



Treasury Issues Committee on Foreign Investment in the United States Review Rules

Technology companies seeking foreign investment should be aware of recently effective changes to the Committee on Foreign Investment in the United States (CFIUS) notification process for investments by foreign entities. While these changes generally mirror CFIUS' recently terminated pilot project, differences between the programs could determine whether a US business needs to file with CFIUS for pre-foreign investment review. The following client alert explains the program changes in greater depth.

On January 17, 2020, the Treasury Department's Office of Investment Security (Treasury) released two final rules requiring some foreign entities acquiring an interest in a US business with a national security nexus (Transaction Rule)¹ or real estate near air or sea ports or near US military installations (Real Estate Rule or, collectively, Rules)² to be approved by the Committee on Foreign Investment in the United States (CFIUS) before the transaction can be completed. The Foreign Investment Risk Review Modernization Act of 2018 (FIRRMA) required Treasury to expand the Transaction Rule—which previously required CFIUS review over only foreign investments that could result in foreign control of a US business—to include non-passive but non-controlling investments and to adopt the Real Estate Rule.³

The Treasury implemented a version of the Transaction Rule under a 2018 interim final rule and through a pilot program requiring mandatory declarations of certain transactions involving investments by foreign entities in US businesses beginning November 10, 2018.⁴ On September 24, 2019, the Treasury issued notices of proposed rulemaking for the Transaction Rule⁵ and the Real Estate Rule.⁶ The Transaction Rule replaced the pilot program beginning February 13, 2020. The Real Estate Rule also took effect that day.

What's in the Rule?

- The Transaction Rule largely continues the processes adopted for the pilot project, which expands CFIUS' review jurisdiction over foreign acquisitions of substantial interests in businesses with critical technology, critical infrastructure, or with access to sensitive personal data (TID Business). Like in the pilot program, CFIUS filings are now mandatory for both any transaction where a foreign government of a single state holds a substantial interest (49% or more) in any foreign entity acquiring a substantial interest (25% or more) in a TID Business and any transaction where a foreign entity gains control or access to information in a TID Business deploying technology in areas of concern to CFIUS, known as covered transactions.
- The Real Estate Rule adopts an analogous process for real estate sales, leases, and concessions with foreign entities acquiring real property within one mile of an airport or seaport and real property within various distances of military installations, increasing from one mile to any real property within the same county, based on the type of military installation.
- Both Rules adopt the pilot program's declaration process, which allows entities engaging in simpler covered transactions or those with a more distant nexus to national security to fill out a five-page Treasury-supplied form for CFIUS review, submitted at least 30 days before the transaction will be complete. Under the processes in both Rules, within 30 days CFIUS may approve a declaration, formally request the parties to the covered transaction to file a notice, reject the transaction, or clear the transaction while inviting the parties to file a notice, often referred to as a "no action letter."
- A notice requires significantly more information about the covered transaction, either as a follow-up to a declaration or an initial filing for a more complex or more sensitive covered transaction. Under a notice, within 45 days CFIUS will clear the transaction, clear it subject to mitigation measures, extend the review period by 45 days, or recommend that the president blocks the covered transaction.

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¹ 85 FR 3112.

² 85 FR 3158.

³ Pub.L. 115-232.

⁴ 83 FR 51316, 51322.

⁵ 84 FR 50174.

⁶ 84 FR 50214.

- Both Rules define the governments of Australia, Canada, and the United Kingdom as excepted states and individuals who are nationals of only those countries as excepted investors who are not subject to the mandatory CFIUS filing requirement for covered transactions. However, they remain subject to filing requirements for covered control transactions. Future governments and their nationals may be excepted if the CFIUS determines that they utilize robust process to analyze foreign investments for national security risks and that they coordinate with the US on matters related to investment security. The three excepted governments and their nationals retain this status until February 13, 2022 unless CFIUS grants them an exception determination, which will extend their status unless and until CFIUS then finds they no longer utilize a robust process to analyze foreign investments for national security risks or that they no longer coordinate with the US on matters related to investment security.
- Both Rules adopt a definition of “principal place of business” as an interim final rule designed to treat several off-shore investment funds as US entities. Both Rules consider the principal place of business to be the primary location from which a business’ management exercises control or, for an investment fund, where the investments are directed, controlled, or coordinated.

What Changed from the Pilot and the Proposed Rule?

- The Transaction Rule clarifies that covered transactions completed on or after November 10, 2018 through February 12, 2020 are subject to the terms of the pilot program and covered transactions completed on or after February 13, 2020 are subject its terms.
- Both Rules provide that transactions that require a CFIUS filing as a covered transaction under the Transaction Rule and also require a CFIUS filing as a covered real estate transaction under the Real Estate Rule should be made under the Transaction Rule.
- Both Rules clarify that, because FIRRMA does not apply to foreign air carriers certified by the Transportation Security Administration, business investments and real estate transactions related to their air carrier operations are not subject to CFIUS review.
- Both Rules provide extensive examples to illustrate whether a transaction is subject to CFIUS review. Although Treasury incorporates these in the regulations, both Rules note that example text is for information purposes only and each potentially covered transaction will be considered on the facts unique to its situation.

What’s Next?

- In FIRRMA, Congress granted Treasury authority to implement a fee for reviewing CFIUS declarations and notices. In the Rules, the Treasury notes that it plans on issuing a future fee rule.
- Today, mandatory filings are required for covered transactions investing in TID Businesses identified by their North American Industry Classification System (NAICS) Code. In the Transaction Rule, Treasury expressed its intention to initiate a future rulemaking replacing the use of NAICS Codes to identify businesses subject to mandatory filing with requiring CFIUS filings if the company produces or uses a technology subject to export control licensing requirements.
- In their comments, several investors requested that Treasury adopt a waiver or certificate of good standing system that, after being approved as an investor in a business subject to CFIUS review, would allow the investor or business to remain presumptively acceptable for future covered transactions. In both Rules, Treasury states its willingness to consider issuing such waivers in a future rulemaking after the two programs have been fully implemented.

If you have questions about the Transaction Rule or the Real Estate Rule or related matters in general, please contact Justine Kasznica at (412) 394-6466 or jkasznica@babstcalland.com or Boyd Stephenson at (202) 853-3452 or bstephenson@babstcalland.com.

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