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CFIUS: New Foreign Investment Review Regulations

Overview

On January 13, 2020, the Department of the Treasury issued final regulations to implement key parts of the Foreign Investment Risk Review Modernization Act (FIRRMA) (Title XVII, P.L. 115-232), which are intended to "strengthen and modernize" the national security review of foreign direct investment (FDI) transactions by the Committee on Foreign Investment in the United States (CFIUS) (under P.L. 110-49). CFIUS is an interagency body comprising nine Cabinet members and others as appointed. The regulations, which largely concern CFIUS's expanded review of certain real estate and noncontrolling investments, became effective on February 13, 2020. These rules were widely anticipated by various stakeholders for clarifying key aspects of FIRRMA. Subsequently, a new rule proposed in May would amend the mandatory filing requirements related to U.S. critical technology companies.

While various provisions of FIRRMA became effective upon enactment in August 2018, the act also required CFIUS to take certain actions within prescribed deadlines for various programs, reporting, and regulations. Treasury launched a pilot program in October 2018 effective through February 12, 2020, regarding certain transactions involving critical technologies. The final regulations implement key provisions of the program, with some changes.

The FIRRMA-amended CFIUS process maintains the President's authority to block or suspend proposed or pending foreign "mergers, acquisitions, or takeovers" that could result in *control* of U.S. entities, including through joint ventures, that threaten to impair national security. The regulations expand and clarify new authority for CFIUS to review certain real estate and other *noncontrolling* foreign investments on the basis of threats, vulnerabilities, and consequences to national security. Reviews of noncontrolling investments are limited to U.S. businesses (referred to as "TID businesses" for Technology, Infrastructure, and Data) that (1) produce, design, test, manufacture, fabricate, or develop one or more *critical technologies* (27 listed subsectors); or (2) performs certain functions with respect to *critical infrastructure* (28 systems and assets specified); or (3) maintain or collect *sensitive personal data* of U.S. citizens. One major aim of the regulations is to "provide clarity to the business and investment communities with respect to the types of U.S. businesses that are covered under FIRRMA's other investment authority." The regulations limit the application of the expanded review process to certain categories of foreign persons, introducing new terms such as "excepted investor" and "excepted foreign state" for noncontrolling transactions. To date, Treasury has identified Australia, Canada, and the United Kingdom as excepted countries.

Parties involved in these new covered transactions can choose between providing voluntarily, a short (not to exceed five pages) written declaration to receive potential expedited consideration or approval by CFIUS, or the traditional longer written notification. A declaration is mandatory however, for transactions where a foreign government has a "substantial interest," and for investments in some TID businesses involved in critical technologies (see below). The regulations specify the content and filing processes for declarations and notices; misstatements or omissions are subject to a fine of $250,000 per violation.

FIRRMA also authorizes CFIUS to impose filing fees. On May 1, Treasury issued an interim rule establishing fees for certain transactions. The tiered fee structure ranges from $0 to $300,000, depending on the transaction's value (based on the operations of the U.S. parent company and its foreign subsidiaries). Fees apply to filings of voluntary notices at the time of the filing, but not declarations.

One concern of some stakeholders has been the potential impact of CFIUS's expanded jurisdiction on smaller U.S. businesses that rely on foreign investment. Treasury indicated that it does not expect the new rules to have a significant economic impact on small entities.

Real Estate Transactions

CFIUS's expanded jurisdiction over certain real estate (land and structures) transactions includes the purchase or lease by, or a concession to, a foreign person of certain private or public real estate located in the United States. Real estate transactions are defined as those that accord the investor certain fundamental property rights. In particular, the provision focuses on real estate that is in proximity of certain airports, maritime ports, and other facilities and properties of the U.S. Government that are sensitive for national security reasons (military installations include 190 facilities located across 40 States and Guam). CFIUS additionally retains the authority to review any transaction that raises national security concerns on the basis of proximity to sensitive sites and activities.

The regulations specify various definitions, such as

- **Stipulated airports**: As defined by the Federal Aviation Administration (FAA), major passenger and cargo airports based on volume and "joint use airports" that serve civilian and military aircraft;
- **Close proximity**: Areas within one mile of a relevant military installation or other facility or property of the U.S. Government;
- **Extended range**: Areas between 1 and 100 miles;
- **Facilities located within designated counties**, according to Appendix A; and
- **Off-shore ranges**: Within 12 nautical miles of the U.S.

Excepted real estate transactions include (1) certain real estate investors, defined as those with a substantial connection to certain foreign countries and who have not violated U.S. laws; (2) housing units; (3) urbanized areas and urban clusters (both defined by the Census Bureau); (4) commercial office space (with some exceptions); (5) retail trade, accommodation, or food service establishments; (6) lands held by Native Americans and some Alaskan Natives; and (7) certain lending and contingent equity transactions. Requirements for filing a voluntary declaration or written notice are similar to those for other investment transactions. The regulations define an excepted foreign investor through various criteria, including holding the right to 5% or more of the profit of the investing foreign firm, or the ability to exercise control.

Noncontrolling Equity Investments

CFIUS's expanded authority directs it to review investment transactions whether or not the investment conveys a controlling equity interest in cases where a foreign person has (1) access to information, certain rights, or involvement in the decisionmaking of certain U.S. businesses involved in critical technologies, critical infrastructure, or sensitive personal data (i.e., TID businesses); (2) any change in a foreign person's rights, if such change could result in foreign control of a U.S. business or a covered investment in certain U.S. businesses; and (3) any other transaction, transfer, agreement, or arrangement, designed or intended to evade or circumvent the CFIUS review process.

In the first category, CFIUS can review *noncontrolling* investments in TID businesses if a foreign investor gains

1. access to any "material non-public technical information" in the business' possession;
2. membership or observer rights on the board of directors (or equivalent body); or
3. involvement other than through voting of shares, in "substantive decisionmaking" regarding the business.

The regulations define the terms "material non-public technical information" and "substantive decision-making," and clarify the circumstances under which CFIUS can review an indirect investment through investment funds.

FIRRMA regulations elaborate a number of important definitions that define and constrain the scope of CFIUS's reviews. The term "critical technologies" reflects the definition in FIRRMA that covers various items, including "emerging and foundational technologies," which are to be identified through an interagency process and subject to export controls, pursuant to the Export Control Reform Act of 2018. Regarding "critical infrastructure," the application of CFIUS's new jurisdiction is limited to 28 subsectors listed in an appendix (such as energy, telecommunications, and transportation), and specific business functions.

"Sensitive personal data" that may be exploited to threaten national security includes 10 categories of "identifiable data" held by U.S. businesses that (1) "target or tailor" products or services to certain populations (U.S. military or government personnel with national security functions); (2) maintain or collect data on more than 1 million individuals; or (3) have a *demonstrated objective* to maintain or collect data on more than 1 million individuals as part of its primary product or service. Data categories covered include certain financial, geolocation, and health data, as well as genetic testing results. Treasury emphasized that these parameters were drafted to provide as much clarity and specificity as possible to businesses. These specifications do not constrain CFIUS's traditional review of any transaction resulting in foreign control of a U.S. business.

The regulations do not target any particular country for greater scrutiny by CFIUS—a major topic of congressional debate during consideration of FIRRMA. FIRRMA did however, mandate criteria that exempts certain categories of foreign investors from CFIUS's expanded jurisdiction. These criteria include the principal place of business and incorporation, as well as ties to certain eligible countries. Treasury identified three countries as "excepted foreign states," based on their intel sharing and defense industrial base integration mechanisms with the U.S. A separate determining factor is whether a country is "effectively utilizing a robust process to analyze foreign investments for national security risks and to facilitate coordination with the United States." Any "excepted investors," however, will not be exempt from CFIUS's review of controlling transactions.

The process of notifying a transaction to CFIUS remains largely voluntary. FIRRMA also provided new authority to require a declaration, an abbreviated filing, with basic information on the transaction. A declaration is mandatory for transactions in which a foreign person has a "substantial interest" of 25% in a U.S. business, and a foreign government (other than excepted states) holds a "substantial interest" of 49% or greater in the foreign person. They also had been mandatory for controlling and noncontrolling investments in certain U.S. TID businesses involved in critical technologies for 27 specified industries. In May 2020, however a new rule would replace the industry-based requirement, with one based on export control licensing requirements—namely, if the U.S. company requires U.S. regulatory authorization for the export, re-export, or transfer of critical technology to certain transaction parties as well as foreign persons in the ownership chain. In these cases, parties may also chose to file a notice instead of a declaration. There are also exemptions to the mandatory filing; for example, if transactions involve "excepted investors" (e.g., exclusively nationals of Australia, Canada, UK), or for investment funds in certain cases.

Issues for Congress

The new CFIUS regulations may raise a number of issues for Congress, including:

- Are the regulations affecting new and existing FDI in the United States? Would the amended review process potentially delay or expedite approvals?
- What impact are CFIUS's additional authorities and regulations regarding reviews of FDI in critical infrastructure, critical technologies, and emerging technologies having on CFIUS activities?

For more, see CRS In Focus IF10952, *CFIUS Reform Under FIRRMA*, and CRS In Focus IF11135, *Deadlines, Programs, and Regulations Mandated by FIRRMA*.

Cathleen D. Cimino-Isaacs, Analyst in International Trade and Finance

James K. Jackson, Specialist in International Trade and Finance

IF11334

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