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U.S. Department of the Treasury
1500 Pennsylvania Avenue, NW
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Summary of Public Stakeholder Briefings on Proposed Regulations Implementing FIRRMA by Senior Treasury Officials¹

Friday, September 27, 2019

The public briefings were held via teleconference.

10:00 AM EDT

Provisions Pertaining to Certain Investments in the United States by Foreign Persons (31 C.F.R. part 800)

Department of Treasury Participants

Thomas Feddo, Assistant Secretary for Investment Security, Office of International Affairs
Brian Morgenstern, Deputy Assistant Secretary for External Affairs, Office of Public Affairs

¹ This summary of the public stakeholder briefings is provided for public reference. It is not intended to be a verbatim transcript of the teleconferences.

BRIAN MORGENSTERN:

Good morning and thank you for joining the call to discuss the proposed regulations pertaining to certain control transactions and covered investments. My name is Brian Morgenstern, Deputy Assistant Secretary of the Treasury for External Affairs here in the Office of Public Affairs. I am joined by our CFIUS team who has done a tremendous amount of work with their interagency colleagues to get these regulations out. They'll be able to answer many of your questions today. Before we do that, I'd like to begin with a few ground rules. We are required to ensure a meaningful opportunity for public comment on the proposed rules and to give comments due consideration as we work to finalize the rules after the comment period closes. With that in mind, we encourage all interested parties to submit comments through [regulations.gov](https://www.regulations.gov) by the deadline of October 17.

To ensure a fair process, we cannot give any individuals or groups special access to information that is not broadly available. That includes our rationales that we may have had for making various decisions. Accordingly, today we will provide an overview of the proposed regulations, and we will have to stick to the content of the rules and the preamble. I would add that a transcript of this call, including your comments or questions, will be made publicly available on the Treasury website.

Now we will proceed as follows: you will hear prepared remarks from our CFIUS team leader Assistant Secretary for Investment Security Tom Feddo. Following his remarks, I will provide some comments that are broadly applicable based on the feedback we received so far. Then, Tom and I will address several of the more specific questions that have been submitted to us in advance of this call by members of the public. I want to thank you for submitting those ahead of time so we could prepare thoughtful answers for you. Finally, if we have time remaining at the end of the call, we will be pleased to take questions live on a first-come, first-served basis. We ask that you clearly identify yourself and your affiliation. With that, I am now pleased to introduce our newly-confirmed and sworn in Assistant Secretary of the Treasury for Investment Security Tom Feddo. Tom, congratulations on your confirmation, and the floor is yours.

THOMAS FEDDO:

Thanks, Brian. Good morning, and thank you everyone for joining this call. I'd like to start by providing some background on CFIUS, and then I'll discuss the proposed regulations.

Last week, the Treasury Department, as chair of CFIUS, released two proposed regulations to implement the Foreign Investment Risk Review Modernization Act of 2018, referred to as FIRREA. The regulations are the product of extensive work by the Treasury Department, all of the CFIUS member agencies, and other relevant government stakeholders. They were drafted with the purpose of protecting U.S. national security and ensuring clarity and predictability for those affected.

Public participation through the comment process is very important to informing the development of the final regulations. The Treasury Department welcomes and appreciates input from all stakeholders and looks forward to receiving comments on a range of topics covered by

the proposed regulations. I also want to note that we have made information available on Treasury's CFIUS web site. If you have not already visited the web site, please consider doing so.

FIRRMA was the product of the Trump Administration and Congress working together in a bipartisan manner, recognizing that in recent years both the national security landscape and the nature of the investments that pose the greatest national security risks have changed. FIRRMA resulted from concerns that some vulnerabilities could be exploited through transactions that fell outside CFIUS's traditional jurisdiction. FIRRMA strengthens and modernizes CFIUS by, among other things, allowing it to review certain transactions that were not previously subject to its jurisdiction.

Before discussing part 800 in detail, I'll emphasize that foreign direct investment is vital to the U.S. economy—among other things, it supports innovation, job creation, and economic growth. We anticipate that the CFIUS process, as modernized and strengthened by FIRRMA and these regulations, will enhance confidence in our longstanding open investment policy. The United States welcomes and supports foreign investment, and remains open for business.

On this point, I'll also note that CFIUS has been running more efficiently, ensuring that safe investments can be made efficiently and expeditiously in the United States. The proof of this is in the data. Over twice as many cases are clearing during the first stage of review as compared to just a year ago. Where there are no national security risks, we are notifying parties promptly, so that they can proceed with their transactions.

With respect to the regulations, I'll note that they do not change CFIUS's traditional authority to review any transaction that could result in a foreign person's control of a U.S. business. Nor does it change the fact that CFIUS remains solely focused on the national security risks that arise from a given transaction.

What is new under FIRRMA and what will be implemented by these regulations is the authority to review certain investments that are not passive, but that don't rise to the level of control, and some kinds of real estate transactions.

FIRRMA provides CFIUS the authority to review some non-controlling "other investments" made by foreign persons in certain U.S. businesses. These are referred to as "covered investments" in the regulations. For an investment to be a covered investment, it must be a non-controlling investment by a foreign person other than an excepted investor in a certain type of U.S. business that we refer to as a "TID U.S. business," and that affords the foreign person access, rights, or involvement in that U.S. business.

The excepted investor definition has raised a number of questions, so I want to spend some time on it. I'll start by emphasizing that the proposed regulations do not target any particular country. As it has throughout its history, CFIUS will continue to review each transaction according to its particular facts and circumstances. The regulations do, however, except certain foreign persons from CFIUS's new jurisdiction over covered investments, and list specific criteria that must be met in order for a foreign person to qualify as an excepted investor, including their ties to

specified excepted foreign states. A foreign state will be an excepted foreign state if two criteria are met: first, it is identified on a list of eligible foreign states that Treasury publishes at a future date, and second, CFIUS determines that the state has established and is effectively utilizing a robust investment review process.

CFIUS intends to delay the effectiveness of the second requirement, that is, to provide a grace period, to allow the eligible foreign states time to enhance their foreign investment review processes. Treasury will publicly identify a set of excepted foreign states no later than February of next year when the final rule must be in place.

To remain excepted, those identified states will have two years to meet the requirement for a robust national security review regime. To clear any confusion, the initial excepted list will not be a null set. In addition, CFIUS will continue considering expanding the list down the road.

I'll now turn to the three types of TID U.S. businesses. TID refers, of course, to Technology Infrastructure and Data. First, critical technology. The proposed rule implements the definition of critical technology from FIRRMA and covers items that are subject to export controls or other regulations, as well as emerging and foundational technologies that will be identified in a separate rulemaking by the Commerce Department under the Export Control Reform Act.

Treasury established a pilot program last fall, which mandates declarations for certain transactions involving critical technology in 27 industries. The pilot was preceded by a public comment period, as many of you know, and CFIUS continues to consider those comments. The pilot program will end no later than the effective date of the final regulations. However, CFIUS is considering whether to include the mandatory filing requirement related to critical technology in the final regulations, and we welcome further comments.

Second, critical infrastructure. FIRRMA requires the implementing regulations limit the application of covered investments to a subset of critical infrastructure. The proposed regulations were carefully and precisely drafted to identify certain infrastructure and certain functions that, if performed by a U.S. business with respect to that infrastructure, results in the U.S. business being a TID U.S. business. This detail, which is included in the appendix to the draft rule, provides clarity to the public.

Third, a TID U.S. business includes any U.S. business that maintains or collects, directly or indirectly, sensitive personal data of U.S. citizens that may be exploited in a manner that threatens national security. The definition of sensitive personal data in the regulations considers both the sensitivity of the data itself, as well as the sensitivity of the population about whom the data is maintained or collected. This part of the regulations is also intended to provide as much clarity as possible to the public.

Finally, regarding the CFIUS process, I'd like to highlight that CFIUS will remain largely voluntary. Transaction parties can choose to notify CFIUS of the transaction in order to receive safe harbor. But, in certain circumstances, filing will be mandatory. I already mentioned the pilot program mandatory declarations relating to critical technology, which, as I said, remains under consideration. In addition, the regulations implement FIRRMA's requirement for mandatory

declarations for transactions that result in the acquisition of a “substantial interest” in a TID U.S. business by a foreign person in which a foreign government has a substantial interest. Those thresholds are set by the rule at 25 percent and 49 percent, respectively.

MORGENSTERN:

Thanks, Tom. We will now transition to the Q&A portion of our briefing. Before we get to the specific questions for which we’ve prepared answers, I’ll give a few overarching clarifications of broad applicability. First, we received a few comments/questions on concepts or ideas that aren’t contained in the rule, including asking whether they were considered by Treasury or the Committee.

As we previously noted on the Treasury web site and previously on this call, Treasury’s discussion is limited here to the content of the rule, and we can’t venture beyond the content of the preamble and regulations, including to discuss our rationale for various decisions, such as what was left out of the rule. We appreciate that the public may be interested in other ideas or concepts, and for that we welcome comments. So again, please submit your comments through [regulations.gov](https://www.regulations.gov) by October 17.

Second, we also received a few questions and comments on whether Treasury will offer any further guidance or clarification on, among other things, certain definitions or examples in the rule. To the extent that you have thoughts or suggestions for improving the rule, and the definitions or examples, we welcome comments. Please submit those comments through [regulations.gov](https://www.regulations.gov) by October 17.

Third, we also received a few comments/questions asking for Treasury’s view on hypothetical scenarios. Because each CFIUS case turns on its individual facts and circumstances, we are not able to address hypothetical scenarios in this session. However again, if you have a general comment please submit those to [regulations.gov](https://www.regulations.gov) by October 17.

Fourth, we received a question on the discrepancy between the deadlines for comments for Part 800 and Part 802. This is important. There was a printing error in the deadlines when the proposed rules were published and we’re working with the Federal Register to get this corrected. The correct deadline for both Part 800 and Part 802 is October 17.

Finally, we received a question regarding comments on the critical technology pilot program. As Tom mentioned, we received comments last year regarding the pilot program and we will address those in the final rule, along with any additional comments that we receive during this open comment period.

Now, with that, at this point Tom and I will discuss and address some of the questions that were submitted in advance and for which we were able to provide prepared responses. I want to thank you all for submitting those questions so that we could give you very thoughtful responses here. We will dive right in.

Tom, we received a question about the definition of the term “business day” in section 800.203 and what the 5:00 PM deadline applies to.

FEDDO:

I would refer the questioner back to the text of the definition of “business day,” which includes two cross-references indicating where the 5PM deadline is relevant. The first is the requirement that parties subject to mandatory declarations submit their filings 30 days before closing. So, if a party submits their declaration after 5PM, it will be considered submitted the next day.

The second is related to stipulations. If a notice includes a stipulation that requires CFIUS to respond within 10 business days, parties submitting that stipulation after 5PM will see that 10 business day clock start on the next day.

MORGENSTERN:

We also received a question about the definition of “own” in section 800.235 and the language “directly possess.” What do these terms mean?

FEDDO:

The short answer is that “directly possess” means to directly own. Unpacking this a bit, note that this definition of “own” only applies to covered investment critical infrastructure. A TID U.S. business that “owns” covered investment critical infrastructure is the entity that directly owns a particular system or asset constituting the specified covered investment critical infrastructure. It does not include the corporate entities sitting above it in the ownership chain that indirectly own infrastructure.

Note, though, that a covered investment, by definition, is direct or indirect. So, even if the foreign person directly makes the investment higher up the chain in a HoldCo, parties still need to consider whether this is an indirect investment in the entity that owns the covered investment critical infrastructure, and whether that investment affords the foreign person the defined access, rights, or involvement in that entity at the bottom of the org chart.

MORGENSTERN:

Speaking of TID U.S. businesses, we got a question about whether it is possible to unknowingly be a TID U.S. business.

FEDDO:

We’re aware of that issue, and attempted to draft the rule to avoid situations where a U.S. business could legitimately not know whether it’s a TID U.S. business. For example, in a few places regarding the defense industrial base with respect to covered investment critical infrastructure, we included specific language that the U.S. business had to be notified of a particular status that goes to the question of whether it’s a TID U.S. business. That being said, we welcome written comments on this if anyone believes there are situations where a U.S. business could legitimately not know it’s a TID U.S. business.

MORGENSTERN:

In the definition of the term “involvement” in section 800.230 with respect to substantive decisionmaking, how does “special approval or veto rights” under part (c) interact with the definition of control under section 800.208?

FEDDO:

The definition of “involvement” has to be read in combination with the definition of “substantive decisionmaking.” A veto right is a type of “involvement,” but it must relate to substantive decisionmaking related to sensitive personal data, critical infrastructure, or critical technology. We have a very specific definition of “substantive decisionmaking” in section 800.245.

The concept of “control” is different. Control is defined as having the power to determine, direct, or decide what we describe as “important matters affecting an entity” in section 800.208, like merging a company.

MORGENSTERN:

Tom, with respect to the “excepted investor” and “excepted foreign state” concepts, we received a couple of questions on the grace period which you addressed in your remarks. As a follow-on question, will prospective investors have to self-analyze whether they are “excepted investors,” or is there a process for seeking CFIUS concurrence regarding this status?

FEDDO:

There is no separate process for CFIUS to give prospective investors opinions on their excepted investor status. That being said, let put’s this in context. The issue of whether an investor is an excepted investor is a jurisdictional question, and is only one of many that parties have to analyze in determining whether to file with CFIUS. It’s analogous to the situation today under the current rule where parties to have analyze whether there is control.

MORGENSTERN:

Turning to the definition of “substantial interest” in section 800.244, we received a few questions on “voting interest,” mostly in the context of limited partners in investment funds including: Whether voting interest includes consent or veto rights? and How voting interest corresponds to economic interests? Can you address that?

FEDDO:

The definition of “substantial interest” includes only voting interests. It doesn’t include purely economic interests or special rights. With respect to investment funds structured as limited partnerships, the regulations provide that a “substantial interest” results from having either the requisite voting interests in the general partner of the fund or the requisite voting interests of the

limited partners. Whether the threshold is met depends on the facts and circumstances. As we've noted before, we welcome comments.

MORGENSTERN:

Let's now talk about the definition of sensitive personal data in section 800.241; as we got a few questions on that. First of all, is the 1 million individual threshold limited to only U.S. citizens?

FEDDO:

No, it's not. FIRRMA allows CFIUS to review transactions involving the sensitive personal data of any U.S. citizens. For purposes of the 1 million person threshold, we aren't asking companies to determine how many U.S. citizens' data they hold.

MORGENSTERN:

Staying with sensitive personal data, how will CFIUS scrutinize whether a U.S. business has a "demonstrated business objective" to maintain or collect sensitive personal data on greater than 1 million individuals?

FEDDO:

CFIUS scrutinizes the particular facts and circumstances of each transaction to determine jurisdiction and ultimately, whether there is a risk to national security. To the extent commenters have suggestions for clarifying any of the provisions, we encourage you to provide written comments. Some examples that come to mind of "demonstrated business objective" might include the company's financial statements or pitch materials that include future customer projections.

MORGENSTERN:

Now let's discuss the related definition of "identifiable data" in section 800.227. How will CFIUS evaluate whether a transaction party has the ability to disaggregate or de-anonymize data?

FEDDO:

As with any jurisdictional question, much like for regular control transactions, the parties themselves should analyze whether they should file with CFIUS based on those facts and circumstances.

MORGENSTERN:

We also received a question on the definition of "target or tailor" in section 800.247. How does it fit into the definition of sensitive personal data?

FEDDO:

I think it's important to walk through how the definition of sensitive personal data actually works. It's basically a two-part test. First, the U.S. company has to have or collect one of the specified categories of data on U.S. citizens, for example health data. The second part is that the company has to either target or tailor its products or services to U.S. government personnel, or collect or intend to collect the sensitive data on greater than 1 million people. To summarize you need to meet both parts: have one of the categories of sensitive data of U.S. citizens, and also meet one of the gating criteria I just described, for example holding that data on more than 1 million people. Note, however, that the gating requirement does not apply to one type of data. The one exception to this is genetic information.

MORGENSTERN:

Finally, we got a question about the change to the definition of U.S. business in section 800.252. Does this change the scope?

FEDDO:

As we stated in the preamble, the regulatory definition of "U.S. business" now conforms to the definition contained in FIRRMA.

MORGENSTERN:

Okay, great. Thank you very much, Tom. We are ready to open the phone line for live questions from the audience. Before we do that, as a reminder to the extent comments are made, we would encourage you to submit them in writing on [regulations.gov](https://www.regulations.gov) for our consideration. As a reminder, a transcript of the call, including your comments or questions, will be made public. We also ask that you please limit your question to one minute and remember that we will provide clarification regarding the proposed regulations but will have to stick to the content of the rules and the preamble in responding to your questions. So with that, we are ready to open up the line to questions.

Live Question 1 (Jennifer Leib, Innovative Policy Solutions):

I am curious as to the rulemaking for emerging technologies coming from the Department of Commerce. One, do you have any information from that agency as to timing of that? Two, in the interim, as companies try to determine if they meet that definition, any advice on what to do as they wait for the rulemaking?

FEDDO:

Thanks for the question. I am not in a position to give advice about preparation for that rulemaking, and I can't comment on the process because we are constrained to just comment on this rulemaking today.

Live Question 2 (Bijou Mgbodikwe, Entertainment Software Association):

Thank you for having this call today. The ESA represents the video game industry, so we are interested in particular in the section on personal data. For non-public electronic communication, how would we go about deciding a primary purpose of communications platform that connects third parties?

FEDDO:

To the extent that this is asking for clarity, I think what we're in a position to do today is to ask you to submit written comments on where additional clarity would be helpful.

Live Question 3 (Shawn Cooley, Kirkland & Ellis):

Hi Tom, thanks for having this call. We just wanted to clarify the comments made about the excepted country list and whether or not that would be immediately effective, pursuant to a grace period, or whether or not, as described, there would be a two year delay.

FEDDO:

It's not a two year delay in the effectiveness or the impact of the list of excepted investors. It's a two year grace period on the second requirement with respect to those identified on the list.

Live Question 4 (Shawn Cooley, Kirkland & Ellis):

To follow up, would that then be immediately effective? So there is no grace period if it is a two part test and both parts need to be effectuated?

FEDDO:

As I mentioned before, it won't be a null set when we publish it. Whatever country, or countries, is on that list, there are two parts to the test in order to be an excepted foreign state: you have to be on that list and the second part is that you have to fulfill the requirement with respect to a robust investment screening mechanism. With respect to that second prong, there is a grace period that if the country identified in the first part of the test on the list does not meet that standard, they have two years to meet that standard in order to remain on the list.

Live Question 5 (Mehmet Karman, Government of Canada):

Hi, I'm sorry. My question was just answered. It was on excepted states. Sorry, please continue.

Live Question 6 (Karalyn Mildorf, White & Case):

Hi Tom, thanks for being here. The last point you mentioned in the prepared remarks was on U.S. business. I was wondering if you could elaborate on the interpretation of that when the definition is no longer limited to just the activity; it's not interstate commerce in the U.S. to the extent of the activities in the interstate commerce in the U.S. Does that mean that a U.S. business can be defined and the scope can include the U.S. business' activities outside of the U.S. or outside interstate commerce in the U.S.?

FEDDO:

I appreciate the question but I am constrained by the rulemaking process on elaborating with respect to that point. What I'll say is what I mentioned before: the definition of U.S. business in the proposed rule matches the definition in FIRRMA.

Live Question 7 (Helen Galloway, Alston & Bird):

Good morning, my question is about if the foreign investor already has some sort of control or triggering rights. Can we conclude that no mandatory filing is required for second or third rounds of investment if the foreign investor already has control or other triggering rights in the TID U.S. business?

FEDDO:

The difficulty for us is that there are multiple pieces to your question and it may be a bit of apples and oranges. I would first refer you to section 800.305 and the incremental acquisition rule for the discussion there. If that doesn't provide enough clarification for you, I think submitting a written comment would be very helpful. To the extent you want to try to break down the question on the call right now, we are happy to try and answer the pieces of it.

Live Question 8 (Mark Bocchetti, Congressional Quarterly):

My question goes to one of your comments about the specific case if there is a foreign government involved in the company that may be making the investment, whether that foreign government has a substantial interest. You talked about two different thresholds: a 49 percent threshold and a 25 percent threshold, but I didn't quite catch what the different distinctions are for the one level versus the other level. If you could go over that again, I would be grateful.

FEDDO:

The statute sets out two substantial interests. One is with respect to the foreign government in a foreign person, that's the 49 percent, and the substantial interest of that foreign person in the U.S. business, which is the 25 percent.

Live Question 9 (Mark Bocchetti, Congressional Quarterly):

Does that mean that the substantial interest test will only turn on the question of a percentage of the actual interest? Or could substantial interest be found to apply in other cases where the issue of the actual percentage of ownership may be murky. I'm thinking of a certain large Chinese telecommunications company where the issue of government involvement has proven to be, as I said, rather murky. So my question is, does substantial interest of a foreign government potentially have a broader application?

FEDDO:

A couple of things. First, this substantial interest test applies not to the jurisdiction of the Committee but to the requirement to file a declaration with the Committee with respect to the "other investment" jurisdiction. With respect to your hypothetical, I am not in a position during the comment period or otherwise to answer hypotheticals. I will say that this pertains to whether or not a party is required to file a declaration.

Live Question 10 (Mark Plotkin, Covington & Burling):

Thank you, Treasury, for hosting this call. My question also relates to the substantial interest test. Does Treasury intend to exercise its discretion to waive that requirement for certain foreign persons in which a foreign government has a substantial interest? If so, what would be the process for such an entity to seek a waiver?

FEDDO:

Thanks, Mark. I can't speak to the intent of the Committee during the rulemaking process or what the final rule will look like at this point. To the extent we do consider the waiver, the provision will provide further guidance for the final rule.

Live Question 11 (Joshua Gruenspecht, on behalf of the National Venture Capital Association):

With respect to the preparatory material to the proposed rule, I think the specific statement is that you guys welcome comments on the retention on the mandatory declaration aspect of the pilot program. Just for a little bit more clarity for folks who do want to submit comments, does that mean that the comments that you're soliciting are with respect to if you should keep the pilot program or if you should eliminate the pilot program? Or is it a possible expansion of the pilot program with the authority that you guys have for mandatory filings in respect to a critical technologies company?

FEDDO:

Thanks for the question. We are welcoming comments on any aspect of the final complexion of the rule.

Live Question 12 (Kassim Ferris, Stoel Rives):

My question relates to the definition of sensitive personal data. My question is whether the element of identifiable data being maintained or collected by a business that targets or tailors products or services requires that the data be maintained by the time when the business targets or tailors products or services. Does it encompass data that was collected outside of the timeframe when companies tailored products or services?

FEDDO:

I think it would be helpful if you submitted this particular comment in writing, and we will consider it.

MORGENSTERN:

Thank you everyone for joining the call and your thoughtful questions. For those joining the 11:15 call on real estate, please note the separate number for that call posted on the CFIUS webpage on the Department of Treasury website where you likely found the information for this call. Just wanted to note that it is a separate number. For those of you joining us at 11:15 am, we will talk to you then. For the rest of you, thank you for joining us today, and we hope this was helpful.

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11:15 AM EDT

Provisions Pertaining to Certain Transactions by Foreign Persons Involving Real Estate in the United States (31 C.F.R. part 802)

Department of Treasury Participants

Thomas Feddo, Assistant Secretary for Investment Security, Office of International Affairs
Brian Morgenstern, Deputy Assistant Secretary for External Affairs, Office of Public Affairs

BRIAN MORGENSTERN:

Good morning and thank you for joining the call to discuss the proposed CFIUS regulations pertaining to transactions by foreign persons involving real estate in the United States. My name is Brian Morgenstern, Deputy Assistant Secretary of the Treasury for External Affairs here in the

Office of Public Affairs. I am joined by our CFIUS team who has done a tremendous amount of work with their interagency colleagues to get these regulations out. They'll be here and able to answer many of your questions today.

I'd like to begin with a few ground rules. We are required to ensure a meaningful opportunity for public comment on the proposed rules and to give comments due consideration as we work to finalize the rules after the comment period closes. We encourage all interested parties to submit comments through regulations.gov by the deadline of October 17.

To ensure a fair process, we cannot give any individuals or groups special access to information that is not broadly available. That includes rationales that we may have had for making various decisions. Accordingly, today we will provide clarification of the proposed regulations and we will have to stick to the content of the rules and the preamble. I would add that a transcript of this call, including your comments or questions, will be made publicly available on the Treasury web site.

Now we will proceed as follows: you will hear prepared remarks from the Assistant Secretary for Investment Security Tom Feddo. Following Tom's remarks, we will address several of the questions that have been submitted to us in advance of this call by members of the public. We want to thank you for those because it makes it much easier for us to provide thoughtful responses to you and craft responses that will be most helpful to a broader subset of the public. Now after we do that, if we have time remaining at the end of the call, we will take questions live on a first-come, first-served basis with the help of our moderator. With that, I am now pleased to introduce our newly-confirmed and sworn in Assistant Secretary of the Treasury for Investment Security Tom Feddo. Tom, congratulations, and the floor is yours.

THOMAS FEDDO:

Thanks, Brian. Good morning, and thank you everyone for joining this call. I know a number of folks were on the earlier call so I'd appreciate your patience while I cover a little bit of background on CFIUS before diving into the regulations on real estate for those who are just joining this second call.

On September 17th, the Treasury Department, as chair of CFIUS, released two proposed regulations to implement FIRRMA (Foreign Investment Risk Review Modernization Act of 2018). The regulations are the product of extensive work by the Treasury Department, CFIUS member agencies, and other relevant government stakeholders. The regulations were drafted with the purpose of protecting U.S. national security and ensuring clarity and predictability for those affected.

Public participation through the comment process is very important to informing the development of the final rule. We welcome and encourage input from all stakeholders and look forward to receiving comments on a full range of topics covered by the proposed regulations. I'll also want to note that we have made a lot of information available on Treasury's CFIUS web site. Please visit the web site if you have not already done so.

FIRRMA was the product of the Trump Administration and Congress working together in a bipartisan manner, recognizing that in recent years both the national security landscape and the nature of the investments that pose the greatest national security risks, have changed. FIRRMA resulted from concerns that some vulnerabilities could be exploited through transactions that fell outside CFIUS's traditional jurisdiction. FIRRMA strengthens and modernizes the CFIUS process by, among other things, allowing CFIUS to review certain transactions that were not previously part of its jurisdiction.

Before further discussing the real estate regulations, I'll emphasize that foreign direct investment is vital to the U.S. economy—among other things, it supports innovation, job creation, and economic growth. We anticipate that the CFIUS process, as modernized and strengthened by FIRRMA and these regulations, will enhance confidence in our longstanding open investment policy. The United States welcomes and supports foreign investment, and remains open for business.

On this point, I'll also note that CFIUS has been running more efficiently, ensuring that safe investments in the United States can be made efficiently and expeditiously. The best proof of this is in the data. Over twice as many cases are clearing during the first stage of review as compared to just a year ago. Where there are no national security risks, we are notifying parties promptly, so that they can proceed with their business transactions.

With respect to the proposed regulations, I'll note that they do not change CFIUS's traditional authority to review any transaction that could result in a foreign person's control of a U.S. business. Nor does it change the fact that CFIUS remains solely focused on the national security risks that arise from a given transaction.

What is new under FIRRMA and what will be implemented by these regulations is the authority to review certain investments that are not passive, but that don't rise to the level of control, and some kinds of real estate transactions.

Prior to FIRRMA, CFIUS did not have the authority to review a transaction involving real estate unless the transaction could result in foreign control of a U.S. business. This meant that if a real estate transaction near a sensitive U.S. facility didn't involve a U.S. business, but a foreign purchaser of the real estate could use it for the purpose of, for example, conducting surveillance, CFIUS didn't have the opportunity to review it.

FIRRMA sought to remedy this by enhancing CFIUS's jurisdiction to cover these kinds of real estate transactions. To implement this new authority, the regulations define a "covered real estate transaction" to include any purchase, lease, or concession of "covered real estate" that affords a foreign person certain property rights.

The regulations focus on these types of transactions when they occur in and/or around specific airports, specific maritime ports, and specific military installations. The regulations also provide reference information for all of the affected ports and military installations so that the public can determine what real estate is covered.

There is a list of relevant military installations in the rule's appendix. And, the Department of Transportation publishes information on its web site regarding the airports and maritime ports that meet the definitions in these rules—they are a subset of all the U.S. airports and maritime ports.

CFIUS's goal is to cover transactions where the foreign person has a meaningful ability to pose a risk to national security based on its rights with respect to the real estate, but at the same time, not capture every type of interest in real estate that might exist.

The proposed regulations also exclude certain types of real estate transactions, including in particular, transactions involving single family houses and most urbanized areas. Transactions by certain foreign persons also will be excepted from CFIUS's jurisdiction, which we'll discuss shortly.

Finally, I want to touch on voluntary versus mandatory filings. Up until now, CFIUS has mostly been a voluntary process. This means that parties evaluate their transaction and determine whether or not to file with the Committee. The benefit of filing is that if the Committee determines there are no unresolved national security issues with the transaction, the parties receive "safe harbor" and CFIUS cannot reopen its review of the transaction.

Under FIRRMA now, there are certain circumstances where notifying CFIUS of a transaction will be mandatory. But for real estate, FIRRMA does not mandate filing with CFIUS. Otherwise, the review process, including the duration of review and investigation periods, under part 802 is essentially the same as in part 800.

MORGENSTERN:

Thank you very much, Tom. We will now transition to the Q&A portion of the briefing. Before that, I'll begin by going through some of the issues with you of broad applicability so that you can deliver some prepared responses to them. Then, if time permits, we will open the line for live questions at the end.

To start off, Tom would you go over in some detail the different types of covered real estate?

FEDDO:

Sure. FIRRMA gives CFIUS the authority to review the purchase or lease by, or a concession to, a foreign person of private or public real estate that falls into two main categories: First, real estate related to an airport or maritime port; and second, real estate related to a United States military installation or other government site that is sensitive for reasons relating to national security, or could reasonably provide the foreign person the ability to collect intelligence or otherwise expose national security activities at such locations.

The area covered by the rule relates to specified airports, maritime ports, and military installations. For airports and maritime ports, the covered real estate is that which is, is within, or will function as part of, the airport or maritime port. For military installations on land or sea, there are four geographic areas of coverage:

The first is close proximity—for most of the military installations listed in the appendix, CFIUS’s jurisdiction is over real estate within “close proximity”—that is, outward one mile from the boundary of the installation.

Second, for a subset of installations on the list, CFIUS’s jurisdiction extends outward 100 miles from the boundary of the installation—what the proposed rule refers to as the “extended range.”

Finally, the proposed regulations deal with the next two categories of military installations differently because of their nature. The concepts of close proximity and extended range do not apply. For missile fields, CFIUS’s jurisdiction is with respect to real estate that is located within any county or other geographic area, as identified in the appendix. For off-shore ranges, the real estate located off-shore and within the first 12 nautical miles of the relevant range is covered.

MORGENSTERN:

On the issue of scoping, we have some questions as to whether the military installations listed in the appendix account for every sensitive U.S. Government site. Could you please comment on the scope of the appendix?

FEDDO:

I can’t comment on why certain sites are listed and others are not. But I’ll emphasize again that this list is a tailored subset of military installations and ports, developed in coordination with subject matter experts in the government, including the Department of Defense. The Committee will routinely consult with the other CFIUS member agencies to evaluate the sites that need to be included.

The rule provides reference information for all of the relevant military installations so that the public can determine which real estate is covered, either through the appendix to the rule or the through the Department of Transportation website.

MORGENSTERN:

Thank you, Tom. Another issue of interest has to do with the type of real estate transactions. Would you mind offering some clarification on how the rule would cover only certain transaction types?

FEDDO:

Sure. FIRRMA specifically authorizes CFIUS to review the purchase or lease by, or a concession to, a foreign person of certain real estate. The regulations define each of these terms, focusing on the substantive aspects of the transaction.

The term “concession” is defined to focus on arrangements where a U.S. public entity grants a right to use real estate for certain purposes relating to airports and maritime ports. The rule also

considers the rights afforded to the foreign person. In order to be a covered real estate transaction, the foreign person must be afforded at least three of these property rights. Those property rights are the right to: physically access; exclude others; to improve or develop the property; or affix structures or objects to it.

As I mentioned before, CFIUS's goal is to cover transactions where the foreign person has a meaningful ability to pose a risk to national security based on its rights with respect to the real estate, but at the same time, not capture every type of interest in real estate that might exist. Requiring three of four property rights that I listed attempts to achieve this.

MORGENSTERN:

Next, I'd like to turn to the issue of exceptions to coverage. Would you address the exceptions?

FEDDO:

The rule includes a list of "excepted real estate transactions" along with a few examples. The purchase, lease or concession of a single housing unit is excluded. Most real estate transactions in urbanized areas are excluded as well.

The proposed regulations do not cover real estate in urbanized areas, as defined by the Census Bureau, unless the real estate is: either within one of the specified airports or maritime ports or is in close proximity to one of the military installations listed in the first two sections of the appendix. Everywhere else, real estate in an urban area is excluded from CFIUS's jurisdiction.

Another exception is for any transaction that is subject to part 800, even if it includes the purchase, lease or concession of real estate.

Part 800 covers transactions that could result in control of a U.S. business, as well as certain non-controlling investments in U.S. businesses, and it is possible that a transaction involving real estate could be subject to that part.

In addition, commercial office space is excepted depending on the amount of space occupied by the foreign person vis-à-vis the total space and number of tenants in the building. I have only highlighted a few of the exceptions. Interested parties should closely consider the exceptions in the regulations.

MORGENSTERN:

On the prior call we discussed the concept of the excepted investor. Is it accurate to say that this concept would also apply in part 802?

FEDDO:

That's right. The real estate regulations do not target any particular country. CFIUS will continue to review each transaction according to its particular facts and circumstances. The

regulations do, however, except certain foreign persons from CFIUS's jurisdiction over covered real estate transactions and list specific criteria that must be met in order for a foreign person to qualify as an excepted real estate investor, including their ties to specified excepted foreign states.

A foreign state will be an "excepted real estate foreign state" if two criteria are met:

First, the foreign state is identified by Treasury as an eligible foreign state on a list that will be published by Treasury at a later date, and two, CFIUS makes a determination that such foreign state has made significant progress toward establishing and effectively utilizing a robust investment review process.

The Committee intends to delay the effectiveness of this second prong—that is to provide a "grace period"—to allow the eligible foreign states time to enhance their foreign investment review processes.

This means that Treasury will publicly designate a group of excepted foreign states by the time the final rule becomes effective. That is in February 2020, Treasury will publically designate a group of excepted foreign states. Those states will immediately be excepted foreign states but will have two years to meet the requirement for a robust national security review regime to continue being excepted.

The requirement related to the investment screening regime is slightly different than in the regulations for part 800. For real estate, in order for a foreign state to satisfy the second criteria, the state needs to have made "significant progress" toward establishing and effectively utilizing a robust process to review foreign investments. In the regulations for part 800, the determination that is needed is that the foreign state has established and is effectively utilizing a robust process.

MORGENSTERN:

Thank you, Tom. We have now gone over a number of the questions that we received in advance and again thank you for those who submitted them. We will now open the phone line for live questions from those on the call with the assistance of our moderator. Before we do that, I want to note that to the extent that you have comments for us, we encourage you to submit those in writing at [regulations.gov](https://www.regulations.gov) for our consideration. Again, those are due by October 17. I will remind you that the transcript of this call, including your comments or questions, will be made public. Please keep that in mind. I'd also ask that you'd limit your question to one minute while you ask it. Remember, we will provide clarification regarding proposed regulations, but we will have to stick to the content of the rules and the preamble in responding to your questions and won't be able to go beyond that.

With that, I will ask our moderator to open us up to questions and we ask that you please clearly articulate your name and affiliation. Thank you.

Live Question 1 (Russell Randle, Miles & Stockbridge):

Thanks to Treasury for offering these clarifications. My question goes to the urban exception in section 217(c) and how that relates to the extended range of military installations described in Part 2 of appendix A. To put some flesh on the bones here, both the Pax River Naval Air Station and Aberdeen Proving Ground have large amount of urban areas nearby them. If we are talking 100 mile range, are those areas excluded? Can we get anymore definition on that?

FEDDO:

Thank you. I think the best way to think about this is from the border of the installation out to one mile, urbanized areas are within the scope of the jurisdiction of the rule. Once you get past that one mile out to 100 miles, the urbanized areas are excluded.

Live Question 2 (Russell Randle, Miles & Stockbridge):

In furtherance to that question, it would be extremely helpful if we would have some mapping of that. In observing by way of comment that the resulting pattern is likely to bare very little relation to the areas subject to review and any actual connection to surveillance and national security.

FEDDO:

Thank you. We appreciate the comment and I'd ask you to submit it in writing so that we can carefully consider it.

Live Question 3 (Jim Mendenhall, Sidley Austin):

Thank you Treasury for having this call today. I have two questions. The first you may have already answered. Just to confirm, given the difference in tests for excepted foreign states, it sounds like it is possible that a state may be excepted for one set of regulations, the covered investment category, but not for the other... actually the reverse. They could be excepted for covered real estate but not for covered investments. If you could confirm that?

The second question actually relates to both sets of regulations. It is the definition of voting interests. Does the ability to appoint a board member count as a voting interest, even if there is not a formal vote to 1, or 5, or 10 different board members?

FEDDO:

You are correct that the excepted foreign states for purposes of part 800 and the excepted real estate foreign states for purposes of part 802 can be different. With respect to the appointment of a board member, can you repeat that one more time for me, please?

Live Question 4 (Jim Mendenhall, Sidley Austin):

The question relates to the definition of voting interests. Voting interests is defined in terms of voting for the election of directors. I think you had said in the earlier call that voting interests does not include veto rights, consent rights, special rights. I am just wondering if voting interests also includes or does not include the right to simply appoint a board director. Does that count as a voting interest?

FEDDO:

I think for this question it would be really helpful for you to submit it in writing and for us to consider the facts and circumstances.

Live Question 5 (Caroline Shanley, Organization for International Investment):

Thanks again Treasury for hosting this call. I have a question for clarification. In the four categories for the CFIUS jurisdiction related to the military, could you distinguish again between the close proximity and extended range and the rules?

FEDDO:

Close proximity is within one mile of the installation.² Extended range is from 1 mile to 100 miles. In respect to the other two categories, it depends on the category of the certain facility. For missile fields, the jurisdiction is any county or geographic area as identified in the appendix. For offshore ranges, it's within the first 12 nautical miles of the relevant range that is covered.

Live Question 6 (Mark Rogers, Sidley Austin):

Thanks for hosting this call. My question relates to pools of mortgage loans that are held in securitized form and whether the management of the pool by a servicer is the operation of a U.S. business? If so, whether the ability of a foreign person to appoint one or more of the foreign servicers is a transaction and is potentially subject to CFIUS review? The person who appoints the servicer will in effect be deciding who initiates a foreclosure or other remedial action in relation to the real estate. Related to that, should we separately be looking simply at what happens when a foreclosure occurs? I want to distinguish between the two. Again, just wondering if the actual management and operation of the securitized pool is itself a business distinct from simply holding a mortgage loan?

² This is a clarification of the response given during the call.

FEDDO:

Thank you. That obviously is a very detailed question with a number of moving parts and I'd like for our team to carefully consider it so it would be most helpful if you submit it in writing so we can think it through. Also, I'll refer you to Part 802.303 for your consideration as you flesh out that comment.

Live Question 7 (Wes Sudduth, Venable):

Thank you and thank you to Treasury for these remarks this morning. You clarified based on an earlier question that there could be a difference between excepted foreign state under Part 800 and excepted real estate foreign state under Part 802 based on the second prong of the test that is different definition of that second prong. My question is to the first prong of those tests and lists themselves and whether we can anticipate Treasury will be posting two separate lists for excepted foreign state versus excepted real estate foreign state or one test to cover both parts?

FEDDO:

I'll keep it very simple and say there is the potential for Treasury to identify one list for Part 800 and a different list for Part 802.

Live Question 8 (Mark Brocchetti, Congressional Quarterly):

My question goes back to the same issue, the excepted investor based on the excepted foreign state. The distinction between the list that might be issued for Part 800 versus the possible second list for Part 802 goes to the second prong of the test. Could you again identify exactly what would differ in the second prong that would create the different lists? Is it required that the excepted foreign state have a robust review process for real estate transactions? Is that the issue?

FEDDO:

This is a brand new rule implementing a brand new statute. The way the rule is currently drafted, the second prong provides a grace period for foreign states identified in the first prong either in 800 or 802 to achieve the standard set forth in the second prong. In other words, in Part 802 they have to demonstrate significant progress toward establishing and effectively utilizing foreign investment review process. With respect to Part 800, within those two years they will have to establish and be effectively utilizing that. It's as simple as that.

MORGENSTERN:

We are hearing nothing further. I want to thank everyone for joining the call and your thoughtful questions. We hope this was helpful for you. Thank you again to the commenters, to the CFIUS

team for all of their hard work they have done on this. We hope this morning's call was helpful.
Have a great day.

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