

Expanded CFIUS Regulations in Effect February 13, 2020

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FAQs on How New Rules Impact Foreign Investment in U.S. Businesses

When do the new CFIUS regulations go into effect?

On January 13, 2020, the Department of the Treasury issued final regulations (31 CFR §§800, 802) which implement the Foreign Investment Risk Review Modernization Act of 2018 (FIRRMA) and its expansion of the jurisdiction of the Committee on Foreign Investment in the United States (CFIUS). The new rules go into effect on February 13, 2020. Transactions are covered by the new rules unless the following occurred prior to February 13, 2020: (1) the completion date of the transaction; (2) the parties executed a binding written agreement establishing the material terms of the transaction; (3) a party has made a public offer to shareholders to buy shares of the U.S. business; or (4) 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.

What U.S. businesses will be affected?

In the case of a “control” investment (which may be less than ten percent of equity interest in certain circumstances) or the acquisition of a U.S. business by a foreign person, a transaction may be subject to CFIUS national security review on a voluntary basis. For so-called “TID U.S. businesses”, the new rules will have a profound effect. In certain circumstances, parties to a foreign investment transaction involving a TID U.S. business will be required to file a mandatory declaration with CFIUS.

TID U.S. businesses are:

1. U.S. businesses that produce, design, test, manufacture, fabricate, or develop one or more “critical technologies.” Critical technology is defined with reference to U.S. export regulations (such the U.S. Munitions List and the Commerce Control List) and other regulatory regimes, and includes certain emerging and foundational technologies which are still to be defined.
2. U.S. businesses that perform certain “covered infrastructure” functions listed in [Appendix A to 31 CFR Part 800](#). These include (but are not limited to) certain IP networks, telecommunications services, non-commercially available industrial resources, interstate oil pipelines, crude oil storage facilities, rail lines, public water systems, and electric power generation, storage, or transmission facilities.
3. U.S. businesses that maintain or collect directly or indirectly, “sensitive personal data” of U.S. citizens. Sensitive personal data includes identifiable health, financial, or genetic data collected or maintained by U.S. businesses, in particular those that target or customize products or services to any U.S. executive branch agency or military department with national security responsibilities; or collect or intend to collect identifiable data on more than one million individuals.

What are the key expansions of CFIUS jurisdiction under the new regulations?

FIRRMA granted CFIUS expanded authority to review the potential national security implications of transactions resulting in foreign control of a U.S. business as well as certain non-controlling foreign investments in a U.S. business. Two areas of expanded authority are:

1. *Non-controlling investments in “TID U.S. Businesses”*. CFIUS’s jurisdiction now includes non-controlling foreign investments in TID U.S. businesses involved with critical technologies, critical infrastructure, or sensitive personal data (“TID Businesses”) that grant a foreign investor access to (a) material nonpublic technical knowledge; (b) membership, observer rights, or rights to nominate an

individual to a U.S. business board of directors; or (c) any involvement other than through voting shares in substantive decision making related to TID matters.

2. *Foreign investment in real estate.* The new rules also cover “the purchase or lease by, or a concession to, a foreign person of private or public real estate that” is (a) located in or part of an airport or maritime port; (b) in close proximity to certain military installations; (c) in extended range of certain military installations; (d) in certain counties or geographic areas identified in connection with military installations; or (e) in certain areas located within the territorial sea of the U.S. Information regarding the locations of these military sites and geographic areas is provided in Appendix A to 31 CFR Part 802. The rules include an exception for a single housing unit and real estate in “urbanized areas,” unless otherwise prescribed by CFIUS.

Will CFIUS filings be mandatory?

Going forward, there will be two types of CFIUS filings: short-form “declarations” or full-length “notice” filings. While certain transactions will require a mandatory declaration, parties can also choose to submit a voluntary notice. CFIUS filings for foreign investments in TID U.S. businesses are generally voluntary, however mandatory declarations are required in certain circumstances where a foreign government acquires a “substantial interest” in the TID U.S. business. Mandatory declarations are also required for certain critical technology businesses (which were previously covered by the CFIUS Pilot Program regulations). CFIUS filings for foreign investments in real estate will be on a voluntary basis.

Are any foreign investors excluded from the requirement?

As authorized by FIRRMA, CFIUS designated certain states, initially Australia, Canada, and the United Kingdom as “excepted foreign states” – although this list may expand in the future. However, the excepted foreign states list does not provide a blanket exception for all transactions involving foreign investors from those countries. Rather, the regulations limit CFIUS’s jurisdiction to require mandatory filings with respect to non-controlling investments by foreign persons that meet specific criteria (“excepted investors”) from the excepted foreign states listed above. Control transactions are always within the jurisdiction of CFIUS, even if the foreign investor is from an excepted state.

There is also a limited exception for an indirect investment by a foreign person through a U.S. investment fund that gives the foreign person membership as a limited partner or equivalent if specific criteria are met to ensure that the foreign person does not gain control or access to the U.S. business.

Does the Pilot Program still exist?

The CFIUS Pilot Program (31 CFR §801) required mandatory declarations of foreign investment if a U.S. business (1) operated within one of twenty-seven specific industries, as defined by the North American Industry Classification System (NAICS) codes, and (2) developed a critical technology. This program still applies to certain Pilot Program covered transactions between November 10, 2018, and February 12, 2020. The final rules incorporate the key aspects of the Pilot Program, including the mandatory declaration requirement, effective February 13, 2020. However, the Treasury has announced that it “anticipates issuing a notice of proposed rulemaking that would revise the mandatory declaration requirement regarding critical technology . . . from one based upon [NAICS] codes to one based upon export control licensing requirements.”

What are the changes from the 2019 Proposed Regulations?

For those familiar with the Proposed Regulations published by the Treasury in September 2019, the final rules are substantively similar, but also incorporate multiple revisions. Some of the main changes between the proposed and final rules relate to:

1. The definition of a principle place of business;
2. Excepted investor criteria;
3. The incremental acquisition rule;
4. Definition of genetic data related to the collection of sensitive personal data;
5. Clarification of substantial interest as related to investment funds;
6. Exclusions for transactions involving certain businesses that develop critical technologies eligible for export pursuant to License

Exception ENC of the EAR (15 CFR §740.17);

7. Exceptions for certain real estate transactions in airports and maritime ports; and
8. The geographic location of certain military installations as listed in Appendix A of the real estate regulations.

While the rules are final, the Treasury is treating the new definition of “principle place of business” as an interim rule. The public is invited to submit comments regarding the definition until February 18, 2020.

Where can I find more information?

The regulations are scheduled to be published in the Federal Register on January 17, 2020. The CFIUS website provides information regarding the final and interim rules, including:

1. Provisions Pertaining to Certain Investments in the United States by Foreign Persons (31 CFR §800)
2. Provisions Pertaining to Certain Transactions by Foreign Persons Involving Real Estate in the United States (31 CFR. §802)
3. Final FIRRMA Regulations – Fact Sheet
4. Final FIRRMA Regulations – FAQs
5. Final FIRRMA Regulations – Press Release

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