

U.S. Treasury Department issues final CFIUS regulations

17 January 2020

On 13 January 2020, the U.S. Department of the Treasury (Treasury) issued the long-awaited final regulations (the Regulations) that implement the Foreign Investment Risk Review Modernization Act of 2018 (FIRRMA), the statute governing the Committee on Foreign Investment in the United States (CFIUS). The Regulations, which include a final rule relating to real estate transactions and a final rule for all other covered transactions, largely retain the substance of the [proposed rules issued in September 2019 \(the Proposed Rules\)](#) and will be effective 13 February 2020.

Notably, FIRRMA and the Regulations represent the first major overhaul of the CFIUS regime in over a decade. With the issuance of the Regulations, the implementation of FIRRMA is substantially complete, thus ushering in a new era for U.S. foreign investment reviews in which CFIUS's jurisdiction is broader and some transactions trigger a mandatory filing.

Key takeaways from the Regulations include:

- **Expansion of CFIUS's Jurisdiction to Non-Controlling Investments:** The Regulations cement CFIUS's enhanced authority to review foreign non-controlling investments in certain U.S. businesses. CFIUS's jurisdiction will now capture transactions involving foreign non-controlling investments in certain U.S. companies associated with critical technologies, critical infrastructure, and sensitive personal data of U.S. citizens (so-called TID U.S. businesses), if the investments would afford the foreign person (i) access to material nonpublic technical information of the U.S. business, (ii) membership or observer rights on, or the right to nominate an individual to a position on, the board of directors or equivalent governing body of the U.S. business, or (iii) any involvement, other than through the voting of shares, in certain substantive decision-making of the U.S. business. Descriptions of these TID U.S. businesses are set forth below:
 - **Critical Technology U.S. Businesses:** These are U.S. businesses that “produce, design, test, manufacture, fabricate, or develop” one or more critical technologies. The term “critical technologies” is defined as: (i) defense articles or defense services controlled under the International Traffic in Arms Regulations, (ii) certain items on the Commerce Control List of the Export Administration Regulations, (iii) items subject to nuclear-related controls administered by the Nuclear Regulatory Commission and Department of Energy, (iv) select agents and

toxins identified in regulations promulgated by the U.S. Department of Agriculture, or (v) “emerging” and “foundational” technologies under the Export Control Reform Act of 2018, which is currently subject to a pending rulemaking proceeding.

- **Critical Infrastructure U.S. Businesses:** These are U.S. businesses that perform the functions set forth in Column 2 of Appendix A to Part 800 with respect to so-called “covered investment critical infrastructure” set forth in Column 1 of Appendix A. Column 1 of Appendix A lists 28 types of covered investment critical infrastructure, including: certain internet protocol networks, internet exchange points, submarine cable systems, oil refineries and pipelines, liquified natural gas terminals, air and maritime ports, and public water systems.
- **Sensitive Personal Data U.S. Businesses:** These are U.S. businesses that maintain or collect, directly or indirectly, sensitive personal data of U.S. citizens. The Proposed Rule sets forth a definition of “sensitive personal data,” which includes “identifiable data” and genetic information. In response to the public’s concerns over the breadth of the term genetic information, the Regulations make changes intended to circumscribe the range of genetic data that will be viewed as sensitive personal data. Sensitive personal data now includes the results of an individual’s “genetic tests” as used in the Genetic Information Non-Discrimination Act of 2008 (GINA), as long as such data is identifiable. Test data from U.S. Government databases used routinely for research are excluded.

Importantly, CFIUS retains its traditional jurisdiction over transactions that could result in foreign control of any U.S. business.

- **Mandatory Declarations for Certain Foreign Government-Backed Transactions and Foreign Investments in Critical Technologies:** The Regulations mandate filings for two types of foreign investments – those involving certain (i) foreign government-backed investments in TID U.S. businesses, and (ii) foreign investments in critical technology TID U.S. businesses with a nexus to specified industries.
 - **Foreign Government-Backed Investments in TID U.S. Businesses:** Filings are required for transactions involving “substantial interests” in which (i) a foreign person acquires a 25% or greater voting interest, direct or indirect, in a TID U.S. business, and (ii) a foreign government, in turn, holds a 49% or greater voting interest, direct or indirect, in that foreign person. The Regulations also provide that a “substantial interest” held by an “excepted foreign state” (as discussed below) will not trigger a mandatory declaration and clarify that a “substantial interest” in the context of investment funds means that the foreign government must have a 49% or greater interest in the general partner, managing member, or equivalent of the entity.
 - **Foreign Investments in Critical Technology TID U.S. Businesses:** Filings are required for certain foreign investments in TID U.S. businesses with critical technologies. The Regulations largely incorporate the provisions of the “pilot program,” established on 10 November 2018, which requires mandatory filings for certain non-controlling and controlling investments in TID U.S. businesses that produce, design, test, manufacture, fabricate, or develop critical technologies within or for 27 identified industries. Importantly, the Regulations incorporate

several exemptions or exclusions from these critical technology mandatory filings including ones for “excepted investors” (as discussed below), foreign ownership or control (FOCI)-mitigated entities, entities whose only critical technology is certain encryption technology, and investment funds that have completely passive foreign investors and are exclusively managed and ultimately controlled by U.S. nationals. The [pilot program](#) remains in effect through 12 February 2020.

- Treasury also plans to issue a separate notice of proposed rulemaking that revises the critical technologies mandatory declaration to replace the NAICS code prong of the analysis with one that is based upon export control licensing requirements.
- **Initially Designated List of Excepted Foreign States:** The Regulations initially designate Australia, Canada, and the United Kingdom of Great Britain and Northern Ireland as “excepted foreign states.” As a result, investors from those excepted foreign states (excepted investors) that meet certain requirements will be exempted from CFIUS’s jurisdiction over non-controlling investments in TID U.S. businesses. The Proposed Rule set forth certain requirements for qualifying as an “excepted investor,” and these have been relaxed slightly under the Regulations; for example, the Regulations reduce from 100% to 75% the percentage of observers or board members that are required to be from an excepted foreign state or the United States in order for a foreign entity to meet the definition of “excepted investor.” Excepted foreign states will not trigger a mandatory filing for the foreign government-backed transactions discussed above, but “excepted investors” remain subject to CFIUS’s jurisdiction over transactions that could result in foreign *control* of a U.S. business.
- **Short-Form Declaration Process Available for All Covered Transactions:** The Regulations provide for a streamlined alternative for all filers through the submission of a short-form declaration – potentially one of the most important aspects of the revised framework. To date, short-form declarations have only been permitted for transactions that implicate the CFIUS pilot program. This voluntary declaration option, which involves a 30-day CFIUS review, could offer a streamlined process in particular for deals involving acquirers with a favorable record with CFIUS and a U.S. target with few national security sensitivities. In a change from the Proposed Rule that may make the short-form declaration option more attractive to parties, transactions that could result in foreign control of a U.S. business that are filed via a short-form declaration will now benefit from the so-called “incremental acquisition rule.” As a result, where the rule applies, parties whose control transactions are cleared via the short-form declaration option would not have to file with CFIUS again in connection with any additional purchases of equity in the U.S. business.
- **Expansion of CFIUS’s Jurisdiction to Certain Covered Real Estate Transactions:** In the real estate context, CFIUS will be able to review the purchase by, lease by, or a concession to, a foreign person of certain U.S. real estate that provides such foreign person with at least three of the following property rights – physical access, ability to exclude others from gaining physical access, ability to improve or develop, or ability to affix structures or objects – even where there is no acquisition by a foreign person of a U.S. business. As such, for the first time, CFIUS has been given the ability to review a limited range of so-called “greenfield” investments – solely in connection with certain real estate transactions that do not involve an investment in or an acquisition of a U.S. business. The Regulations focus on real estate that involves airports or maritime ports – called “covered ports” – or is in close proximity to U.S. military installations or other sensitive facilities. An appendix to the 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 Department of Transportation. The Regulations provide several exemptions, including acquisitions by “excepted real estate investors,” real estate within “urbanized areas,” acquisitions of single housing units, certain commercial spaces in multi-unit commercial buildings, and the lease or concession of real estate in airports and maritime ports solely for retail purposes. There is no mandatory filing requirement for these investments. Parties may file a long-form joint voluntary notice or short-form declaration on a voluntary basis. Importantly, CFIUS’s jurisdiction over these real estate transactions does not apply if CFIUS otherwise has jurisdiction over the transaction. Finally, Treasury notes that it will be providing tools to help parties in assessing the scope of the coverage of this rule.

- **“Principal Place of Business” Defined But Subject to Comments:** The Regulations propose a definition of “principal place of business,” a term that has never been defined in CFIUS regulations. In particular, the term informs the definition of “foreign entity,” and therefore, “foreign person,” a critical term under the CFIUS framework. The Regulations define a “principal place of business” as “the primary location where an entity’s management directs, controls, or coordinates the entity’s activities.” For investment funds, the “principal place of business” is defined as “where the fund’s activities and investments are primarily directed, controlled, or coordinated on behalf of the general partner, managing member, or equivalent.” Although the new definition is subject to certain exceptions, it may provide relief for investment funds and other businesses that are established offshore but that are managed and controlled by U.S. nationals because they otherwise would be viewed as foreign entities, and therefore their investments might be subject to CFIUS jurisdiction. This new definition is effective on an interim basis on 13 February 2020, and Treasury is taking comments through 13 February 2020.
- **Changes in Rights.** A change in the rights of a foreign person in respect of a U.S. business in which that foreign person has an investment could result in CFIUS jurisdiction. Accordingly, companies will need to closely monitor certain of their foreign investments for changes in rights, including, importantly, governance rights.
- **No Filing Fees Yet:** FIRRMA provided CFIUS the authority to impose a filing fee equal to one percent of the value of the transaction, not to exceed US\$300,000, in order to provide more resources for CFIUS. The Regulations do not include filing fees, but instead note that provisions for filing fees will be undertaken via a separate rulemaking.

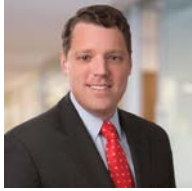
The importance of the new CFIUS framework for review of foreign investment in the United States should not be underestimated. By preserving the framework as largely voluntary, retaining certain long-standing practices, and crafting enhanced authority to address certain critical areas, CFIUS appears to have sought to balance encouragement of an open investment environment with the need to adapt to national security threats that may arise through non-controlling investments or certain real estate transactions. Whether subsequent interpretation of the Regulations will strike the appropriate balance remains to be seen and will likely be particularly impacted by whether the new framework is accompanied by enhanced enforcement.

Although we expect that there will likely be a period of uncertainty as the new authority is implemented in practice, buyers and sellers will need to be mindful from the get-go of the potential for mandatory filings and the breadth of CFIUS’s new jurisdiction under the new framework. Notably, Treasury has explicitly signalled that it does not view the Regulations as a static set of rules, noting that it envisions that it will periodically review and revise the new

framework to respond to evolving future threats and vulnerabilities. Therefore, foreign investors and U.S. companies alike would be well-advised to stay apprised of CFIUS developments.

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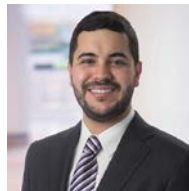
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