

# CLIENT ALERT

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## United States CFIUS Jurisdiction Expands: Non-Controlling Interest Acquisitions and Real Estate Investments

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On September 17, 2019, the United States Department of the Treasury released two sets of proposed regulations under the Foreign Investment Risk Review Modernization Act of 2018 ("FIRRMA") that broaden the scope of transactions subject to national security review by the Committee on Foreign Investment in the United States ("CFIUS"). FIRRMA expanded the authority of CFIUS to review two new categories of transactions that could impact United States national security: (i) non-controlling investments in United States businesses; and (ii) real estate transactions. The new regulations, which are part of an overall rule making action, are published for public review and comment, and currently scheduled to be effective no later than February 13, 2020.

The new regulations will not be applicable to transactions in which one of the following occurred prior to the effective date of the final regulations: (i) the transaction closed, (ii) the parties executed a binding agreement establishing the material terms of the transaction, or (iii) a public offer or proxy solicitation has been made. These transactions are subject to the CFIUS existing regulations and jurisdictional coverage.

### CFIUS

CFIUS is a Federal interagency committee, chaired by the Secretary of the Treasury, Department of the Treasury. Other government departments that are part of CFIUS include: Justice, Homeland Security, Commerce, State, Defense and Energy. CFIUS is authorized to review and approve transactions involving foreign investment in the United States that could impact United States national security.

### Business Investment Review

Prior to FIRRMA, CFIUS had authority to review controlling investments in United States businesses by foreign persons, called "covered transactions." Review was usually in the context of a business acquisition where there was a change in ownership. CFIUS review over the years extended on an *ad hoc* basis to also include substantive investments giving a level of control over a business. FIRRMA, in 2018, formally expanded the jurisdiction of CFIUS to authorize reviews of certain non-controlling investments by foreign persons in a United States business if:

- (1) the investment affords the foreign person
  - (i) access to material nonpublic technical

information, (ii) membership, observer, or nomination rights for the board of directors or equivalent, (iii) involvement in substantive decision-making regarding use, development, acquisition, safekeeping, or release of “sensitive personal data” of United States citizens, (iv) use, development, acquisition, or release of “critical technologies,” or (v) management, operation, manufacture, or supply of “critical infrastructure,” and

- (2) if the United States business is one that (i) produces, designs, tests, manufactures, fabricates or develops one or more “critical technologies,” (ii) owns, operates, manufactures, supplies or services “critical infrastructure,” or (iii) maintains or collects “sensitive personal data” of United States citizens that may be exploited in a manner that threatens United States national security.

The new rules will define the terms mentioned above as to the scope of the regulation coverage. The new rules will name the types of non-controlling investment subject to CFIUS jurisdiction as a covered investment, rename what is a foreign controlling investment in a United States business, what is a covered control transaction and retain the old term covered transaction to cover both of the above-stated transactions as well as any transaction intended to evade or circumvent the CFIUS law.

Critical technologies will be defined to include certain items subject to export controls and other existing regulatory schemes, and emerging and foundational technologies controlled pursuant to the Export Control Reform Act of 2018. Critical infrastructure will be those that perform specified functions, such as owning, operating, manufacturing, supplying, or servicing critical infrastructure businesses across subsectors such as

telecommunications, utilities, energy, and transportation, each as identified in an appendix to the proposed regulations. Sensitive personal data will be defined to include ten categories of data maintained or collected by United States businesses that (i) target or tailor products or services to sensitive populations, including United States military members and employees of federal agencies involved in national security, (ii) collect or maintain data on at least one million individuals, or (iii) have a demonstrated business objective to maintain or collect data on greater than one million individuals and the data is an integrated part of the primary products or services of the United States business. The categories of data include types of financial, geolocation, genetic and health data, among others.

The new rules will create an exception from “covered investments” (but not from “covered control transactions”) for foreign persons that qualify as “excepted investors,” which will be investors tied to a country that CFIUS determines to be an “excepted foreign state” based on that country’s maintenance and compliance with certain laws and practices in furtherance of national security protection. The list of these countries has yet to be created.

Lending arrangements made by foreign persons and syndicated loans with foreign participation typically are not subject to CFIUS review; but that will depend on the terms of the lending arrangement and if the borrowing party is a business covered by the CFIUS regulations. If a loan or a similar financing arrangement through which a foreign person acquires an interest in profits of a United States business, the right to appoint members of the board of directors of the United States business, or other comparable financial or governance rights characteristic of an equity investment, but not of a typical loan, may constitute a reviewable

transaction. If default provisions ultimately may result in control or a controlling interest in a defaulting United States business or piece of real estate, the transaction may then be a reviewable transaction.

Investments in technology, infrastructure and data businesses through investment vehicles such as investment funds that have foreign participation typically will not require CFIUS review, provided that the foreign involvement does not extend to controlling the vehicle such that it controls the United States business or actually controls the United States business in which the vehicle is invested. Whether there is indirect or direct control will depend on the particular terms of the investment vehicle or the terms of the investment made into the United States business by the investment vehicle.

CFIUS business investment review will continue to be triggered by parties voluntarily notifying CFIUS of the transaction, by filing either a full-form “notice” or a short-form “declaration.” The new rules will change many of the former processes and timings. Pursuant to FIRRMA, however, the rules will make declarations mandatory for certain covered transactions where a foreign government has a “substantial interest” or where the United States business involves critical technologies. For the latter, the Department of the Treasury already has established a “pilot program” mandating declarations or notices for those covered investments, and the new rules would not at this time modify the pilot program.

### **Real Estate Transactions**

Historically, CFIUS reviewed real estate acquisitions only when it was a component of a business transaction or investment resulting in control by a foreign person of a United States

business. Notwithstanding the addition of the new rules that focus on purely real estate transactions, business transactions that include real estate should continue to be analyzed under the CFIUS existing and proposed regulations regarding control transactions and non-controlling investments involving United States businesses.

### **CFIUS Real Estate Coverage**

CFIUS will have authority to review foreign acquisitions of particular types of real estate in the United States. A “covered real estate transaction” includes the (i) purchase by, (ii) lease by, of (iii) or concession to a foreign person that gives the foreign person any three of the following four rights (a) physical access to the property, (b) excluding others from access to the property, (c) making improvements to the property, or (d) attaching fixed or immovable structures or objects to the property.

Real estate transactions that are subject to CFIUS review will fall into identified categories. The principal categories are the following: (i) airports and maritime ports, (ii) property in close proximity to military installations, (iii) property within an extended range of military installations, and (iv) coastal areas within a limited range from military installations. Airports and maritime ports subject to CFIUS review will be generally limited to large airports and maritime ports. Airports include those classified as (i) a “large hub airport,” (ii) any airport with an annual aggregate all-cargo landed weight greater than 1.24 billion pounds, or (iii) any “joint use airport.” Maritime ports include (i) any strategic seaport within the National Port Readiness Network, and (ii) any of the top 25 tonnage, container, or dry bulk ports in the United States designated by the Department of Transportation. Military install-

lotions will be only those that are designated in the rules, for which there are several appendices that relate to the specific categories. Real estate near military installations subject to CFIUS review must fall into one of the following four categories, (i) “close proximity,” which is any real estate within one mile of a designated military installation, (ii) “extended proximity,” which is any real estate extending 99 miles outward from the boundary of a designated military installation but does not extend further than 12 nautical miles seaward of the United States coastline, (iii) “county or geographic areas,” which is any real estate identified in connection with designated military installations, and (iv) “coastal,” which is any real estate located within 12 nautical miles of any designated military installation.

### **Real Estate Exceptions**

There will be a country based exception. Certain foreign persons will be able to avail themselves of exception from CFIUS review if they are “excepted real estate investors.” An “excepted real estate investor” will be based on their ties to certain countries identified as “excepted real estate foreign states,” and their compliance with certain laws, orders, and regulations. The countries that will be included for this exception have not yet been determined. Additionally, although there is no specific investment level that will be permitted, the current belief among legal practioners is that foreign investors below 10% might not trigger a CFIUS review.

There are several real estate-based exceptions. These include the purchase, lease, or concession of covered real estate (i) that is within an “urbanized area” or “urban cluster,” as defined by the Census Bureau, except those that relate to relevant ports and those in close

proximity to certain military installations, (ii) that is a single “housing unit” as defined by the Census Bureau, (iii) that is only able to be used for retail trade, accommodation, or food service, and (iv) that is commercial office space within a multi-unit commercial office building if the foreign interests do not cover more than 10 percent of the total square footage of the office space, and (2) the foreign interests do not represent more than 10 percent of the total number of tenants in the building.

### **Filing Process**

The new regulations will provide for a streamlined process for real estate transaction review. There will be a short-form “declaration” available for real estate transaction as opposed to a long-form “notice” that is used for other CFIUS transaction review. The short-form will not only be abbreviated but also require a CFIUS response within 30 days.

The decision whether to file or not to file for CFIUS review will be voluntary. Parties to a real estate transaction involving foreign buyers/investors cannot be found to violate the law for failure to file a CFIUS notice. In real estate transactions where CFIUS has jurisdiction and the parties do not file a notice and do not obtain clearance from CFIUS, they then risk action by CFIUS at any time in the future, including a forced unwinding of the transaction. Thus, many parties may prefer to obtain the “safe harbor” benefits of the CFIUS clearance process, because if there is CFIUS review, then CFIUS is precluded from re-examining a cleared transaction.

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