Government Contracts

Major CFIUS Changes Now Set for February 13, 2020

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On January 13, 2020, the Committee on Foreign Investment in the United States (CFIUS) within the United States Department of the Treasury issued two final regulations implementing the Foreign Investment Risk Review Modernization Act of 2018 (FIRRMA). FIRRMA, which was signed into law in August 2018, broadens the authority of the president and CFIUS to review certain non-controlling foreign investments in US businesses that deal in critical technologies or collect sensitive personal data of US citizens.

On September 24, 2019, the Treasury Department published two proposed rules to implement provisions of FIRRMA. Public comments on the proposed rules were due by October 17, 2019. This client alert provides a high-level summary of some of the key provisions in the two now-final CFIUS regulations: one for covered investments and the other for covered real estate investments.

Key Provisions in the Final Rules

Country Exceptions – The final regulations identify Australia, Canada and the United Kingdom as the first designated "excepted foreign states." As a result, investors from these three countries are no longer subject to CFIUS review when making non-controlling investments in US businesses. CFIUS "identified these countries due to aspects of their robust intelligence sharing and defense industrial base integration mechanisms with the United States."

Relaxed "excepted investor" thresholds – The final regulations relax some criteria related to excepted investors. Excepted investors, which are certain investors connected to the excepted foreign states above, may now have up to 25% non-excepted-foreign-state membership on their board of directors. Additionally, the minimum ownership percentage for excepted investors is 80% as opposed to 90% contemplated by the proposed rule.

Principal place of business and the "nerve center" test – On an interim basis, the final regulations adopt the "nerve center" test to determine an entity's principal place of business and thus its status as a foreign entity. Notably, this is the same test used by US courts to evaluate federal diversity jurisdiction. Under the new definition, "principal place of business" is 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," subject to certain qualifications.

The Critical Technology Pilot Program – The final regulations adopt the Critical Technologies Pilot Program's mandatory filing requirement for covered transactions involving critical technologies. However, there are new exemptions related to (i) "excepted investors", (ii) FOCI (foreign ownership, control, or influence)-mitigated entities, (iii) certain encryption technology, and (iv) investment funds managed exclusively by, and ultimately controlled by, US nationals.

Still largely a voluntary process – Under the final regulations, the CFIUS process will remain voluntary for most covered investments. In determining whether to file for CFIUS review of a covered investment, transaction parties should closely review, among other things, the sensitivity of the US business, the country of origin of the foreign investor, and the rights provided to the investor under the investment.

Parties that seek and obtain clearance for a covered investment will still receive the statutory safe harbor from further CFIUS review.

The final regulations will become effective on February 13, 2020. We will provide a more in-depth review and analysis of the final regulations in the coming weeks.

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