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Fact Sheet: Final CFIUS Regulations Implementing FIRRMA

Background

The Committee on Foreign Investment in the United States (CFIUS) is an interagency committee chaired by the Secretary of the Treasury that is authorized to review certain transactions involving foreign investment in the United States to determine the effect of such transactions on the national security of the United States. On August 13, 2018, the Foreign Investment Risk Review Modernization Act of 2018 (FIRRMA) was enacted after receiving broad bipartisan support in Congress. FIRRMA strengthens and modernizes CFIUS to address national security concerns more effectively, including by broadening the authorities of the President and CFIUS regarding national security concerns arising from certain foreign non-controlling investments and real estate transactions that previously fell outside CFIUS’s jurisdiction.

Today, the Department of the Treasury issued final regulations, which will become effective on February 13, 2020, to comprehensively implement FIRRMA. Specifically, the regulations broaden the scope of transactions subject to CFIUS’s review and make certain changes to enable a more effective and efficient process. The Department of the Treasury previously published proposed versions of the regulations, on which it received comments from the public. The final regulations address many of the public comments.

This fact sheet provides a summary of key aspects of the regulations issued today. Additionally, in response to public comments, the regulations include a new definition for the term “principal place of business” as an interim rule. The Department of the Treasury is providing the public 30 days to comment on this definition.

The CFIUS regulations and related resources—including updated Frequently Asked Questions—can be found on the Department of the Treasury’s website: <http://www.treasury.gov/cfius>.

FIRRMA Provisions on Non-Controlling Investments

FIRRMA expands CFIUS’s jurisdiction beyond transactions that could result in foreign control of a U.S. business to also include non-controlling investments, direct or indirect, by a foreign person in certain U.S. businesses that affords the foreign person:

- access to any material nonpublic technical information in the possession of the U.S. business;
- membership or observer rights on, or the right to nominate an individual to a position on, the board of directors or equivalent governing body of the U.S. business; or
- any involvement, other than through voting of shares, in substantive decisionmaking of the U.S. business regarding—
 - the use, development, acquisition, safekeeping, or release of sensitive personal data of U.S. citizens maintained or collected by the U.S. business;
 - the use, development, acquisition, or release of critical technologies; or
 - the management, operation, manufacture, or supply of critical infrastructure.

This new authority applies only to non-controlling investments in U.S. businesses that:

- produce, design, test, manufacture, fabricate, or develop one or more **critical technologies**;
- own, operate, manufacture, supply, or service **critical infrastructure**; or
- maintain or collect **sensitive personal data** of U.S. citizens that may be exploited in a manner that threatens national security.

FIRRMA also requires that CFIUS prescribe regulations that further define the term “foreign person” in the context of non-controlling investments by specifying criteria to limit its applicability over certain categories of foreign persons.

Key Aspects of the Regulations Regarding “Covered Investments”

Types of investments covered: Non-controlling investments that afford a foreign person certain access, rights, or involvement in certain U.S. businesses (referred to as “covered investments”).

Largely a voluntary process: The process remains largely voluntary, where parties may file a notice or submit a short-form declaration notifying CFIUS of an investment in order to receive a potential “safe harbor” letter (which limits CFIUS from subsequently initiating a review of a transaction except in certain limited circumstances). In some circumstances, filing a declaration for a transaction is mandatory. In particular, the regulations implement FIRRMA’s mandatory declarations for covered transactions where a foreign government is acquiring a “substantial interest” in certain U.S. businesses, as discussed below. Additionally, the regulations require declarations for covered transactions involving certain U.S. businesses that produce, design, test, manufacture, fabricate, or develop one or more critical technologies.

U.S. businesses covered: The new provisions on covered investments apply only to investments in U.S. businesses involved in specified ways with critical technologies, critical infrastructure, or sensitive personal data—referred to as “TID U.S. businesses” for technology, infrastructure, and data.

- **Critical technologies:** CFIUS may review certain transactions involving U.S. businesses that produce, design, test, manufacture, fabricate, or develop one or more critical technologies. “Critical technologies” is defined to include certain items subject to export controls and other existing regulatory schemes, as well as emerging and foundational technologies controlled pursuant to the Export Control Reform Act of 2018.
- **Critical infrastructure:** CFIUS may review certain transactions involving U.S. businesses that perform specified functions—owning, operating, manufacturing, supplying, or servicing—with respect to critical infrastructure across subsectors such as telecommunications, utilities, energy, and transportation, each as identified in an appendix to the regulations.
- **Sensitive personal data:** CFIUS may review certain transactions involving U.S. businesses that maintain or collect sensitive personal data of U.S. citizens that may be exploited in a manner that threatens national security. “Sensitive personal data” is defined to include ten categories of data maintained or collected by U.S. businesses that (i) target or tailor products or services to certain populations, including U.S. military members and employees of federal agencies with national security responsibilities, (ii) collect or maintain such data on at least one million individuals, or (iii) have a demonstrated business objective to maintain or collect such data on greater than one million individuals and such data is an integrated part of the U.S. business’s primary products or services. The categories of data include types of financial, geolocation, and health data, among others.

Foreign person and excepted investor: The regulations create an exception from covered investments for investments by certain foreign persons defined as “excepted investors” based on their ties to certain countries identified as “excepted foreign states,” and their compliance with certain laws, orders, and regulations. Importantly, investments from all foreign persons remain subject to CFIUS’s jurisdiction over transactions that could result in foreign control of a U.S. business.

FIRRMA Provisions on Real Estate Transactions

In FIRRMA Congress authorized CFIUS to review “the purchase or lease by, or a concession to, a foreign person of private or public real estate that”

- “is, is located within, or will function as part of, an air or maritime port...”
- “is in close proximity to a United States military installation or another facility or property of the United States Government that is sensitive for reasons relating to national security;”
- “could reasonably provide the foreign person the ability to collect intelligence on activities being conducted at such an installation, facility, or property; or”
- “could otherwise expose national security activities at such an installation, facility, or property to the risk of foreign surveillance.”

This authority does not extend to “a single ‘housing unit,’” and also does not apply to “real estate in ‘urbanized areas’ . . . *except as otherwise prescribed by [CFIUS] in regulations in consultation with the Secretary of Defense.*” (emphasis added)

FIRRMA directs CFIUS to “prescribe regulations to ensure that the term ‘close proximity’ refers only to a distance or distances within which the purchase, lease, or concession of real estate could pose a national security risk.”

FIRRMA also requires that CFIUS prescribe regulations that further define the term “foreign person” for real estate transactions by specifying criteria to limit its applicability over certain categories of foreign persons.

Key Aspects of the Regulations Regarding Real Estate Transactions

Types of transactions covered: The purchase or lease by, or a concession to, a foreign person of certain real estate in the United States, is covered if it affords the foreign person three or more of the following property rights: to physically access, to exclude others from physically accessing, to improve or develop, or, to affix structures or objects (referred to as “covered real estate transactions”).

Voluntary process: There is no mandatory filing requirement for covered real estate transactions. Parties may file a notice or submit a short-form declaration notifying CFIUS of a real estate transaction in order to potentially qualify for a “safe harbor” letter (which limits CFIUS from subsequently initiating a review of the transaction except in certain limited circumstances).

Covered sites: Coverage is focused on transactions in and/or around specific airports, maritime ports, and military installations. The relevant military installations are listed by name and location in an appendix to the regulations. The relevant airports and maritime ports are on lists published by the Department of Transportation and identified in the regulations.

Locations around covered sites: The regulations focus on:

- real estate that is, is within, or will function as part of an air or maritime port;
- real estate that is within “close proximity” (defined as one mile) of certain specified U.S. military installations;
- real estate that is within the “extended range” (defined as between one mile and 100 miles) of certain military installations; and
- real estate that is within certain geographic areas associated with missile fields and off-shore ranges.

Foreign person and excepted real estate investor: The regulations create an exception from covered real estate transactions for transactions by certain foreign persons defined as “excepted real estate investors” based on their ties to certain countries identified as “excepted real estate foreign states,” and their compliance with certain laws, orders, and regulations.

Urbanized areas and urban clusters: The regulations create exceptions for real estate transactions in an “urbanized area” or “urban cluster,” as defined by the Census Bureau, except those relating to relevant ports and those in “close proximity” to certain military installations.

Other excepted real estate transactions: The regulations create exceptions for the following, in addition to other transactions:

- the purchase, lease, or concession of a single “housing unit,” as defined by the Census Bureau;
- the lease or concession of real estate in airports and maritime ports only where for the purpose of retail sales; and
- the purchase, lease, or concession of certain commercial space in a multi-unit commercial building.

Interaction with other CFIUS regulations: Real estate transactions involving U.S. businesses and that are subject to CFIUS’s regulations regarding control transactions and covered investments should be analyzed under those regulations (discussed above).

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