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The New CFIUS Regulations: How Will This Actually Work? FAQs We Wish Treasury Would Answer

By Scott M. Flicker, Robert Silvers, Charles A. Patrizia, Randall Johnston, Talya Hutchison & Holly Flynn

Gallons of ink will be spilled explaining the new regulations published by the Department of the Treasury to implement the extensive changes to the national security review process undertaken by the Committee on Foreign Investment in the United States ("CFIUS"). The updated rules, which went into effect on February 13, 2020, were mandated by the 2018 Foreign Investment Risk Review Modernization Act ("FIRRMA").[1]

Treasury's task in translating into regulations FIRRMA's many areas of expansion and alteration of the CFIUS process was gargantuan, and its output impressive. Treasury also released two guidance documents when it published the new regulations.[2] These (along with the examples provided in the regulations) are helpful, but they fail to unlock the puzzle that was created by deploying a list of 54 defined terms—many nested within others like Russian dolls—into a largely new regulatory structure intended to cover a wide variety of investment transactions. We offer here a set of "Frequently Asked Questions We Wish Treasury Would Answer" in the hope of clarifying how the new provisions actually work.

1. How Do the Regulations Implement CFIUS's Expanded Jurisdiction Over "Non-Controlling" Transactions?

Prior to FIRRMA, CFIUS had jurisdiction to review a "covered transaction," which was defined as (and thus confined to) "any transaction … which could result in *control* of a U.S. business by a foreign person."[3] "Control," broadly and loosely defined, was generally regarded as the trigger for CFIUS's review authority.

FIRRMA left the "control" trigger intact, but extended CFIUS's jurisdiction to cover some minority foreign investments that do not rise to the level of "control" over a U.S. business.

To implement this authority, CFIUS expanded the definition of a "covered transaction" to incorporate two new definitions: the "covered control transaction" and the "covered investment."[4] The "covered control transaction" is essentially a carry-over of the old "covered transaction," in that it pertains to any transaction "that could result in foreign control of any U.S. business[.]"[5]

The "covered investment" concept is entirely new, and itself incorporates a number of key provisions in the new regulations.[6]

First, it can apply to any "investment," regardless of size. (An "investment," however, is limited to the acquisition of an equity interest in the U.S. business.[7] Lending transactions typically are not covered unless a foreign party thereby secures financial or government rights more characteristic of an equity investment but not of a typical loan.[8])

Second, the investment must be in an "unaffiliated TID U.S. business."[9] In other words, not all minority equity investments by foreign persons into U.S. business enterprises are open to CFIUS scrutiny. Only those in the subset of targets qualifying as a "TID U.S. business" are eligible.[10] A "TID U.S. business" is one that, in some manner, trades in specified **T**echnology, **I**nfrastructure, or **D**ata.

- A **T**echnology TID U.S. business is one that "[p]roduces, designs, tests, manufactures, fabricates, or develops one or more 'critical technologies'."[11]
  - "Critical technologies," in turn, means items (goods, software, technology and, in some cases, services) that (i) are subject to heightened U.S. export controls (including under the International Traffic in Arms Regulations, the Export Administration Regulations, and the Department of Energy or the Nuclear Regulatory Commission export regulations) or (ii) become designated as one or more "emerging" or "foundational" technologies under an interagency process currently being led by the Commerce Department to identify new or recent technologies deemed essential to the national security of the United States but not yet subject to heightened controls.[12] This is where such leading-edge ventures as those developing systems relying on artificial intelligence, quantum computing, breakthroughs in genomics, or autonomous vehicle technology could be swept into the "covered investment" provisions of CFIUS, meaning that even minority, non-controlling foreign investments in technology start-ups might be subject to CFIUS review jurisdiction. Silicon Valley take heed.
- An **I**nfrastructure TID U.S. business is one that performs specified functions with respect to "covered investment critical infrastructure."[13]
  - A new Appendix A to the regulations specifies the systems and assets that qualify as "covered investment critical infrastructure" and the functions pertaining to them that, when undertaken by the investment target, define an infrastructure TID U.S. business.[14] Appendix A is informative reading, describing systems ranging from terrestrial, submarine and satellite telecommunications, industrial resources, energy generation, transmission and storage facilities, financial markets and technologies, maritime and aviation ports, and public water systems. The act of specifying, in a detailed appendix, the particular critical infrastructure and activities that will trigger review is a major departure from CFIUS's historical "we will let you know it when we see it" approach to its authorities.
- A **D**ata TID U.S. business is one that "[m]aintains or collects, directly or indirectly, sensitive personal data of U.S. citizens."[15] Key to applying this provision is an understanding of the definition of "sensitive personal data." Because gaining this understanding requires a review of the interplay among multiple definitions, we discuss the concept of "sensitive personal data" separately in FAQ 2, below.

Third, to qualify as a "covered investment," the transaction must entitle the foreign investor to at least one of three privileges:

a. Access to any "material nonpublic technical information" possessed by the business;[16]

- "Material nonpublic technical information" is information, not available in the public domain, that,
  - in the case of an "infrastructure" TID U.S. business, "[p]rovides knowledge, know-how, or understanding...of the design, location, or operation of covered investment critical infrastructure, including vulnerability information such as that related to physical security or cybersecurity;" or
  - in the case of a "technology" TID U.S. business, is "necessary to design, fabricate, develop, test, produce, or manufacture a critical technology, including processes, techniques, or methods."[17]
- However, affording a foreign investor access to non-public financial data regarding the business will not, alone, trigger CFIUS jurisdiction over the investment.[18]

b. Membership or observer rights on (or the right to nominate an individual to), the governing board of the TID U.S. business;[19] or

c. Any involvement (other than through the voting of its shares) in substantive decision-making of the TID U.S. business regarding:

i. In the case of a "technology" TID U.S. business, "[t]he use, development, acquisition, or release" of critical technologies;

ii. In the case of an "infrastructure" TID U.S. business, "[t]he management, operation, manufacture, or supply of" its covered investment critical infrastructure; or

iii. In the case of a "data" TID U.S. business, "[t]he use, development, acquisition, safekeeping, or release of sensitive personal data of U.S. citizens maintained or collected by" the business.[20]

Simply because CFIUS has jurisdiction to review a "covered investment" in a TID U.S. business does not mean that a filing is always mandated or warranted when the definition is met. Additional analysis is required to reach a determination on either issue.

However, it is reasonable to conclude that if a transaction is neither a "covered control transaction" nor a "covered investment," it is unlikely to raise sufficient concern to justify a filing, even if the target is a TID U.S. business.

Indeed, the new regulations carry forward the "safe harbor" provision that a foreign investment of 10 percent or less of the outstanding voting interest in a U.S. business is not a "covered control transaction," if the transaction is "solely for the purpose of passive investment."[21]

2. Okay, So What Is "Sensitive Personal Data"?

The complex definition of "sensitive personal data" highlights the astonishing breadth of CFIUS's mandate to address concerns over foreign access to information about U.S. citizens that could be

exploited to undermine U.S. national security. For years, CFIUS has been expanding the edges of its authority to block or restrict foreign takeovers of all manner of U.S. businesses out of concerns over foreign access to personal information of U.S. citizens. But in FIRRMA, Congress expressly conferred on the Committee power to scrutinize even minority investments in companies that may have, in the ordinary course of business, certain types of non-public customer information: so-called "sensitive personal data."

For information to qualify as "sensitive personal data" it must be "identifiable." "Identifiable data" is any information that "can be used to distinguish or trace an individual's identity, including through the use of any personal identifier."[22] A "personal identifier" is "name, physical address, email address, social security number, phone number, or other information that identifies a specific individual."[23]

- "Aggregated data"[24] or "anonymized data"[25] can still qualify as "identifiable data" if "any party to the transaction has, or as a result of the transaction will have, the ability to disaggregate or de-anonymize the data, or if the data is otherwise capable of being used to distinguish or trace an individual's identity."[26]

- However, "identifiable data" does not include encrypted data, "unless the U.S. business that maintains or collects the encrypted data has the means to de-encrypt the data so as to distinguish or trace an individual's identity."[27]

Data that is "identifiable" constitutes "sensitive personal data" in one of two circumstances:

a. It consists of certain results of an individual's **genetic tests**; or[28]

b. It falls within one of 10 categories of information and is collected or maintained (directly or indirectly) by a U.S. business that either:

   - "[t]argets or tailors products or services to any U.S. executive branch agency or military department with intelligence, national security, or homeland security responsibilities, or to personnel and contractors thereof;"[29] or

   - has at any time over the past 12 months maintained or collected such data on more than one million individuals; or expressed a "demonstrated objective" to do so in the future.[30]

The 10 categories[31] of personal data that, if maintained or collected by such a business, constitute "sensitive personal data" are:

- **Financial data** "that could be used to analyze or determine an individual's financial distress or hardship;"[32]

- The set of data in **consumer credit report** maintained by a credit reporting agency;[33]

- The set of data in an **application for** health, long-term care, professional liability, mortgage, or life **insurance**;[34]

- Physical, mental, or psychological **health records** of an individual;[35]

- The non-public **electronic communications (*e.g.*, email, messaging, or chat**) among or between the users of a product or service of a U.S. company, "if a primary purpose of such product or service is to facilitate third-party user communications;"[36]

- "**Geolocation data** collected using positioning systems, cell phone towers, or WiFi access points such as via a mobile application, vehicle GPS, other onboard mapping tool, or wearable electronic device;"[37]

- "**Biometric enrollment data** including facial, voice, retina/iris, and palm/fingerprint templates;"[38]

- "Data stored and processed for generating a state or federal **government identification card**;"[39]

- "Data concerning **U.S. Government personnel security clearance status**;"[40] or

- The set of data in an **application for a U.S. Government personnel security clearance or** an **application for employment in a position of public trust**.[41]

Data that is maintained or collected by a U.S. business concerning its employees is excluded from the definition, "unless the data pertains to employees of U.S. Government contractors who hold U.S. Government personnel security clearances[.]"[42]

So there you have it. If a U.S. business maintains or collects any of the foregoing categories of personal information of U.S. citizens and (except in the case of genetic data) either targets national security-sensitive populations or meets one of the "more than one million persons" threshold, even a minority investment by a foreign person in that business could trigger CFIUS's jurisdiction. And in some cases, CFIUS review is mandatory.

3. When Is a CFIUS Filing Mandatory?

Prior to FIRRMA, the decision whether to file for CFIUS review was essentially voluntary. Parties to a transaction that could trigger the President's authority to intervene in and potentially block foreign investment in response to a threat to national security could elect to submit the transaction for clearance by CFIUS and thereby to obtain a "safe harbor" against intervention. But they were also free in every case to forego CFIUS review and the protection that clearance can provide. FIRMMA changed that, mandating review in certain cases. For the remainder of transactions, the voluntary filing regime remains.

The new regulations make filing mandatory in two cases.

First, the parties to a "covered control transaction" or a "covered investment" that results in the acquisition (i) of at least a 25% voting interest, direct or indirect, in a "TID U.S. business" by (ii) one or more investors, directly or indirectly through one or more state-owned entities from of the same foreign country, has at least a 49% voting interest must file with CFIUS at least 30 days before completing the transaction.[43] This requirement is subject to a number of exceptions:

- Mandatory filing is not required if the foreign government interest in the foreign investor is held by an "excepted foreign state."[44] For the time being, CFIUS has designated only Australia, Canada, and the United Kingdom as "excepted foreign states." More could be

designated in the future. Specifically, CFIUS may "at any time" designate a government as an "excepted foreign state" if it determines that the foreign state "has established and is effectively utilizing a robust process to analyze foreign investments for national security risks and to facilitate coordination with the United States on matters relating to investment security."[45]

- Mandatory filing is also not required if the investment is made via an investment fund that meets specified criteria, including that the fund is managed exclusively by a U.S. general partner, managing member, or equivalent, and that the foreign limited partners are subject to certain management and information access restrictions.[46]

The second type of transaction for which filing is mandatory is one that, since November of 2018, had been subject to the CFIUS "pilot program."[47] Specifically, filing is mandated for any "covered control transaction" or "covered investment" in a "TID U.S. business" that "produces, designs, tests, manufactures, fabricates, or develops" one or more "critical technologies," either (1) utilized in connection with the business's own activity in, or (2) designed by the U.S. business "specifically" for use in, one or more of 27 industry sectors identified by reference to their North American Industry Classification System ("NAICS") codes and listed in Appendix B to the regulations.[48]

- Notably, CFIUS has indicated that it intends to "revise the mandatory declaration requirement regarding critical technology … from one based upon [NAICS] codes to one based upon export control licensing requirements."[49] We anticipate that this change will significantly clarify those foreign investments that will trigger a mandatory filing.

The mandatory filing requirement for this category of investments is also subject to several exceptions.

- No mandatory filing is required if the investment is made by an "excepted investor."[50] The criteria for qualifying as an "excepted investor" are complex, but they essentially require that the investor be, or be almost exclusively controlled by, consist of nationals, governments, and entities of an "excepted foreign state" (currently Australia, Canada, or the U.K.).[51]

- No mandatory filing is required if the foreign investor holds the investment in the "TID U.S. business" through a mitigation structure established under the National Industrial Security Program ("NISP") to mitigate foreign ownership, control, or influence over an entity that is operating under a facility security clearance granted by the U.S. Government.[52]

- No mandatory filing is required if the investment in the "TID U.S. business" is made via a U.S.-managed investment fund that meets the funds criteria discussed in FAQ 6, below.[53]

- No mandatory filing is required if the sole reason why the U.S. target constitutes a "TID U.S. business" is because it produces, designs, tests, manufactures, fabricates, or develops items that are export-controlled due to encryption capability, and those items are eligible for export, reexport, or transfer (in country) under a license exception (ENC) pursuant to the U.S. Export Administration Regulations.[54] Many categories of personal electronic devices, communications equipment, and associated software are subject to licensing requirements under U.S. export controls due to incorporation of encryption capability but eligible for export under license exception ENC. CFIUS has made a determination that foreign investments in businesses that develop, design, produce, or test these items, even in connection with one of

the 27 enumerated industry sectors, need not be subject to mandatory filing requirements. This said, such investments might well warrant voluntary filing in some cases (e.g., if they also collect or maintain sensitive personal data).

4. Who Is a "Party" to a Transaction for Purposes of a Mandatory Filing?

Penalties for failing to make a mandatory filing are stiff. A person who does not comply can face penalties of up $250,000 or the value of the transaction, whichever is greater.[55]

The obligation to file is imposed on "the parties" to a transaction that falls under the mandatory requirements.[56] So who are "the parties"? The regulation on this issue is expansive.

"The term party to a transaction means:

a. In the case of an acquisition of an ownership interest in an entity, the person acquiring the ownership interest, the person from whom such ownership interest is acquired, and the entity whose ownership interest is being acquired, without regard to any person providing brokerage or underwriting services for the transaction;

b. In the case of a merger, the surviving entity, and the entity or entities that are merged with or into that entity in the transaction;

c. In the case of a consolidation, the entities being consolidated, and the new consolidated entity;

d. In the case of a proxy solicitation, the person soliciting proxies, and the person who issued the voting interest;

e. In the case of the acquisition or conversion of contingent equity interests, the issuer and the person holding the contingent equity interests;

f. In the case of a change in rights that a person has with respect to an entity in which that person has an investment, the person whose rights change as a result of the transaction and the entity to which those rights apply;

g. In the case of any other transaction, transfer, agreement, or arrangement, the structure of which is designed or intended to evade or circumvent the application of section 721, any person that participates in such transaction, transfer, agreement, or arrangement;

h. In the case of any other type of transaction, any person who is in a role comparable to that of a person described in paragraphs (a)[through (g)] of this section."[57]

Given the broad scope of who is a party and exposure of all parties to penalties for failure to comply, investors and acquisition targets alike must be diligent to ensure that, if a transaction falls within the scope of CFIUS's mandatory filing provisions, but does not qualify for one of the exceptions, a filing is made at least 30 days prior to the transfer of any equity interest or other indicia of control to a foreign investor.

5. How Does the New Declaration Process Work?

One bit of good news, especially for parties subject to a mandatory filing requirement, is that CFIUS has implemented FIRMMA's short form "declaration" filing procedure. Prior to FIRMMA, all CFIUS notices had to be submitted in the form of a detailed filing providing nearly 40 categories of information, plus attachments. It would not be unusual for filings to exceed 30 pages in length, single-spaced. The process of compiling the information and submitting it, usually in non-final form for comment by the CFIUS staff at the Treasury Department, could consume many weeks, often critical weeks in the timeframe of a fast-moving M&A transaction. After the written notice was formally received, CFIUS first had to officially "accept" it as complete, and then initiate a statutory review period (30 days prior to FIRRMA, extended to 45 days in the new statute). The initial review period could end in clearance or a determination by CFIUS that the case warranted further investigation, which would itself take an additional 45 days.

After FIRMMA was enacted, CFIUS began piloting a procedure for collapsing the essential information about a transaction into a five-page standard template and truncating the review to an initial period of 30 days. The new regulations roll out this procedure for all filings. Specifically, for any transaction in which filing is mandatory, the requirement can be met by submitting the five-page declaration at least 30 days prior to completing the transaction.[58] Similarly, any party that wishes to voluntarily notify a transaction to CFIUS can elect to do via a short-form declaration in lieu of a full written notice.[59] In either case, the regulations specify that, upon determining that the declaration is complete, the CFIUS Staff Chairperson will circulate it to the full Committee and notify the parties that an initial assessment of the transaction will be completed within 30 days.[60]

Upon completing this initial assessment, CFIUS can take one of three actions. First, it can clear the transaction, in which case the parties will have obtained the "safe harbor" and will be free close without risk of penalty or intervention.[61] Second, CFIUS can advise that it has insufficient information to evaluate whether national security concerns exist, and that if the parties want to obtain a safe harbor, they will need to submit a full written notice, though failure to do so will not expose the parties to penalties, as they will have at that point discharged the mandatory obligation to notify the Committee of the transaction.[62] Third, CFIUS can advise that the transaction might raise national security concerns, and request that the parties file a full written notice.[63]

The unwritten guidance on the short-form declaration process is this: if parties to a "mandatory filing" transaction are reasonably sure that CFIUS would identify a national security concern in response to a declaration, they might elect to submit a full written notice at the outset, as doing so will both satisfy their mandatory notice requirement, and will short-circuit 30 days of unnecessary review at the front end, moving directly to the full CFIUS review and investigation process.

6. Treatment of Investment Funds: What Do Managers and Investors Need to Know?

FIRMMA marked a significant step by Congress to acknowledge that a large proportion of investments (whether outright acquisitions or targeted minority stakes) come through some form of private investment fund structure, and that some of those investments should not trigger CFIUS review simply because the fund is located offshore or contains foreign participants.

In a typical arrangement, investment decisions, management and the power to vote shares held by the fund are vested in a fund manager, with the limited partners holding economic interests under agreements conferring only minority protection rights over the manager and the portfolio investments made by the fund.

The new regulations implement several concepts that, properly applied, can substantially reduce the impact of CFIUS reviews on investments made through these typical fund structures.

First, CFIUS has included a provision clarifying that a privately-held entity organized under the laws of a jurisdiction outside the United States is not a "foreign entity" for purposes of CFIUS jurisdiction if its "principal place of business" is in the United States.[64]

The term "principal place of business" means "the primary location where an entity's management directs, controls, or coordinates the entity's activities, or, in the case of an investment fund, where the fund's activities and investments are primarily directed, controlled, or coordinated by or on behalf of the general partner, managing member, or equivalent."[65] While this definition is not limited to offshore investment funds, it has particular application where the fund is organized as an offshore entity (often for tax purposes) but is under the primary management and control of a general partner that is located in the United States.[66]

With this relatively simple change, the new regulations recognize that an investment fund organized under the laws of a foreign jurisdiction (such as the Cayman Islands) should not be regarded as "foreign" for CFIUS purposes so long as the general partner/managing member interests are primarily directed, controlled, or coordinated in the United States. In many fund structures, applying the provision might entail tracing up through several general partner/managing member "layers" to reach the individuals or entities that ultimately exercise the power to direct, control, or coordinate the fund's activities and investments.

Where doing so results in the conclusion that the general partner/managing member interests are directed, controlled, or coordinated in the United States, then in most cases an acquisition or minority investment by the fund itself is not a covered transaction subject to CFIUS jurisdiction. But in some cases the participation by one or more foreign persons in the fund structure can still result in an indirect foreign investment in a U.S. business over which CFIUS's review authority does extend. This is where the second limiting principal comes in.

Under FIRRMA, foreign limited partner (or equivalent) participation in an investment fund will not qualify as a "covered investment" (even where the fund itself is invested in a "TID U.S. business"), if the following criteria are satisfied:

- The fund is managed exclusively by a general partner, managing member, or equivalent who is not a foreign person;[67]
- The foreign person does not sit on or have the right to appoint a member to an advisory board or committee that:
  - Has authority to approve, disapprove, or otherwise control investment decisions of the fund;

  - has authority to approve, disapprove, or otherwise control decisions by the general partner, managing member, or equivalent "related to entities in which the fund is invested;"[68] or
  - provides the foreign person access to "material nonpublic technical information;"[69]
- The foreign person does not otherwise have the ability to control the fund, including authority to:
  - approve, disapprove, or otherwise control investment decisions of the fund;
  - approve, disapprove, or otherwise control decisions made by the general partner, managing member, or equivalent related to entities in which the investment fund is invested; or
  - "unilaterally dismiss, prevent the dismissal of, select, or determine the compensation of the general partner, managing member, or equivalent;"[70]
- The investment does not otherwise afford the foreign person any of the rights in any TID U.S. business that would trigger the "covered investment" provisions of the regulations,[71] including (i) board/observer rights; (ii) access to non-public technical information; or (iii) involvement in substantive decision-making affecting the TID U.S. business's dealings related to critical technology, critical infrastructure or sensitive personal data.[72]

These "fund clarifications" provide parties a valuable guide for how best to insulate a transaction from CFIUS risk by carefully structuring foreign participation in an investment fund context. CFIUS will, in its review of an acquisition or investment by a limited partnership or equivalent structure, scrutinize the underlying investment documents to evaluate the rights, entitlements and authorities conferred on foreign investors.[73] Where possible, these documents should be drafted to address in clear terms aspects of the limited/managing member relationship that touch upon the criteria outlined by the new regulations as described above.

Finally, the regulations clarify that, where a foreign government-controlled entity invests solely as a limited partner or non-managing member in a fund with a general partner, managing member, or equivalent, that foreign government's interest, at any level of equity, will not be counted as a "substantial interest" in the fund's investment in a TID U.S. business sufficient to trigger a mandatory filing with CFIUS. Instead, the "substantial interest" trigger for purposes of mandatory filing will only come into play where a foreign government-controlled entity has at least a 49% interest in the general partner, managing member, or equivalent entity of the investment fund itself.[74] This provision will go a long way to limiting the CFIUS obligations and exposures of a fund that takes in equity from foreign sovereign wealth or government retirement fund investors solely as limited partners.

7. What Real Estate Transactions Are Covered By the CFIUS Process?

Long before FIRRMA, CFIUS had exercised jurisdiction to review transactions involving the foreign acquisition of real estate, so long as the entity being acquired met the definition of a "U.S. business." Thus, purchase of a commercial office building, a hotel, and even a partially-developed-but-not-yet-operational wind farm were all subject to CFIUS scrutiny. The only real estate transactions clearly outside the Committee's purview were those involving fully undeveloped property—literally "greenfield" investments.[75]

FIRRMA provided CFIUS with more targeted jurisdiction over categories of real estate transactions deemed likely to present national security concerns, including "the purchase or lease by, or a concession to," a foreign person of property that (i) is located in or constitutes part of an airport or maritime port; (ii) is in "close proximity" to a military or other national security-sensitive U.S. government property; or (iii) could provide the foreign party with the ability to collect intelligence on activities being conducted at the property or that "could otherwise expose national security activities at" the property.[76] Congress also included some specific limitations on what real estate transactions CFIUS could review under its new authority, excluding the purchase, lease, or concession of a single "housing unit" as defined by the Census Bureau and any real estate located within an "urbanized area" as defined by the Census Bureau, unless that real estate is itself an airport or maritime port or is in "close proximity" to a sensitive U.S. military installation.[77]

CFIUS has implemented its expanded authority over real estate transaction in a new part of the Code of Federal Regulations: 31 C.F.R. Part 802. Several aspects of the new rule merit notice:

- The Part 802 regulations do not supplant the "foreign investment" provisions of the regulations at 31 C.F.R. Part 800. In other words, a transaction that constitutes a "covered control transaction" or a "covered investment" must be evaluated for mandatory or voluntary filing under Part 800 even if the transaction might involve the purchase, lease or concession of real estate that falls outside the scope of Part 802. Thus, for example, the acquisition by a foreign person of a TID U.S. business that also owns real property within an "urbanized area" might not trigger CFIUS jurisdiction under Part 802, but it also must be assessed for mandatory or voluntary filing under the "covered control transaction" and "covered investment" provisions of Part 800.

- The new rule covers not only "acquisitions of, leases by and concessions to" foreign persons of "covered real estate," but also "a purchase by a foreign person … of less than full ownership of covered real estate that nevertheless affords the foreign person at least three" of the following four "property rights," whether or not shared concurrently with any other person: "(1) To physically access the real estate; (2) To exclude others from physically accessing the real estate; (3) To improve or develop the real estate; or (4) To attach fixed or immovable structures or objects to the real estate."[78]

- CFIUS has gone to lengths to specify the properties that would constitute "covered real estate" subject to this new review authority.

  - The regulations detail categories of military installations, complete with a full appendix (Appendix A), listing bases, air stations, ranges, combat training centers, and other sites.[79] Property within a specified proximity (typically a one-mile radius, but in some cases up to 99 miles) of one of these facilities is "covered real estate" potentially subject to the new rule.[80]

  - Similarly, the definition of a "covered port" refers to specified lists of airports and marine ports maintained by various branches of the U.S. Department of Transportation.[81]

  - In its guidance accompanying the release of Part 802, the Department of the Treasury stated that it "anticipates making available a Web-based tool to help the public understand the geographic coverage of the rule."[82]

- The concept of the "excepted investor" discussed above, which creates some exemptions for investors from one of the "excepted foreign states" (currently, Australia, Canada, and the U.K.), is carried into the regulations on covered real estate transactions as well. Specifically, a purchase or lease by, or concession to, an "excepted investor" will itself be regarded as an "excepted real estate transaction" not subject to review.[83]

- There is no mandatory filing requirement for covered real estate investments. As with the vast majority of covered transactions under Part 800, parties to a covered real estate transaction can evaluate the costs and benefits of a CFIUS review (including obtaining a safe harbor from future U.S. government intervention) and determine whether a voluntary filing is warranted.

The overall structure of Part 802 might be familiar to CFIUS practitioners, and (as noted) CFIUS has exercised authority over real estate transactions at multiple stages in its history. However, the regulations introduce a new level of complexity to foreign investors active in the commercial real estate market in the United States. Advisors to these transactions must become sufficiently versed in the "covered real estate transaction" concept to understand when a full CFIUS analysis is warranted.

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If you have any questions concerning these developing issues, please do not hesitate to contact any of the following Paul Hastings lawyers:

New York

Randall V. Johnston
1.212.318.6664
randalljohnston@paulhastings.com

Charles A. Patrizia
1.202.551.1710
charlespatrizia@paulhastings.com

Holly Suzanna Flynn
1.202.551.1908
hollyflynn@paulhastings.com

Washington, D.C.

Scott M. Flicker
1.202.551.1726
scottflicker@paulhastings.com

Robert P. Silvers
1.202.551.1216
robertsilvers@paulhastings.com

Talya Hutchison
1.202.551.1930
talyahutchison@paulhastings.com

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1 Subtitle A of Title XVII of Public Law 115-232, 132 Stat. 2173 ("FIRRMA").

2 "Fact Sheet: Final CFIUS Regulations Implementing FIRRMA" (https://home.treasury.gov/system/files/206/Final-FIRRMA-Regulations-FACT-SHEET.pdf) and "Frequently Asked Questions on Final CFIUS Regulations Implementing FIRRMA" (https://home.treasury.gov/system/files/206/Final-FIRRMA-Regulations-FAQs.pdf) ("FIRRMA FAQs").

3 *See former* 31 C.F.R. § 800.207 (Nov. 21, 2008) (emphasis added).

4 31 C.F.R. § 800.213.

5 31 C.F.R. § 800.210.

6 31 C.F.R. § 800.211.

7 31 C.F.R. § 800.227.

8 31 C.F.R. § 800.306(b). Contingent equity interests held by a foreign party typically are also disregarded, unless conversion is imminent, is within the control of the foreign party and would, upon conversion, result in a "covered transaction" at that time. New Regulations, 31 C.F.R. § 800.308.

[9] 31 C.F.R. § 800.211.

[10] The requirement that the U.S. investment target (the "TID U.S. business") be "unaffiliated" is notable. A TID U.S. business is "unaffiliated" if it is one in which the foreign investor "does not hold more than 50 percent of the outstanding voting interest or have the right to appoint more than half of the members of the board of directors or equivalent governing body." 31 C.F.R. § 800.250. Thus, if the foreign investor already holds a majority of the voting equity or controls a majority of the board, its further investment in the U.S. business does not trigger CFIUS jurisdiction. Presumably this is a recognition that, where a business is already controlled by a foreign investor, the additional acquisition of equity in that business by the same investor presents no new national security concerns. Introduction of a new foreign investor, however, would warrant further assessment into whether the "covered investment" provisions have been triggered.

[11] 31 C.F.R. § 800.248(a).

[12] 31 C.F.R. § 800.215.

[13] 31 C.F.R. § 800.248(b).

[14] The definition of "covered investment critical infrastructure" is found at 31 C.F.R. § 800.212 and detailed in Column 1 of Appendix A to Part 800—Covered Investment Critical Infrastructure and Functions Related to Covered Investment Critical Infrastructure.

[15] 31 C.F.R. § 800.248(c).

[16] 31 C.F.R. § 800.211(b)(1).

[17] 31 C.F.R. § 800.232(a).

[18] 31 C.F.R. § 800.232(b).

[19] 31 C.F.R. § 800.211(b)(2).

[20] 31 C.F.R. § 800.211(b)(3).

[21] 31 C.F.R. § 800.302(b). To qualify as solely "passive," the investor cannot acquire, nor have intention to acquire, any rights that could constitute "control," nor any of the three privileges (board seat or observer right, access to non-public technical information, or involvement in substantive decision-making) that mark a "covered investment" under Section 800.211(b). 31 C.F.R. § 800.243(a).

[22] 31 C.F.R. § 800.226.

[23] 31 C.F.R. § 800.238.

[24] "Aggregated data" means "data that have been combined or collected together in summary or other form such that the data cannot be identified with any individual." 31 C.F.R. § 800.201.

[25] "Anonymized data" means "data from which all personal identifiers have been completely removed." 31 C.F.R. § 800.202.

[26] 31 C.F.R. § 800.226. CFIUS does not explain how data that meets the definitions of "aggregated" or "anonymized" can ever be "otherwise capable of being used to distinguish or trace an individual's identity."

[27] *Id*. This "encryption" carve-out is only available for data "to which National Institute of Standards and Technology (NIST)-allowed cryptographic techniques, as identified in the most current NIST special publication 800–175B, or superseding publication, have been applied." 31 C.F.R. § 800.221.

[28] 31 C.F.R. § 800.241(a)(2). Excluded from covered genetic test results are "data derived from databases maintained by the U.S. Government and routinely provided to private parties for purposes of research." *Id.*

[29] 31 C.F.R. § 800.241(a)(1)(i)(A).

[30] 31 C.F.R. § 800.241(a)(1)(i)(B)&(C).

[31] 31 C.F.R. § 800.241(a)(1).

[32] 31 C.F.R. § 800.241(a)(1)(ii)(A).

[33] 31 C.F.R. § 800.241(a)(1)(ii)(B). This provision incorporates the definition of a "consumer report" under the Fair Credit Reporting Act, 15 U.S.C. § 1681a, but excludes any such data obtained from a consumer credit reporting agency for a "permissible purpose" under that Act, including a credit report on an individual generated to evaluate provision of credit or employment to that person (*see* 15 U.S.C. §1681b(a)), *unless* the data is "substantially similar to the full contents of a consumer file as defined under 15 U.S.C. 1681a[.]" Thus, for example, an auto dealership that runs routine credit reports on prospective purchasers is not thereby collecting "sensitive personal data" sufficient to render it a "TID U.S. Business."

[34] 31 C.F.R. § 800.241(a)(1)(ii)(C).

[35] 31 C.F.R. § 800.241(a)(1)(ii)(D).

[36] 31 C.F.R. § 800.241(a)(1)(ii)(E). Presumably, if a U.S. company's products or services only incidentally facilitate electronic communications, they do not generate "sensitive personal data" for purposes of the regulation. An example of this might be communications generated via the customer relations platform of a retail business. While the retail business might not qualify as a "TID U.S. business" if it collects or stores these communications, a third-party provider of the communications platform might qualify, if the primary purpose of its product or service is to facilitate those communications.

[37] 31 C.F.R. § 800.241(a)(1)(ii)(F).

[38] 31 C.F.R. § 800.241(a)(1)(ii)(G).

[39] 31 C.F.R. § 800.241(a)(1)(ii)(H).

[40] 31 C.F.R. § 800.241(a)(1)(ii)(I).

[41] 31 C.F.R. § 800.241(a)(1)(ii)(J). The reference to "positions of public trust" denotes information collected on persons who apply for authorizations to serve in functions that, while not warranting a security clearance, nonetheless are sufficiently sensitive that a formal vetting is appropriate.

[42] 31 C.F.R. § 800.241(b)(1). Also excluded is any data "that is a matter of public record, such as court records or other government records that are generally available to the public." *Id.,* § 800.241(b)(2).

[43] 31 C.F.R. § 800.401(b).

[44] *Id.*

[45] 31 C.F.R. §§ 800.218 and 1001(a).

[46] The criteria are set forth at 31 C.F.R. § 800.307 ("Specific clarification for investment funds") and are discussed in greater detail in another FAQ below.

[47] While the separate pilot program is being "sunseted" as part of the implementation of the new regulations, the new regulations incorporates the same mandatory filing requirement. *See* 31 C.F.R. Part 801.

[48] 31 C.F.R. § 800.401(c). *See* Appendix B to 31 C.F.R. Part 801 for the list of covered industries and corresponding NAICS codes.

[49] 85 Fed. Reg. 3112, 3113 (Jan. 17, 2020).

[50] 31 C.F.R. § 800.401(e)(1).

[51] 31 C.F.R. § 800.219.

[52] 31 C.F.R. § 800.401(e)(2).

[53] 31 C.F.R. § 800.401(e)(3).

[54] 31 C.F.R. § 800.401(e)(6). License Exception ENC is found at 15 C.F.R. § 740.17.

[55] 31 C.F.R. § 800.901(b).

[56] 31 C.F.R. § 800.401(a).

[57] 31 C.F.R. § 800.236.

[58] 31 C.F.R. § 800.401(g)(2).

[59] 31 C.F.R. § 800.402.

[60] 31 C.F.R. § 800.405(b).

[61] 31 C.F.R. § 800.407(a)(4).

[62] 31 C.F.R. § 800.407(a)(2).

[63] 31 C.F.R. § 800.407(a)(1).

[64] 31 C.F.R. § 800.220(a) (definition of "Foreign entity"). However, a publicly-held entity is still regarded as "foreign" if "its equity securities are primarily traded on one or more foreign exchanges[,]" even if its principal place of business is in the United States. *Id.*

[65] 31 C.F.R. § 800.239(a). This definition controls unless the entity has represented in any U.S. or foreign government filing that its principal place of business, headquarters, or equivalent operation is outside the United States, in which case it must demonstrate that the location has changed since the time representation was made. 31 C.F.R. § 800.239(b).

[66] This "principal place of business" concept augments a pre-existing provision in the regulation that an entity organized under foreign law is not a "foreign entity" "if can demonstrate that a majority of the equity interest in such entity is ultimately owned by U.S. nationals." 31 C.F.R. § 800.220(b). This standard has proven hard to satisfy in practice, especially in the case of a publicly-traded firm, where it might not be possible fully to account for and trace down "ultimate ownership" of a majority of the shares. Moreover, the provision does not apply to an offshore fund when a majority of the ownership (i.e., equity) interests are held by foreign limited partners, even if those interests are non-voting and do not confer control on the foreign L.P.s.

[67] 31 C.F.R. §§ 800.307(a)(1) and (2).

[68] 31 C.F.R. § 800.307(a)(3).

[69] 31 C.F.R. § 800.307(a)(5).

[70] 31 C.F.R. § 800.307(a)(4).

[71] 31 C.F.R. § 800.211(b).

[72] 31 C.F.R. § 800.307(a)(6).

[73] FIRRMA specifically provided that CFIUS can require parties to submit a copy of "any partnership agreements, integration agreements, or other side agreements relating to the transaction," as part of the submission for review. FIRMMA, § 1705. The new regulations implement this requirement. 31 C.F.R. § 800.502(c)(1)(x).

[74] 31 C.F.R. § 800.244(b).

[75] *See* former 31 C.F.R. § 800.301, Example 3 (explaining that "greenfield" investments did not constitute the acquisition of a "U.S. business" for purposes of CFIUS jurisdiction). 73 Fed. Reg. 70702, 70721 (Nov. 21, 2008).

[76] FIRRMA, § 1703 (expanding the definition of a "Covered Transaction").

[77] *Id.*

[78] 31 C.F.R. §§ 802.301(b) and 802.233.

[79] 31 C.F.R. § 802.227 and App. A.

[80] 31 C.F.R. § 802.211(b).

[81] 31 C.F.R. § 802.210.

[82] FIRRMA FAQs at 6 (Jan. 13, 2020).

[83] 31 C.F.R. § 802.216(a).