

# Client Alert

## U.S. Treasury Finalizes FIRRMA Implementing Regulations

January 14, 2020

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On January 13, 2020, the U.S. Department of the Treasury (the “**Treasury**”) issued final regulations to implement the Foreign Investment Risk Review Modernization Act of 2018 (“**FIRRMA**”) that become effective on February 13, 2020 (the “**Final FIRRMA Regulations**”). The Final FIRRMA Regulations significantly expand the jurisdictional scope of the Committee on Foreign Investment in the United States (“**CFIUS**”), while also introducing exceptions that limit CFIUS’ authority to review certain foreign investments. The Final FIRRMA Regulations also make procedural changes concerning the form, length and voluntary nature of certain CFIUS submissions and reviews.

Notably, the Final FIRRMA Regulations withdraw the FIRRMA Pilot Program (the “**Pilot Program**”) with respect to foreign investments involving critical technologies, although many provisions of the Pilot Program have been incorporated into the Final FIRRMA Regulations. In addition, the Final FIRRMA Regulations preserve CFIUS’ legacy jurisdiction over any transaction that results in a foreign person acquiring control of a U.S. business (a “**covered control transaction**”).

### Jurisdictional Expansion – TID U.S. Business

The Final FIRRMA Regulations expand the definition of “covered transaction” to include non-controlling investments in U.S. companies that deal in certain critical technologies, critical infrastructure or sensitive personal data (a “**TID [technology, infrastructure, or data] U.S. business**”) and that afford the foreign investor certain governance or access rights in the TID U.S. business – these involve: (i) access to material non-public technical information in the possession of the TID U.S. business; (ii) membership or observer rights on the board of directors of the TID U.S. business; or (iii) any involvement in substantive decision-making of the TID U.S. business).

- **Covered Investments Involving Critical Technologies:** The Final FIRRMA Regulations incorporate most aspects of the Pilot Program. Non-controlling foreign investments in certain U.S. businesses that produce, design, test, manufacture, fabricate or develop one or more critical technologies utilized in or designed by a TID U.S. business for use in one of 27 specific industries (identified by NAICS Code – see list below) must file a mandatory declaration (discussed further below) with CFIUS. We note that the Pilot Program remains in effect until February 12, 2020.

- **Covered Investments Involving Critical Infrastructure:** FIRRMA expands CFIUS' jurisdiction to include non-controlling investments by a foreign person in a U.S. business that owns, operates, manufactures, supplies or services (each a “function”) critical infrastructure. The expanded jurisdictional scope does not cover all types of critical infrastructure, however, and only applies to the specific types of critical infrastructure identified in a new appendix included with the Final FIRRMA Regulations (e.g., certain subsectors involved in telecommunications, utilities, energy and transportation). As such, CFIUS may now review certain non-controlling transactions in U.S. businesses that perform a function in connection to such critical infrastructure identified in the appendix to the regulations. Non-controlling investments in critical infrastructure, unlike such investments involving critical technology, do not require a mandatory declaration.
- **Covered Investments Involving Sensitive Personal Data:** FIRRMA expands CFIUS' jurisdiction to include non-controlling investments by a foreign person in a U.S. business that maintains or collects the sensitive personal data of U.S. citizens. The regulations are primarily concerned with those U.S. businesses that: (i) target or tailor products to U.S. executive branch agencies or military departments (and their respective personnel) with intelligence, national security or homeland security responsibilities; or (ii) maintain or collect, or have the objective to maintain or collect, identifiable data on greater than one million individuals within a 12-month period. Given that most companies collect at least some data on customers, the Final FIRRMA Regulations identify specific categories of data that constitute “sensitive personal data”, including a U.S. citizen's genetic information, biometric data, health data and geolocation data. U.S. businesses that collect data on employees as a consequence of employment are mostly exempt from this jurisdictional expansion, except where the personal employment data pertains to U.S. government contractors who hold personnel security clearances. Such non-controlling investments involving the sensitive personal data of U.S. citizens do not require a mandatory declaration.

#### Jurisdictional Expansion – Real Estate

In a concurrent rulemaking, and consistent with the expansions mandated by the U.S. Congress through FIRRMA, Treasury expanded CFIUS' ability to review certain transactions involving U.S. real estate. These real estate-related regulations focus on: (i) real estate that is, is within, or will function as part of specified air or maritime ports; (ii) real estate that is within “close proximity” (defined as one mile) of certain specified U.S. military installations; (iii) real estate that is within the “extended range” (defined as between one mile and 100 miles) of certain military installations; and (iv) real estate that is within certain geographic areas associated with missile fields and offshore ranges. There is no mandatory notice or declaration requirement for covered real estate transactions.

#### Jurisdictional Exceptions

The Final FIRRMA Regulations include two important exceptions that limit CFIUS' jurisdiction over certain indirect or non-controlling foreign investments in TID U.S. businesses. The first exception exempts certain transactions involving indirect investment in a TID U.S. business by a foreign person through an investment fund where the foreign investor is a limited partner in the fund, enjoys no management or investment rights and the fund's general partner is a U.S. person.

The second exception applies to certain investors from “excepted foreign states”. Under the Final FIRRMA Regulations, non-controlling investments in a TID U.S. business by a foreign person from Australia, Canada or the United Kingdom are exempt from review, provided that the foreign person investor satisfies several specific conditions. The U.S. Treasury may expand the list of excepted foreign states in the future, but eligible candidates must be allies of the United States that have implemented similarly robust review processes to assess foreign investments for national security risks.

#### Procedural Changes – Declarations

Under the Final FIRRMA Regulations, parties to a transaction may choose to file a declaration with CFIUS as opposed to a full voluntary notice. A declaration is a short-form filing (generally not exceeding 5 pages) that includes a high-level overview of the transaction and the parties involved. The timeline for a

declaration is shorter than the timeline for a notice. CFIUS must take action on a declaration within 30 days of CFIUS' receipt of the declaration. Such CFIUS action includes granting a "safe harbor" to the transaction or requesting that the transaction parties file a full notice. A full notice detailing a transaction may not be filed while CFIUS is reviewing a previously submitted declaration concerning that transaction.

We note, however, that there are two types of transactions that require filing a declaration (*i.e.*, a mandatory declaration):

- **Covered Investments Involving Critical Technologies:** As discussed above, the first type of transaction requiring a mandatory declaration is a covered transaction involving controlling or certain non-controlling investments by a foreign person (except for qualifying investment funds) in U.S. businesses that produce, design, test, manufacture, fabricate or develop one or more critical technologies.
- **Covered Transactions Involving Foreign States:** The second type of transaction that requires a mandatory declaration is a covered transaction that results in the acquisition of a "substantial interest" in a TID U.S. business by a foreign person in which a national or subnational government of a single foreign state (not including an excepted foreign state) has a substantial interest. In order to trigger the mandatory declaration requirement, the foreign person must acquire a direct or indirect voting interest of 25% or more in a TID U.S. business, and the foreign state must have a direct or indirect voting interest of 49% or more in the foreign-person acquirer of the TID U.S. business.

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This Client Alert is not comprehensive as to the full scope of the Final FIRRMA Regulations published by the Treasury and represents a high-level overview of the Final FIRRMA Regulations.

<b>CRITICAL TECHNOLOGY – SPECIFIC INDUSTRIES</b>	
<b>Industry</b>	<b>NAICS Code</b>
Aircraft Manufacturing	NAICS Code: 336411
Aircraft Engine and Engine Parts Manufacturing	NAICS Code: 336412
Alumina Refining and Primary Aluminum Production	NAICS Code: 331313
Ball and Roller Bearing Manufacturing	NAICS Code: 332991
Computer Storage Device Manufacturing	NAICS Code: 334112
Electronic Computer Manufacturing	NAICS Code: 334111
Guided Missile and Space Vehicle Manufacturing	NAICS Code: 336414
Guided Missile and Space Vehicle Propulsion Unit and Propulsion Unit Parts Manufacturing	NAICS Code: 336415
Military Armored Vehicle, Tank, and Tank Component Manufacturing	NAICS Code: 336992
Nuclear Electric Power Generation	NAICS Code: 221113
Optical Instrument and Lens Manufacturing	NAICS Code: 333314
Other Basic Inorganic Chemical Manufacturing	NAICS Code: 325180
Other Guided Missile and Space Vehicle Parts and Auxiliary Equipment Manufacturing	NAICS Code: 336419
Petrochemical Manufacturing	NAICS Code: 325110
Petrochemical Manufacturing Powder Metallurgy Part Manufacturing	NAICS Code: 332117
Power, Distribution, and Specialty Transformer Manufacturing	NAICS Code: 335311
Primary Battery Manufacturing	NAICS Code: 335912
Radio and Television Broadcasting and Wireless Communications Equipment Manufacturing	NAICS Code: 334220
Research and Development in Nanotechnology	NAICS Code: 541713

Research and Development in Biotechnology (except Nanobiotechnology)	NAICS Code: 541714
Secondary Smelting and Alloying of Aluminum	NAICS Code: 331314
Search, Detection, Navigation, Guidance, Aeronautical, and Nautical System and Instrument Manufacturing	NAICS Code: 334511
Semiconductor and Related Device Manufacturing	NAICS Code: 334413
Semiconductor Machinery Manufacturing	NAICS Code: 333242
Storage Battery Manufacturing	NAICS Code: 335911
Telephone Apparatus Manufacturing	NAICS Code: 334210
Turbine and Turbine Generator Set Units Manufacturing	NAICS Code: 333611

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