

Final Regulations Expand CFIUS Jurisdiction Over Foreign Investments in the U.S.

I. Overview

The U.S. Department of the Treasury issued final regulations on January 13, 2020 designed to further carry out the Foreign Investment Risk Review Modernization Act (“FIRRMA”).¹ The final regulations most notably expand the jurisdiction of the Committee on Foreign Investment in the United States (“CFIUS”) to review and potentially block or alter foreign non-controlling² and real estate investments³ in the U.S.⁴ The final regulations implement the proposed regulations from September 2019, with some differences and will become effective on February 13, 2020.⁵ Our memorandum on the proposed regulations can be found [here](#). This memorandum covers a few key highlights from the final regulations.

II. Non-Controlling Investments

The final regulations will expand CFIUS’s jurisdiction to cover investments by foreign persons in certain non-controlling interests in U.S. businesses involved in critical technology, critical infrastructure, or sensitive personal data. The covered investments must afford the foreign person “access to any material nonpublic technical information in the possession of the U.S. business; membership or observer rights on, or the right to nominate an individual to a position on, the board of directors or equivalent governing body of the U.S. business; or any involvement, other than through voting shares, in substantive decision making of the U.S. business regarding—the use, development, acquisition, safekeeping, or release of sensitive personal data of U.S. citizens maintained or collected by the U.S. business; the use, development, acquisition, or release of critical technologies; or the management, operation, manufacture, or supply of critical infrastructure.”⁶ CFIUS’s new authority only applies to non-controlling investments in U.S. businesses that are involved in critical technologies, critical infrastructure, or sensitive personal data, collectively referred to as “TID U.S. businesses.” These terms are defined in the final regulations.

III. Real Estate Transactions

The final regulations also expand CFIUS’s jurisdiction to cover some real estate transactions. The regulations address real estate transactions near sensitive U.S. facilities, such as certain airports, maritime ports, military facilities, and intelligence locations or where the real estate could “reasonably provide the foreign person the ability to collect intelligence” or “otherwise expose national security activities at such an installation, facility,

¹ John S. McCain National Defense Authorization Act of 2019, H.R. 5515, 115th Cong. (2018) (adopted as H.R. Rep. No. 115-847 at 540-608 (2018)).

² 31 C.F.R. part 800, <https://s3.amazonaws.com/public-inspection.federalregister.gov/2020-00188.pdf>.

³ 31 C.F.R. part 802, <https://s3.amazonaws.com/public-inspection.federalregister.gov/2020-00187.pdf>.

⁴ The process for covered non-controlling investments and covered real-estate transactions remains largely voluntary. Foreign persons may file a notice or short-form declaration notifying CFIUS of a covered non-controlling investment in a U.S. business or for covered real estate transactions.

⁵ U.S. Department of the Treasury, Fact Sheet: Final CFIUS Regulations Implementing FIRRMA (Jan. 13, 2020), <https://home.treasury.gov/system/files/206/Final-FIRRMA-Regulations-FACT-SHEET.pdf> (last visited, Jan. 22, 2019) (“Fact Sheet”).

⁶ Fact Sheet.

or property to the risk of foreign surveillance.”⁷ Under the final regulations, CFIUS’s jurisdiction extends to transactions for the purchase, lease, or concession of property such locations if the transaction “affords the foreign person three or more of the following property rights: to physically access; to exclude; to improve or develop; or, to affix structures or objects.”⁸

IV. Mandatory Filings

The final regulations require a mandatory declaration for a foreign person’s covered non-controlling investment in a U.S. business when a foreign government has a substantial interest.⁹ The new rules also incorporate the mandatory declaration requirement from the Pilot Program¹⁰ that has been in effect since November 10, 2018, which is based on whether the transaction involves certain U.S. businesses with a nexus to specified industries.¹¹ The Treasury Department plans to issue additional rulemaking, however, that will change this requirement to a mandatory declaration requirement based on export licensing requirements. In the meantime, the Pilot Program will continue until February 12, 2020, after which transactions should be evaluated according to the final regulations.

V. Exception

The final regulations create an exception from coverage for non-controlling investments in U.S. businesses and for real estate transactions by certain foreign persons based in certain identified countries and having not violated specified U.S. laws, orders, and regulations.¹² Three countries are currently excepted: Australia, Canada, and the United Kingdom.¹³ Additionally, certain types of investments are not considered covered non-controlling investments (*e.g.*, certain passive investments) and covered real estate transactions (*e.g.*, certain real estate transactions in an “urbanized area” or “urban cluster”).¹⁴

VI. Conclusion

These final regulations provide some welcome clarity on the expanded jurisdiction of CFIUS under FIRRMA. Foreign investors should monitor developments and consult counsel as requirements for mandatory filings are refined. The final regulations include several additional detailed clarifications and definitions that may be relevant to some investors for transactions that may result in a foreign person gaining access to or influence over a U.S. business that may affect national security.

⁷ Fact Sheet.

⁸ *Id.*

⁹ 31 C.F.R. 800.401.

¹⁰ Click [here](#) for our November 7, 2018 discussion of the Pilot Program.

¹¹ *Id.*

¹² 31 C.F.R. §800.1001; 31 C.F.R. §802.1001. To remain an excepted foreign state, these three countries have until February 13, 2022 to demonstrate to CFIUS that their national security-based foreign investment review processes and bilateral cooperation with the U.S. on national security-based investment reviews meet the requirements in the final regulations.

¹³ U.S. Department of the Treasury, Frequently Asked Questions on Final CFIUS Regulations Implementing FIRRMA (Jan. 13, 2020), <https://home.treasury.gov/system/files/206/Final-FIRRMA-Regulations-FAQs.pdf> (last visited, Jan. 22, 2019).

¹⁴ Fact Sheet.

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If you have any questions about the issues addressed in this memorandum or if you would like a copy of any of the materials mentioned, please do not hesitate to call or email Helene R. Banks at 212.701.3439 or hbanks@cahill.com; Bradley J. Bondi at 202.862.8910 or bbondi@cahill.com; Katz at 212.701.3039 or ekatz@cahill.com; Geoffrey E. Liebmann at 212.701.3313 or gliebmann@cahill.com; Ross Sturman at 212.701.3831 or rsturman@cahill.com; or Lauren Rackow at 212.701.3725 or lrackow@cahill.com.

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