualifying for the simplified procedure; all other transactions are reviewed within a six-month period (and failure to obtain clearance within the six-month period implies prohibition).

## Timing/process changes?

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Changes to the foreign direct investment regime in Spain have set a general decision deadline of six months (30 days if the transaction benefits from the simplified procedure). This deadline is consistent with the prior regime.

## Change in law?

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Yes.

Broadening of sectors subject to FI review in line with the EU regulation on FI screening: mostly aimed at critical infrastructure, critical technology/dual-use items, the supply of critical inputs, sectors with access to sensitive information and communication media.

New rules have been introduced widening the scope to capture until 30 June 2021 certain investments made by EU/EFTA investors in Spanish listed companies or those with a Spanish value above €500M.

## Change in policy?

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Yes.

Wider scope of industries potentially subject to review and relevant consequences in case of non-compliance (eg the transaction is considered null and void until approval is obtained).

The foreign direct investment regime now captures also investments by EU/EFTA investors on a temporary basis.

# 12 | United Kingdom

## Timing (statutory)

Currently no specific legislative framework governing inbound foreign investment but the Government can intervene in transactions on the grounds of media plurality, financial stability, public health emergencies and national security (the latter ground will be superseded once the new national security regime comes into force). The issuance of a public intervention notice has important timing implications and certain parts of the process are not subject to statutory deadlines.

The proposed new national security regime (not yet in force) will allow acquirers to notify acquisitions for review. Once a (mandatory or voluntary) notification is accepted by the Government, 30 day initial review period followed by a 30 day in-depth review if the transaction raises national security concerns (extendable by an additional 45 working days or longer by agreement with the parties).

## Timing/process changes?

No timing and process changes due to COVID-19, but note the new processes and statutory timelines under the proposed new national security regime.

## Change in law?

Comprehensive legislative reform to introduce a new national security regime has been proposed and is expected to come into force in Spring 2021. The regime imposes a mandatory, suspensory notification obligation in relation to transactions in 17 strategic sectors (scope under consultation). In addition, the new Bill introduces a voluntary regime and grants the UK Government further 'call in' powers over a broad range of transactions in a significant overhaul of the existing UK regime.

Transactions may be called-in for national security review by the Government up to 6 months after the Secretary of State 'becomes aware' of the deal, provided this is done within 5 years of the acquisition taking place.

Transactions taking place after 12 November but before the new regime comes into force can be called in once the regime is in force unless the UK Government has issued a public interest intervention notice.

## Change in policy?

Introduction of the new UK national security regime indicates a very substantial policy shift in the UK approach to national security screening and increasing interventionism, including the introduction of a mandatory regime for the first time.

No specific policy change to date in relation to public interest interventions under the existing regime, however additional government interventions should be expected, particularly given the addition of the public health emergency ground.

Ongoing inquiry is being conducted into the role of the UK's Foreign and Commonwealth Office (FCO) in blocking foreign asset stripping of UK companies to ensure the FCO has a full role in future decisions to intervene.

# 13 | United States

## Timing (statutory)

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**Declaration:** 30-calendar-day statutory review period.

**Notice:** 45-calendar-day Phase 1 review period, plus the potential for a 45-day Phase 2 investigation period (which can be extended by 15 days in extraordinary circumstances). If, following the investigation period, CFIUS refers the transaction to the president for review, the president will make a decision within 15 days.

In addition, parties need to anticipate a pre-notification period with CFIUS prior to formal notification.

## Timing/process changes?

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No.

## Change in law?

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Not formally in response to COVID-19, as CFIUS already has the authority to consider the national security implications of FI in any sector if the investment results in foreign control, including any with COVID-19 implications.

As part of the legislative changes introduced through FIRRMA, CFIUS recently implemented regulations that changed the scope of critical technology transactions subject to a mandatory filing requirement by removing the industry-based test and instead focusing on export control requirements. CFIUS also implemented a filing fee of up to \$300,000 depending on transaction value.

FIRRMA has now been fully implemented and no major changes are expected in the coming year.

## Change in policy?

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CFIUS has increased its scrutiny of transactions involving critical infrastructure sectors (including healthcare) designated by the Department of Homeland Security as essential during the COVID-19 crisis, as well as transactions involving companies in the technology sector or that are in defense supply chains.

The expected change in U.S. administration is not likely to significantly change CFIUS's approach or focus. With a greater number of government employees now focused on CFIUS across the government and bipartisan support for a robust committee, including with respect to China, CFIUS will likely continue to be a material consideration for foreign investment into the United States.

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