



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

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Fact Sheet: Proposed CFIUS Regulations to Implement 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 signed into law 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 proposed regulations that would comprehensively implement FIRRMA. Treasury is providing an immediate opportunity for public comment on the proposed regulations. The comment period opens today and concludes 30 days later on October 17, 2019. Comments 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.

This fact sheet describes key aspects of the proposed regulations issued today. The full text of the proposed regulations and frequently asked questions—including information on how to submit comments—can be found on the Department of the Treasury's website:

<https://home.treasury.gov/policy-issues/international/the-committee-on-foreign-investment-in-the-united-states-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 a non-controlling investment, direct or indirect, by a foreign person 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 the board of directors or equivalent governing body of the U.S. business or the right to nominate an individual to a position on the board of directors or equivalent governing body; 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 only applies to a non-controlling investment in a U.S. business that:

- produces, designs, tests, manufactures, fabricates, or develops one or more **critical technologies**;
- owns, operates, manufactures, supplies, or services **critical infrastructure**; or
- maintains or collects **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 Proposed 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: Process remains largely voluntary, where parties may file a notice or submit a short-form declaration notifying CFIUS of a covered investment in order to receive a potential “safe harbor” letter (after which CFIUS does not initiate a review of a transaction except in certain limited circumstances). In some circumstances, filing a declaration for a transaction is mandatory. In particular, FIRRMA creates a mandatory declaration requirement for specified covered transactions where a foreign government has a “substantial interest”. Additionally, FIRRMA authorizes CFIUS to mandate 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 only apply 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 transactions related to U.S. businesses that 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 transactions related to 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 proposed regulations.
- **Sensitive personal data:** CFIUS may review transactions related to 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 sensitive populations, including U.S. military members and employees of federal agencies involved in national security, (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. Genetic information is also included in the definition regardless of whether it meets (i), (ii), or (iii).

Foreign person and excepted investor: The regulations create an exception from “covered investments” for 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. The regulations do not except these persons from control transactions previously subject to CFIUS jurisdiction; 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.”

Pursuant to FIRRMA, this authority does not extend to “a single ‘housing unit.’” This authority 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 Proposed 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 that affords the foreign person three or more of the following property rights: to physically access; to exclude; to improve or develop; or, to affix structures or objects.

Voluntary process: There is no mandatory filing requirement for real estate transactions. Parties may file a notice or submit a short-form declaration notifying CFIUS of a covered real estate transaction in order to potentially qualify for a “safe harbor” letter (which prevents CFIUS from 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 proposed regulations. The relevant airports and maritime ports are on lists published by the Department of Transportation.

Locations around covered sites: The proposed 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 exceptions from coverage applicable for real estate 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 from coverage 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: Exceptions from coverage for the following, in addition to other transactions include:

- The purchase, lease, or concession of a single “housing unit,” as defined by the Census Bureau; and
- Transactions involving certain commercial office space in a multi-unit commercial office building.

Interaction with other CFIUS regulations: Real estate transactions that are also subject to CFIUS’s existing and proposed regulations regarding control transactions and non-controlling investments involving U.S. businesses should be analyzed under those regulations.

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