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CFIUS Update: Final Regulations Implement FIRRMA

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The US Department of the Treasury has issued two final regulations implementing the Foreign Investment Risk Review Modernization Act of 2018 ("FIRRMA"). The final regulations broadly expand the jurisdiction of the Committee on Foreign Investment in the United States ("CFIUS" or the "Committee") to review foreign investment transactions that implicate US national security concerns and to mitigate such concerns.[1]

This alert provides an overview of the Committee and its authority, discusses key aspects of the final regulations and addresses questions that the business and investment communities will face as they consider whether future investments may be subject to CFIUS jurisdiction and the requirement to submit mandatory CFIUS filings in certain circumstances.

Key aspects of the final regulations

- **Greatly expanded jurisdiction to review noncontrolling investments:** Whereas in the past CFIUS jurisdiction was narrowly limited to transactions resulting in foreign control of a US business, FIRRMA and the final regulations give CFIUS broad new authority to review non-passive, noncontrolling investments in certain US businesses that deal in "critical technology," "critical infrastructure" or "sensitive personal data." US businesses that fall within the scope of this expanded jurisdiction are referred to in the final regulations as "TID US businesses" (*i.e.*, "T" for technology, "I" for infrastructure and "D" for data). This expansion of jurisdiction to cover certain noncontrolling investments in TID US businesses, coupled with the requirement to submit mandatory filings for certain investments, represents the most significant change to the CFIUS regime in a decade.

- **Mandatory filings:** Whereas CFIUS filings have historically been ostensibly voluntary, the final regulations compel mandatory filings for foreign investments in TID US businesses in two general situations – where a foreign government will acquire (directly or indirectly) a "substantial interest" in a TID US business or where a foreign investor will obtain access to certain information and/or governance rights in a TID US business that deals in one or more "critical technologies" and deploys a critical technology in certain industries of concern to the Committee.[2] Failure to make a mandatory filing when one is required can subject the parties to penalties in amounts up to the value of their transaction.

- **Excepted Investors:** The final regulations exempt from mandatory filing requirements certain investments made by nationals and entities from "Excepted Foreign States" (currently, Canada, the United Kingdom and Australia) that meet specific qualifying criteria. CFIUS will announce additional eligibility criteria in forthcoming regulations and, in the future, may add to or remove nations from the list of Excepted Foreign States.

- **Investment funds:** The final regulations clarify that certain noncontrolling investments in TID US businesses by investment funds (*e.g.*, venture capital funds) may fall outside CFIUS jurisdiction notwithstanding that a fund has foreign limited partners, *provided* the fund is managed by US persons and meets certain other structuring requirements that are commonly addressed in limited partnership agreements and/or side letters. Furthermore, a new and more favorable definition of a fund's principal place of business focusing on a "nerve center" test may permit investments by some US-based funds to fall outside CFIUS jurisdiction, even if the funds are organized abroad (*e.g.*, in the Caymans). Finally, the application of the Excepted Investor rule may allow some fund investments in TID US businesses to fall outside a mandatory CFIUS filing requirement.

- **Expanded jurisdiction to review real estate transactions:** The final regulations provide CFIUS with new authority to review certain real estate transactions involving the **purchase** or **lease** by, or **concession** to, a foreign person of real estate in the United States in circumstances where there is no "US business" involved in the transaction (*e.g.*, the lease of

unimproved land in proximity to a port or a sensitive government facility).

Read the full report

Notes

1. The final regulations are comprised of two distinct parts. Part 800 addresses foreign acquisitions of and investments in US businesses; Part 802 addresses transactions involving foreign persons and US real estate. *See* 31 C.F.R. Part 800; 31 C.F.R. Part 802.
2. Note that the term "substantial interest" is defined in the final regulations with a two-prong test requiring a foreign government of a single foreign state (other than an Excepted Foreign State) to have a substantial interest – 49% or more – in the foreign person that is acquiring a substantial interest – 25% or more – in the TID US business.

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