

The Committee on Foreign Investment in the United States
Outline of Regulations in Effect as of June 2020

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I. Introduction

- a. What is CFIUS?
 - i Established by Executive Order of President Ford in 1975, the Committee on Foreign Investment in the United States (“CFIUS”) is the government committee charged with protecting national security by reviewing economic transactions made in the United States by foreign entities. CFIUS operates under the auspices of the Department of the Treasury.

- b. What does CFIUS do?
 - i CFIUS is empowered to conduct national security reviews of various types of foreign investment including control transactions and non-control investments meeting certain specifications. Historically, until 2018, CFIUS examined only control transactions. While determining what is a control transaction is a question of fact, investments providing the holder under 10 percent of a company’s voting equity without the power to control significant corporate actions would generally not be deemed a control transaction.
 - ii For example, in May of 2019, CFIUS determined that the Grindr app posed a national security risk because of feared Chinese government access to the app user’s personal data, which resulted in its Chinese owner being forced to divest itself of its ownership interest.

- c. How does CFIUS get involved?
 - i CFIUS can examine control transactions and non-control investments on its own volition if it determines the potential exists of a national security risk, or as a result of a voluntary or mandatory short form declaration or long form notice by the parties to a transaction.
 - ii Until the adoption of the Foreign Investment Risk Review Modernization Act (“FIRMMA”) in October 2018, there was no concept of a mandatory filing for any acquisition or investment, controlling or non-controlling. FIRMMA established the requirement of a mandatory filing for investments, even non-control investments with certain access rights such as a board observer seat, in 27 specific industries (“pilot program industries”) involving so-called “critical technologies”. FIRMMA, as finally adopted in February 2020, also extended CFIUS jurisdiction to non-controlling investments in certain U.S. businesses when the investment is

accompanied by certain rights such as a board nomination right, board observer seat or other substantive decision making or access rights.

- iii Other regulations adopted since October 2018 call for mandatory filings for certain investments by foreign government controlled entities making substantial investments in a so-called TID U.S. business (see below). Also a May 2020 proposed modification of the mandatory filing regime for businesses involved in critical technologies focuses on the need for export licensing to the investor's country, rather than an industry specific analysis, to determine whether a mandatory filing is to be made. In addition, voluntary filings can be made for any other transaction under CFIUS oversight.

II. The new regulations expand CFIUS' oversight to the following transactions:

- a. Effective February 13, 2020, the final FIRMMA regulations expanded CFIUS' jurisdiction to include (a) certain **real estate transactions** (discussed further below) and (b) non-controlling, non-passive investments in businesses performing certain activities involving **critical technologies, critical infrastructure, and sensitive personal data**.
- b. What is a **TID U.S. Business**? **TID** is an acronym for Critical **T**echnologies, Critical **I**nfrastructure and Sensitive Personal **D**ata (defined below). To be a **TID U.S. Business**, the business must (i) produce, design, test, manufacture or fabricate one or more "critical technologies"; (ii) perform certain function specified in Appendix A of the FIRMMA regulations with respect to "critical infrastructure"; or (iii) maintain or collect, directly or indirectly, certain "sensitive personal data" of U.S. citizens. The definition of TID U.S. Business becomes important in the expanded scope of CFIUS jurisdiction.
- c. What is an **Excepted Investor**? An investor who is a national of or connected to (see below) an excepted foreign state, which are initially limited to Canada, the United Kingdom and Australia. Excepted Investors are not under CFIUS jurisdiction with respect to non-controlling investments **but remain subject to CFIUS jurisdiction for controlling investments**.

Within this exception are the nationals of these excepted foreign states, governments of these excepted foreign states and entities which are organized in these excepted foreign states or the U.S., have their principal place of business in the excepted foreign state or the U.S., and with respect to which at least 75% of the board and at least 75% of the board observers are US nationals or nationals of the excepted foreign state. In addition, at least a majority (if a public entity) and 80% (if a private entity) of the equity must be owned by non-foreign persons, nationals of the excepted foreign state, the government of the excepted foreign state, or entities organized under and having their principal place of business in an excepted foreign state. No more than 10 % of the entity can be owned by foreign persons other than nationals of an excepted foreign state, the government of the

excepted foreign state, or entities organized under and having their principal place of business in an excepted foreign state. Additional requirements apply, including that the Excepted Investor has not engaged in certain defined bad acts relating to the United States.

Critical Technologies include the following:

- Defense articles or services set forth in the International Traffic in Arms Regulations (ITAR);
- Certain items included on the Commerce Control List (CCL) set forth in the Export Administration Regulations (EAR);
- Nuclear equipment, parts and components, materials, software, and technology covered by 10 CFR part 810 (relating to assistance to foreign atomic energy activities);
- Nuclear facilities, equipment, and material covered by 10 CFR part 110 (relating to export and import of nuclear equipment and material);
- Select agents and toxins covered by 7 CFR part 331, 9 CFR part 121, or 42 CFR part 73; and
- Emerging and foundational technologies to be controlled pursuant to section 1758 of the Export Control Reform Act of 2018 (ECRA). These have not been defined by the Treasury Department and remain to be defined by the Commerce Department. There are expectations, based on a November 2018 Notice of Advanced Rulemaking, that this category will include a variety of cutting edge technologies in the categories of artificial intelligence, robotics, block chain, biotechnology, brain-computer interface, quantum information and sensing technology, data analytics, as well as position, navigation and timing technology. The first such technology, designated in January 2020 by the Dep't of Commerce's Bureau of Industry and Security is software designed to automate the analysis of geospatial imagery and so-called point clouds. **Emerging and Foundational technologies are likely to be a significant source of reviewed transactions once they are fully defined by the Department of Commerce.**

Critical Infrastructure

- The systems and assets, whether physical or virtual,” that are specifically identified in an appendix to the final FIRMMA regulations. Such “covered investment critical infrastructure” includes certain IP networks; telecommunications and information services; submarine cable systems and facilities; data centers; satellite systems; facilities that manufacture certain specialty metals, carbon, alloy, or armor steel plate; electricity, oil, and gas

facilities; securities exchanges; facilities that serve military installations; technology service providers; airports; maritime ports; and public water systems. Because a U.S. business must “own, operate, manufacture, supply, or service” critical infrastructure in order for an investment in such a business to be treated as a “covered investment,” the appendix to the FIRMMA rules also identifies the specific functions that the U.S. business must perform in order to qualify as a “TID U.S. business” with respect to the particular covered investment critical infrastructure at issue.

Sensitive Personal Data

- The final regulations define “sensitive personal data” to include certain “identifiable data” (described below) and certain genetic information”. **This is another area likely to be a prolific source of CFIUS reviewed transactions.**
- Genetic information which constitutes identifiable data (as described below) and excluding genetic data typically maintained by the U.S. government and provided to private parties for research
- “Identifiable data” refers to data that can be used to distinguish or trace an individual’s identity, including through the use of a “personal identifier,” such as a name, physical address, email address, social security number, phone number, or “other information that identifies a specific individual.” The final rule clarifies that aggregated data or anonymized data will be treated as identifiable data “if any party to the transaction has, or as a result of the transaction will have, the ability to disaggregate or deanonymize the data, or if the data is otherwise capable of being used to distinguish or trace an individual’s identity.” Identifiable data does not include encrypted data “unless the U.S. business that maintains or collects the encrypted data has the means to de-encrypt the data so as to distinguish or trace an individual’s identity.”
- Identifiable data will be treated as “sensitive personal data” only if:
 - (1) it is maintained or collected by a U.S. business that (a) targets or tailors products or services to any U.S. executive branch agency or military department with intelligence, national security, or homeland security responsibilities, or to personnel and contractors thereof; (b) has maintained or collected such data on more than one million individuals at any point over the preceding 12 months; or (c) has a demonstrated business objective to maintain or collect such data on more than one million individuals and such data is an integrated part of the U.S. business’s primary products or services; **and**
 - (2) it falls within any of the following categories:

- Data that could be used to analyze or determine an individual’s financial distress or hardship;
- The set of data in a consumer report, unless such data is obtained from a consumer reporting agency for certain identified purposes and such data is not substantially similar to the full contents of a consumer file;
- The set of data in an application for health insurance, long-term care insurance, professional liability insurance, mortgage insurance, or life insurance;
- Data relating to the physical, mental, or psychological health condition of an individual;
- Non-public electronic communications, including email, messaging, or chat communications, between or among users of a U.S. business’s products or services if a primary purpose of such product or service is to facilitate third-party user communications;
- Geolocation data collected using positioning systems, cell phone towers, or WiFi access points such as via a mobile application, vehicle GPS, other onboard mapping tool, or wearable electronic device;
- Biometric enrollment data, including facial, voice, retina/iris, and palm/fingerprint templates;
- Data stored and processed for generating a state or federal government identification card;
- Data concerning U.S. government personnel security clearance status; or
- The set of data in an application for a U.S. government personnel security clearance or an application for employment in a position of public trust.

III. **What types of non-controlling investments does CFIUS now have jurisdiction over? :** Unlike in the pre-FIRMMA era, CFIUS now has jurisdiction over non-controlling investments in a TID U.S. business in which the investor has:

- Access to any material nonpublic technical information in the possession of a TID U.S. Business;
- Membership or observer rights on the board of directors or equivalent governing body of the TID U.S. Business;
- The right to nominate an individual to a position on the board of directors or equivalent governing body of the TID U.S. Business; **or**

- Involvement, other than through voting of shares, in substantive decision making of the TID U.S. Business regarding:
 1. The use, development, acquisition, safekeeping, or release of sensitive personal data (as discussed above) of U.S. Citizens maintained or collected by a TID U.S. Business;
 2. The use, development, acquisition or release of critical technologies;
 - a. **Mandatory Filing**: a foreign investment in a TID U.S. business involved in critical technologies in the 27 pilot program industries, that is coupled with the access, board or board observer rights noted above, or specified involvement in substantive decisions making, is subject to a mandatory declaration. Failure to file is subject to monetary fines equal to the greater of US \$250,000 or the amount of the investment.
 - i. Exceptions to the mandatory filing requirement:
 1. Investment made by an “Excepted Investor”;
 2. Investments made by an entity subject to a security agreement to offset Foreign Ownership Control or Influence and operating under a specified security clearance;
 3. Investments involving the acquisition of certain encryption technology; or
 4. Investments made by an investment fund managed exclusively by and controlled by U.S. nationals or other non-foreign persons and any foreign persons owning equity do not have certain specified control rights.
 - ii. In May 2020, CFIUS proposed new regulations pursuant to which the mandatory filing requirement would instead apply to businesses which are involved in critical technologies, and which would require an export license if the technology were to be exported to the country of the foreign investor (as if the foreign investor were the end user). However, the proposed regulations permit avoidance of the mandatory filing requirement if the investment is a non-control investment and also does not have any of the factors, e.g., a board or observer seat, or access to

information, etc., that bring a non-control investment under CFIUS jurisdiction. The regulations under which an export license requirement is to be analyzed are (i) International Traffic in Arms Regulations (“ITAR”); (ii) Export Administration Regulations (“EAR”) (iii) Department of Energy in connection with foreign atomic energy assistance and (iv) Nuclear Regulatory Commission with respect to the export of nuclear material. With respect to ITAR and EAR, the requirement is to be determined without giving effect to any exemption in those regulations.

3. The management, operation, manufacture, or supply of critical infrastructure (as described above).

Joint ventures can also be under CFIUS jurisdiction if a U.S. business is contributed and a foreign investor has an interest in the joint venture with certain characteristics.

Lending transactions with equity like economic or control features may be under CFIUS jurisdiction, and the acquisition by a foreign lender of a U.S. business upon default of a loan may be under CFIUS jurisdiction if the foreign lender will take control of the assets of the U.S. business or acquire an equity interest with similar access characteristics of an equity investment subject to CFIUS jurisdiction. Another exception is where a foreign lender is part of a syndicate of banks where the US banks control the decision of the syndicate.

IV. Investment Fund Acquisitions

- a. Indirect investments by a foreign person in a TID U.S. Business through an investment fund that gives the foreign person membership as a limited partner or equivalent on an advisory board or committee of the fund will not be considered as subject to CFIUS’s expanded jurisdiction for non-control investments if:
 - i The fund is managed exclusively by a general partner or managing member;
 - ii The foreign person is not the general partner or managing member;
 - iii The advisory board or committee does not have the ability to approve, disapprove or otherwise control (a) Investment decisions of the investment fund; or (b) Decisions made by the general partner or managing member;
 - iv The foreign person does not otherwise have the ability to control the investment fund;
 - v The foreign person does not have access to material non-public technical information; and

- vi The investment does not afford the foreign person any of the access, rights, or involvement characterizing covered investments (board seat, board observer seat, etc.).

V. **Investments by Foreign Government Controlled Entities:**

If an entity in which a foreign government (other than an excepted state) indirectly or directly, owns **49%** or more of the investment whereby, the investment entity owns **25%** or greater voting interest in **any** TID U.S. Business, the parties **must** file a declaration or notice with CFIUS with respect to an investment in that TID U.S. Business. There are a variety of attribution rules here and uncertainty on how to treat multi-class stock structures. An exception exists if the foreign government investor does not control the control person of the investor entity, analogous but not identical to the Investment Fund exception described in IV above. Failure to file is subject to monetary fines equal to the greater of US \$250,000 or the amount of the investment.

VI. **Declarations and Notices**

Short form declarations-must be responded to by CFIUS within 30 days. Possible outcomes include (i) CFIUS requesting parties file a long form notice (ii) notification that CFIUS has concluded review and will take no further action or (iii) CFIUS initiates unilateral review.

A long form notice has an initial 45 day review period and subsequent proceedings can take 6 months. The long form notice is a far more expansive filing than the short-form declaration. Fees apply for any filing based on the size of the transaction.

VII. **Real Estate transactions in the U.S. involving foreign persons:**

- a. Purchase or lease by a foreign person of certain private or public real estate in the United States.
- b. Transactions that accord the investor at least three of four of the fundamental property rights to: (1) physically access the real estate; (2) 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.
- c. CFIUS jurisdiction pertains to:
 - i Property located:
 - 1. Within, or will function as part of, a covered port;
 - 2. Close proximity -- the area that extends outward one mile from the boundary of a military installation, or another facility or property of the U.S. government, with certain exceptions specified in the appendix to the regulations;
 - 3. The extended range -- the area that extends 99 miles outward (but a maximum of 12 seaward miles) from the outer boundary of combat

training centers, major range and test facility base activities and certain specified military ranges or joint forces training centers

4. Any county or other geographic area identified in connection with any active Air Force ballistic missile fields; or
5. Any part of a Navy off shore range complex or operating area located within the limits of the territorial sea of the United States.

d. Exceptions for Certain Investors:

- i a foreign person who is a national of one or more excepted real estate foreign states (UK, Australia, Canada) and is not also a national of any foreign state that is not an excepted foreign state;
- ii a foreign government of an excepted real estate foreign state; or
- iii a foreign entity that meets all the following:
 1. an entity organized under the laws of an excepted foreign state or the United States;
 2. the entity has a principal place of business in the United States or in the excepted real estate foreign state;
 3. 75% or more of the members of the board of directors and 75% or more of the board observers are (A) U.S. nationals, or (B) nationals of one or more excepted real estate foreign states and not also nationals of a foreign state that is not an excepted real estate foreign state;
 4. Any foreign person that individually, and each foreign person that is part of a group of foreign persons that in the aggregate, holds 10% or more of the outstanding voting interest of such entity; holds the right to 10% or more of the profits of such entity; holds the right in the event of dissolution to 10% or more of the assets of such entity; or otherwise could exercise control over such entity, is: (A) A foreign national who is a national of one or more excepted real estate foreign states and is not also a national of any foreign state that is not an excepted real estate foreign state; (B) A foreign government of an excepted real estate foreign state; or (C) A foreign entity that is organized under the laws of an excepted real estate foreign state and has its principal place of business in an excepted real estate foreign state or in the United States; and
 5. The minimum excepted ownership of such entity (majority for publicly held entity and 80% for privately held) is held, individually or in the aggregate, by one or more persons each of whom is: (A)

Not a foreign person; (B) A foreign national who is a national of one or more excepted real estate foreign states and is not also a national of any foreign state that is not an excepted real estate foreign state; (C) A foreign government of an excepted real estate foreign state; or (D) A foreign entity that is organized under the laws of an excepted real estate foreign state and has its principal place of business in an excepted real estate foreign state or in the United States.

- e. Exceptions for certain real estate transactions:
- i Housing Units;
 - ii Urbanized areas and urban clusters;
 - iii Commercial office space;
 - iv Retail, trade, accommodation or food service establishments;
 - v Lands held by Native American and some Alaskan Natives;
 - vi Lending transactions until default; upon default, characterization depends on whether lender will cause the real estate to be transferred to persons who would be excepted investors or U.S. nationals.
 - vii Contingent equity transactions depending on timing, likelihood of conversion.
 - viii Multiple tenant unit in commercial space where foreign person holds less than 10 % of units and less than 10 % of square footage.

Manti Bean, associate at Moses & Singer, LLP, assisted in the preparation of this article.

Please note this article summarizes relevant regulations but is not intended as and should not be construed as legal advice. This article is current as of June 30, 2020.