

Client Alert

U.S. Treasury Publishes Proposed FIRRMA Implementing Regulations

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On September 24, 2019, the U.S. Department of the Treasury ("**Treasury**") published proposed regulations for the implementation of the Foreign Investment Risk Review Modernization Act of 2018 ("**FIRRMA**"). As directed by FIRRMA, the proposed regulations significantly expand the jurisdictional authority of the Committee on Foreign Investment in the United States ("**CFIUS**"), but also formally establish meaningful exceptions with the aim of promoting foreign investment in the United States while protecting U.S. national security interests. In addition, the proposed regulations prescribe procedural changes concerning the form and length of CFIUS submissions and reviews.

Notably, the proposed regulations retain the current FIRRMA Pilot Program with respect to foreign investments involving critical technologies (the "**Pilot Program**") and preserve CFIUS' legacy jurisdiction over any transaction that results in a foreign person acquiring control of a U.S. business (a "**covered control transaction**").

The proposed regulations are subject to a 30-day comment period. It is possible that the final version of the FIRRMA implementing regulations will reflect changes to the proposed regulations based on comments received by Treasury.

Jurisdictional Expansion

FIRRMA directs the expansion of CFIUS jurisdiction to include any non-controlling investment by a foreign person in a U.S. company dealing in certain critical technologies, critical infrastructure or sensitive personal data (a "**TID U.S. Business**") where such investment would afford the foreign person: (a) access to material non-public technical information in the possession of the U.S. company; (b) membership or observer rights on the board of directors of the U.S. company; or (c) involvement in substantive decision-making of the U.S. company. The Pilot Program, which was implemented in November 2018, requires that parties to such non-controlling investments that involve critical technology file a mandatory declaration with CFIUS. The proposed regulations published on September 24, 2019 supplement the Pilot Program by addressing CFIUS review of such non-controlling investments that involve critical infrastructure or sensitive personal data. However, unlike investments involving critical technology, as covered under the Pilot Program, investments involving critical infrastructure or sensitive personal data do not trigger a mandatory declaration requirement under the proposed rules.

In addition to the above, the proposed regulations also add the following three types of transactions to the definition of “covered transaction”: (a) the purchase or lease by a foreign person of certain real estate in the United States (addressed in a concurrent rulemaking); (b) any change in a foreign person’s rights that could result in foreign control of a U.S. business or a non-controlling investment in a TID U.S. Business; and (c) any other transaction whose structure is designed or intended to evade or circumvent review by CFIUS.

Jurisdictional Carveouts

The proposed regulations formalize two carveouts that remove a transaction from CFIUS jurisdiction. The first carveout exempts certain transactions involving indirect foreign investment through an investment fund where the foreign investor is a limited partner in the fund, enjoys no management or governance rights and the fund’s general partner is a U.S. person. The second carveout applies to certain investors from “excepted foreign states”. Treasury has yet to identify these excepted foreign states, but it is expected that they will be selected from among close allies of the United States that have implemented similar review processes for the assessment of national security risks of inbound foreign investment transactions.

Procedural Changes

Under the proposed regulations, parties to a covered transaction may elect to file a CFIUS declaration rather than a full-form joint voluntary notice. A declaration is a short-form filing (generally not exceeding 5 pages) that includes a high-level overview of the relevant transaction and the parties involved. The proposed regulations require CFIUS to take action on a declaration within 30 days of CFIUS’ receipt of the declaration (such action may include granting approval of the transaction or requesting that the parties file a full-form joint voluntary notice). Alternatively, parties may still file a full-form joint voluntary notice, which CFIUS must respond to within 45 days of receipt. The proposed regulations provide that parties to a covered transaction may not file a full-form joint voluntary notice during the pendency of CFIUS review of a previously submitted declaration for the same transaction.

This Client Alert is not comprehensive as to the full scope of FIRRMA or the proposed FIRRMA implementing regulations and represents only a high-level overview of relevant portions of FIRRMA and such regulations.

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