

Final CFIUS Regulations Implementing FIRRMA Take Effect in February 2020: 10 Key Questions Answered

Under the final regulations, CFIUS filings for certain transactions will be required, and CFIUS will have broader jurisdiction to review certain foreign investments.

On January 13, 2020, the US Treasury Department [published](#) two Final Rules (available [here](#) and [here](#)) implementing changes to the foreign investment review process administered by the Committee on Foreign Investment in the United States (CFIUS). These changes, brought about by the Foreign Investment Risk Review Modernization Act of 2018 ([FIRRMA](#)), will take effect on February 13, 2020. These regulations finalize the proposed regulations that the Treasury Department issued in September 2019, which we reported on in a previous [Client Alert](#).

The most important takeaways include:

- A CFIUS filing requirement for certain investments in US critical technology businesses (including some non-passive minority investments), similar to the [CFIUS Pilot Program](#) that took effect in November 2018
- A CFIUS filing requirement for most foreign-government-related investors making investments in US businesses involved in (1) critical **T**echnology, (2) critical **I**nfrastructure, or (3) sensitive personal **D**ata (so-called “TID” US businesses)
- A carve-out from CFIUS jurisdiction of certain non-controlling investments in TID US businesses and covered real estate transactions by certain “excepted” investors from Australia, Canada, and the United Kingdom
- Broader jurisdiction for CFIUS to assert its power of review over minority and non-passive TID US business investments by foreign investors
- CFIUS jurisdiction to review the purchase or lease by, or concession to, a foreign person of real estate located in proximity to sensitive US government facilities (but no mandatory filing requirement for covered real estate transactions)

This *Client Alert* answers 10 key questions about how the final CFIUS regulations will impact parties to transactions involving foreign investments in the United States.

1. What is a TID US business, and why does it matter?

A TID US business includes the following:

- A US business that produces, designs, tests, manufactures, fabricates, or develops critical technology. The final regulations clarify that not all US businesses involved with critical technology are TID US businesses. For example, if a US business produces an item using a critical technology component from a third party, and if the role of the US business is limited to merely verifying the fit and form of the third-party-supplied component, the US business is not a TID US business. The final regulations also provide much-needed relief to US critical technology businesses that were subject to the CFIUS Pilot Program solely because they were involved with items subject to certain encryption controls under the Export Administration Regulations ([EAR](#)), but eligible to take advantage of License Exception ENC.
- A US business that performs specified functions with respect to certain critical infrastructure, such as owning, operating, manufacturing, supplying, or servicing critical infrastructure across subsectors such as telecommunications, utilities, energy, and transportation, each as identified in an [appendix](#) to the Final Rules.
- A US business that maintains or collects sensitive personal data of US citizens, which is defined to include, among other things, identifiable data related to US government employees, health information, certain financial information, geolocation data, and genetic test results. Impacted US businesses are those that (1) “target or tailor” products or services to a US executive branch agency or military department with intelligence, national security, or homeland security responsibilities, (2) maintain or collect sensitive US citizen data on more than 1 million individuals within the 12-month period preceding certain transaction-related dates, or (3) have a demonstrated business objective to maintain or collect sensitive US citizen data on greater than 1 million individuals — and this data is an integrated part of the US business’s primary products or services.

The final regulations expand CFIUS jurisdiction to reach non-controlling and non-passive investments by foreign investors in TID US businesses where the foreign investor is afforded certain triggering rights, such as board or observer rights, access to material non-public technical information about the TID US business, or involvement in the substantive decision-making of the TID US business. As discussed below, CFIUS filings are also required for certain investments in TID US businesses.

2. When will a CFIUS filing be required once the final regulations take effect?

Once the final regulations take effect, foreign investors will be required to file with CFIUS in connection with certain investments involving “critical technology” as well as certain investments in TID US businesses by parties in which a foreign government has a “substantial interest.”

- *Investment in critical technology businesses:* The CFIUS Pilot Program already requires review by CFIUS of non-passive investments by foreign persons in US businesses that produce, design, test, manufacture, fabricate, or develop one or more “critical technologies” either used in connection with or designed specifically for one or more of 27 specified pilot program industries. This Pilot Program is now a permanent part of the final CFIUS regulations, with certain changes, including:
 - The current Pilot Program requires a CFIUS filing if the US business has a nexus to one of 27 industries identified by certain North American Industry Classification System

(NAICS) codes. In a forthcoming rule change, the Treasury Department is expected to replace the reference to NAICS codes with criteria relating to export control licensing requirements.

- As noted earlier, the final regulations remove basic encryption items subject to License Exception ENC from consideration as a critical technology.
- *Substantial foreign government interest transactions:* With certain exceptions, a CFIUS filing will be required for transactions in which a foreign person in which a foreign government has a “substantial interest” will itself acquire a “substantial interest” in a TID US business.
 - A foreign government has a substantial interest in the foreign investor if the foreign government has a 49% or greater direct or indirect voting interest in the foreign investor. A foreign investor has a substantial interest in a TID US business if the investment gives the foreign investor a 25% or greater direct or indirect voting interest in the TID US business. Notably, the final regulations make clear that limited partnership interests held by a foreign government generally do not count toward the substantial interest test.

If parties fail to make a mandatory CFIUS filing, CFIUS can assess a civil monetary penalty against the foreign investor, the US business, or both, up to US\$250,000 or the value of the transaction, whichever is greater.

3. When does CFIUS have jurisdiction to review a transaction if a filing is not required?

CFIUS has jurisdiction to review three types of transactions:

- *Control transactions:* CFIUS retains jurisdiction to review any transaction that could result in control of a US business by a foreign person. The final CFIUS regulations define “control” broadly to encompass certain minority investments. Importantly, the final regulations maintain the carve-out from CFIUS jurisdiction for transactions that result in a foreign person holding 10% or less of the outstanding voting interest in a US business “solely for the purpose of passive investment.” A US business is a business that engages in interstate commerce in the United States. (The final regulations, consistent with FIRRMA, delete the phrase “but only to the extent of its activities in interstate commerce in the United States.” The Treasury Department noted in response to comments about the new, more expansive definition that the change “is not intended to suggest that the extent of a business’s activities in interstate commerce in the United States is irrelevant to the Committee’s analysis of national security risk.”)
- *Certain non-controlling TID US business investments:* Once the final regulations take effect, CFIUS will have jurisdiction to review non-passive investments in a TID US business by a foreign person if the investment affords the foreign person any of the following triggering rights identified in the final regulations, even if the investment does not give the foreign person control of the US business:
 - Access to material non-public technical information of the US business regarding its critical technology or its covered investment in critical infrastructure
 - 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 US business

- Involvement, other than through the voting of shares, in substantive decision-making of the US business regarding the business's critical technology, the operation or supply of a covered investment in critical infrastructure, or the use of sensitive personal data of US citizens
- *Certain real estate investments:* Once the final regulations take effect, CFIUS will have jurisdiction to review transactions involving the purchase or lease by, or concession to, a foreign person of real estate in the United States located within (or functioning as a part of) an airport or maritime port, or in "close proximity to" a US military installation or other facility "sensitive for reasons relating to national security."

When CFIUS has jurisdiction to review an investment but a CFIUS filing is not required, the parties should consider carefully whether to make a voluntary filing to obtain CFIUS clearance. Absent such a clearance, CFIUS retains the right to force a filing of a transaction after signing or even after closing — with the possibility that CFIUS may impose conditions on the deal (called "mitigation") or even recommend to the President of the United States that the President block or unwind the transaction. In most cases, once CFIUS clearance has been received for a control transaction, the parties to the transaction benefit from safe harbor from further review. The decision whether to make a voluntary filing with CFIUS depends on a variety of factors, including the national-security risks associated with the foreign investor and the US business, the deal timing, and the parties' tolerance for the possibility of a CFIUS review after signing or closing. Notably, CFIUS is devoting considerably more resources to identifying so-called "non-notified" transactions.

4. Which transactions will not be subject to filing requirements or CFIUS jurisdiction?

Transactions Involving Only Non-Foreign Investors

CFIUS does not have jurisdiction to review transactions involving only non-foreign investors unless an investor is ultimately controlled by a foreign person. As in the current CFIUS regulations, and in general terms, an entity qualifies as a foreign person if (1) it is organized under the laws of a country other than the United States and (2) its principal place of business is outside the United States or its equity securities are primarily traded on one or more foreign exchanges — unless the majority of its equity interests are ultimately owned by US nationals.

- *Principal place of business:* The final regulations include for the first time a definition for "principal place of business."
 - Principal place of business is defined as the place where a company's management "directs, controls, or coordinates the entity's activities," or in the case of an investment fund, where the investment fund's "activities and investments are primarily directed, controlled, or coordinated by or on behalf of the general partner, managing member, or equivalent."
 - If the investor has recently represented to the US government, a US state government, or any foreign government for tax or other purposes that its principal place of business is outside the United States, that location will be deemed to be the investor's principal place of business unless the investor can demonstrate that its principal place of business has changed to the United States since the earlier representation.

Although the definition of principal place of business will take effect on February 13, 2020, the Treasury Department is accepting public comments on the definition until February 18 and may revise the definition based on the comments.

Transactions Involving Certain Investment Funds

As required under FIRREA, certain transactions involving investment funds are excluded from the expanded scope of CFIUS's jurisdiction for non-controlling investments in TID US businesses (but not from the expanded jurisdiction for real estate investments). In addition, filings are not required for qualifying transactions involving investment funds. This topic is discussed in more detail in the answer to Question 9.

Transactions Involving Investors With Close Ties to Australia, Canada, or the United Kingdom

FIRREA requires CFIUS to exempt investors from some countries from the expanded scope of CFIUS's jurisdiction for non-controlling investments in TID US businesses and real estate investments. As alluded to in the proposed regulations in September 2019, the final regulations identify a short list of "excepted" foreign states: Australia, Canada, and the United Kingdom. The final regulations note that the list could be expanded in the future.

To qualify as an excepted investor, a party must satisfy several requirements establishing close connections to one or more of the excepted foreign states and/or the United States. For example, at least 75% of the foreign investor's board members and all individuals holding 10% or more of the voting interests in the investor must be from an excepted foreign state or the United States. (Under the proposed regulations, the requirement applied to all board members and individuals holding voting interests of 5% or more.) Even if a foreign investor satisfies these requirements, it will not be eligible for the exception if it has been found to have violated certain US laws, regulations, and orders. For instance, the foreign investor will not be eligible for the exception if it has been notified of a breach of a CFIUS mitigation agreement; if it has received a finding of a US sanctions violation by the Office of Foreign Assets Control; or if it has been debarred by the US State Department, or been identified on the Commerce Department's Entity List or Unverified List.

In a change from the proposed regulations, investors will not be required to file with CFIUS based solely on the fact that the government of an excepted foreign state has a substantial interest in a transaction. A filing could still be required for other reasons, however. For example, filings are required for certain transactions involving critical technology, and that requirement applies regardless of whether a foreign government has an interest in the transaction.

Transactions Involving Investors Subject to Other Governmental Oversight

Some foreign investment transactions that are already subject to US government oversight do not need to be notified to CFIUS. For instance, for investments involving critical technology, the final regulations exempt from the CFIUS filing requirement certain investments through an entity that is already subject to a security control agreement, special security agreement, voting trust agreement, or proxy agreement to offset foreign ownership, control, or influence (so-called FOCI) pursuant to the National Industrial Security Program regulations. However, the fact that a transaction involves an entity operating under such an agreement does not exempt it from CFIUS's jurisdiction or the filing requirement for transactions in which a foreign government has a substantial interest, so a CFIUS filing may still be warranted under certain circumstances.

5. When will parties be able to file a short-form declaration with CFIUS instead of a full notice?

Under the Pilot Program, parties required to file with CFIUS have had the choice of filing a short-form declaration (currently a [five-page PDF form](#)) or submitting a full notice to CFIUS.

Under the final regulations, parties generally have a choice of filing either a declaration or a full notice to CFIUS, including with respect to real estate transactions. Declarations and full notices each have advantages and disadvantages. A declaration can be prepared more quickly than a full notice, and CFIUS completes its review of a declaration in 30 calendar days as opposed to the two to four months or longer that its review of a full notice takes. However, filing a full notice necessarily leads to a final decision by CFIUS, whereas filing a declaration can lead to an inconclusive result — CFIUS can ask the parties to file a full notice after finishing its review of a 30-day declaration, or can conclude its review of a declaration without clearing the investment, meaning that the parties must file a full CFIUS notice to obtain protection against post-closing review of the transaction.

6. Is there now a CFIUS filing fee?

Not yet. The final regulations do not provide for filing fees, but FIRRMA authorizes CFIUS to establish them, and the Treasury Department has indicated that it will issue a proposed regulation regarding filing fees “at a later date.” Under FIRRMA, the maximum fee is the lesser of 1% of the value of the transaction or US\$300,000, adjusted for inflation. However, the Treasury Department could establish fees lower than this statutory maximum in its regulations.

7. Which real estate transactions are subject to CFIUS jurisdiction under the final regulations, and what are the filing requirements?

The final regulations ([31 CFR Part 802](#)) expand CFIUS’s jurisdiction to review the purchase or lease by, or concession to, a foreign person of:

- Real estate located in or functioning as part of “covered ports,” which includes certain airports and maritime ports
- Real estate located within one of the following areas, consistent with the updated list of military installations identified in [Appendix A to Part 802](#):
 - One mile (close proximity) of certain military installations identified in [Part 1](#) or [Part 2](#) of Appendix A, such as the Pentagon in Arlington, Virginia, and Los Angeles Air Force Base in California
 - One to 100 miles (the extended range) of certain military installations identified in Part 2 of Appendix A, such as real estate located within 40 miles of Cape Canaveral Air Force Station in Florida or Fort Bragg in North Carolina
 - Certain counties identified in connection with military installations identified in [Part 3](#) of Appendix A, such as Burke, Dunn, and McHenry counties in North Dakota in connection with the 91st Missile Wing Minot Air Force Base Missile Field
 - To the extent real estate is located within the limits of the United States’ territorial sea, any part of a military installation as identified at [Part 4](#) of Appendix A, such as the Boston

Range Complex offshore Massachusetts, New Hampshire, and Maine, and the Pensacola Operating Area offshore Alabama and Florida

The final regulations explain that the Treasury Department will make available to the public a web-based tool to help parties determine whether their transaction implicates “covered real estate.” In the interim, the Treasury Department has directed the public to consult [TIGERweb](#), a tool maintained by the Census Bureau, to view relevant military installations, urbanized areas, and urban clusters on a map.

Consistent with the proposed regulations, CFIUS can assert jurisdiction under the final regulations if a foreign investor holds at least three of the following property rights:

- To physically access the real estate
- To exclude others from physical access to the real estate
- To improve or develop the real estate
- To attach fixed or immovable structures or objects to the real estate

As provided in FIRRMA, there is no filing requirement for covered real estate investments. Parties may determine whether to file a short-form declaration or submit a full notice to CFIUS.

8. Which real estate transactions are not subject to CFIUS review?

The final regulations carve out from CFIUS’s jurisdiction the following types of real estate investments:

- Investments made by investors from excepted foreign states, as discussed above (currently limited to Australia, Canada, and the United Kingdom)
- Investments in real estate located within an “urbanized area” (an area with a minimum population of 50,000 individuals according to the most recent US Census) or an “urban cluster” (an area containing at least 2,500 and fewer than 50,000 people) — except if the real estate is located within or functioning as part of an air or maritime port, or within close proximity to a military installation
- Investments in a single housing unit, including fixtures and adjacent land, as long as the land is incidental to the use of the real estate
- Leases and concessions of real estate in airports and maritime ports only where for the purpose of retail sales
- Investments in commercial office space within a multi-unit commercial office building so long as, at the completion of the transaction (1) the amount of space occupied by a foreign person is equal to 10% or less of the total square footage and (2) the ratio of a foreign person and its affiliates to the total number of tenants in the building amounts to less than 10% of the total number of tenants “based on the number of ownership, lease and concession arrangements for commercial space in the building.”

9. What are the implications of the final regulations for private equity funds?

- *Principal place of business:* One important implication for private equity funds is the new definition of “principal place of business,” as discussed in Question 4. The final regulations define principal place of business, in the case of a fund, as the place “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.” This definition clarifies for private equity funds whether a transaction is subject to CFIUS jurisdiction and seeks to ensure that a fund’s principal place of business is the same across federal, state, and foreign government filings.

- *Investment fund clarification:* The final regulations retain the clarification that excludes from CFIUS’s jurisdiction certain non-controlling indirect investments in TID US businesses through investment funds where (1) the fund is managed exclusively by a general partner or equivalent that is not a foreign person, (2) if there is an advisory board or committee, the foreign person does not have the ability to control investment decisions of the fund through the advisory board or committee, (3) the foreign person does not otherwise have the ability to control the investment fund, and (4) the foreign person does not have any of the triggering rights discussed in response to Question 3 (e.g., board or observer rights).

10. What are emerging and foundational technologies, and why are they important?

The Final Rules continue to include “emerging and foundational technologies” in the definition of “critical technologies.” The technologies that constitute emerging and foundational technologies are being determined by an interagency process, which is anticipated to result in a proposed rule for new Export Control Classification Numbers (ECCNs) on the EAR’s Commerce Control List. Once these emerging and foundational technologies are identified in new ECCNs, they will become part of the CFIUS critical technology landscape.

On November 19, 2018, the Department of Commerce’s Bureau of Industry and Security (BIS) published an [advance notice of proposed rulemaking](#), seeking public comment on the criteria for identifying emerging technologies that are essential to US national security. At the time, BIS identified 14 categories of technology under consideration, including artificial intelligence; biotech; robotics; position, navigation, and timing (PNT) technology; microprocessor technology; additive manufacturing; advanced computing technology; hypersonics; and advanced surveillance technologies.

The timing of a new rule identifying emerging technologies and corresponding new ECCNs remains unclear, but its publication will be another significant development for CFIUS as well as US export control purposes.

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