



U.S. Department of the Treasury Office of Public Affairs

Date: January 13, 2020
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Frequently Asked Questions on Final CFIUS Regulations Implementing FIRRMA

General

Why is the Department of the Treasury issuing these regulations?

The two rules published in the Federal Register on January 13, 2020, finalize the regulations relating to the Committee on Foreign Investment in the United States (CFIUS). The Department of the Treasury previously published proposed versions of the regulations, on which it received comments from the public. The regulations implement the Foreign Investment Risk Review Modernization Act of 2018 (FIRRMA), which was enacted with bipartisan support on August 13, 2018. FIRRMA strengthens and modernizes CFIUS, an interagency committee authorized to review certain transactions involving foreign investment in the United States, in order to determine the effect of such transactions on the national security of the United States. The regulations implement changes that FIRRMA made to CFIUS's jurisdiction and review process.

The Department of the Treasury published the regulations in two parts:

- *Provisions Pertaining to Certain Investments in the United States by Foreign Persons:* These regulations replace the current regulations found at part 800 of title 31 of the Code of Federal Regulations (C.F.R.) and implement the changes that FIRRMA made to CFIUS's jurisdiction and process with respect to transactions that could result in foreign control of any U.S. business, as well as certain non-controlling "covered investments" that afford a foreign person certain access, rights, or involvement in certain types of U.S. businesses.
- *Provisions Pertaining to Certain Transactions by Foreign Persons Involving Real Estate in the United States:* These regulations establish a new part 802 of title 31 of the C.F.R.

and implement the authority FIRREA provided to CFIUS to review the purchase or lease by, or concession to, a foreign person of certain real estate in the United States.

Additionally, incorporated into both rules is an interim rule on the new definition for “principal place of business,” on which the Department of the Treasury is seeking public comments.

When do these regulations become effective?

The two rules become effective on February 13, 2020. The interim rule that defines “principal place of business” also becomes effective on February 13, 2020. The Department of the Treasury is seeking public comments on this definition, and it may be amended based upon comments received.

Is the United States still open to foreign investment?

The United States welcomes foreign investment and remains one of the most open countries in the world to foreign investors. The United States is also one of the best places to invest, having adopted strong economic growth policies and maintained a strong innovation ecosystem and highly developed market. The specificity provided in the regulations gives clarity to the business and investment communities with respect to the types of transactions that are covered by the Committee’s new authority under FIRREA. The CFIUS process, as modernized and strengthened by FIRREA and these regulations, should enhance confidence in the nation’s longstanding open investment policy.

How do the final regulations differ from the proposed regulations issued in September 2019?

The Department of the Treasury published proposed versions of the regulations in September 2019, and received comments from the public. The Department of the Treasury considered each comment submitted during the public comment period and made a number of revisions in response to the comments. The preambles to the final rules contain summaries of these changes.

In response to written comments, the final rules update a number of provisions including:

- adding a definition for “principal place of business;”
- modifying certain criteria to qualify as an “excepted investor;”
- clarifying the application of the “incremental acquisition rule;”
- adjusting the treatment of genetic data within the definition of “sensitive personal data;”
- refining the application to investment funds, including by amending the definition of “substantial interest;”
- modifying the exceptions for certain real estate transactions in airports and maritime ports; and
- refining the geographic coverage relating to certain military installations on appendix A to the real estate regulations.

The rules also include a number of additional illustrative examples and provide clarifying edits in the text of the provisions.

Finally, the rule amending the part 800 regulations incorporates many of the provisions of the pilot program regarding critical technologies (published in October 2018), including the

mandatory declaration requirement for certain covered transactions involving certain U.S. businesses that produce, design, test, manufacture, fabricate, or develop one or more critical technologies.

Does the Department of the Treasury anticipate that it will make additional revisions to the regulations in the future or issue other rules?

Given the specificity of certain provisions of the rule, the Department of the Treasury anticipates that it will periodically review, and when necessary amend, the regulations to address changes in technology and data use, as well as the evolving national security landscape more generally.

Additionally, as noted in the final rules, FIRRMA also authorizes the Committee to assess and collect fees with respect to covered transactions under both rules for which a written notice is filed. The Department of the Treasury will publish a separate proposed rule implementing the Committee’s fee authority at a later date.

As noted in the rule amending the part 800 regulations, the Department of the Treasury anticipates issuing a notice of proposed rulemaking that would revise the mandatory declaration requirement for certain covered transactions involving certain U.S. businesses that produce, design, test, manufacture, fabricate, or develop one or more critical technologies.

Interim Rule on Definition of “Principal Place of Business”

Why is the Department of the Treasury treating the definition of “principal place of business” as an interim rule?

The proposed rules that were issued in September 2019 included provisions that use the term “principal place of business.” The Department of the Treasury received comments on those provisions, including requests to add a definition for the term. In response to these comments, a definition for “principal place of business” has been included, further clarifying which entities are foreign entities and therefore foreign persons subject to CFIUS jurisdiction. This definition will become effective with the rest of the rule. The Department of the Treasury has determined that it would benefit the public and the Committee to receive comments from the public on this definition before it is made final.

When does the public comment period on the interim rule begin and end?

The Department of the Treasury is providing an immediate opportunity for public comment on the definition of “principal place of business.” The comment period will be open for 30 days.

Who may submit comments during the public comment period and how?

Interested members of the public may comment on the proposed regulations. Comments may be submitted electronically through the Federal government’s eRulemaking Portal at <https://www.regulations.gov> or mailed to: U.S. Department of the Treasury, Attention: Laura Black, Director of Investment Security Policy and International Relations, 1500 Pennsylvania Avenue, NW, Washington, DC 20220. All comments received, including attachments and other supporting material, will be part of the public record and subject to public disclosure.

Control Transactions

Do the regulations change CFIUS’s jurisdiction over transactions that could result in control of a U.S. business by a foreign person?

No. CFIUS maintains its authority to review the potential national security effects of any transaction that could result in foreign control of any U.S. business. The regulations expand CFIUS’s jurisdiction over certain “non-controlling” transactions and certain real estate transactions.

Country Specification

Do the regulations treat investors from certain countries differently?

FIRRMA does not prohibit investments from any country, and investments from all foreign persons remain subject to CFIUS jurisdiction over transactions that could result in foreign control of a U.S. business. As required by FIRRMA, however, the regulations limit the application of CFIUS’s jurisdiction over non-controlling “covered investments” and certain real estate transactions by certain foreign persons, defined as “excepted investors,” from certain “excepted foreign states.” Any such eligible investor and foreign state must meet specific criteria to qualify for this status.

How did the Department of the Treasury determine the eligible foreign states under the regulations? Will the list be revised in the future?

CFIUS has identified Australia, Canada, and the United Kingdom as the initial excepted foreign states and excepted real estate foreign states. CFIUS identified these countries due to certain aspects of their robust intelligence-sharing and defense industrial base integration mechanisms with the United States. Because this is a new concept with potentially significant implications for U.S. national security, CFIUS is initially identifying a limited number of foreign states and may expand the list in the future. Note that in order for each of these countries to remain an excepted foreign state and an excepted real estate foreign state after February 13, 2022, the Committee must make a determination regarding an eligible foreign state’s national security-based foreign investment review processes and bilateral cooperation with the United States on national security-based investment reviews.

How long does an “excepted foreign state” and “excepted real estate foreign state” have to meet the factors that the Committee will consider when making a determination regarding an eligible foreign state’s national security-based foreign investment review processes and bilateral cooperation?

As detailed in the regulations, from February 13, 2020 to February 13, 2022, the countries identified as eligible foreign states are considered “excepted foreign states” and “excepted real estate foreign states.” In order for each of these countries to remain excepted after the end of the two-year delayed effectiveness period (*i.e.*, February 13, 2022), the Committee must make a determination under § 800.1001 or § 802.1001, as applicable. This two-year period is intended to provide these initial eligible foreign states time to ensure that their national security-based foreign investment review processes and bilateral cooperation with the United States on national security-based investment review meet the requirements under § 800.1001 and § 802.1001. The

Committee takes no position on whether the foreign states currently meet the determination factors discussed above.

What factors will CFIUS consider in making a determination regarding an eligible foreign state’s national security-based foreign investment review processes and bilateral cooperation with the United States on national security-based investment review?

A list of factors will be posted on the Department of the Treasury’s Website outlining what the Committee will consider when making a determination regarding an eligible foreign state’s national security-based foreign investment review processes and bilateral cooperation with the United States on national security-based investment reviews.

Will every foreign person based in an “excepted foreign state” or “excepted real estate foreign state” qualify as an “excepted investor” or “excepted real estate investor” as applicable?

Not necessarily. The regulations identify criteria that a foreign person must meet in order to qualify as an “excepted investor” or “excepted real estate investor” regarding, for example, its principal place of business, place of incorporation, and ownership. The regulations also identify criteria that would preclude a foreign person from qualifying as an excepted investor, such as non-compliance with the law.

Will “excepted investors” remain subject to CFIUS jurisdiction for control transactions?

Yes. CFIUS retains the authority to review a transaction that could result in foreign control of any U.S. business, regardless of whether the foreign person is an “excepted investor.”

Sensitive Personal Data

Is personally identifiable information (PII) the same as sensitive personal data under the regulations?

“Sensitive personal data” is defined to include ten specified categories of data that may be maintained or collected by U.S. businesses. The categories of data include types of financial, geolocation, and health data, among others. Moreover, a U.S. business that maintains or collects these categories of data on U.S. citizens will only be considered to have sensitive personal data to the extent it (i) targets or tailors products or services to certain populations, including U.S. military members and employees of federal agencies with national security responsibilities, (ii) collects or maintains such data on at least one million individuals, or (iii) has 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. Genetic test information is also included in the definition regardless of whether it meets (i), (ii), or (iii).

Declarations

For what type of transactions can parties submit a declaration?

The regulations provide a short-form declaration as an alternative to CFIUS’s traditional voluntary notice. Declarations allow parties to submit basic information regarding a transaction that should generally not exceed five pages in length. The Department of the Treasury will

accept declarations submitted by parties using a standard template form, which will be available on the Department of the Treasury’s Website by the time the final regulations become effective.

In certain circumstances filing a declaration for a transaction is mandatory. In particular, the regulations implement FIRRTA’s requirement that certain covered transactions where a foreign government is acquiring a “substantial interest” in specified types of U.S. businesses are subject to a mandatory declaration. Additionally, the regulations require the filing of a declaration for covered transactions involving certain U.S. businesses that produce, design, test, manufacture, fabricate, or develop one or more critical technologies. Parties may choose to file a notice instead of a declaration.

How do the regulations address the pilot program on critical technologies that became effective in November 2018?

The pilot program on critical technologies remains in effect through February 12, 2020. Starting on February 13, 2020, parties should analyze their transactions involving U.S. businesses with critical technologies under the regulations for part 800.

The rule published for part 800 incorporates many of the provisions of the pilot program on critical technologies, including the mandatory filing requirement for certain covered transactions involving critical technologies. As noted in the regulations, the Department of the Treasury anticipates issuing a notice of proposed rulemaking that would revise the mandatory declaration requirement regarding critical technology from one based upon North American Industry Classification System (NAICS) codes to one based upon export control licensing requirements.

Real Estate

In what locations are real estate transactions covered by the regulations on real estate?

The regulations on real estate are generally structured around specific sites—certain airports, maritime ports, and military installations—and specific geographic areas in and around those sites. Other facilities or properties of the U.S. Government may in the future be included in the list of sites identified in the rule.

Will the Department of the Treasury publish a tool to help the public interpret the scope of the new real estate regulations?

The Department of the Treasury anticipates making available a Web-based tool to help the public understand the geographic coverage of the rule. In the meantime, the Census Bureau within the Department of Commerce maintains a Web-based system, TIGERweb, which allows users to select features (e.g., military installations, urbanized areas, and urban clusters) and view such attributes on a map. Additionally, the Department of Transportation publishes the relevant lists of airports and maritime ports referenced in the rule. Finally, the Bureau of Ocean Energy Management maintains Web-based resources which should be helpful to parties with transactions in or near the offshore areas.

Are all real estate transactions covered if they fall within the specific geographic areas described in the regulations?

No. The regulations on real estate transactions exclude from CFIUS’s jurisdiction certain transactions based on characteristics of the foreign person, the transaction, and the real estate. The regulations include a section on “excepted real estate transactions” and exclude the following, subject to certain conditions:

- real estate transactions involving an excepted real estate investor;
- real estate transactions that are part of a “covered transaction” under the part 800 regulations;
- real estate transactions in an “urbanized area” or “urban cluster,” as defined by the Census Bureau, except those relating to “covered ports” and those in “close proximity” to certain military installations;
- 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 for the purpose of retail sales;
- the lease or concession of real estate in airports and maritime ports involving a foreign air carrier with a security program accepted by the Transportation Security Administration;
- the purchase, lease, or concession of certain commercial space in a multi-unit commercial building; and
- transactions involving real estate owned by Alaska Natives or held in trust by the United States for certain native populations.

Do the regulations cover the sale or lease of residential property?

FIRRMA excludes from CFIUS’s jurisdiction the purchase or lease by, or concession to, a foreign person of a single “housing unit,” as defined by the Census Bureau. Given that many single housing units are conveyed with adjoining land, the regulations on real estate also exclude any fixtures and adjacent land *but only to the extent* they are incidental to the intended use of the real estate as a housing unit. Fixtures and land may be considered incidental if their size and nature is common for similar single housing units in the locality in which the unit is located. If the incidental fixtures or land is not common for other similar housing units in the locality, the exception would apply only to the housing unit itself.

Are all real estate transactions in urbanized areas excluded from the regulations?

No, in certain locations, real estate transactions in urbanized areas are within the scope of the regulations. Specifically, transactions involving real estate that is in “close proximity” (one mile) to a military installation listed in part 1 or part 2 of appendix A is covered, as is real estate that is, is located within, or will function as part of a “covered port.”

Where can I find more information on urbanized areas and urban clusters?

Information on urbanized areas and urban clusters can be found on the Census Bureau Website, including through a Web-based system, TIGERweb, which allows users to select features such as urbanized areas and urban clusters, and view such attributes on a map. See <https://tigerweb.geo.census.gov/tigerweb/>.

Is there a mandatory notification requirement for real estate transactions?

No. The transactions described in the regulations on real estate are not subject to a mandatory declaration requirement. As a general matter, parties to a covered real estate transaction will decide whether to file a notice or submit a declaration to CFIUS.

Filing Fees

Do the regulations establish filing fees pursuant to FIRRMA?

No. The Department of the Treasury will publish separate proposed regulations regarding filing fees at a later date.

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