

Treasury Publishes Proposed CFIUS Regulations to Implement FIRRMA: An Overview

September 18, 2019

On Tuesday, September 17, 2019, the U.S. Department of the Treasury (Treasury) issued proposed regulations to implement the Foreign Investment Risk Review Modernization Act (FIRRMA), a law that significantly expands the jurisdiction and operational mandate of the Committee on Foreign Investment in the United States (CFIUS). The proposed regulations would implement most of the provisions of FIRRMA that have not already gone into effect and include important considerations regarding mandatory filings and expansion of CFIUS's jurisdiction to include certain non-controlling, non-passive investments in certain U.S. businesses. Treasury is providing an opportunity for public comment on the proposed regulations, which closes on **October 17, 2019**. The final regulations implementing FIRRMA will become effective no later than February 13, 2020. Find Wiley Rein's client alert analysis [here](#).

Treasury published the proposed regulations in two parts:

- **Provisions pertaining to certain investments in the United States by Foreign Persons:** These proposed regulations, when finalized, will replace the current CFIUS regulations at part 800 of title 31 of the Code of Federal Regulations.
- **Provisions pertaining to certain transactions by Foreign Persons involving real estate in the United States:** These proposed regulations, when finalized, will establish a new part 802 of title 31 of the Code of Federal Regulations.

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Practice Areas

Committee on Foreign Investment in the United States (CFIUS)
Government Contracts
International Trade
National Security
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Broadly, the proposed regulations implement CFIUS's new authority under FIRRMA to: (1) review certain non-controlling, non-passive investments in technology, infrastructure, and data companies ("TID U.S. businesses"); (2) require mandatory filings for "substantial" investments in TID U.S. businesses by a foreign person in which a foreign government has a "substantial" interest; and (3) review a broad swath of real estate transactions. The following provides a brief overview of the proposed regulations. Wiley Rein will be following up on this alert with two additional alerts analyzing the two sets of proposed rules in greater detail.

Expansion of Transactions Subject to CFIUS Jurisdiction

The proposed regulations implement CFIUS's authority under FIRRMA to review certain non-controlling, non-passive investments, direct or indirect, by a foreign person in an unaffiliated TID U.S. business that afford the foreign person one or more of the following:

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

It is important to note that even if the foreign person gains the aforementioned rights or access as a result of the investment, only transactions involving TID U.S. businesses are subject to these new provisions. Such businesses include the following:

- A U.S. business that produces, designs, tests, manufactures, fabricates, or develops one or more ***critical technologies***;
- A U.S. business that owns, operates, manufactures, supplies, or services ***critical infrastructure***; or
- A U.S. business that maintains or collects ***sensitive personal data*** of U.S. citizens that may be exploited in a manner that threatens national security.

Mandatory Declarations

The proposed regulations establish a mandatory filing requirement for certain investments involving the acquisition of a "substantial interest" in a TID U.S. business (which the proposed regulations define as a direct or indirect voting interest of at least 25 percent) by a foreign person in which a foreign government holds a "substantial interest" (defined as a direct or indirect voting interest of at least 49 percent).

Excepted Investments and Countries

Introducing a new consideration, the proposed regulations limit the application of CFIUS's jurisdiction over non-controlling "covered investments" and certain real estate transactions by certain foreign persons, defined as "excepted investors" from certain "excepted foreign states."

Investment Fund Acquisitions

The proposed rule establishes provisions relating to investment funds. Specifically, in the context of an indirect investment by a foreign person in an unaffiliated TID U.S. business through an investment fund that affords the foreign person (or a designee of the foreign person) membership as a limited partner or equivalent on an advisory board or committee of the fund, the foreign person's investment will not be treated as a covered investment as long as certain criteria are met.

Real Estate Transactions

The proposed regulations extend CFIUS's jurisdiction to review certain real estate transactions. The focus of the regulations, as expressed in the definition of "covered real estate," is on transactions concerning certain sites and their surrounding areas, including airports, maritime ports, military installations, and other U.S. Government facilities. The regulations provide that CFIUS's jurisdiction now covers the purchase or lease by, or concession to, a foreign person of covered real estate that affords the foreign person three or more of the following rights: physical access; the right to exclude; the right to improve or develop; or the right to affix structures or objects.

Wiley Rein has an unparalleled ability to assist clients on investments that raise national security concerns. We have more than two decades of experience handling matters involving national security, including CFIUS, export controls, Team Telecom, and the Defense Counterintelligence Security Agency (DCSA), and have counseled clients in transactions that involve nearly every industry sector subject to CFIUS review. Please reach out to any of the attorneys listed on this alert should you have any questions about the proposed regulations implementing FIRRMA.