

## U.S. Treasury Department issues new proposed CFIUS regulations

18 September 2019

On 17 September 2019 the U.S. Department of the Treasury announced proposed regulations to "comprehensively implement the Foreign Investment Risk Review Modernization Act of 2018 (FIRRMA)." In a [press release](#) announcing the proposed regulations, the Treasury Department noted these regulations were aimed at better "address[ing] national security concerns arising from certain investments and real estate transactions." In addition to releasing the full text of the regulations in two parts: "[Provisions Pertaining to Certain Investments in the United States by Foreign Persons](#)" (31 Code of Federal Regulations part 800) and "[Provisions Pertaining to Certain Transactions by Foreign Persons Involving Real Estate in the United States](#)" (31 Code of Federal Regulations part 802), the Treasury Department also released a [fact sheet](#) and an [FAQ document](#). Key provisions of the proposed regulations include:

- **Expansion of the Committee on Foreign Investment in the United States' (CFIUS) jurisdiction:** The proposed regulations expand CFIUS' jurisdiction beyond transactions that could result in foreign control of a U.S. business to also include certain "non-controlling investment[s], direct or indirect, by a foreign person" that afford the foreign person (i) access to material nonpublic technical information, (ii) membership or observer rights on the governing board of the U.S. business or the right to nominate an individual to the board, or (iii) involvement, other than through the voting of shares, in substantive decision-making of the U.S. business. Such new authority, however, is limited to foreign investments in certain U.S. businesses involving critical technologies, critical infrastructure, and sensitive personal data of U.S. citizens.
- **Mandatory declarations:** FIRRMA gave CFIUS the authority to mandate the submission of certain short-form filings called "declarations" for certain transactions. The proposed regulations implement this FIRRMA mandate for transactions in which (i) a foreign person holds a "substantial interest" in a U.S. business, (ii) a foreign government, in turn, holds a "substantial interest" in the foreign person, and (iii) the U.S. business (a) produces, designs, tests, manufactures, fabricates, or develops one or more critical technologies; (b) performs certain functions with respect to critical infrastructure; or (c) maintains or collects sensitive personal data of U.S. citizens that may be exploited in a manner that threatens national security. The proposed rule establishes the voting interest threshold for substantial interest between a foreign person and the U.S. business at a 25 percent voting interest, direct or indirect, and between a foreign government and a foreign person at a 49 percent voting interest, direct or indirect. Notably, CFIUS is still considering whether to also continue the

mandatory declaration requirement, which took effect on 10 November 2018, for [certain foreign investments in companies with "critical technologies" involved in 27 identified industries](#), but no change to this mandatory declaration requirement has been made at this time.

- **Allied country investor exemptions:** The proposed regulations exempt certain foreign persons called "excepted investors" from CFIUS' expanded jurisdiction based on their ties to certain "excepted foreign states." The Secretary of the Treasury, with the concurrence of two-thirds of CFIUS's voting members, may designate such "excepted foreign states" based, in part, on their cooperation with the U.S. government on investment security issues. Notably, the investments of these "excepted investors" are not exempt from CFIUS' jurisdiction over transactions that could result in foreign control of a U.S. business.
- **Expansion of CFIUS' jurisdiction to real estate transactions:** The proposed regulations detail CFIUS' jurisdiction over certain real estate purchases, leases, or concessions "in and/or around specific airports, maritime ports, and military installations." These transactions do not have to involve any foreign investment in a U.S. business. An [appendix](#) to the proposed regulations contains the names of relevant military installations, while the relevant airports and maritime ports can be found on lists published by the Federal Aviation Administration and the U.S. Department of Transportation, respectively. The regulations also exempt certain "excepted real estate investors" along the same lines as the "excepted investors" described above.

Written comments on the proposed regulations must be received electronically or by mail by 17 October 2019. For further information or assistance with submitting comments, please contact any of the Hogan Lovells lawyers identified below.

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