

The New CFIUS: Final Regulations Implementing Expanded Authorities Issued

January 14, 2020

CFIUS

The institutional transformation of the Committee on Foreign Investment in the United States (“CFIUS” or “the Committee”) that commenced more than two years ago with the introduction in Congress of the Foreign Investment Risk Review Modernization Act (FIRRMA) now is largely complete with the issuance of the highly anticipated final regulations implementing FIRRMA (the Regulations) on January 13, 2020. The Regulations will become effective **February 13, 2020**.

Executive Summary

Overall, the Regulations retain most of the features of the proposed rules issued in September 2019 — discussed in our previous client alerts [here](#) and [here](#) — though they do appear to reflect careful consideration of the public comments on those proposed rules. Thus, the Regulations incorporate a number of significant changes that clarify and, in some respects, place appropriate boundaries on the scope of the Committee’s authorities.

Key aspects of the proposed rules that the Regulations have retained — in many instances with additional clarifications and helpful examples — include:

- The dual-track voluntary filing process, which will allow parties to submit “declarations,” i.e., short-form filings on which CFIUS must act within 30 days, in lieu of full notices. This should permit more efficient, expedited CFIUS review and clearance of benign transactions involving foreign acquirers with a strong track record before the Committee. We would expect this to be particularly true for transactions involving U.S. businesses that are similar, in terms of national security sensitivity and industry, to transactions that the Committee has approved previously for that acquirer.
- The limited “white list” approach to “excepted foreign states,” which will allow certain foreign investors significantly associated with such states to avoid the Committee’s expanded jurisdiction with respect to non-passive, non-controlling investments in so-called “TID” U.S. businesses (for Critical Technology, Critical Infrastructure, and Sensitive Personal Data) and the Committee’s new real estate authorities, as well as the Regulations’ mandatory filing requirements (although, importantly, not the Committee’s jurisdiction over traditional control transactions).
 - The Regulations identify an exceptionally short initial list of excepted foreign states: just Australia, Canada, and the United Kingdom.

- The Regulations also modify and slightly liberalize the criteria needed to qualify as an “Excepted Investor.”
- The new definition of “U.S. business,” which FIRRMA and the proposed rules defined to mean “a person engaged in interstate commerce in the United States,” omitting the existing regulatory qualification “but only to the extent of its activities in interstate commerce in the United States.” In this regard, the Committee confirmed in the preamble to the Regulations that the definition is not intended to alter substantively the historical definition, and in response to comments, added helpful examples suggesting that in practice the traditional limitations on the scope of what constitutes a “U.S. business” still largely apply.
- The definitions of “covered critical infrastructure” and “sensitive personal data,” as they relate to the Committee’s expanded jurisdiction over certain non-passive, non-controlling foreign investments in TID U.S. businesses. The Committee has tweaked and clarified these definitions, including with respect to the scope of “genetic data.”
- The approach to defining what constitutes a “substantial interest,” as it relates to mandatory filings for investments that involve the acquisition of a “substantial interest” in a TID U.S. business by an entity in which a foreign government in turn has a “substantial interest.” The definition was adjusted in important ways, including excluding the governments of excepted foreign states and, with respect to investment funds, focusing solely on the foreign government interests in the general partner or equivalent, not those held as limited partners.
- Most of the Committee’s key historical jurisdictional terms and approach, including the definitions of “foreign person” and “control,” remain essentially untouched.
- The Committee’s new authority to review certain greenfield real estate transactions (outside the context of transactions involving investments in U.S. businesses) remains effectively unchanged from the proposal, with some fine-tuning of language and examples.

Notable additions include:

- Adopting, as an interim rule on which the Committee is seeking additional comment, a definition for “principal place of business,” to provide further clarity regarding the scope of the “foreign entity” definition. This is a particularly important clarification for U.S. investment funds, which often secure significant capital from foreign passive limited partners, but which are controlled and managed from the United States as their “principal place of business.”
- Incorporating most — but not all — of the provisions from the pilot program on critical technologies (the Pilot Program), implemented in November 2018, including its mandatory filing requirements. Importantly, the Pilot Program provisions now incorporate exemptions for certain types of transactions, including those involving excepted investors, foreign ownership, control, or influence (FOCI)-mitigated entities, certain encryption technologies, and investment funds exclusively managed and controlled by U.S. nationals.
 - The Regulations also note that the Department of the Treasury anticipates issuing a separate notice of proposed rulemaking to revise further the mandatory filing requirements for certain critical technology transactions. This component of the Regulations signals that the Committee likely will abandon the use of North American Industry Classification System (NAICS) codes as one of the criteria for defining a business subject to the mandatory filing requirements in favor of a criterion instead

based on export control licensing requirements; such a change should make the treatment of technologies under the CFIUS mandatory filing regime more consistent with their treatment under the U.S. export control regime while also reducing the ambiguity associated with the use of NAICS codes.

Lastly, as with the proposed rules, we note that the Regulations do not address FIRRMA's filing fee authorities. This again indicates that these will be addressed in a separate proposed rule at some future date.

The Regulations are designed to strike a balance between the twin goals of preserving the U.S. open investment policy and enabling the Committee to protect against evolving threats and risks to U.S. national security posed by foreign direct investment in the current era. It is a tightrope walk, to be sure: no matter how one slices it, the Regulations inevitably represent a dramatic increase in the intricacies and nuance of the rules that will govern foreign investment reviews in the United States for the foreseeable future. More than ever before, transaction parties need to take account of these complexities and build consideration of CFIUS issues into their transaction planning from the very start, whenever non-U.S. investors may be involved in the deal.

Discussion of Key Elements of the Final Rules

Core Jurisdictional Terms

In most respects, CFIUS's core jurisdictional terms were not materially altered from what appeared in the proposed rules, although CFIUS has proposed adding, for the first time, a clarifying definition for "principal place of business," which is central to several aspects of the CFIUS jurisdictional provisions. It is evident from the preservation of the core jurisdictional terms and the clarifying definition of "principal place of business" that CFIUS's focus in the rulemaking and in adopting the Regulations principally related to its new authorities under FIRRMA, rather than altering significantly its traditional authorities. Key terms that remain virtually the same as in the proposed rules include "control" and "foreign person."

- **An important clarification to Foreign Entity.** While the definition of "foreign entity" was not radically altered, a key element of the definition, "principal place of business" was defined for the first time (as discussed in detail below). Further, CFIUS did make a key clarifying change to the "foreign entity" definition itself. Previously, in both the existing regulations and the proposed rules, the built-in exception to the "foreign entity" definition read "Notwithstanding [the main definition], any branch, partnership, group or subgroup, association, estate, trust, corporation or division of a corporation, or organization that *demonstrates* [emphasis added] that a majority of the equity interest in such entity is

ultimately owned by U.S. nationals is not a foreign entity.” In the Regulations, “demonstrates” was changed to “can demonstrate,” clarifying that a party does not need to make an affirmative demonstration to the Committee for the exception to apply, just that it can make such a demonstration to the Committee if need be to confirm the exception applies.

- **“Principal Place of Business” defined for the first time.** The term “principal place of business” arises in several aspects of the Regulations, including in components of the “expected investor” definition and in the information components required for declarations or notices to CFIUS. Most importantly, however, the term has been — and remains — central to the definition of “foreign entity,” which is defined as “any branch, partnership, group or sub-group, association, estate, trust, corporation or division of a corporation, or organization organized under the laws of a foreign state if either its *principal place of business* is outside the United States or its equity securities are primarily traded on one or more foreign exchanges.” Until the Regulations, the scope of this definition was somewhat ambiguous, as “principal place of business” was not a defined term. That term is now defined as:

the primary location where an entity’s management directs, controls, or coordinates the entity’s activities, or, in the case of an investment fund, where the fund’s activities and investments are primarily directed, controlled, or coordinated by or on behalf of the general partner, managing member, or equivalent.

This definition is subject to an important qualifier. If the entity has represented in its most recent submissions to the U.S. government or to a non-U.S. government that its “principal place of business, principal office and place of business, address of principal executive offices, address of headquarters, or equivalent” is outside the United States, then the entity will be deemed to have its “principal place of business” outside the United States for CFIUS purposes as well, unless the entity can demonstrate that it has subsequently changed to the United States. With this qualifier, the Committee appears to want to ensure that the entity is acting consistently with regard to its principal place of business, and not making different representations to different regulators based on what would be favorable in each forum.

Parties should note that the “principal place of business” definition is an interim rule, on which CFIUS has invited further comment. Interested parties should consider the submission of comments on this definition, particularly given potential interpretative ambiguities in the qualifier language. For example, the qualifier refers only to a party’s “most recent” governmental submissions, but is unclear on whether it applies if a party’s most recent submission was silent with regard to principal place of business or the other listed categories, but previous submissions had indicated a non-U.S. location and no subsequent submission indicated a subsequent change to the United States.

While CFIUS has never challenged a party’s determination that its principal place of business is the United States, the additional clarity provided by the definition should help parties make more accurate, efficient determinations regarding whether such entities might be subject to the Committee’s jurisdiction.

- **The “U.S. Business” definition remains the same as in the proposed rules, but new examples seem to confirm no material change in scope.** The proposed rules revised

the definition of “U.S. business” — which is a core element of CFIUS jurisdiction — by excluding the phrase “but only to the extent of its activities in interstate commerce in the United States,” and defining the term to apply to any person engaged in interstate commerce in the United States. The Regulations retain the broader definition of U.S. business, but in the preamble to the regulations, the Committee seems to acknowledge that the extent of a business in interstate commerce is relevant to determining whether there is a U.S. business in scope. More helpfully, the Regulations have added language in an example indicating that, assuming no other relevant facts, a foreign entity with no assets in the United States is not a U.S. business merely because it “exports and licenses technology to an unrelated company in the United States,” “provides remote technical support services to customers that are in the United States,” or “exports goods to [an affiliate] and to unrelated companies in the United States.”

Expanded Jurisdiction – TID U.S. Businesses

The Regulations retain the concept and definition of “TID U.S. business” to implement the expanded jurisdiction for CFIUS under FIRRMA to review non-controlling investments by a foreign person in U.S. companies that deal with critical technology, critical infrastructure, or sensitive personal data.

In the context of TID U.S. businesses, a “covered investment” subject to the Committee’s jurisdiction is a non-controlling transaction that affords the foreign person: (i) access to any material nonpublic technical information in the possession of the TID U.S. business; (ii) membership or observer rights on the board of directors or equivalent governing body of the TID U.S. business; or (iii) any involvement in substantive decision making of the TID U.S. business regarding critical technologies, critical infrastructure, or sensitive personal data of U.S. citizens.

While there is no substantive change to the definitions of “TID U.S. business” or “covered investment” from the proposed rules, the Regulations include some clarifying examples as follows:

- First, the Regulations clarify that if a foreign person is afforded board rights in connection with a non-controlling investment in an entity whose subsidiary deals with critical technologies, the transaction would be a covered investment even though the foreign person would not be acquiring a board right at the subsidiary-level entity.
- Second, the Regulations include new examples of changes in rights that could trigger CFIUS jurisdiction. Specifically, the examples clarify that if a foreign person already holds a non-controlling equity interest in a TID U.S. business and later acquires a new board right, access to material nonpublic technical information, or a role in substantive decision making, that alone could trigger the Committee’s jurisdiction even if the foreign person does not acquire any additional equity interest in the TID U.S. business.

Critical Technologies

As noted above, the Regulations incorporate many of the provisions of the Pilot Program currently codified at 31 C.F.R. Part 801, and indicate that Part 801 will remain in effect only through February 12, 2020, after which the Regulations will be effective.

Notably, reflecting comments received on the Pilot Program as well as the proposed rules, the Regulations exempt certain transactions from the critical technology mandatory declaration requirement. These exemptions relate to excepted investors, FOCI-mitigated entities, certain

encryption technology, and investment funds managed exclusively by, and ultimately controlled by, U.S. nationals.

While the Regulations do not otherwise narrow the mandatory declaration requirements for critical technology investments, they attempt to clarify certain ambiguities. For instance, a key issue in interpreting the Pilot Program regulations has been the meaning of the word “test.” The Regulations include a new example illustrating that “the mere verification of the fit and form of a relevant critical technology” does not constitute “testing” under the rules. Another example provides that a U.S. business that ceases producing, designing, testing, fabricating, manufacturing, or developing a critical technology but that retains the ability to perform such an action is a TID U.S. business. Finally, the Regulations clarify that if a U.S. business producing, designing, testing, manufacturing, fabricating, or developing a critical technology has some customers that fall within one of the NAICS industries, but the technology is not designed by the TID U.S. business specifically for use in that industry, a non-controlling investment in that U.S. business will not trigger a mandatory filing.

Additionally, as noted above, the preamble to the Regulations notes that the Treasury Department expects to revise the mandatory declaration requirement for critical technology investments such that NAICS codes will no longer be part of the analysis. Instead, the mandatory filing rules will be tied to export control licensing requirements, but exactly how Treasury will construct this rule remains to be seen.

Critical Infrastructure

The Regulations maintain the dual definitions of “critical infrastructure” included in the proposed rules for control transactions and non-controlling investments. Specifically, for non-controlling, non-passive investments, there is no substantive change to the definition of “covered investment critical infrastructure,” including the enumerated set of categories and associated functions laid out in Appendix A to the Regulations.

Sensitive Personal Data

As in the proposed rules, any U.S. business that “maintains or collects, directly or indirectly, sensitive personal data of U.S. citizens” is a TID U.S. business. To clarify what is meant by “indirectly,” the Regulations include a new example highlighting that a company that outsources the maintenance or collection of sensitive personal data to a third party, which in turn collects the data according to the company’s instructions and maintains the data on its own servers for the company to access, is still a TID U.S. business because it is indirectly maintaining and collecting sensitive personal data through the third party.

Turning to the definition of “sensitive personal data,” the proposed rules defined the term to mean both “identifiable data” and “genetic information.” While the Regulations do not change the definition of “identifiable data” — described further below — they do narrow the type of genetic information that will constitute “sensitive personal data.” In particular, the Regulations now define “sensitive personal data” to include the results of an individual’s “genetic tests” as that term is defined in the Genetic Information Non-Discrimination Act of 2008 (GINA), only if the genetic test data is identifiable. Moreover, any genetic test data derived from databases maintained by the U.S. government and routinely provided to private parties for research will be excluded from the definition of “sensitive personal data.”

The Regulations otherwise do not substantively change the ten categories of identifiable data that constitute “sensitive personal data.” They include:

1. Financial data that could be used to analyze or determine an individual’s financial distress or hardship;
2. The set of data in a consumer report, including an individual’s credit score and/or summaries of debts and payment histories, unless limited data is obtained from a consumer reporting agency for the legitimate purposes described in the Fair Credit Reporting Act;
3. The set of data in an application for health insurance, long-term care insurance, professional liability insurance, mortgage insurance, or life insurance;
4. Data relating to the physical, mental, or psychological health condition of an individual;
5. Non-public electronic communications, including email, messaging, or chat communications, between or among users of a U.S. business’s products or services, only if the U.S. business is providing communications platforms used by third parties;
6. 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;
7. Biometric enrollment data including facial, voice, retina/iris, and palm/fingerprint templates;
8. Data stored and processed for generating a state or federal government identification card;
9. Data concerning U.S. government personnel security clearance status; and
10. 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.

These ten categories of identifiable data only constitute “sensitive personal data” if:

1. The U.S. business “targets or tailors” its products or services to sensitive U.S. government personnel or contractors;
2. The U.S. business has maintained or collected data within one or more categories described above on greater than one million individuals at any point over twelve months preceding the earliest of certain specified events (including, for example, the completion date of the transaction, the execution of a binding written agreement establishing the material terms of the transaction, the notification to the Committee, etc.); or
3. The U.S. business has a demonstrated business objective to maintain or collect data within one or more categories described above on greater than one million individuals and such data is an integrated part of the U.S. business’s primary products or services.

The Regulations therefore do not change the one million individual threshold. They do, however, include examples clarifying what is meant by “the preceding twelve months” and “a demonstrated business objective.”

Expanded Authorities – Real Estate

The separate Regulations in part 802 implementing CFIUS's new authority to review certain investments involving the purchase by, lease by, or concession to a foreign person of certain real estate effectively preserve the core framework, defined terms, exceptions, and appendix of identified locations presented in the proposed rules, [on which we previously reported](#), and which form the basis of what the Committee has defined as its jurisdiction over "covered real estate transactions." On the whole, the clarifications in the Regulations represent an effort by the Treasury Department to fine-tune the proposed rules and their supporting examples, which is not unexpected given this *de novo* authority and the technical nature of the Regulations.

As we reported previously, CFIUS's new authority is tethered to specific U.S. military and government installations, facilities, and operating areas and graduated proximity ranges corresponding to the level of vulnerability of those locations. Notably, the Regulations maintain the "close proximity" distance as the area extending one mile from the outward boundary of an identified location and the "extended range" distance as the area extending an additional 99 miles from the outward boundary of an identified location. References to "12 nautical miles" in the Regulations have been replaced by "the territorial sea," to the same effect. The four-part appendix identifying locations that are tied to the proximity ranges remains substantially the same, with only modest tweaks. The preamble to the Regulations notes that the Treasury Department anticipates making tools and information available on its website to assist in identifying the geographic coverage of the Regulations, and we expect these resources to be welcomed by transaction parties.

The Regulations refine other key definitions. The Regulations consolidate the proposed definitions of "airport" and "maritime port" into a single new defined term — "covered port." More significantly, given that "covered ports" are defined in relation to lists maintained by multiple U.S. government agencies and those lists may be updated, the definition clarifies that any additions to those lists are not in effect for CFIUS jurisdiction until 30 days after their addition. The Regulations also clarify that the definitions of "concession" and "lease" include assignments in whole or in part, provide clarifying examples for the definition of "property rights," and adopt the definition of "investment funds" from the part 800 Regulations.

With one notable addition, the Regulations also maintain the range of exceptions to the definition of covered real estate to CFIUS's jurisdiction over real estate transactions — including those related to single housing units, commercial office spaces, and densely populated areas. The Regulations add an exception for leases and concessions within a covered port to "foreign air carriers," as defined in 49 U.S.C. 40102, to the extent that the lease or concession is related to activities as a foreign air carrier and the Transportation Security Administration has accepted a security program for the foreign air carrier. The Regulations further refine the exception for leases or concessions within a covered port for the retail sale of consumer goods or services — eliminating the reference to NAICS codes and instead applying to how the covered real estate is used — as well as the exception for multi-unit buildings, where a foreign person does not represent more than 10 percent of the total number of tenants based on the number of ownership, lease, and concession arrangements.

Finally, the Regulations maintain the approach in the proposed rules that parties seeking CFIUS approval may do so either through a voluntary notice or short-form declaration. The Regulations provide additional details on the required contents of such filings and clarify that if a declaration

is filed, the Committee may request a notice if it has reason to believe that the transaction may raise national security considerations.

Given the complexity of the real estate Regulations, transaction parties should work closely with counsel to conduct a detailed analysis to determine whether a real estate transaction falls within the scope of CFIUS's new authority.

Exceptions to Expanded Authorities

While FIRREA expanded CFIUS's jurisdiction, it also required CFIUS to narrow the scope of that expanded jurisdiction by defining the category of "foreign persons" to which that expanded jurisdiction applies. The proposed rules addressed this requirement by establishing three new defined terms, "Excepted Foreign State," "Excepted Investor," and "Minimum Excepted Ownership," which together serve to exempt certain parties from CFIUS's expanded jurisdiction. While initially listing only three Excepted Foreign States, the Regulations modestly relax certain of the requirements to be an Excepted Investor, and also expand the legal safe harbor provided to certain transactions submitted to CFIUS pursuant to a declaration.

Excepted Foreign State

As we expected, the initial list of Excepted Foreign States is quite short. CFIUS initially has selected Australia, Canada, and the United Kingdom based on those countries' "robust intelligence-sharing and defense industrial base integration mechanisms with the United States." CFIUS has acknowledged that this list is limited, and stated that it may expand the list in the future. Further, in order for Australia, Canada, and the United Kingdom to remain on the list, CFIUS will need to determine that the "foreign state has established and is effectively utilizing a robust process to analyze foreign investments for national security risks and to facilitate coordination with the United States on matters relating to investment security." CFIUS elected to delay the effectiveness of this requirement for two years, until February 13, 2022, in order to "provide these initial eligible foreign states time to ensure that their national security-based foreign investment review processes and bilateral cooperation with the United States on national security-based investment reviews meet the requirement." Thus, in two years, CFIUS will determine whether the initial list of Excepted Foreign States has met the requirement, which also will apply to new states that CFIUS may add to the list.

Excepted Investor

As we described in our analysis of the proposed rules, the universe of investors that would meet the requirements to be an Excepted Investor was likely to be exceedingly small, and the benefits of meeting those criteria quite limited. CFIUS appears to have sought to address those concerns by relaxing the requirements to qualify as an Excepted Investor, and expanding the benefits. Specifically:

- Under the proposed rules, to be an Excepted Investor, each of the members of the investor's board of directors was required to be a U.S. national or national of an Excepted Foreign State who is not also not a national of any foreign state that is not an Excepted Foreign State (i.e., a dual citizen of any country other than Australia, Canada, or the United Kingdom). Under the Regulations, this requirement has been modified to require that 75% or more of the members, and 75% or more of the observers, on the board of directors must meet those requirements.

- The proposed rules required that each person that holds 5% or more of the outstanding voting interest in the investor must be from the United States or an Excepted Foreign State. The Regulations increase this threshold to 10%.
- For companies whose shares are publicly traded on an exchange that is not in the United States or an Excepted Foreign State, the proposed rules required such parties to demonstrate that 90% or more of their shares were held by parties from the United States or an Excepted Foreign State. The Regulations decrease this requirement to 80%. For companies whose shares are traded on a U.S. exchange or that of an Excepted Foreign State, the requirement is a simple majority.

Importantly, Excepted Investors are *not* exempt from CFIUS jurisdiction generally; rather, they are only exempted from CFIUS's *expanded* jurisdiction under FIRRMA (i.e., the Committee's new jurisdiction under the "other investments" provision described above). Excepted Investors also are exempt from mandatory filings with respect to transactions with critical technology companies, as described below, and the governments of Excepted Foreign States are disregarded for purposes of determining whether there is a mandatory filing for investments in TID U.S. businesses.

Expansion of "Incremental Acquisition" Rule

The Regulations also expand the scope of the "Incremental Acquisition Rule" which, under current law, provides that if CFIUS approves a transaction on the basis of a notice, subsequent acquisitions of additional equity interest or rights are not subject to CFIUS jurisdiction (and, therefore, do not trigger mandatory filings). Thus, when it applies, the rule provides a broad legal safe harbor for future transactions, up to 100% of the shares of the U.S. business. Under the Pilot Program, this rule did not apply to transactions that were filed pursuant to a declaration, or non-control transactions filed pursuant to a notice. The Regulations now provide that the rule applies to covered control transactions that are submitted to CFIUS via a declaration, where the Committee concludes action on the basis of that declaration. This change may make declarations a more attractive filing option for some transactions, because of the potential for the parties to receive the full safe harbor that is provided by the application of the Incremental Acquisition Rule.

Treatment of Investment Funds

As we noted in our earlier alert, one subject of considerable debate and discussion during the FIRRMA legislative process was the extent to which the expanded jurisdictional authorities of CFIUS would capture indirect investment by foreign persons through limited partnership and similar interests in investment funds. To address this, FIRRMA included a "specific clarification" on investment funds intended to reflect that standard minority limited partnership interests (and the limited rights associated with them) would not, in and of themselves, be sufficient to render investment funds subject to CFIUS's authorities.

The Regulations should largely be helpful with respect to investment funds, particularly those based in the United States. As discussed in detail above, subject to the further rulemaking, the "principal place of business" definition may provide helpful clarity to funds that are managed and controlled by U.S. firms based in the United States. In addition, the Regulations clarify that the "substantial interest" definition (which is relevant to the scope of mandatory declarations discussed below) now only applies to foreign government interests in the general partner or equivalent of a fund; a foreign government's limited partnership interests are disregarded when assessing whether it has a substantial interest that could trigger a mandatory filing. The

Regulations also now include explicit exceptions from mandatory filings for investment funds where a fund is managed exclusively by a general partner or equivalent and that general partner or equivalent is not a foreign person.

Process Impact – the New Declarations

While expanding CFIUS jurisdiction, FIRRMA also sought to manage the impact of this new requirement on CFIUS and on transaction parties by introducing new shorter form reviews called “declarations.” To date, the declaration process has only been available for transactions involving critical technology companies; as of February 13, it will be available for all transactions subject to CFIUS jurisdiction. Transaction parties should therefore consider whether filing a declaration — rather than a full notice — is advisable.

Parties should also be aware of the new mandatory filing requirements, and take them into account when planning transactions. FIRRMA created two categories of mandatory filings: (i) mandatory declarations for certain transactions with critical technology companies, and (ii) mandatory declarations for investments in TID U.S. businesses by investors with foreign government ownership. The Regulations implement the latter of these requirements (the former having been implemented by the Pilot Program).

- **Mandatory filings for critical technology businesses.** The Pilot Program imposed mandatory filings for certain investments in critical technology companies, and applied those requirements to all “foreign persons” — i.e., to the fullest extent of CFIUS’s jurisdiction. The Regulations maintain for the time being the mandatory filing requirements under the Pilot Program, but scale back their application by exempting (i) all Excepted Investors, and (ii) companies that hold a facility security clearance under applicable industrial security regulations, and that are party to certain forms of agreements with the U.S. government to mitigation FOCI. CFIUS also exempted transactions involving U.S. business that are considered critical technology companies only because they produce, design, test, manufacture, fabricate, or develop software involving certain encryption that, while widely used, is technically a critical technology. CFIUS also stated that it anticipates issuing a notice of proposed rulemaking that would revise the mandatory declaration requirement regarding critical technology business from one based upon NAICS codes to one based upon export control licensing requirements.
- **Mandatory filings for TID U.S. Businesses.** Under FIRRMA and the Regulations, a mandatory declaration is required for a covered transaction (meaning a covered control transaction or a covered investment) that results in the acquisition of a substantial interest in a TID U.S. business by a foreign person in which a foreign government has a substantial interest. The Regulations narrow the scope of these filing requirements in two respects. First, “substantial interests” held by governments of Excepted Foreign States will not result in the foreign person being subject to mandatory filings under this provision. Second, as discussed above, the Regulations provide that in the context of investment funds, only interests in the general partner (or equivalent) may be a “substantial interest,” and that limited partner interests are disregarded for purposes of the substantial interest analysis.

We will continue to keep our clients and friends apprised of developments related to CFIUS, including the continued implementation of FIRRMA. If you have any questions concerning the material discussed in this client alert, please contact the following members of our firm:

<u>Mark Plotkin</u>	+1 202 662 5656	mplotkin@cov.com
<u>David Fagan</u>	+1 202 662 5291	dfagan@cov.com
<u>Stuart Eizenstat</u>	+1 202 662 5519	seizenstat@cov.com
<u>Alan Larson</u>	+1 202 662 5756	alarson@cov.com
<u>Peter Lichtenbaum</u>	+1 202 662 5557	plichtenbaum@cov.com
<u>John Veroneau</u>	+1 202 662 5034	jveroneau@cov.com
<u>David Marchick</u>	+1 202 662 5514	dmarchick@cov.com
<u>Heather Finstuen</u>	+1 202 662 5823	hfinstuen@cov.com
<u>Brian Williams</u>	+1 202 662 5270	bwilliams@cov.com
<u>Zachary Mears</u>	+1 202 662 5414	zmears@cov.com
<u>Jonathan Wakely</u>	+1 202 662 5387	jwakely@cov.com
<u>Ruchi Gill</u>	+1 202 662 5131	rgill@cov.com
<u>Charles Buker</u>	+1 202 662 5139	cbuker@cov.com
<u>B.J. Altvater</u>	+1 202 662 5160	baltvater@cov.com
<u>Samuel Karson</u>	+1 202 662 5341	skarson@cov.com
<u>Jenny Reich</u>	+1 202 662 5885	jreich@cov.com
<u>Claire Kim</u>	+1 202 662 5071	ckim@cov.com

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