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Expanded CFIUS Jurisdiction Under FIRRMA Regulations: An Overview

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EXPANDED CFIUS JURISDICTION UNDER FIRRMA REGULATIONS: AN OVERVIEW

Two years after the passage of the Foreign Investment Risk Review Modernization Act of 2018 ("FIRRMA")[1] by Congress, on February 13, 2020, final implementing regulations governing the jurisdiction and procedures of the Committee on Foreign Investment in the United States ("CFIUS") became effective. The final regulations make several changes to CFIUS's mandate, including expanding, clarifying, and, in some cases, placing boundaries on CFIUS's jurisdiction.

The regulations were issued in two parts, part 800 (Investments in the United States by Foreign Persons) and part 802 (Certain Transactions by Foreign Persons Involving Real Estate in the United States). The following article discusses CFIUS's jurisdiction to review investments made by a foreign person in a U.S. business.

The regulations generally maintain CFIUS's original jurisdiction with regard to transactions where a foreign person acquires control over a U.S. business through a covered investment. However, the regulations do adjust some of the terms applicable to CFIUS's traditional jurisdiction over these control transactions, including adjusting the definitions that identify foreign persons.

The regulations then expand CFIUS's jurisdiction over non-controlling investments made by foreign persons in U.S. businesses involved in: (1) critical technologies, (2) critical infrastructure, and (3) sensitive personal data on U.S. citizens. Given this expansion in jurisdiction with regard to investments in U.S. businesses, CFIUS also elaborated on carve-outs and exceptions for investments that do not provide for involvement in a U.S. business's substantive decision-making, with its board of directors, or with material non-public information.

This expanded regime emphasizes the need for preliminary analysis of all investors involved in a given transaction, including with regard to limited partners. There is a new, significant focus by CFIUS on limited partners of foreign businesses and their possible influence on the U.S. business's decision-making, operations, and strategy. However, funds that provide limited partners with no significant rights to the U.S. business, thereby acting as "silent" partners, may avoid CFIUS's expanded jurisdiction. In addition, structural knowledge of a foreign business's investors and a complete understanding of a U.S. business's activities in the United States will allow transaction parties to gauge the U.S. national security "vulnerabilities" and "threats" that serve as the cornerstone of a CFIUS analysis.

1 The Defense Production Act of 1950 ("DPA"), inspired by the First and Second War Powers Acts of 1941 and 1942, served as the precursor to CFIUS and gave the executive branch broad authority to regulate industry during World War II. The DPA has been amended several times, the most recent being FIRMMA in 2018, and ultimately provides both the authority for CFIUS and the president to review certain corporate mergers, acquisitions, and takeovers, and investigate the impact of those transactions on national security.

I. COVERED CONTROL TRANSACTIONS

CFIUS's core jurisdiction over "covered transactions" is largely unchanged with the passage of FIRRMA and its implementing regulations. Transactions now called "covered control transactions" continue to be transactions by or with any ***foreign person*** that could result in the foreign ***control*** of any ***U.S. business***. This jurisdiction includes transactions carried out through a joint venture which would lead to foreign ownership or control of a U.S. business.

This determination continues to rely on the definition of three terms: (1) foreign person; (2) control; and (3) U.S. business. FIRRMA modified these definitions, resulting in slight changes to the scope of CFIUS's jurisdiction over covered control transactions.

a. Definitions

i. Foreign Person

Whether or not the person acquiring control of the U.S. business is defined as a "foreign person" is a central determination for CFIUS's jurisdiction. The definition of foreign person continues to include any foreign national, government, or entity, or any entity over which control is or can be exercised by a foreign national, government, or entity. A "foreign entity" is any branch, partnership, group or sub-group, association, estate, trust, corporation or division of a corporation that is organized under the laws of a foreign state, and either its principal place of business is outside the United States or its securities are primarily traded on one or more foreign exchanges.

The final regulations further clarify that an entity that is majority owned by a foreign person is itself considered a foreign person for the purposes of CFIUS's jurisdiction. Under the regulations, a section, branch, or subsidiary of a foreign entity that can demonstrate that a majority of its equity interest is owned by U.S. nationals is not considered to be a foreign entity. The new regulations changed "demonstrate" to "can demonstrate," suggesting that an entity need not make an affirmative showing to CFIUS, just ensure that it is able to do so if pressed.

While the definition of "foreign person" did not change significantly, the new definition of "principal place of business" provides significant clarity in determining CFIUS's jurisdiction. Under the final regulations, an entity's principal place of business has been defined with a focus on the center of control. Specifically, an entity's principal place of business is considered to be:

> the primary location where an entity's management directs, controls, or coordinates the entity's activities, or, in the case of an investment fund, where the fund's activities and investments are primarily directed, controlled, or coordinated by or on behalf of the general partner, managing member, or equivalent.[2]

Accordingly, a foreign entity organized under the laws of a foreign state may still be considered a U.S. entity if the entity's decisions and operations are based in the United States. The latter portion of the definition is particularly important for investment funds managed in the United States that may be organized overseas. For example, if a Cayman fund is managed by a U.S. investment advisor, it could now be considered a U.S. entity. However, companies that have represented that their principal place of business is outside the United States for the purpose of any submission or filing to the U.S. government, or any foreign government, may not alter that determination when considering CFIUS's jurisdiction.

Parties should note that the definition of "principal place of business" is an interim rule, which may be revised in the future based on further comment.

ii. Control

The final regulations did not change the definition of control from the pre-FIRRMA regulations. Control is defined as

[2] 31 CFR § 800.239.

the power, direct or indirect, whether or not exercised, through the ownership of a majority or dominant amount of the total outstanding voting interest in an entity, board representation, or other means to determine, direct, or decide important matters affecting an entity including:

(1) the sale, lease, mortgage, pledge, or other transfer of any tangible or intangible principal assets;

(2) the reorganization, merger, or dissolution of the entity;

(3) the closing, relocation, or substantial alteration of the production, operational, or research and development facilities of the entity;

(4) major expenditures or investments, issuances of equity or debt, or dividend payments by the entity, or approval of the operating budget of the entity;

(5) the selection of new business lines or ventures that the entity will pursue;

(6) the entry into, termination, or non-fulfillment by the entity of significant contracts;

(7) the policies or procedures of the entity governing the treatment of nonpublic technical, financial, or other proprietary information of the entity;

(8) the appointment or dismissal of officers or senior managers or, in the case of a partnership, the general partner;

(9) the appointment or dismissal of employees with access to critical technology or other sensitive technology or classified U.S. government information; or

(10) the amendment of the Articles of Incorporation, constituent agreement, or other organizational documents of the entity with respect to the matters described above.

The final regulations continue to provide an exception for specified minority shareholder protections which would not constitute control.

iii. U.S. Business

A U.S. business is broadly defined as any entity, regardless of the nationality of the person controlling the entity, that engages in interstate commerce in the United States. Both the proposed and final regulations broadened the original definition of a U.S. business by removing language stating the U.S. business's engagement in interstate commerce was "only to the extent of its activities in interstate commerce." However, the Department of Treasury clarified in the preamble to the final regulations that the scope of the definition essentially remains the same as the historical pre-FIRRMA definition of U.S. business, and that the extent of a U.S. business's activities remain relevant for CFIUS's analysis of national security risk.

II. COVERED INVESTMENTS IN TID BUSINESSES

Under part 800 of the new regulations, CFIUS's authority expands to include non-controlling investments made by foreign persons in "TID U.S. businesses," defined as businesses operating in one of three "TID" sectors, Critical **T**echnology, Critical **I**nfrastructure, or Sensitive Personal **D**ata. This highlights the need for foreign investors to have a clear idea of the full extent of a U.S. business's activities, products, and data within its possession.[3]

A "covered investment" is defined in the regulations as any direct or indirect investment by a foreign person, other than an excepted investor, in an unaffiliated TID U.S. business that is proposed or pending on or after February 13, 2020, and provides the foreign investor with certain governance rights described below. Notably, there is no equity investment threshold that would except a covered investment in a TID U.S. business, meaning that a foreign person acquiring even a 1% interest in a TID U.S. business will be considered a covered investment if an investment right enumerated below is granted.

a. Governance Rights Triggering a Covered Investment

In order to be covered by the expanded authority on non-controlling investments, the nature of the investment must afford a foreign person (other than a foreign person that is an "excepted investor," described below) one or more of the following:

- access to any ***material non-public technical information*** in the possession of the TID U.S. business;
- ***membership or observer rights*** on the board of directors (or equivalent) of the TID US business or the ***right to nominate*** an individual to a position thereto; or
- any involvement, other than through voting of shares, in ***substantive decision-making*** of the TID U.S. business regarding the:
  - use, development, acquisition, or release of ***critical technologies***;
  - management, operation, manufacture, or supply of covered investment ***critical infrastructure***; or
  - use, development, acquisition, safekeeping, or release of ***sensitive personal data*** of U.S. citizens maintained or collected by the TID U.S. business.

b. Industries Covered

i. Critical Technologies

The new regulations expand CFIUS's jurisdiction to allow review of non-controlling investments in TID U.S. businesses that produce, design, test, manufacture, fabricate, or develop one or more "critical technologies." Critical technologies are defined as those that are controlled under the International Traffic in Arms Regulations ("ITAR") and certain categories of controls under the Export Administration Regulations ("EAR"). Critical technologies also include those designated as "emerging and foundational" technologies pursuant to the Export Control Reform Act of 2018 by the U.S. Department of Commerce.[4] The list of emerging and foundational technologies is still in the process of being finalized.

To fall under the definition of a covered investment involving critical technologies, the foreign investor would need to obtain one or more of the three governance rights discussed above. With regard to involvement in the substantive decision-making of a critical technology TID U.S. business specifically, the foreign investor governance rights would need to pertain to the "use, development, acquisition, safekeeping, or release" of critical technologies.

[3] Note that CFIUS relies on company websites when evaluating a transaction, and will often request clarifications on discrepancies between the description of a U.S. business's activities in a formal CFIUS notice against activities described or illustrated on the U.S. business's website or within its annual report. For example, if a U.S. business states that it does not market its products to the defense sector, a picture of a fighter jet on the U.S. business's website will likely lead to requests for clarification by CFIUS.

[4] The final regulations provide an exemption for encryption-related critical technologies controlled under the EAR that are eligible for export pursuant to License Exception ENC of the EAR. License Exception ENC is available to many forms of encryption software that would otherwise be captured by export control licensing requirements.

ii. Critical Infrastructure

The new regulations also expand CFIUS's jurisdiction to allow review of non-controlling investments into TID U.S. businesses that are performing particular functions with regard to critical infrastructure enumerated in Appendix A to part 800 of the CFIUS regulations. Critical infrastructure is defined as systems or assets that are so vital to the United States that the "incapacity or destruction of such systems or assets would have a debilitating impact on national security."

Appendix A to part 800 specifies which functions (ownership, operation, supply, servicing, or manufacturing of the infrastructure) apply to each narrow category of critical infrastructure. When determining CFIUS's jurisdiction with regard to a non-controlling covered investment, transaction parties would need to match these particular functions with the covered critical infrastructure specifically listed in Appendix A. This two-part requirement allows CFIUS to focus on the U.S. businesses that are most vulnerable to threat actors. For example, investments in a U.S. company located along the Gulf of Mexico that ***owns*** a crude oil storage facility with the capacity to hold 30+ million barrels of crude oil under section (xvi) of Appendix A, or a U.S. company that ***operates*** a constellation of satellites providing services directly to the Department of Defense under section (vi) of Appendix A.

Broad industry categories under Appendix A include:

- Telecommunications (*e.g.*, internet protocol networks, telecommunication or information services, submarine cable systems and related systems, and data centers);
- Energy (*e.g.*, power generation, distribution, transmission, or storage of electric energy, and oil and natural gas refineries, storage facilities, import and export terminals, and controlling systems);
- Products, weapons, and materials designated by the U.S. Department of Defense ("DOD") (*e.g.*, industrial resources not readily available that have been funded by various DOD contracts);
- Financial systems (*e.g.*, financial market utilities, registered exchanges, and technology service providers of core processing services listed in the Significant Service Provider Program).[5]

To fall under the definition of a covered investment involving critical infrastructure, the foreign investor would need to obtain one or more of the three governance rights discussed above. With regard to involvement in the substantive decision-making of the critical infrastructure U.S. business specifically, a covered investment would need to involve substantive decision-making in the "management, operation, manufacture, or supply" of critical infrastructure.

iii. Sensitive Personal Data

The new regulations expand CFIUS's jurisdiction to allow the review of non-controlling investments by foreign entities in TID U.S. businesses maintaining or collecting, directly or indirectly, the "sensitive personal data" of U.S. citizens. Sensitive personal data is defined as "identifiable data" that is held or collected by a U.S. business that:

- targets or tailors products or services to certain branches or agencies of the U.S. government;
- has maintained or collected identifiable data within one or more of the 10 categories of identifiable data described below on greater than one million individuals at any point within the last 12 months; or
- has a demonstrated business objective to maintain or collect data in one or more of the 10 categories of identifiable data described below on more than one million individuals and such data is an integrated part of the U.S. business's primary products or services.

1. "Identifiable Data"

Identifiable data is defined as data that can be used to distinguish or trace an individual's identity, including through the use of any personal identifier. The definition

[5] For background on the supervision of technology service providers by the Federal Financial Institutions Examination Council, please see here.

also covers aggregated data if the foreign investor would gain the ability to disaggregate, or de-anonymize the data, revealing the type of information described above. Notably, the definition does not include encrypted data unless the U.S. business collects and has the means to decrypt that data to provide identifiable data.

The categories of sensitive personal data covered by the regulations are as follows:

(1) financial data that could be used to analyze or determine an individual's financial distress or hardship;

(2) the set of data in a consumer report, as defined under 15 U.S.C. 1681a, unless such data is obtained from a consumer reporting agency for one or more purposes identified in 15 U.S.C. 1681b(a) and such data is not substantially similar to the full contents of a consumer file as defined under 15 U.S.C. 1681a;

(3) the set of data in an application for health insurance, long-term care insurance, professional liability insurance, mortgage insurance, or life insurance;

(4) data relating to the physical, mental, or psychological health condition of an individual;

(5) non-public electronic communications, including email, messaging, or chat communications, between or among users of a U.S. business's products or services if a primary purpose of such product or service is to facilitate third-party user communications;

(6) geolocation data collected using positioning systems, cell phone towers, or Wi-Fi access points such as via a mobile application, vehicle GPS, other onboard mapping tool, or wearable electronic device;

(7) biometric enrollment data including facial, voice, retina/iris, and palm/fingerprint templates;

(8) data stored and processed for generating a state or federal government identification card;

(9) data concerning U.S. government personnel security clearance status; and

(10) the set of data in an application for a U.S. government personnel security clearance or an application for employment in a position of public trust.

Sensitive personal data does not include employee data, unless the data pertains to employees of U.S. government contractors carrying security clearances, or data that is a matter of public record, such as court records or other government records that are generally available to the public. Furthermore, results of an individual's genetic tests,[6] and related genetic sequencing data, would also be considered sensitive personal data when the results constitute "identifiable data," as described here.

c. Carve-outs and Exceptions

In order to narrow CFIUS's expanded jurisdiction, FIRRMA introduced the concepts of "Excepted Foreign State" and "Excepted Investor." Together, these concepts serve to exempt certain parties from countries determined to have "robust intelligence-sharing and defense industrial base integration mechanisms with the United States."

[6] The definition of "genetic test" derives from the definition in the Genetic Information Non-Discrimination Act of 2020 ("GINA"). In GINA, genetic information is defined as:

(A) In general, with respect to any individual, information about

(i) such individual's genetic tests,

(ii) the genetic tests of family members of such individual, and

(iii) the manifestation of a disease or disorder in family members of such individual.

(B) Inclusion of genetic services and participation in genetic research. Such term includes, with respect to any individual, any request for, or receipt of, genetic services, or participation in clinical research which includes genetic services, by such individual or any family member of such individual.

(C) Exclusions. The term "genetic information" shall not include information about the sex or age of any individual.

i. Excepted Investors

"Excepted investors" are not subject to CFIUS jurisdiction over non-controlling investments in TID US businesses and are exempted from mandatory filing requirements for investments in US businesses producing or developing critical technologies. Currently, the list of excepted foreign states is limited to Australia, Canada, and the United Kingdom, all of which are highly integrated into the defense sector of the United States. The list remains open and more foreign states may be added according to certain factors yet to be published by CFIUS.

The requirements of an excepted investor are tied directly to the countries identified as excepted foreign states. In order to qualify as an "excepted investor," the foreign investor must:

(1) Be organized under the laws of an ***excepted foreign state (currently identified as Australia, Canada, and the United Kingdom)*** or the United States;

(2) Have its principal place of business in an excepted foreign state or the United States;

(3) Require that 75% or more of its board members or observers be U.S. nationals or nationals of an excepted foreign state; **and**

(4) Ensure that any foreign person who, individually or as part of a group of foreign persons, holds more than 10% of its voting interest be a national of an excepted foreign state or the United States.

Foreign persons will be disqualified from receiving the exemption if they have committed or been subject to any of a list of various acts of misconduct or penalties, including but not limited to submitting a material misstatement or omission to CFIUS, receiving a Finding of Violation or Penalty Notice from the Office of Foreign Assets Control at the U.S. Treasury Department, or being convicted of a felony by the U.S. Department of Justice.

Foreign excepted investors from the designated states remain subject to CFIUS's jurisdiction over traditional control transactions.

ii. Investment Funds Exception

The implementing regulations provide an exception for indirect foreign investments made through investment funds. This exception should provide significant clarity for U.S. hedge funds with foreign limited partners. These investments are exempt from CFIUS jurisdiction as long as the foreign investor receives only standard, passive limited partnership rights in the fund. In order to qualify for the exemption, the fund must meet the following criteria:

(1) the fund is managed exclusively by a general partner, a managing member, or an equivalent who is not a foreign person;

(2) the advisory board or committee does not have the ability to approve, disapprove, or otherwise control

a. investment decisions of the fund; or

b. decisions made by the general partner, managing member, or equivalent related entities in which the fund is invested;

(3) the foreign person does not otherwise have the ability to control the fund, including the authority to:

a. approve, disapprove, or otherwise control investment decisions of the fund;

b. approve, disapprove, or otherwise control decisions made by the general partner, managing member, or equivalent related entities in which the fund is invested; or

c. unilaterally dismiss, prevent the dismissal of, select, or determine the compensation of the general partner, managing member, or equivalent; and

(4) the foreign person does not have access to material non-public technical information.

Any fund meeting these requirements will also be exempt from the mandatory filing requirements for investments in TID U.S. businesses that produce or develop the specified set of “critical technologies” noted above.

III. MANDATORY FILINGS FOR CERTAIN COVERED TRANSACTIONS

The final regulations continue a mandatory declaration[7] requirement similar to that of the Pilot Program under FIRRMA for:

- investments by foreign parties (subject to certain exemptions) in a TID U.S. business that produces, designs, tests, or develops critical technologies that would require a license in order to be exported to certain persons in the new ownership chain (with certain exceptions);[8] and
- investments by foreign parties with substantial foreign government ownership in a TID U.S. business.

If the parties fail to abide by the mandatory filing requirement, CFIUS is authorized to levy a civil monetary penalty against either or both of the parties of up to the greater of $250,000 or the value of the transaction.

a. Critical Technology Covered Transactions

The Pilot Program originally set forth a mandatory declaration requirement for covered investments involving certain critical technology TID U.S. businesses. On September 15, 2020, CFIUS published a final rule changing its mandatory filing requirement for covered investments involving certain critical technology TID U.S. businesses. The new rule does away with the focus on a U.S. business's NAICS code. Instead, mandatory filings will be required for foreign investments in a U.S. business where any critical technology or technologies designed, produced, tested, manufactured, fabricated, or developed by the U.S. business would require one or more U.S. regulatory authorizations[9] in order to be exported, re-exported, transferred, or retransferred to a person that:

- could directly control such U.S. business as a result of the covered transaction;
- is directly acquiring an interest that is a covered investment in such U.S. business;
- has a direct investment in such U.S. business, the rights of such person with respect to such U.S. business are changing, and such change in rights could result in a covered control transaction or a covered investment;
- is a party to any covered transaction; or
- individually, or is part of a group of foreign persons that, in the aggregate, holds a voting interest of 25% or more in a person that meets one of the criteria listed above.

Mandatory declarations will generally be required even if a license exception under the EAR or license exemption under the ITAR would be available for the export of the product to the foreign person in question. However, the rule provides for three narrow exemptions, stating that a mandatory declaration would not be required if the export would be eligible for license exceptions under the EAR because the item is considered unrestricted technology or software,[10] is a specified type of encryption technology,[11] or is authorized for export without a license for strategic reasons.[12]

[7] After filing a mandatory declaration, which is an abbreviated, approximately five-page notification requiring less information than filing a full CFIUS notice, CFIUS has 30 days to review the declaration before deciding on a course of action. CFIUS may then decide to require a full notice from the parties, start a unilateral review of the investment, or declare its decision based on the declaration. Further information on notices and declarations is contained in the Timing and Declarations section below.

[8] This requirement applies to transactions completed after October 15, 2020. The previous NAICS-based requirement will apply to any transactions for which the following has occurred between February 13, 2020 and October 15, 2020: the completion date; the parties to the transaction have executed a binding written agreement, or other binding document, establishing the material terms of the transaction; a party has made a public offer to shareholders to buy shares of a U.S. business; or a shareholder has solicited proxies in connection with an election of the board of directors of a U.S. business or an owner or holder of a contingent equity interest has requested the conversion of the contingent equity interest.

[9] U.S. regulatory authorization is defined as a license or other approval issued by the Department of State under the International Traffic in Arms Regulations; a license from the Department of Commerce under the Export Administration Regulations; a specific or general authorization from the Department of Energy; or a specific license from the Nuclear Regulatory Commission. 31 CFR § 800.254.

[10] License Exception TSU at 15 CFR § 740.13.

[11] License Exception ENC at 15 CFR § 740.17(b).

[12] License Exception STA at 15 CFR § 740.20(c)(1).

CFIUS also provides exemptions to the mandatory filing requirements for transactions involving:

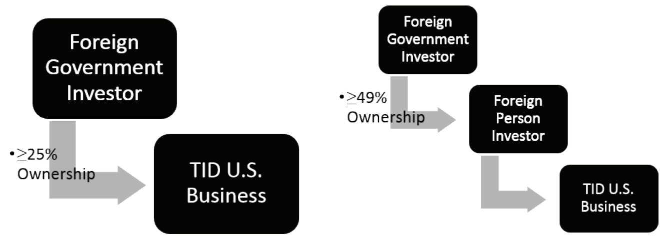
- excepted investors;
- FOCI-mitigated entities; and
- investment funds managed exclusively by, and ultimately controlled by, U.S. nationals.

b. Substantial Government Interest

The final regulations also expand the mandatory filing requirement in the Pilot Program to include investments or acquisitions giving a foreign government a "substantial interest" in a TID U.S. business. The final regulations describe the threshold requirements that would constitute a foreign government "substantial interest" and trigger a mandatory filing requirement as either:

- a foreign government investor acquiring a 25% or greater stake in a TID U.S. business; or
- a foreign person investor in which a 49% or greater voting interest ("substantial interest") is held by a national or subnational government of a single foreign state
  - in the case of an entity directed, controlled, or coordinated by a general partner, managing member, or equivalent, the national or subnational government holds a 49% or greater interest in the general partner, managing member, or equivalent of the entity.

Examples:



For the purpose of determining substantial foreign government interest in investment funds, only investments in the general partner apply. Investments as a limited partner will not be considered by CFIUS as a substantial foreign government interest.

IV. INCREMENTAL INCREASES IN EQUITY OR CHANGE IN RIGHTS

The final regulations also provide that for covered control transactions submitted to CFIUS through a declaration process that results in CFIUS concluding all action, there is a safe harbor for any future transactions that would result in a foreign person increasing their equity or being granted more rights in the U.S. business. Originally, the safe harbor was limited to transactions approved by CFIUS on the basis of a notice. This provision expands on the terms of the Pilot Program, which did not provide the safe harbor for declarations or non-control transactions filed by notice.

V. MITIGATION

While FIRRMA did not alter the possibility for CFIUS to negotiate mitigation agreements, it did formalize certain mitigation possibilities and procedures. The final regulations continue to authorize CFIUS to negotiate, enter into, or impose and enforce any agreement or condition with any party to an investment transaction to mitigate any national security risks. The regulations also authorize CFIUS to conduct periodic reviews of mitigation agreements, determining if the agreements should be phased out, or modified if the threat no longer exists. When negotiating or agreeing to a mitigation agreement, CFIUS must also consider whether the agreement is reasonably calculated to be effective, verifiable, monitored, and enforceable.

VI. TIMING AND DECLARATIONS

Prior to FIRRMA, CFIUS was allowed a 30-day initial review period for filings and an additional 45-day investigation period. FIRRMA extended the initial review period for CFIUS filings to 45 days, with the possibility of an additional 15-day extension of the investigation period, at the request of the lead agency, in the event of "extraordinary circumstances." As a result of FIRRMA's extended review period, and not including instances in which a party may choose to withdraw and resubmit a filing, the maximum review period for CFIUS filings has been extended from 75 days to 90 days, or 105 days in extraordinary circumstances. Additionally, the final regulations only grant CFIUS retrospective jurisdictions over completed deals if there is an expansion of rights that would bring a closed transaction under the expanded jurisdiction of the new regime.

Per the final regulations, a shorter "declaration" process is now available for all covered control and investment transactions. Declarations are short, approximately five-page submissions including: (a) a description of and rationale for the transaction, including information on the foreign party ownership and financing; (b) a statement regarding the foreign party's access to material nonpublic information, membership on the board, or other involvement in substantive decision-making of the U.S. business, including rights that could result in control of the U.S. business by the foreign party; and (c) a detailed description of the U.S. business's activities with specific information on its TID U.S. business activities, if any. Parties must submit the declaration at least 30 days ahead of closing and CFIUS must respond within 30 days of the filing of a Declaration.

After a party files a short declaration, CFIUS is required to respond in one of four ways:

(1) request the parties file a written notification;

(2) inform the parties that CFIUS cannot complete the review on the basis of a declaration and that they can file a notice to seek a written notification from CFIUS that it has completed all actions relevant to the transaction;

(3) initiate a unilateral review of the transaction; or

(4) notify the parties that CFIUS has completed its action.

In order to file a declaration, the parties must complete a declaration submission form in accordance with the guidelines set out by Treasury. The guidance includes both technical and substantive instructions on how to fully complete and submit a declaration. The Treasury website also has sample documents to assist parties in filling out a declaration. After the declaration is filed, the Staff Chairperson of CFIUS will inspect the declaration for completeness and will circulate the declaration, setting off the 30-day review period, only if it is deemed complete. This highlights the need for parties to ensure that they follow the guidelines as closely as possible to avoid any preventable delays.

VII. FILING FEES

FIRRMA mandated the collection of a filing fee by CFIUS from transaction parties constituting 1% of the value of the transaction, not to exceed $300,000. On April 29, 2020, CFIUS released an interim final rule establishing a tiered-fee approach based on the value of the transaction.

Transaction Value	Filing Fee
Under $500,000	No Transactions Fee
$500,000 – Under $5,000,000	$750
$5,000,000 – Under $50,000,000	$7,500
$50,000,000 – Under $250,000,000	$75,000
$250,000,000 – Under $750,000,000	$150,000
$750,000,000 or Greater	$300,000

Notably, the interim final rule states that these fees are for formal written notices and that they do not apply to (1) declarations or (2) unilateral notice reviews initiated by CFIUS agency members. Under this system, the value of assessing CFIUS's interest in a particular transaction through a declaration may become a more attractive option, even with the potential "implicit" expense of adding 30 days to a transaction closing period as a result of an extended CFIUS review period in order to receive an affirmative response from CFIUS.

In general, the parties will be required to pay the filing fee before CFIUS will accept a notice for review and the Staff Chairperson may reject a voluntary notice if they determine that the filing fee was insufficient under this subpart. Therefore, in order to avoid unnecessary delay's parties should ensure that they correctly value the transaction when determining the filing fee. The interim final rule states that the value of the transaction is generally the total value of all present and future consideration, including cash, assets, shares or other ownership interests, debt forgiveness, or services, provided to the foreign person party to the transaction.

The interim final rule also states that the fees will be refunded if CFIUS determines the transaction is not a covered transaction or, in response to a petition by a party, the Staff Chairperson determines the parties paid more than was required. Additionally, parties will not be required to pay an additional filing fee if the Staff Chairperson permits the parties to withdraw and refile the notice, unless there was a material change in the transaction or a material inaccuracy or omission made by the parties which would necessitate CFIUS considering new information.

VIII. NATIONAL SECURITY FACTORS

When assessing the national security risk posed by a transaction, CFIUS conducts a threat assessment by determining the intent and capabilities of the acquirer, assessing the vulnerability of the U.S. business that could impact national security, and the consequences if those vulnerabilities were exploited. Section 721 of the DPA, which has been amended several times, most recently by FIRRMA, lays out the president's authority, responsibility, and mandate for reviewing foreign investment in the United States. These factors continue to be used as the cornerstone for evaluating U.S. national security risks.

Specifically, Section 721(f) of the DPA, "Factors to be Considered," lays out 18 factors to be considered by CFIUS and the president when conducting a national security review of foreign investment in U.S. businesses.

The first twelve U.S. national security factors pre-existed FIRRMA and include the effect of foreign investment on the capability, capacity, and control of domestic industries needed to meet requirements for U.S. national security. The factors further include the national security implications of transactions on U.S. technological leadership in key areas: critical infrastructure and critical technologies. Another common factor that is often the cause of a national security review is foreign government control over the foreign investor.

FIRRMA added the following six factors, focused on increased foreign competition in the race for the next generation of technological supremacy:

(1) a transaction involves a country of special concern that has a demonstrated or declared strategic goal of acquiring a type of critical technology or critical infrastructure that would affect United States leadership in areas related to national security;

(2) the potential national security-related effects of the cumulative control of, or pattern of recent transactions involving, any one type of critical infrastructure, energy asset, critical material, or critical technology by a foreign government or foreign person;

(3) whether any foreign person engaging in a covered transaction with a United States business has a history of complying with United States laws and regulations;

(4) control of United States industries and commercial activity by foreign persons as it affects the capability and capacity of the United States to meet the requirements of national security;

(5) the extent to which a covered transaction is likely to expose, either directly or indirectly, personally identifiable information, genetic information, or other sensitive data of United States citizens to access by a foreign government or foreign person that may exploit that information in a manner that threatens national security; and

(6) a transaction that is likely to have the effect of exacerbating or creating new cybersecurity vulnerabilities in the United States or is likely to result in a foreign government gaining a significant new capability to engage in malicious cyber-enabled activities against the United States, including such activities designed to affect the outcome of any election for federal office.

The factors for consideration added by FIRMMA, in addition to CFIUS's expanded authority covering critical technologies and infrastructure, sensitive personal data, and real estate transactions providing foreign persons with rights over property near sensitive U.S. sites, highlight Congress's recognition that advancements in technology and growing international competition raise new national security concerns.

IX. CONCLUSION

The final regulations provide clarification on several definitions and expand CFIUS's mandate to cover new areas of concern to U.S. national security. The final regulations also provide exceptions to the newly covered transactions and for short-form written declarations, which will hopefully streamline the review process, allowing for fewer delays. Since 2009, the number of CFIUS notifications per year has increased dramatically. With the expansion of CFIUS's authority we expect that trend to continue and for CFIUS notifications to grow at an even faster rate.

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