



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

Date: September 17, 2019
Contact: Treasury Public Affairs, (202) 622-2960

Frequently Asked Questions on the Proposed Regulations Implementing FIRRMA

General

Why is Treasury issuing these proposed regulations?

The proposed regulations would 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 the Committee on Foreign Investment in the United States (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 proposed regulations would implement the changes that FIRRMA made to CFIUS's jurisdiction and review process.

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

- *Provisions Pertaining to Certain Investments in the United States by Foreign Persons:* These proposed regulations would replace the current regulations found at part 800 of title 31 of the Code of Federal Regulations (31 C.F.R. part 800) 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 "other 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 proposed regulations would establish a new part 802 of title 31 of the C.F.R. and implement the authority FIRRMA provided to CFIUS to review the purchase or lease by, or concession to, a foreign person of certain real estate in the United States.

When will Treasury seek to publish final regulations?

The Department of the Treasury is seeking public comment on the proposed regulations until October 17, 2019. Comments submitted on the proposed regulations will inform the development of the final regulations to implement FIRRMA. FIRRMA requires that final regulations become effective no later than February 13, 2020.

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 CFIUS process, as modernized and strengthened by FIRRMA, should enhance confidence in the nation's longstanding open investment policy by continuing to restrict only those foreign investments that pose national security concerns.

Public Comment Period

When does the public comment period begin and end?

Treasury is providing an immediate opportunity for public comment on the proposed regulations. The comment period opens on September 17, 2019, and concludes 30 days later on October 17, 2019.

Who may submit comments during the public comment period?

Interested members of the public may comment on the proposed regulations. Comments will be posted publicly at <https://www.regulations.gov>.

How do parties submit comments?

Interested persons may submit comments electronically through the Federal government's eRulemaking Portal at <https://www.regulations.gov> or by mailing comments to: U.S. Department of the Treasury, Attention: Thomas Feddo, Assistant Secretary for Investment Security, 1500 Pennsylvania Avenue, NW, Washington, DC 20220.

Is there a process for stakeholders to engage with Treasury on the proposed regulations?

Yes. The Department of the Treasury plans to hold one or more teleconferences on the proposed regulations. Details will be provided on the Department of the Treasury's website at: <https://home.treasury.gov/policy-issues/international/the-committee-on-foreign-investment-in-the-united-states-cfius>

Control Transactions

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

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

Country Specification

Do the proposed regulations include a “white list” or “black list” of certain countries?

FIRRMA does not prohibit investments from any country, and investments from all foreign persons remain subject to CFIUS jurisdiction over control transactions that could result in foreign control of a U.S. business. As required by FIRRMA, however, the proposed regulations would 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 strict criteria to qualify for this excepted status.

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

Yes. CFIUS retains 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” or an “excepted real estate investor.”

Will every foreign person based in an “excepted foreign state” be deemed an “excepted investor”?

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

What factors will CFIUS consider in making a determination for an “excepted foreign state”?

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 on whether a foreign state has established and is effectively utilizing a robust process to assess foreign investments for national security risks and to facilitate coordination with the United States on matters relating to investment security.

Declarations

For what type of transactions can parties submit a declaration?

The proposed regulations provide a short-form declaration as an alternative to CFIUS’s traditional voluntary notice. Declarations will 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, FIRRMA creates a mandatory declaration requirement for certain covered transactions where a foreign government has a substantial interest. Additionally, FIRRMA authorizes CFIUS to

mandate through regulations 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.

How do the proposed regulations address the ongoing pilot program on critical technologies?

The proposed regulations do not at this time modify the regulations currently at 31 C.F.R. part 801, which set forth the scope of, and procedures for, a pilot program to review certain transactions involving foreign persons and critical technologies. CFIUS continues to evaluate the pilot program on critical technologies, and the Department of the Treasury welcomes comments on the retention of the mandatory declarations for certain transactions involving critical technologies.

Real Estate

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

The proposed regulations on real estate are generally structured around specific sites—certain airports, maritime ports, military installations, and other facilities and properties of the U.S. Government—and specific geographic areas in and/or around those sites. To assist the public in identifying the specific sites, the proposed regulations focus on a subset of airports and maritime ports that meet certain criteria and for which the Department of Transportation publishes information, and the relevant military installations are provided in an appendix to the proposed regulations.

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

No. The proposed regulations on real estate would exclude from CFIUS’s jurisdiction certain transactions based on the identity of the foreign person or the type of transaction. The proposed regulations describe the transactions that are excluded in the definition of “excepted real estate transaction” at section 802.217.

Do the proposed 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 proposed regulations on real estate also exclude any fixtures and adjacent land *but only if* they are incidental to the intended use of the real estate as a housing unit. Fixtures and land will 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 real estate 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 proposed regulations?

No, in certain cases, real estate transactions in urbanized areas are within the scope of the proposed regulations.

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 the map (using the “urban areas” filter) at <https://tigerweb.geo.census.gov/tigerweb/>.

Is there a mandatory notification requirement for real estate transactions?

No. The transactions described in the proposed rule 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 voluntarily or submit a declaration to CFIUS.

Filing Fees

Do the proposed regulations establish filing fees pursuant to FIRREA?

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

###