

FAQs on Interim Regulations Amending 31 CFR Part 800

1. What are the main changes?

The interim regulations amending 31 CFR part 800 implement and make updates consistent with certain provisions of the Foreign Investment Risk Review Modernization Act of 2018 (FIRRMA). The key amendments to the regulations at part 800 are summarized in the preamble to the interim rule and include, among other things:

- extending the CFIUS review period from 30 days to 45 days;
- revising certain definitions such as “critical technologies” and “transaction” to be consistent with FIRRMA;
- adding a provision allowing parties to stipulate that the transaction that is the subject of a voluntary notice is a covered transaction and, as relevant, a foreign government-controlled transaction;
- providing the Treasury Secretary with the authority to grant one 15-day extension of an investigation in “extraordinary circumstances;”
- removing the language “intentionally or through gross negligence” in the provisions allowing for the imposition of civil penalties for (1) a material misstatement or omission in a notice or a false certification or (2) a violation of a material provision of a CFIUS mitigation agreement or material condition imposed by CFIUS under section 721(l); and
- authorizing the Committee to address any failure to comply with a mitigation agreement or condition entered into or imposed by CFIUS under section 721(l) by negotiating a remediation plan, requiring filings for future covered transactions for five years, or seeking injunctive relief.

2. When do these changes take effect?

The interim regulations took effect on the date of publication in the Federal Register (*i.e.*, October 11, 2018). The amendments apply with respect to any covered transaction the review of which is initiated under section 721 on or after October 11, 2018. Certain of the provisions in FIRRMA that are addressed in this interim rule, however, took effect upon enactment of the statute. Most notably, FIRRMA’s extension of the CFIUS review period from 30 days to 45 days went into effect immediately, and the temporary rule updates part 800 to reflect the current practice of CFIUS.

3. Do the new provisions regarding penalties for violations of mitigation agreements apply to existing agreements?

The “intentionally or through gross negligence” standard will continue to apply to the imposition of civil monetary penalties for violations of material provisions of mitigation agreements entered into before October 11, 2018. The new standard (*i.e.*, without the intentionality or gross negligence requirement) will apply to the imposition of civil monetary penalties for violations of material provisions of mitigation agreements entered into on or after October 11, 2018.

4. Under what circumstances will an investigation be extended?

The Chairperson may extend an investigation for one 15-day period only in “extraordinary circumstances” and upon a written request signed by the head of a lead agency. This provision is not intended to be invoked for routine or common occurrences. The provision focuses on two general categories of circumstances that would constitute “extraordinary circumstances:” a force majeure event and to protect the national security of the United States.

5. What should parties think about when deciding whether to include a stipulation in a notice?

A stipulation pursuant to section 800.402(n) could expedite review and action by CFIUS because it may streamline certain aspects of CFIUS’s review. It may also result in fewer follow-up questions from the Committee. Parties submitting a stipulation should be aware, however, that the Committee and the President are entitled to rely on such stipulation in determining whether the transaction is a covered transaction and/or a foreign government-controlled transaction, and parties making a stipulation waive the right to challenge any such determination. Additionally, neither the Committee nor the President is bound by any such stipulation, nor does any such stipulation limit the ability of the Committee or the President to act on any authority provided under section 721 with respect to any covered transaction.

6. What changes have been made to the definition of “covered transaction?”

The interim regulations revise the definition of “covered transaction” to reflect FIRRMA. Specifically, the revisions clarify that the definition includes a transaction that could result in foreign control of any U.S. business carried out through a joint venture. The interim regulations also revise the definition of “transaction” to reflect FIRRMA’s provisions relating to changes in rights that could result in foreign control of a U.S. business and transactions the structure of which is designed or intended to evade or circumvent the application of section 721.