

CLIENT ALERT

Proposed CFIUS Regulations Would Expand Jurisdiction, but Also Offer Investors Some Relief

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On September 17, 2019, the Committee on Foreign Investment in the United States (“**CFIUS**”) issued proposed regulations to implement the provisions of the Foreign Investment Risk Review Modernization Act of 2018 (“**FIRMA**”).¹ The proposed regulations would significantly expand CFIUS’s jurisdiction over non-controlling investments by foreign persons involving U.S. critical infrastructure and U.S. businesses maintaining sensitive personal data (“**Covered TID Investments**,” where “TID” is an abbreviation for technology, infrastructure, and data); and real estate transactions that previously fell outside CFIUS’s jurisdiction (“**Covered Real Estate Transactions**”). The mandatory filing requirement under the pilot program for foreign investments in critical technologies² will continue to apply to foreign investments in U.S. businesses that develop critical technology in or specifically for a covered industry.

However, the proposed regulations would offer some relief to covered buyers and sellers by making a shorter “Declaration” process available for all transactions within CFIUS’s jurisdiction, allowing parties to file for review of a transaction 45 days ahead of closing. The Declaration process will give parties the opportunity to gauge CFIUS’s concern over a transaction in a shorter process without deciding between the “all or nothing” approach of requesting a full review or proceeding to close without CFIUS clearance.

¹ See Willkie Client Alert, “*Significant Changes to CFIUS Review Process and Export Controls Finalized in 2019 Defense Spending Legislation*,” available [here](#).

² See Willkie Client Alert, “*CFIUS Expands Jurisdiction and Introduces Mandatory Filings for Foreign Investments in Critical Technology Businesses*,” available [here](#).

Proposed CFIUS Regulations Pursuant to FIRRMA Would Expand Jurisdiction, but Also Offer Investors Some Relief by Providing a Shorter Process and Exceptions

The proposed regulations will also create an exception from “covered investments” for certain non-controlling investments by foreign persons defined as “excepted investors” from countries identified by CFIUS as “excepted foreign states.” While CFIUS has yet to determine countries eligible for this exception, the process would create a fast-track for investors from countries with a “robust process” to assess foreign investments for national security risk and that coordinate with the United States on matters related to investment security.

Moreover, except for the existing pilot program transactions for certain investments involving critical infrastructure and investments in which a foreign government has a substantial interest,³ pre-closing reviews of traditional covered transactions (“**Covered Control Transactions**”), the Covered TID Investments, and Covered Real Estate Transactions will be voluntary. As a result, for most covered transactions, parties will have greater choice of how to proceed in order to manage potential CFIUS interest in a transaction.

I. **Expanded Jurisdiction over Non-Controlling Investments and Real Estate Transactions**

The expansion in CFIUS’s jurisdiction primarily applies to (1) Covered TID Investments, and (2) Covered Real Estate Transactions.

A. **Non-Controlling Investments (Covered TID Investments)**

The proposed regulations would expand CFIUS’s jurisdiction beyond transactions that could result in foreign control of the U.S. business to also include non-controlling investments, direct or indirect, in certain TID businesses in the United States. The jurisdiction extends to any investment by a foreign person that affords the foreign person:

- Access to any material non-public technical information;
- Membership or observer rights on the board of directors; or
- Involvement in substantive decision-making of the U.S. business regarding critical technologies, critical infrastructure, or sensitive personal data of U.S. citizens.

Please note that this new authority applies only to an investment in a U.S. business in one of the following areas:

1. **Critical Technologies:** The U.S. business must produce, design, test, manufacture, fabricate, or develop one or more critical technologies. Generally, this means most items subject to U.S. export controls and items yet to be

³ A Declaration filing is mandatory when a foreign government obtains a “substantial interest” (defined as a 49% or greater voting interest) in a foreign person obtaining a “substantial interest” (defined as a 25% or greater voting interest) in the target.

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identified as “Emerging and Foundational Technologies” by the Bureau of Industry and Security at the U.S. Department of Commerce.

2. **Critical Infrastructure:** The U.S. business owns, operates, manufactures, supplies, or services critical infrastructure. Appendix A to the proposed regulations identifies specific critical infrastructure to limit the application of its investment jurisdiction. The covered infrastructure predominantly exists within the telecommunications, utilities, energy, and transportation sectors.
3. **Sensitive Personal Data:** The U.S. business maintains or collects sensitive personal data of U.S. citizens. Sensitive personal data is specifically defined within ten categories of data maintained or collected by U.S. businesses, including financial, geolocation, health, and government services. The data must specifically (1) target or tailor products to sensitive populations; or (2) collect or maintain data on over one million people (or have a business objective to do so).

B. Covered Real Estate Transactions

The proposed regulations also extend CFIUS’s jurisdiction to real estate purchases by foreign entities in locations in proximity to sensitive government facilities. CFIUS made significant efforts to add specificity to this category of transactions, going as far as listing and referencing lists of locations of national security sensitivity rather than relying on transaction parties to independently ascertain the location themselves.

The types of transactions covered by the proposed regulations include a purchase, lease, or concession to a foreign person of real estate in the United States that affords the foreign person three or more of the following property rights: (1) physical access; (2) ability to exclude; (3) ability to improve or develop; and (4) ability to affix structures or objects.

The proposed regulations apply only to: (1) real estate that is, is within, or will function as part of an airport or seaport listed by the U.S. Department of Transportation; or (2) real estate that is within one mile or 100 miles of certain specified U.S. military installations. The relevant military installations are listed by name and location in Appendix A to Part 802 of the proposed regulations. The proposed regulations create exceptions for real estate in “urbanized areas,” individual “housing units,” or commercial space in office buildings.

II. Relief for Investors

In spite of the expansion in CFIUS’s jurisdiction by the proposed regulations, would take several steps to give parties more options to seek CFIUS review of a transaction without undergoing a full notice briefing, which can often delay closing by five or six months.

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A. Declarations vs. Notices

The proposed rules establish that Declarations will be available for all transactions. This Declaration process was introduced as part of the pilot program covering transactions involving critical technologies in specified industries. A Declaration is essentially an abbreviated notice (expected to be less than five pages) that needs to be filed at least 45 days prior to closing.

It is expected that the Declaration process will become more common under the FIRRMA regulations than under the pilot program, which has been primarily concerned with sensitive transactions involving critical technology. As the FIRRMA regulations are finalized and CFIUS's transaction jurisdiction expands, parties will have this intermediary option available to them to use strategically and potentially avoid a multi-month notice clearance process.

Since FIRRMA requires that CFIUS respond to a Declaration within 30 days, it should serve to mitigate significant risk for transactions where a potential threat to U.S. national security is unclear. In response to a Declaration, CFIUS will have four possible options: (1) request that the parties file a full notice; (2) inform the parties that CFIUS cannot complete action on the basis of the Declaration, and that they would need to file a notice in order for CFIUS to clear the transaction; (3) initiate a unilateral review of the transaction through an agency notice; or (4) notify the parties that CFIUS has concluded all action.

B. Excepted Investors from Excepted Foreign States

The proposed regulations also create an exception from Covered TID Investments for foreign persons defined as "excepted investors" from "excepted foreign states." The criteria require a foreign person to have a substantial connection (e.g., nationality of ultimate beneficial owners and place of incorporation) to an excepted foreign state, which CFIUS will identify at a later date based on criteria described in FIRRMA. Ultimately, investors from this list of countries would have an advantage over investors from other countries when bidding on acquisitions. As CFIUS's scrutiny of foreign investments increased over the past several years, bidders from countries less likely to draw scrutiny from CFIUS, e.g., countries that are members of the North Atlantic Treaty Organization or the European Union, have generally been at an advantage over bidders from countries under heavier scrutiny, e.g., China or Russia.

III. Preparations for the Final Regulations

The proposed regulations are unlikely to be finalized in time to affect deals signed before November 2019, but any entity with any transactional exposure to non-U.S. investment in the United States should determine its exposure to the new regulations prior to their finalization by February 2020 at the latest. In the meantime, parties should continue to abide by the current CFIUS regulations until these new regulations are made final.

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