



PROGRAM MATERIALS

Program #3089

May 6, 2020

CFIUS and Foreign Investment in the United States: Navigating a New Regulatory Regime

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CFIUS and Foreign Investment in the United States

Navigating a New Regulatory Regime

May 6, 2020

Agenda

- CFIUS Background
- Traditional CFIUS Review
- FIRORMA and the CFIUS Pilot Program
- CFIUS Regulations Implementing FIRORMA
- CFIUS Review of Real Estate Transactions Under FIRORMA
- Priorities and Practical Considerations

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CFIUS Background

What is CFIUS?

- Interagency committee led by the Treasury Dept.
 - Authorized to review certain transactions involving foreign investment in the United States and certain real estate transactions by foreign persons
 - Reviews the effect of such transactions on the national security of the United States
- Each agency/office conducts its own investigation
 - Additional agencies may also be involved based on their expertise and the specific transaction
 - Intelligence community also provides CFIUS with an independent assessment of whether the foreign acquirer poses a threat to the national security
 - All CFIUS decisions are made by consensus of the entire committee
- Ultimately, decisions to block a transaction or order divestment are made by the President

CFIUS Organization

Chair

Department of the Treasury

Member Agencies/Offices

Department of Justice

Department of Homeland Security

Department of Commerce

Department of Defense

Department of State

Department of Energy

Office of the U.S. Trade Representative

Office of Science & Technology Policy

Observer Agencies/Offices

Office of Management & Budget

Council of Economic Advisors

National Security Council

National Economic Council

Homeland Security Council

Non-Voting, *Ex-Officio* Members

Director of National Intelligence

Secretary of Labor

Historical Context

- 1975
 - President Ford established CFIUS through an executive order over concerns regarding the impact of acquisitions of U.S. firms by Japan
 - Limited power to study foreign investment and propose policy and legislation
 - Between 1980 and 1988, DoD intervened in three transactions, but did so using its power to classify information
- 1988
 - Exon-Florio Amendment to the Defense Production Act of 1950
 - Created the authority of the President to suspend or prohibit certain transactions that would result in a foreign person controlling a U.S. business if “there is credible evidence that leads the President to believe that the foreign interest exercising control might take action that threatens to impair the national security.”
 - Through executive order, President Reagan delegated the authority to review and investigate investments to CFIUS

Historical Context

- 1990
 - President Bush took first action under the power established by the Exon-Florio Amendment
 - Ordered China National Aero-Technology Import and Export Corporation (CATIC) to divest its acquisition of U.S.-based MAMCO Manufacturing
 - MAMCO produced metal parts and assemblies for aircraft
 - Concerns that CATIC might gain access to technology through MAMCO that it would otherwise have to obtain under an export license
- 1992
 - Byrd Amendment to the National Defense Authorization Act for Fiscal Year 1993
 - Required CFIUS to investigate mergers, acquisitions, and takeover where the acquirer is controlled by or acting on behalf of a foreign government, the transaction would result in a foreign person controlling a U.S. business, and there would be national security concerns

Historical Context

- 2006
 - Dubai Ports World, a state-owned company, purchased Peninsular and Oriental Steam Navigation Company (P&O), a U.K. company
 - P&O owned management contracts for six U.S. ports that were consequently assumed by Dubai Ports World
 - The parties provided voluntary notice to CFIUS, which cleared the transaction after only an initial review and without proceeding to a formal investigation
 - CFIUS approval drew criticism from Congress, who interpreted an investigation as mandatory under the Byrd Amendment, while CFIUS viewed it as discretionary
 - Transaction exposed tension between national security and an open economy

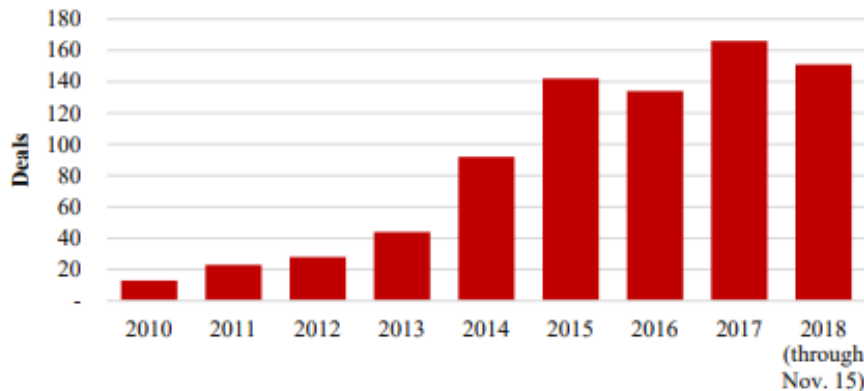
Historical Context

- 2007
 - After Dubai Ports World, CFIUS reform became a legislative priority
 - Foreign Investment and National Security Act of 2007 (FINSIA) became law
 - Provided statutory authority for CFIUS
 - Expanded CFIUS membership to include Dept. of Energy and add DNI and Sec. of Labor as *ex officio* members
 - Authorized President to add agencies on a case-by-case basis
 - Broadened factors President could consider in making determination
 - Required member agency approval from Assistant Secretary level or higher
 - Required reporting to Congress

Historical Context

- 2010-2018
 - Between 2010 and 2018, transactions involving Chinese venture capital firms increased more than eight times.
 - Made in China 2025 Plan made public in 2015
 - Concerns over technology transfers and supply chain security

Figure 2 – Number of VC Investment Deals in the United States Involving at Least One Chinese Investor (Deals)



Source: Office of the U.S. Trade Representative, Update Concerning China's Acts, Policies and Practices Related to Technology Transfer, Intellectual Property, and Innovation (Nov. 20, 2018), <https://ustr.gov/sites/default/files/enforcement/301Investigations/301%20Report%20Update.pdf>.

POLITICO INVESTIGATION
How China acquires 'the crown jewels' of U.S. technology
The U.S. fails to adequately police foreign deals for next-generation software that powers the military and American economic strength.
By CORY BENNETT and BRYAN BENDER | 05/22/2018 05:10 AM EDT

THE HILL
Pentagon worried about Chinese investment in US startups: report
BY ELLEN MITCHELL - 03/23/17 04:49 PM EDT
77 SHARES
f SHARE TWEET

The New York Times
China Tech Investment Flying Under the Radar, Pentagon Warns
By Paul Mozur and Jane Perlez
April 7, 2017

Historical Context

- 2012
 - President Obama orders divestment of Oregon wind farm project by Ralls Corporation, owned by Chinese company Sany Group.
 - First Presidential blocking action since CATIC transaction in 1992
- 2016
 - President Obama blocks acquisition of Aixtron, a German-based semiconductor firm with U.S. assets, by Chinese firm Fujian Grand Chip Investment Fund
- 2017
 - President Trump blocks acquisition of Lattice Semiconductor Corp. by Canyon Bridge Capital Partners, a Chinese investment fund
- 2018
 - President Trump blocks acquisition of semiconductor chip maker Qualcomm by Singapore-based Broadcom

Historical Context

Covered Transactions, Withdrawals, and Presidential Decisions* 2009-2017					
Year	Number of Notices	Notices Withdrawn During Review Phase	Number of Investigations	Notices Withdrawn During Investigation Phase	Presidential Decisions
2009	65	5	25	2	0
2010	93	6	35	6	0
2011	111	1	40	5	0
2012	114	2	45	20	1
2013	97	3	48	5	0
2014	147	3	51	9	0
2015	143	3	66	10	0
2016	172	6	79	21	1
2017	237	7	172	67	1
Total	1,179	36	561	145	3

Source: CFIUS Annual Report to Congress, CY 2016 and 2017, *available at* <https://home.treasury.gov/system/files/206/CFIUS-Public-Annual-Report-CY-2016-2017.pdf>

Historical Context

- 2018
 - Foreign Investment Risk Review Modernization Act (“FIRRMA”) becomes law
 - Broadens scope of CFIUS’s jurisdiction
 - Mandates filings for certain transactions
 - Broadens national security risk assessment
 - Concurrently with FIRRMA, the Export Control Reform Act (“ECRA”) becomes law
 - Directs the Department of Commerce, Bureau of Industry and Security (“BIS”) to define “emerging and foundational technologies” and create export controls for such technologies
 - CFIUS creates “pilot program” to require mandatory notices for transactions involving “critical technologies” (defined to include “emerging and foundational technologies”) in one of 27 specified industries
- 2020
 - CFIUS regulations implementing FIRRMA become effective on February 13

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Traditional CFIUS Review

Traditional CFIUS Review

Until August 2018, CFIUS review was limited to transactions that were voluntarily notified to CFIUS.

Central question for CFIUS in voluntary review: ***Whether transactions that would result in a foreign person acquiring control of an existing U.S. business threaten to impair U.S. national security.***

Key CFIUS concepts are “foreign person,” “U.S. business,” and “control”

- **Foreign person**: Defined to include any foreign national, foreign government, or foreign entity, or any person over which control is exercised or exercisable by a foreign person.
- **U.S. Business**: Defined as any entity, irrespective of the nationality of the persons that control it, engaged in interstate commerce in the United States. Whether an acquisition of less than all of the assets of an entity is an acquisition of a business that confers control (and is therefore a covered transaction) will depend on the nature of the assets required.

Traditional CFIUS Review

- **Foreign Control**

- Investments that did not or could not confer control were not subject to CFIUS review – analysis of “control” therefore central to CFIUS jurisdiction
- **Control**: Defined as the power to determine, direct, or decide certain enumerated actions of a U.S. Business, whether or not that power is exercised, subject to certain carve-outs for limited minority shareholder protections.
 - Example of powers conferring “control”:
 - disposition of assets;
 - closing of facilities;
 - changing business lines;
 - major expenditures;
 - policies governing treatment of non-public proprietary information of the entity;
 - appointment or dismissal of officers and senior managers or personnel with access to sensitive information
- Increasingly, this jurisdictional threshold became a loophole, with foreign parties structuring transactions to not confer “control” but to allow them to influence the business or access technologies

Traditional CFIUS Review

- **Voluntary Review Process**

- Notice should first summarize the nature of the transaction, the expected date of completion and its estimated value, a copy of all agreements relating to the transaction, and an identification of all other filings made with U.S. government agencies in connection with the transaction.
- Both parties required to provide detailed information on, *inter alia*, ownership structure, nature of businesses, nature of foreign person's business; value of transactions; competitors; potential military applications of technology produced by U.S. business.
- Acceptance of voluntary notice triggered the running of a strict statutory timeline for CFIUS to analyze the transaction (up to 90 days total until 2018)
 - 30 days – Review Period
 - 45 days – Investigation Period
 - 15 days – Presidential Determination (rare)

Traditional CFIUS Review

- **Assessing Threats to National Security**

- The term “national security” is undefined, but as CFIUS confronted evolving global challenges, became broader than military/defense.
- Recent CFIUS attention increasingly focused on protecting U.S. technology, trade controls, and “critical infrastructure” (e.g., ports, military bases)
 - **2012** – Chinese-owned Ralls Corp. purchased wind farms in Oregon near Navy drone training base. President Obama ordered divestment within 90 days.
 - **2015** – Chinese-owned Anbag Insurance Group sought to purchase the Waldorf Astoria, which serves as the official residence of the U.S. ambassador to the U.N., from Hilton Worldwide. CFIUS approved the deal, but required Anbag to provide Hilton with the property management rights to the hotel for 100 years.
 - **2017** – Chinese-owned Cosco Shipping Holdings attempted to acquire Orient Overseas, a Hong-Kong shipping company with container ship operations in California. CFIUS required Cosco to mitigate the national security risks posed by the deal by transferring its U.S. port lease to a trust overseen by a U.S. citizen.
 - **2018** – Chinese-owned HNA Group purchased a Manhattan skyscraper that housed a police precinct responsible for security at Trump Tower, in 2016 without filing a voluntary notice. In 2018, CFIUS reviewed the transaction and required the HNA to divest its ownership.

Traditional CFIUS Review

- **CFIUS Actions**

- If CFIUS found no national security threat from the transaction, it could issue notice that all action has concluded under Section 722 of the DPA, clearing the transaction and providing a safe harbor from further review
- If CFIUS determined that an acquisition threatened to impair the U.S. national security it could:
 - Request the parties to restructure the transaction or take other mitigating measures to reduce the risk, or
 - CFIUS could recommend to the President that the transaction be blocked.
 - In the latter case, the President would then have 15 days to determine whether to block the transaction

Traditional CFIUS Review

- **Mitigation Measures**

- If transaction is found to threaten national security, CFIUS can condition clearance on parties adopting measures to mitigate the national security concerns
- Mitigating measures could include:
 - Restructuring
 - Requiring U.S. nationals to have board seats
 - Implementing technology controls
 - Supply assurances
 - Government approval before certain business actions

Traditional CFIUS Review

- **Mitigation Measures (continued)**

- Mitigation could be required before closing (without a formal agreement) or could take the form of a formal mitigation agreement
 - Formal agreement typically has other standard requirements, such as recordkeeping and inspection rights
- If the required mitigation is too onerous, some parties abandon the transaction altogether
- In 2016 and 2017 (the most recent data available), CFIUS required mitigation measures in 12% of reviewed transactions

Traditional CFIUS Review

- **Implications for Not Voluntarily Filing**

- If the parties to a covered transaction do not voluntarily notify CFIUS, CFIUS on its own may review the transaction upon the request of any member of CFIUS (up to three years after the acquisition) and take appropriate action – including ordering divestment. This has happened.



- Example: In 2016, Chinese-owned HNA Group purchased a Manhattan skyscraper (850 Third Ave.) for \$462 million that housed a police precinct responsible for security at Trump Tower without filing a voluntary notice. In 2018, CFIUS reviewed the transaction and required the HNA to divest its ownership. In January 2019, HNA confirmed it was selling the building at a \$41 million loss.

- Any CFIUS member agency may request an investigation of a non-notified transaction

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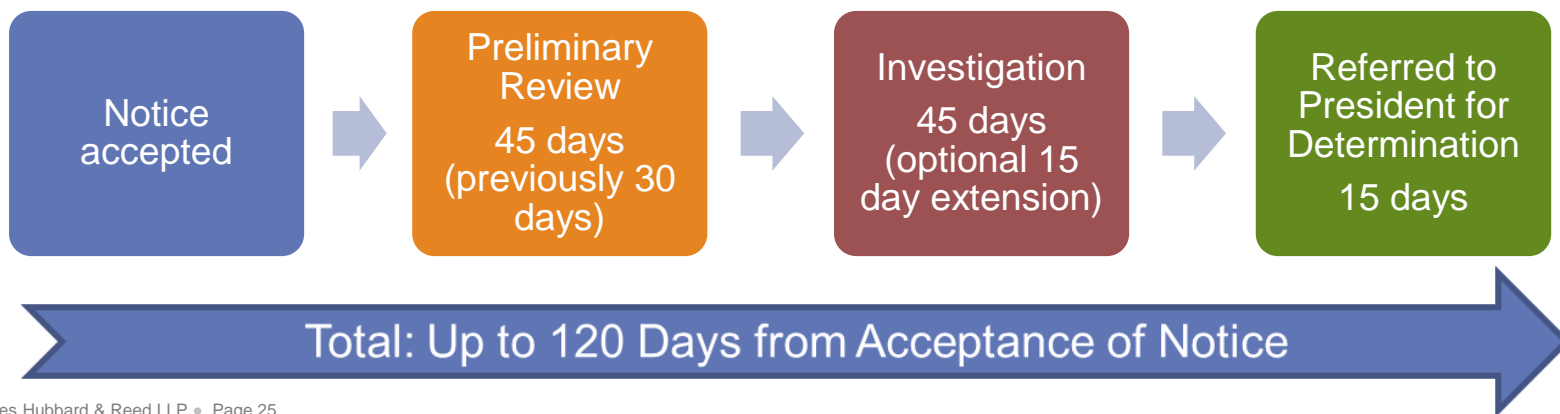
FIRORMA and CFIUS Pilot Program

FIRRMA Summary

- Authorized CFIUS to designate certain transactions as requiring **mandatory** notification and review.
- Expanded scope of CFIUS transactions requiring mandatory notification and review beyond transactions that result in foreign control of a U.S. business. Additional transactions covered:
 1. Purchase by a foreign person of certain sensitive real estate in the United States;
 2. Non-controlling investments by foreign persons in U.S. businesses engaged in specified activities that involve critical technology, critical infrastructure, or sensitive personal data;
 3. Changes in a foreign person's rights in a U.S. business that could result in foreign control; and
 4. Any other transaction that could evade or circumvent FIRRMA.
- Required mandatory, short-form declaration for all transactions involving the acquisition of a “substantial interest” in a U.S. business involved in **critical infrastructure, critical technology, or sensitive personal data.**

FIRRMA Review Timing

- Until FIRRMA, CFIUS was required to conduct a preliminary review in 30 days after receipt of a complete notification. At the end of 30 days CFIUS would decide whether to take no action (the transaction is cleared), or conduct a full 45 day investigation.
- Now, under FIRRMA, the initial review is expanded from 30 to 45 days; FIRRMA also allows CFIUS to extend 45 day investigation for one additional 15 day period.
- If action is referred to the President, the President would then have 15 days to determine whether to block the transaction.
- Thus, entire review CFIUS review period, once initial notice is accepted, may be up to 120 days (previously 90 days).



Pilot Program Overview

- Implemented by CFIUS on November 10, 2018 and **expired on February 12, 2020.**
 - Still applies to transactions conducted during that time frame
- Required mandatory declarations to CFIUS of certain investments, including contingent equity interests, whether or not the investment would result in control.
 - Covered U.S. businesses that produce, design, test, manufacture, fabricate, or develop a “critical technology” utilized in, or designed for use in, any of 27 listed industries.
 - Created mandatory notification and review process for certain sensitive investments in “critical technologies” even absent control by a foreign person.
 - Transactions were covered when foreign investor would:
 - Get access to “material nonpublic technical information” about the U.S. business and is necessary to design, fabricate, develop, test, produce, or manufacture critical technologies (excludes financial information);
 - Would gain membership or observer rights on a U.S. business’s board or the right to nominate a board member;
 - Would have involvement, other than through voting of shares, in the substantive decision-making of the U.S. company regarding use, development, acquisition, or release of critical technology; or
 - Would gain control of the U.S. company.

Pilot Program Declaration

- To implement the Pilot Program, CFIUs also created an optional short-form five-page declaration
 - Designed to minimize the burden of filing a full notice – which can take weeks to draft and often consists of dozens of pages and a multitude of supporting documents
 - Primarily useful for non-controversial transactions that can be quickly cleared
 - More complicated Pilot Program transactions could submit a more fulsome traditional notice instead

OMB Control No. 1505-0121, Expiration Date: 11/30/2021

U.S. DEPARTMENT OF THE TREASURY
Declaration Submission Form for Critical Technology Pilot Program
to the Committee on Foreign Investment in the United States

IMPORTANT: All fields on this form are required unless otherwise explicitly noted.

1. List of all parties to this transaction and, if not directly a party to the transaction, the pilot program U.S. business that is the subject of this declaration (300 max. character count):

2. Are all parties to this transaction submitting this declaration jointly? ☐ Yes ☐ No

3. For the pilot program U.S. business:

a. Business name: _____

b. Primary point of contact name: _____

c. Phone: _____

d. Primary email: _____

e. Secondary contact email (optional): _____

4. For the foreign person:

a. Business or person name: _____

b. Primary point of contact name: _____

c. Phone: _____

d. Primary email: _____

e. Secondary contact email (optional): _____

5. Structure of transaction: _____

6. Percentage of voting interest acquired: 0.00%

7. Percentage of economic interest acquired: 0.00%

8. Does the pilot program U.S. business have multiple classes of ownership? ☐ Yes ☐ No

9. Total transaction value in U.S. dollars: _____

10. Expected closing date: _____

PAPERWORK REDUCTION ACT NOTICE
The information collected will be used for the U.S. Government to assess the effects of the transaction in question to the national security of the United States pursuant to authorities under Section 721 of the Defense Production Act of 1950, as amended. We estimate that it will take an average of 20 hours to complete each declaration. Comments concerning the accuracy of this burden estimate and suggestions for reducing this burden should be directed to the Office of Privacy, Transparency and Records, Department of the Treasury, 1500 Pennsylvania Ave., N.W., Washington, D.C. 20220. An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a valid control number assigned by OMB.

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Pilot Program – “Critical Technologies”

- Under FIRRMA, “critical technologies” includes:
 - All ITAR defense articles, defense services, and technology
 - Certain goods, software, and technology subject to the EAR and controlled pursuant to multilateral regimes, including for reasons relating to national security, chemical and biological weapons proliferation, nuclear nonproliferation, or missile technology, for reasons relating to regional stability or surreptitious listening
 - Certain nuclear equipment and facilities
 - Certain agents and toxins
 - **“Emerging and foundational technologies”**

Pilot Program – “Emerging and Foundational Technologies”

Export Control Reform Act (“ECRA”) – passed concurrently with FIRRMA – directs BIS with defining the term “emerging and foundational technologies”

- BIS is approaching a definition of “emerging technologies” first before “foundational technologies”
- In November 2018, BIS issued an Advanced Notice of Proposed Rulemaking (“ANPR”) to solicit comments on the criteria to be used for “emerging technologies”

See 83 FR 58201 (Nov. 19, 2018)

- ANPR included “Representative Technology Categories,” including:

Biotechnology	Artificial Intelligence	Position, Navigation, and Timing (PNT) Tech	Microprocessors
Advanced Computing Tech	Data Analytics Tech	Quantum Information and Sensing Technology	Logistics Tech
Additive Manufacturing (e.g., 3D printing)	Robotics	Brain-Computer Interfaces	Hypersonics
Advanced Materials	Advanced Surveillance Tech (e.g., facial recognition)		

Pilot Program – “Emerging and Foundational Technologies”

- No proposed rule on a definition since the ANPR in November 2018
- In January 2020, BIS published controls applicable to AI software
 - Controls specifically target automated processing of geospatial imagery
 - Technically not controlled as an emerging technology, but rather as a temporary unilateral control that must be submitted for international consideration as a multilateral control
- Nevertheless, could indicate the agency is taking a staged, piecemeal approach

Pilot Program Review Timing

- CFIUS had 30 days to review the Pilot Program declaration, after which it:
 - could require parties to submit a full notification;
 - inform the parties that it is unable to complete its review based on the information provided;
 - initiate a unilateral review;
 - clear the transaction.
- In lieu of as 30-day declaration, parties could instead file a full notice.
- Failure to file declaration at least 45 days prior to consummation of the transaction carried a penalty up to the value of the transaction.

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CFIUS Regulations Implementing FIRORMA

Regulations Implementing FIRRMA

- Timeline:
 - September 17, 2020: U.S. Department of the Treasury issues interim rules to implement FIRRMA, subject to review and comment.
 - January 13, 2020: U.S. Department of the Treasury issues two new final rules to implement changes required by FIRRMA.
 - February 13, 2020: Regulations become effective.
- Regulations are divided into two primary parts:
 - 31 C.F.R. Part 800 – Rules relating to acquisitions that could result in control of a U.S. business, plus new provisions relating to certain non-controlling investments in the United States by a foreign person (the new rule replaced the existing Section 800 – covering “traditional” CFIUS filings – in its entirety).
 - 31 C.F.R. Part 802 – Provisions related to transactions by foreign persons involving sensitive U.S. real estate.
 - *Note: 31 C.F.R. Part 801, the FIRRMA “Pilot Program,” expired on February 12, 2020. The regulations remain in place to cover transactions that closed during that time (including penalties for not making mandatory filings).

Part 800 Regulations Implementing FIRRMA

- Covered transactions expanded to include certain non-controlling investments in U.S. businesses engaged in specified activities involving **critical technology**, **critical infrastructure**, or **sensitive personal data** (referred to as “TID U.S. Businesses”), if the investment would afford the foreign person:
 1. Access to material non-public technical information;
 2. Membership or observer rights in the governing body of the U.S. business; or
 3. Any involvement, other than through the voting of shares, in substantive decision-making of the U.S. business regarding:
 - The use, development, acquisition, safekeeping, or release of “sensitive personal data” of U.S. citizens maintained or collected by the U.S. business;
 - The use, development, acquisition, or release of critical technologies; or
 - The management, operation, manufacture, or supply of “covered investment critical infrastructure.”

Key Definitions

- **Critical Infrastructure**

- Defined as “systems and assets, whether physical or virtual, so vital to the United States that the incapacity or destruction of such systems or assets would have a debilitating impact on national security.”
- Regulations list 28 categories of critical infrastructure and identify specific functions related to each type of critical infrastructure that would cause a non-controlling foreign investment to be a covered transaction that CFIUS could review.
- Includes:
 - Certain telecommunications networks and services;
 - Certain power and energy systems;
 - Certain oil and gas refineries and facilities;
 - Certain public water systems;
 - Certain financial market utilities;
 - Defense industrial base; and
 - Ports.

Key Definitions

- **Sensitive Personal Data**

- Regulations apply to three types of U.S. businesses:
 - U.S. businesses that provide goods or services to the U.S. government or military agencies;
 - U.S. businesses that maintain or collect data on more than one million individuals at any point during the preceding 12 months; or
 - U.S. businesses that have expressed a business objective to maintain or collect data on more than one million individuals, and the data is an integrated part of the U.S. business's primary product or services.
- Within specified categories of businesses, proposed regulations define ten types of data that constitute sensitive personal data, including geolocation data, health data, and data included in applications for health insurance, life insurance, and other types of insurance.

Key Definitions

- **Sensitive Personal Data (cont.)**

- Genetic information is also sensitive personal data *regardless of the type of U.S. business collecting the genetic information.*
 - Definition of “genetic tests” as defined in the Genetic Information Non-Discrimination Act of 2008.
 - Coverage limited to “identifiable data.”
 - Carve-out for genetic testing data derived from databased maintained by the U.S. government and routinely provided to private parties for purposes of research.

Key Definitions

- **Excepted Foreign State**

- Rules provide for Treasury Department to select certain “excepted foreign states” for which CFIUS would limit the application of FIRRMA’s expanded jurisdiction.
- Rules do not give process for choosing excepted foreign state.
- In final rules, the Treasury Department identified Australia, Canada, and the United Kingdom because of “robust intelligence sharing and defense industrial base integration mechanisms within the United States.”
 - Selected countries have “excepted foreign state” status for two years, after which the Treasury Department must make a determination whether the country continues to qualify.
 - Treasury Department may expand the list in the future.

- **Excepted Foreign Investor**

- Must have strong ties to excepted foreign states (e.g., nationals, governments, or entities organized under the laws of excepted foreign states).
- Entities organized under the laws of an excepted foreign state must be located in an excepted state, and each member of the board of directors must be a national of an excepted foreign state or the United States.

Procedural Changes

- **Mandatory Filings**

- Mandatory filing requirement is triggered when a foreign government acquires a *substantial interest*, either direct or indirect, in a U.S. business that deals in critical technologies, critical infrastructure, or sensitive personal data.
- Under new regulations, filing requirement is triggered when a foreign person holds a 25 percent voting interest, direct or indirect, in the U.S. business or when a foreign government holds 49 percent or greater voting interest, either direct or indirect, in the foreign person.
- Parties subject to mandatory filing must file notices at least 30 days prior to closing. (Note: More permissive than Pilot Program regulations, which required filing 45 days prior to closing.)

Procedural Changes

- **Short Form Declaration**

- Option to file a short, eight page declaration similar to Pilot Program mandatory declaration, though CFIUS can request or require a full notice.
- Potentially useful for noncontroversial transactions that nevertheless meet the mandatory filing requirement
- The short-form declaration differs from the Pilot Program by, *inter alia*, requiring the geographic coordinates of all U.S. locations of the target as well as detailed descriptions of any applicable critical infrastructure and sensitive personal data of the target.
- See <https://home.treasury.gov/system/files/206/CFIUS-Part-800-Declaration-Form-v2-13.pdf>

OMB Control No. 1505-0121, Expiration Date: 01/31/2023

U.S. DEPARTMENT OF THE TREASURY
Declaration Submission Form for Transactions Under 31 CFR Part 800
to the Committee on Foreign Investment in the United States

IMPORTANT: All fields on this form are required unless otherwise explicitly noted. If additional space is needed for any field, attach a separate document.

1. List the foreign person(s) and U.S. business(es) that are parties to, or, in applicable cases, the subject of the transaction, as well as the name, telephone number, and email address of the primary point of contact for each party, and, optionally, the email address of any secondary point of contact:

Foreign Person(s)	U.S. Business(es)

2. Are all parties to this transaction submitting the declaration jointly? ☐ Yes ☐ No

3. (Optional) Do the parties believe that submitting this declaration is mandatory under 31 CFR § 800.401(b) and/or § 800.401(c)? ☐ Yes ☐ No

4. Briefly describe the rationale for and nature of the transaction, including its structure (e.g., effectuated via a share purchase, merger, asset purchase):

PAPERWORK REDUCTION ACT NOTICE
The information collected will be used for the U.S. Government to assess the effects of the transaction in question to the national security of the United States pursuant to authorities under Section 721 of the Defense Production Act of 1950, as amended. We estimate that it will take an average of 20 hours to complete each declaration. Comments concerning the accuracy of this burden estimate and suggestions for reducing this burden should be directed to the Office of Privacy, Transparency and Records, Department of the Treasury, 1500 Pennsylvania Ave., N.W., Washington, D.C. 20220. An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a valid control number assigned by OMB.

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Procedural Changes

- **Streamlined Voluntary Declaration**

- Regulations authorize voluntary, short-form declaration in lieu of a full notice that requires less information and has a 30-day lead time. Same form as mandatory declaration.
- Can benefit parties to low-risk but covered transactions.
- In response, CFIUS may either (1) request that parties file a full notice; (2) take no action but advise a full notice; (3) initiate a full review of the transaction; or (4) find no threat to U.S. national security.
- Because the normal 120-day review period would apply to full notices filed even after a short-form declaration, more complicated or more controversial transactions should consider initially filing a full notice

Procedural Changes

- **Filing Fees**

- Traditionally, CFIUS notices did not have a filing fee
- As authorized by FIRRMA, and in anticipation of increased volume of review, on March 4, 2020, the Committee published a proposed rule that would establish progressive filing fees based on the value of the transaction
 - The proposed fees would apply to both Part 800 notices and real estate transactions reviewed under Part 802
 - The fees would be due at the time a notice is filed; CFIUS can refuse acceptance of the notice (and the running of the statutory deadlines) until the fees are received
 - Comments on the proposed rule were collected through April 4, 2020. No final rule has yet been issued.
 - See 85 Fed. Reg. 13586 (Mar. 9, 2020)

Value of Transaction	Filing Fee
<\$500,000	\$0
\$500,000—<\$5,000,000	\$750
\$5,000,000—<\$50,000,000	\$7,500
\$50,000,000—<\$250,000,000	\$75,000
\$250,000,000—<\$750,000,000	\$150,000
≥\$750,000,000	\$300,000

Recent CFIUS Actions

- Recent CFIUS actions have highlighted a growing concern over transactions involving sensitive personal data:
 - January 2018 – CFIUS blocked China-based Ant Financial from acquiring U.S. money transfer company MoneyGram International Inc. CFIUS reportedly rejected Ant Financial's proposals to mitigate concerns over the safety of data that can be used to identify U.S. citizens.
 - April 2019 – China-based Beijing Kunlun Tech Co. Ltd. bought U.S.-based Grindr, a gay dating app, in 2018, but did not provide notice of the transaction to CFIUS. The app's database contains personal information such as a user's location, messages, and HIV status. CFIUS initiated an investigation and in ordered Kunlun to divest its ownership.
 - April 2019 – In 2017, China-based iCarbonX acquired a majority of U.S.-based PatientsLikeMe, an online service that helps patients find people with similar health conditions. CFIUS initiated a review of the transactions and ordered divestment.
 - March 2020 – In 2018, Chinese-based Beijing Shiji Information Technology Co. acquired U.S.-based StayInTouch Inc., which produces hotel property management software. CFIUS ordered divestment of the acquisition.

CFIUS Review of Real Estate Transactions Under FIRRMA

Part 802 Real Estate Transaction Review

- Part 802 regulations apply to any purchase or lease by, or concession to, a foreign person, or a subsequent change in the rights of **covered real estate**, that results in at least three of the following rights (i.e., a “**covered real estate transaction**”):
 1. To physically access the real estate;
 2. To exclude others from physically accessing the real estate;
 3. To improve or develop the real estate; or
 4. To attach fixed or immovable structures or objects to the real estate.
- There is no mandatory filing requirement under Part 802; all notices are voluntary
- Part 802 regulations do not apply to other transactions that indirectly result in investment in U.S. real estate, such as investment or acquisition of a holding company. These transactions may be subject to Part 800 review.

“Covered Real Estate”

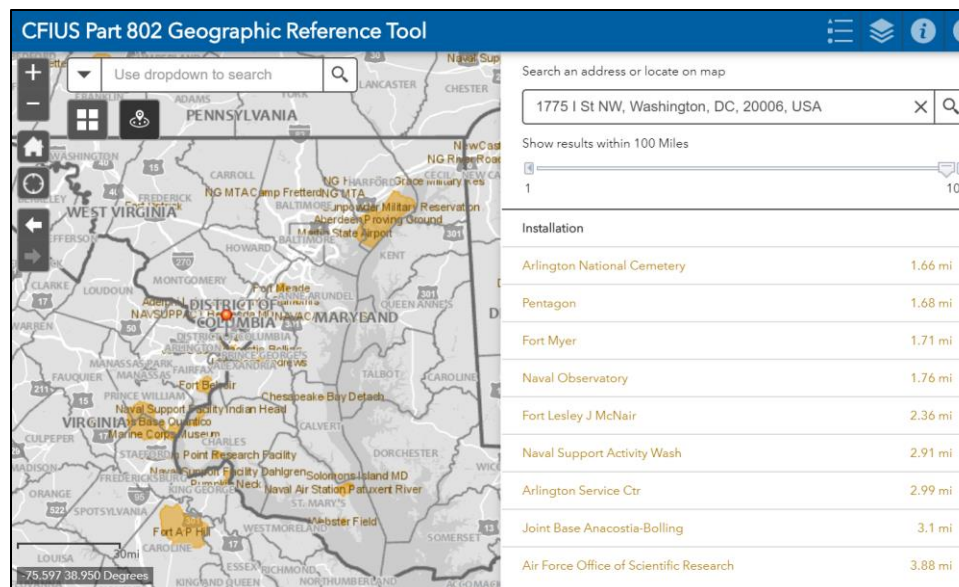
- Includes:
 - Certain described “covered ports”
 - Real estate located within:
 - “close proximity” (i.e., within 1 mile) of certain highly sensitive military installations identified in part 1 or part 2 of appendix A to 31 C.F.R. Part 802;
 - “extended range” (i.e., within 99 miles) of army combat training centers, major range and test facilities, or certain military ranges identified in part 1 or part 2 of appendix A to 31 C.F.R. Part 802;
 - Any county or geographic areas identified in part 3 of appendix A to 31 C.F.R. Part 802
 - Any off-shore ranges identified in part 4 of appendix A to 31 C.F.R. Part 802
- Exception
 - “Covered ports” and military installations within “close proximity” of the subject real estate if located within an urbanized area or urban cluster

“Covered Port”

- Includes:
 - “Large Hub Airports,” as defined at 49 U.S.C. § 40102
 - Airports with annual aggregate all-cargo landed weight greater than 1.24 billion pounds
 - “Joint Use Airports,” as defined at 49 U.S.C. § 47175
 - A commercial strategic seaport within the National Port Readiness Network
 - A top 25 tonnage, container, or dry bulk port

Geographic Reference Tool

- On March 25, 2020, CFIUS published a new geographic reference tool to help determine if real estate is covered under Part 802
 - Enables users to search for U.S. military installations located in close proximity or extended range of any U.S. property and identify urbanized areas and urban clusters
 - Should only be used as a guide, not a definitive determination
 - See <https://home.treasury.gov/policy-issues/international/the-committee-on-foreign-investment-in-the-united-states-cfius/cfius-real-estate-instructions-part-802>



Short Form Notice

- If a transaction qualifies for Part 802, notice may optionally be provided through a short-form four-page declaration
 - CFIUS has 30 days to review
 - CFIUS could request additional information or require a full notice to be filed
 - See <https://home.treasury.gov/system/files/206/CFIUS-Part-802-Declaration-Form-v2-13.pdf>

OMB Control No. 1505-0121, Expiration Date: 01/31/2023

U.S. DEPARTMENT OF THE TREASURY
Declaration Submission Form for Real Estate Transactions Under 31 CFR Part 802
to the Committee on Foreign Investment in the United States

IMPORTANT: All fields on this form are required unless otherwise explicitly noted. If additional space is needed for any field, attach a separate document.

1. List the foreign person(s) and the current holder(s) of interest in the real estate that are parties to, or in applicable cases, the subject of, the transaction, as well as the name, telephone number, and email address of the primary point of contact for each party, and, optionally, the email address of any secondary point of contact:

Foreign Person(s)	Current Holder(s) of Interest in Real Estate

2. Are all parties to this transaction submitting the declaration jointly? ☐ Yes ☐ No

3. For the transaction, provide:

a. A brief description of the rationale for and nature of the transaction, including

- (1) Its structure (e.g., purchase, lease, or concession) and term;
- (2) Whether the foreign person is acquiring a collection of assets or interest in an entity; and
- (3) Whether it is part of a larger project undertaken by the foreign person:

b. Total transaction value in U.S. dollars:

c. The status of the transaction, including the actual or expected completion date of the transaction:

PAPERWORK REDUCTION ACT NOTICE
The information collected will be used for the U.S. Government to assess the effects of the transaction in question to the national security of the United States pursuant to authorities under Section 721 of the Defense Production Act of 1950, as amended. We estimate that it will take an average of 15 hours to complete each declaration. Comments concerning the accuracy of this burden estimate and suggestions for reducing this burden should be directed to the Office of Privacy, Transparency and Records, Department of the Treasury, 1500 Pennsylvania Ave., N.W., Washington, D.C. 20220. An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a valid control number assigned by OMB.

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Full Notice Procedures

- As with a Part 800 transaction, parties may also submit a full notice of a Part 802 real estate transaction
- Review timing mirrors Part 800 notices
 - CFIUS has 45 day initial review period
 - Can then proceed to an investigation period of an additional 45 days (can be extended in extraordinary circumstances for 15 days)
 - Presidential determination to be made within 15 days
- Proposed filing fees would also apply to real estate transactions under Part 802

**Hughes
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Priorities and Practical Considerations

Continued Focus on China

- FIRRMA was passed in large part to address China's growing investment in the United States, which will continue to receive scrutiny under the current regulations.
- On November 1, 2018, then-Attorney General Jeff Sessions announced the DOJ's "China Initiative," which prioritizes enforcement and resource allocation within the DOJ to address alleged Chinese interference in U.S. economic interests.
- One of the goals of the DOJ's China Initiative is: "Implement the Foreign Investment Risk Review Modernization Act ("FIRRMA") at the DOJ (including working with the Treasury Department to develop regulations under the statute and prepare for increased workflow)."
 - While FIRRMA does not contain any explicit reference to China and applies to foreign investment in the U.S. from throughout the world, the Act was widely interpreted as a response to changing trends in Chinese investment trends.
 - The inclusion of FIRRMA implementation as a China Initiative goal further suggests that Chinese companies planning significant investments in the U.S., particularly in technology companies, should anticipate regulatory scrutiny.

Mitigating Transactions

- Foreign companies considering investments in the U.S., particularly in areas involving emerging technologies, should consider ways to structure those transactions so as to increase the likelihood the transaction will be approved by CFIUS.
- This structuring might include:
 - Ensuring the investment is passive and non-controlling;
 - Ensuring that only authorized persons have access to certain technology and information;
 - Appointing a U.S. government approved security officer or trustee;
 - Notifying security officers or relevant U.S. government parties in advance of foreign national visits to the U.S. business for approval; and
 - Providing written notification when additional assets are purchased.
- Parties should also consider engaging with CFIUS in advance of filing notice of the proposed transaction to identify any specific concerns and address them in the filed notice.

Practical Considerations for CFIUS Filings

- Build in time for completion of review before closing
 - Plan for informal consultations or pre-filing to get CFIUS views before making formal filing – reduces risk of CFIUS not accepting a filing as complete, and helps flesh out concerns
 - Keep in mind possible other government agency review
 - Depending on its resources and work load, CFIUS may manage its time by delaying acceptance or asking the parties to re-file
 - CFIUS concerns are generally clear by end of the investigation period (i.e., 90 days after acceptance of notice)
- Each party to the transaction must participate in the process and provide required information; CFIUS can subpoena information as well

Practical Considerations for CFIUS Filings

- CFIUS may require meetings with the parties during the initial review and investigation stages
 - Opportunity to educate CFIUS on the industry and transaction specifics
- Proactively anticipating and addressing CFIUS concerns may reduce scope of any resulting mitigation agreement
 - In particular, Committee has an interest in resolving compliance-related issues
- Costs of CFIUS process will vary depending on complexity of issues, and whether or not CFIUS clears the transactions within the initial 45 day review period.
 - If CFIUS initiates a full investigation, costs may increase significantly. Additional filings may be required, and meetings with CFIUS staff will be likely, and modifications to the form and scope of the transaction may need to be made.
 - Assuming each party to the transaction participates, costs should be borne by each party.

Other Agency Approvals

- Role of other agencies

- Classified contracts – if the U.S. company has a security clearance for access to classified information, any acquisition will also need to address and classify the defense security requirements of the Department of Defense or other relevant agency.
- State Department for manufacturers or exporters of defense equipment – if the U.S. company is a manufacturer or exporter of articles or technology controlled on the U.S. Munitions List, a separate 60 day advance notice of the proposed acquisition must be provided to the State Department.
- Antitrust review – the transaction may be subject to separate review under the antitrust laws by DOJ or the FTC.
- Bureau of Economic Analysis – requires reporting for foreign direct investments of at least 10% of a U.S. business valued at \$3 million or more within 45 days of closing (does not require pre-closing approval)



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Questions?

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