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ALERTS

CFIUS Releases New Proposed Regulations Transforming Foreign Investment In The United States

September 23, 2019 | Atlanta | Chicago | Columbus | Dallas | Delaware | Elkhart | Fort Wayne | Grand Rapids | Indianapolis | Los Angeles | Minneapolis | San Diego | South Bend | Washington, D.C.

On Sept. 17, 2019, more than a year since the passage of the Foreign Investment Risk Review Modernization Act (FIRRMA), the Committee on Foreign Investment in the U.S. (CFIUS) released its highly anticipated proposed regulations detailing the committee's increased scope and authority to review and approve certain foreign investments in the United States.

Interested parties have until Oct. 17, 2019, to comment on CFIUS' proposed regulations. The comments will inform the development of the final rules, which CFIUS must implement no later than Feb. 13, 2020.

FIRRMA, enacted on Aug. 13, 2018, was designed to address emerging national security risks and fundamental shifts in the nature of foreign investments in the U.S., which many have attributed to China. While a limited number of changes under FIRRMA were fully or partially implemented in late 2018, such as the launch of a mandatory declaration pilot program and the extended initial review period timeline, many of FIRRMA's most significant changes were still pending the implementation of new regulations.

With its published proposed regulations, CFIUS has provided a glimpse into how it will impact and regulate foreign investment in the United States. In particular, buyers and sellers need to consider conducting due diligence and an assessment on potential CFIUS implications in the early stages of a transaction.

For transactions covered by the mandatory declaration pilot program,

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FIRRMA currently allows CFIUS to require the filing up to 45 days prior to closing, but the proposed regulations, if finalized, would shorten the mandatory declaration deadline. The proposed CFIUS regulations not only affect transactions that could result in foreign control of U.S. business, but also certain non-controlling "other investments" that afford a foreign person certain rights, access, or involvement in certain types of U.S. businesses. The proposed rules do not address filing fees authorized by FIRRMA.

Highlighted below are several other major takeaways from the proposed regulations.

Blacklisted and White Listed Countries

CFIUS released an FAQ that attempted to quell rumors it would single out specific countries or foreign persons of specific countries, like China, as prohibited from investment in the U.S., creating a de facto blacklist. While the proposed regulations do not mention any such blacklist, they do hint at the creation of a potential white list by referring to "excepted foreign states." CFIUS has not specified which countries qualify as an excepted foreign state, but does explain that such excepted foreign states would have "a robust process to assess foreign investments for national security risks and to facilitate coordination with the United States on matters relating to investment security." Excepted foreign states will be designated in a list to be published by CFIUS at a date yet to be determined.

Mandatory Declarations for Critical Technologies Still Governed by Pilot Program

In November 2018, CFIUS launched a pilot program that imposed mandatory declaration requirements on covered transactions involving certain critical technology within the 27 pilot program industries, such as manufacturing of aircraft and aircraft engines (including parts), research and development in nanotechnology, and electronic computer and semiconductor manufacturing, just to name a few. FIRRMA also expanded CFIUS' enforcement authority, allowing CFIUS to impose significant monetary penalties on parties that fail to comply with the new mandatory declaration requirements. Additionally, FIRRMA imposes a mandatory declaration requirement on certain covered transactions where a foreign government has a substantial interest. At the moment, mandatory declarations on critical technologies are still governed by the current pilot program regulations, but the final rules are expected to expand beyond the pilot program industries and may also alter the pre-closing declaration filing deadline from 45 days to 30 days.

Critical Technologies, Critical Infrastructure and Sensitive Personal Data Defined

FIRRMA expands the scope of covered transactions to include certain non-controlling investments in technology, infrastructure and data, or "TID U.S. businesses," as the proposed regulations refer to them. These terms are defined in the proposed regulations as follows.

Critical Technologies. The proposed definition of this term includes certain items subject to export controls and other existing regulatory

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schemes (e.g., the International Traffic in Arms Regulation (ITAR); Export Administration Regulations (EAR)), as well as emerging and foundational technologies. Pursuant to FIRRMA, the Department of Commerce's Bureau of Industry and Security (BIS) identifies "emerging and foundational technologies," and the proposed definition here would automatically incorporate such technologies as they are identified and controlled by BIS.

Critical Infrastructure. The proposed definition of critical infrastructure is fairly broad in that it relates to specified functions, such as owning, operating, manufacturing, supplying or servicing, with respect to critical infrastructure subsectors including telecommunications, utilities, energy, and transportation. These "covered investment critical infrastructure" are specified in the proposed regulations' Appendix A.

Sensitive Personal Data. The proposed definition of sensitive personal data attempts to strike a balance between protecting national security and avoiding any "chilling effect" on beneficial foreign investment. It covers all genetic information, as well as "identifiable data" maintained or collected by a U.S. business that (1) targets or tailors its products or services to sensitive U.S. Government personnel or contractors, (2) maintains or collects such data on greater than 1 million individuals, or (3) has a demonstrated business objective to maintain or collect such data on greater than 1 million individuals and such data is an integrated part of the U.S. business's primary products or services. Note, however, that there is a general carve out for certain data pertaining to a U.S. business's own employees and data that is part of the public record.

Further amendments to the above definitions are anticipated, potentially both as part of CFIUS review of comments on its proposed regulations, and as CFIUS periodically revises its regulations.

More Real Estate Transactions to Be Reviewed

While CFIUS has reviewed, and even blocked, some real estate transactions prior to passage of FIRRMA – for instance, one famous case involved Chinese investment in an American-owned wind farm near military airspace – the majority of foreign investments in U.S. real estate were largely considered outside the purview of CFIUS. Indeed, pre-FIRRMA, CFIUS expressly excluded certain real estate transactions like greenfield investments.

Now, CFIUS has included an entirely separate set of proposed regulations pertaining solely to covered real estate transactions, and we expect to see a significant uptick in CFIUS review of these transactions as a result. The regulations describe primarily two "proximity" categories of real estate transactions: real estate within or part of an air or maritime port and real estate in close proximity to U.S. military installations or sensitive U.S. government facilities. CFIUS' scope of review of real estate can also extend to undeveloped tracts of land (the greenfield investments), and can cover both purchases and leases.

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