

CFIUS Review Authority Expands

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New U.S. Treasury rules expanding the jurisdiction of the Committee on Foreign Investment in the United States (CFIUS) to review foreign direct investment in the United States take effect on Feb. 13. Our summary of the new rules explores the arising mandatory filing requirements, the major changes to the CFIUS review process under the Foreign Investment Risk Review Modernization Act (FIRRMA) implementing regulations, the current foreign investment policy of the United States, and the role of CFIUS to focus a transaction review on national security. The key takeaways on the rules are as follows:

- Although FIRRMA imposes many jurisdictional changes to CFIUS, FIRRMA does not alter the cornerstone open foreign investment policy of the United States or the national security focus of CFIUS.
- Foreign investors are best served by approaching a CFIUS review with an initial focus on the U.S. national security concerns presented by the transaction, then the impacted parties may take steps to address the complex jurisdictional questions now arising under FIRRMA.
- Now, under FIRRMA, CFIUS jurisdiction may arise for foreign direct investments that provide a foreign investor material access or substantive decisionmaking rights related to a U.S. business with critical technology, sensitive data, or a critical infrastructure nexus, rather than CFIUS jurisdiction arising solely as a result of foreign control of the U.S. business.

The revisions implement FIRRMA. Although FIRRMA imposes many jurisdictional changes to CFIUS, FIRRMA does not alter the cornerstone open foreign investment policy of the United States or the national security focus of CFIUS.

FIRRMA broadens CFIUS jurisdiction by providing authority to review foreign direct investments that do not result in foreign control of a U.S. business. Prior to FIRRMA, foreign control was the focus of a CFIUS jurisdiction review. Now, foreign direct investments that do not result in foreign control of a U.S. business become a subject of analysis required for CFIUS jurisdiction review. CFIUS jurisdiction may arise for foreign direct investments that provide a foreign investor material access or substantive decisionmaking rights related to a U.S. business with critical technology, sensitive data, or a critical infrastructure nexus (see MAD Rights discussed below).

Mandatory Filings for Foreign Investors under FIRRMA for Certain Investments

The FIRRMA final rules alter CFIUS jurisdiction by adding two additional instances where a filing with CFIUS is mandatory: (1) a transaction covered by the initial Pilot Program (defined below) and now required in the main CFIUS regulations of Part 800, and (2) an investment by a foreign government resulting in the acquisition of a substantial interest in a TID U.S. business (defined below) by a foreign person in which a foreign government has a substantial interest.

Foreign Investment in Specified Pilot Program Industries

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First, FIRRMA provides CFIUS the authority to implement temporary pilot programs and thereby field test the utility of certain mandatory filing requirements that may enhance the CFIUS process. The initial Pilot Program became effective on Oct. 10, 2018, and required the mandatory filing of a declaration for investments in a Pilot Program US Business that (1) produces, designs, tests, manufactures, fabricates, or develops critical technology, and (2) utilizes that critical technology in connection with a Pilot Program industry as identified by NAICS code in Annex A of the initial Pilot Program. The initial Pilot Program is discontinued as of Feb. 12, 2020, but the mandatory declaration filing requirements for transactions within the scope of the initial Pilot Program are required by the primary CFIUS regulations of Part 800 which now integrate the filing requirements from the initial Pilot Program.

Foreign Investment in Specified TID Businesses

Second, CFIUS now requires the filing of a declaration for a covered transaction that results in the acquisition of a substantial interest in a TID U.S. business by a foreign person in which a foreign government has a substantial interest. A TID U.S. business includes a business that (1) produces, designs, tests, manufactures, fabricates, or develops one or more *critical technologies*, (2) performs the specific functions with respect to covered investment *critical infrastructure* set forth in Part 800, Appendix A, or (3) maintains or collects, directly or indirectly, *sensitive personal data* of U.S. citizens. For example, TID businesses may include the following: a U.S. business that operates a munitions plant producing a variety of military-grade explosives listed on the United States Munitions List (critical technologies); a U.S. business that manufactures pipe segments for a pipeline within the list of critical infrastructure (critical infrastructure); and, a U.S. business that operates as a credit reporting agency and maintains consumer credit reports on greater than one million individuals (sensitive personal data).

Major Changes for Foreign Investors under FIRRMA

In addition to the mandatory filing requirements, the final rules implementing FIRRMA bring other significant changes to the CFIUS review of foreign direct investments:

Real Estate

CFIUS created a stand-alone set of real estate regulations within Part 802 that detail positive requirements for covered real estate over which CFIUS now has jurisdiction. Covered real estate must be (1) located within, or will function as part of, certain airports or maritime ports, or (2) located within: (a) "close proximity" (*i.e.*, one mile from the boundary) to specific military installations, (b) the "extended range" (*i.e.*, in most cases 99 miles from the boundary) of a subset thereof, (c) certain larger geographic areas identified in connection with other military installations, or (d) any part of certain military installations that is located within 12 nautical miles seaward of the coastline of the United States. The relevant military installations and categories are identified in Part 802, Appendix A.

However, importantly, as to real estate (1) there are no mandatory filing requirements for the purchase of covered real estate by a foreign person, (2) no separate additional real estate filings are required for any transaction for which a joint voluntary notice or declaration is otherwise filed with CFIUS under Part 800, and (3) CFIUS maintains the traditional policy that the extension of a loan by a foreign person to a U.S. business does not result in a covered real estate transaction.

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From Control only to MAD Rights as Well

Another major shift, CFIUS jurisdiction now extends to foreign investments that do not provide control of a U.S. business but rather provide a foreign person the following: (1) access to any material nonpublic technical information in the possession of the TID U.S. business, (2) *membership* or observer rights on the board of directors or equivalent governing body of the TID U.S. business, and (3) any involvement in substantive *decisionmaking* of the TID U.S. business pertaining to the use, development, acquisition, safekeeping, or release of the sensitive personal data and critical technologies, or management or operation of critical infrastructure (the foregoing (1)-(3) are MAD Rights).

So, transactions providing MAD Rights to foreign investors should be carefully screened for national security risks, and those raising capital should carefully evaluate the actual need to convey MAD Rights to foreign investors and thereby trigger CFIUS jurisdiction.

Investment Funds

Since CFIUS jurisdiction now extends review from control of a U.S. business to the conveyance of MAD Rights, FIRRMA provides corresponding exclusions for those impacted investment funds that incorporate certain governing characteristics designed to limit the access and control of foreign person investors, such as the following examples:

- the fund is managed exclusively by a general partner, a managing member, or an equivalent;
- the foreign person is not the general partner, managing member, or equivalent;
- the fund advisory board does not have the ability to approve, disapprove, or otherwise control the investment decisions of the investment fund;
- the foreign person does not otherwise have the ability to control the investment fund;
- the foreign person does not have access to material nonpublic technical information as a result of its participation on the advisory board or committee; or
- the investment does not afford the foreign person any MAD rights.

Consequently, those involved in fund creation and management should take due care at the onset of fund creation to confirm whether the fund intends to reduce the risk of creating CFIUS jurisdiction over the foreign direct investment, and thereby, potentially eliminate the extension of MAD Rights to foreign investors from the outset within the fund governing documents.

Fees

Finally, CFIUS is authorized under FIRRMA to require filing fees that may not exceed the lesser of 1% of the value of a transaction or a maximum of \$300,000. The U.S. Treasury has not yet published any rules implementing filing fees; rather, the U.S. Treasury has confirmed a separate proposed rule implementing the filing fee authority of CFIUS will be published at a later date.

Foreign Investment Policy of the United States

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Importantly, despite these expansions to CFIUS jurisdiction and review, the longstanding policy of the U.S. government to welcome foreign investment remains consistent under FIRRMA. FIRRMA provides clear Congressional support of the longstanding U.S. foreign investment policy: *It is the sense of Congress that—foreign investment provides substantial economic benefits to the United States, including the promotion of economic growth, productivity, competitiveness, and job creation, thereby enhancing national security; . . . it should continue to be the policy of the United States to enthusiastically welcome and support foreign investment, consistent with the protection of national security . . .* Again, notwithstanding the many complex jurisdictional changes resulting from FIRRMA, the fundamental open economy and open investment policy of the U.S. government remains unchanged.

Also under FIRRMA, the singular focus of the CFIUS review process on national security remains unchanged: *the Committee on Foreign Investment in the United States should continue to review transactions for the purpose of protecting national security and should not consider issues of national interest absent a national security nexus.* CFIUS is neither tasked with nor statutorily authorized to undertake a broader review of foreign direct investment for economic and competitive concerns outside the bounds of a national security nexus.

In sum, foreign investors are best served by approaching a CFIUS review with an initial focus on the U.S. national security concerns presented by the transaction, then the impacted parties may take steps to address the complex jurisdictional questions now arising under FIRRMA. Continue to watch for Miller Canfield eAlerts and updates as CFIUS continues to implement FIRRMA requirements. If you need further assistance to understand the impact of FIRRMA on the CFIUS review process and your transactions, we invite you to contact Miller Canfield.