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Treasury Publishes Interim Rules to Implement CFIUS Reform

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Hughes Hubbard & Reed LLP • A New York Limited Liability Partnership
One Battery Park Plaza • New York, New York 10004-1482 • +1 (212) 837-6000

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October 11, 2018 – On October 10, 2018, the U.S. Department of the Treasury, Office of Public Affairs, as lead agency for the Committee on Foreign Investment in the United States (“CFIUS”), published two interim rules to implement key provisions of the Foreign Investment Risk Review Modernization Act of 2018 (“FIRRMA”). We previously summarized FIRRMA in an [earlier advisory](#). One [interim rule](#) creates a pilot program, as authorized by FIRRMA, to address foreign investments in sensitive technology sectors. The [other rule](#) makes amendments to CFIUS’s existing regulations to reflect the provisions of FIRRMA that became effective immediately upon enactment. Together, these rules would extend CFIUS review authority to transactions not previously covered, and would also modify in important ways reporting requirements for transactions that are covered.

Pilot Program for Investments in Technology

The pilot program will primarily (1) expand the range of transactions subject to review by CFIUS, and (2) implement FIRRMA’s mandatory declaration requirement. The pilot program will become effective on November 10, 2018, and will only apply to transactions consummated after that date. The pilot program will end on the date on which the regulations fully implementing FIRRMA become effective, which will be no later than March 5, 2020.

A. Expanded CFIUS Jurisdiction

Prior to FIRRMA, CFIUS only had jurisdiction to review transactions that could result in the acquisition of control of a U.S. business by a foreign person. The pilot program will expand CFIUS’s jurisdiction primarily to allow review of certain foreign investments in certain categories of U.S. companies that would not result in control of the U.S. business. Transactions covered by the interim rule that will be subject to CFIUS review after November 10 include those that would result in providing the foreign investor:

- Access to material non-public technical information (which is defined to exclude financial information);
- Membership, observer rights, or the right to nominate an individual to the board of directors or other governing body;

- Involvement, other than through voting of shares, in substantive decision making regarding the use, development, acquisition or release of critical technology.

In addition, the pilot program will also cover other transactions by or with foreign persons that could result in foreign control of any covered U.S. business.

The U.S. businesses covered by the pilot program include any U.S. business that produces, designs, tests, manufactures, fabricates, or develops a “critical technology” that is utilized in connection with the U.S. business’s activity in, or designed specifically for use in, one of 27 specified industries identified in an Annex A to the interim rule. The term “critical technologies” tracks the definition of the term in FIRRMA, and includes all items on the United States Munitions List; Commerce Control List items that are subject to multilateral regimes for reasons of national security, chemical and biological weapons proliferation, nuclear nonproliferation, or missile technology, or that are controlled for reasons of regional stability or surreptitious listening; certain nuclear facilities, equipment, and related parts and components; select agents and toxins; and the new concept of “emerging and foundational technologies” that are controlled pursuant to section 1758 of the Export Control Reform Act of 2018. The 27 specified industries listed in Annex A are said to be industries for which strategically motivated foreign investment could pose a threat to U.S. technological superiority and national security. These include manufacturing related to aircraft, electronic computers, optical instruments and lenses, petrochemicals, and semiconductors and related devices.

B. Mandatory Declaration Requirement

The pilot program requires mandatory declarations for any transaction subject to CFIUS review (including the non-controlling investments described above) that involves a covered pilot program U.S. business (i.e., a business involved with a “critical technology” that is used or designed for use in a specified industry). While CFIUS filing has historically been a voluntary process, the pilot program, for the first time, requires the filing of a declaration (or, alternatively, a full voluntary notice) for all covered transactions.

As of the date of this advisory, CFIUS has not published a form or sample declaration. However, [FAQ guidance](#) provided contemporaneously with the interim rule says that CFIUS is developing a “Web template” for the declaration that should be available on the [CFIUS website](#) in the near future. The interim rule also specifies the information that should be included in the declarations, including:

- Identity of the foreign person(s) and U.S. business involved;
- Basic information about the expected transaction, including all sources of financing;
- Statements regarding whether the parties stipulate that the transaction is a covered transaction under the pilot program and/or whether the transaction would result in control of a U.S. business covered by the pilot program;
- Information regarding whether the transaction would result in any of the non-control covered transactions described above;
- Basic information about the U.S. business;
- Description of the U.S. business’s business activities;
- Statement regarding which critical technology or technologies the U.S. business is involved with;
- Identification of any U.S. government contracts held by the U.S. business;
- Identification of any Department of Defense or Department of Energy grants or participation in any defense or energy programs involving critical technologies;
- Identification of any Defense Production Act Title III programs that the U.S. business participated during the prior seven years;
- Identification of whether the U.S. business received or placed priority rated contracts or orders under the Defense Priorities and Allocations System;

- Name of the parent of the foreign person;
- Organizational chart and related information for the parent of the foreign person;
- Information regarding all foreign government ownership of the foreign person;
- Description of the foreign person's business activities;
- Statement of whether any party has been a party to another transaction reviewed by CFIUS; and
- Identification of any criminal convictions by any party.

Under threat of a civil monetary penalty up to the full value of the entire transaction, mandatory declarations must be filed at least 45 days prior to the consummation of the transaction. CFIUS then has 30 days to review the transaction. At the end of the 30 day period, CFIUS may:

- Require the parties to submit a full written notice;
- Inform the parties that CFIUS is unable to complete its review on the basis of the information provided;
- Initiate a unilateral review of the transaction;
- Notify the parties that CFIUS has concluded all action (effectively approving the transaction).

Parties may also still submit a full notice under CFIUS's standard procedure in lieu of a short-form declaration, but CFIUS would have 45 (instead of 30) days to review such a notification.

Regulatory Amendments to Implement FIRRMA Provisions

In addition to the pilot program, CFIUS published an interim rule making several technical amendments to its existing regulations governing acquisitions of control by a foreign person (at 31 C.F.R. Part 800) in order to implement certain provisions of FIRRMA that became immediately effective upon its enactment. These changes become effective on October 11, 2018, and include:

- Extending the CFIUS review period from 30 days to 45 days;
- Expanding the definition of "covered transaction" throughout 31 C.F.R. Part 800 to be consistent with FIRRMA and include transactions, transfers, agreements, or arrangements designed to evade or circumvent CFIUS review;
- Applying 18 U.S.C. § 1001 (criminal liability for false statements) to all information provided to CFIUS;
- Revising the definition of "critical technologies" to capture emerging and foundational technologies;
- Revising the definitions of "transaction" and "parties or parties to a transaction" to include certain changes in rights that a foreign person has with respect to a U.S. business in which the foreign person has an investment and transactions designed to evade CFIUS review;
- Adding examples to illustrate the expanded range of "covered transactions";
- Reflecting a shift from hardcopy submissions to electronic submissions of voluntary notices;
- Modifying the requirements for the contents of voluntary notices consistent with FIRRMA;
- Providing that an investigation can be extended for 15 days under certain defined "extraordinary circumstances";
- Adding additional remedies available to CFIUS for failure to comply with a prior mitigation agreement or condition, including remediation plans, requiring mandatory filings for future covered transactions for up to five years, or injunctive relief.

Next Steps

The interim rules and related guidance represent the first formal action by CFIUS to implement FIRRMA since the bill was signed into law on August 13, 2018. Notably, for both interim rules, CFIUS is accepting public comments until November 10, 2018 (notwithstanding the fact that the interim rule providing for technical changes to the CFIUS regulations becomes effective October 11). As indicated in a [statement](#) accompanying the release of the

rules, Treasury Secretary Steven Mnuchin emphasized that one purpose of the rules is to “inform[] the development of final regulations that will fully implement FIRRMA.” Interested parties, either foreign or domestic, should therefore strongly consider submitting feedback to CFIUS to help shape the future development of its review process.

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Alan G. Kashdan



Tyler Grove

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