

over the process in December 2019 from the previous administration. Given that MORENA holds a comfortable majority, it can be expected that any ad-hoc or related legislation moving forward would be aligned and shall facilitate the implementation of the provisions and new regulations imposed by the revised document.

In light of the above, it is expected that Mexico will continue to constitute a focal point in the continued expansion of the Latin America region into a global market, and that current and forthcoming international laws, along with local immigration policies, will provide a proper environment to this end. 🌐

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Endnotes

- 1 *Agreement between the United States of America, the United Mexican States, and Canada*, adopted Jan. 29, 2020 [USMCA].
- 2 USMCA, *supra* note 1, Chapter 16, Appendix 2.
- 3 *Practice Alert: L-1 Adjudications at Ports of Entry for Canadian Citizenship*, AMERICAN IMMIGRATION LAWYERS ASSOCIATION (May 14, 2019), <https://aila.org/advo-media/aila-practice-pointers-and-alerts/practice-alert-filing-subsequent-l-1-petitions>.
- 4 8 C.F.R. § 214.2(l)(17)(i) (1998).
- 5 *Id.*
- 6 *Form I-129/I-129S Pilot Program for Canadian L-1 Nonimmigrants*, U.S. CITIZENSHIP AND IMMIGRATION SERVICES (April 29, 2019), <https://www.uscis.gov/working-united-states/information-employers-employees/form-i-129i-129s-pilot-program-canadian-l-1-nonimmigrants>.
- 7 *Policy Memorandum: TN Nonimmigrant Economists Are Defined by Qualifying Business Activity*, U.S. CITIZENSHIP AND IMMIGRATION SERVICES (Nov. 20, 2017), https://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/2017/2017-1120-PM-602-0153_-TN-Economists.pdf.
- 8 *Occupational Employment Statistics*, U.S. BUREAU OF LABOR STATISTICS, <https://www.bls.gov/oes/2018/may/oes193011.htm> (last visited February 10, 2020).
- 9 U.S. CITIZENSHIP AND IMMIGRATION SERVICES, *supra* note 5.

CFIUS Review under FIRRMA - Jurisdiction Expands, while Open Investment Policy and National Security Focus Remain

By Jeffrey Richardson

The US Treasury recently published final rules effective on February 13, 2020 revising the Committee on Foreign Investment in the United States (CFIUS) review requirements for foreign direct investment in the United States. The revisions implement the Foreign Investment Risk Review Modernization Act (FIRRMA) included within the voluminous John S. McCain National Defense Authorization Act for Fiscal Year 2019. Although FIRRMA imposes many jurisdictional changes to CFIUS, FIRRMA does not alter the cornerstone open foreign investment policy of the United States or the national security focus of CFIUS. This article reviews the current foreign investment policy of the United States, the role of CFIUS to focus a transaction review on national security, the arising mandatory filing requirements, and the major changes to the CFIUS review process under these final rules implementing FIRRMA.

Foreign Investment Policy of the United States

First and foremost, FIRRMA broadens CFIUS jurisdiction by providing authority to review foreign direct investments that do not result in foreign control of a US business. Prior to FIRRMA, foreign control was the focus of a CFIUS jurisdiction review. Now, under FIRRMA, a secondary analysis is required to determine CFIUS jurisdiction for foreign direct investments that do not result in foreign control of a US business. CFIUS jurisdiction may arise for foreign direct investments that provide a foreign investor material access or substantive decision-making rights related to a US business with critical



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technology, sensitive data, or a critical infrastructure nexus (see MAD Rights discussed below).

However, the longstanding policy of the US Government to welcome foreign investment remains consistent under FIRRMA despite the changes to CFIUS jurisdiction.¹ FIRRMA provides clear Congressional support of the longstanding US foreign investment policy: *It is the sense of Congress that—foreign investment provides substantial economic benefits to the United States, including the promotion of economic growth, productivity, competitiveness, and job creation, thereby enhancing national security; . . . it should continue to be the policy of the United States to enthusiastically welcome and support foreign investment, consistent with the protection of national security . . .*² Again, notwithstanding the many complex jurisdictional changes resulting from FIRRMA, the fundamental open economy and open investment policy of the US Government remains unchanged.

Also under FIRRMA, the singular focus of the CFIUS review process on national security remains unchanged: *the Committee on Foreign Investment in the United States should continue to review transactions for the purpose of protecting national security and should not consider issues of national interest absent a national security nexus.*³ CFIUS is neither tasked with nor statutorily authorized to undertake a broader review of foreign direct investment for economic and competitive concerns outside the bounds of a national security nexus.

Mandatory Filings for Foreign Investors under FIRRMA for Certain Investments

The FIRRMA final rules alter CFIUS jurisdiction by adding two additional instances where a filing with CFIUS is mandatory: (1) a transaction covered by the initial Pilot Program (defined below) and now required in the main CFIUS regulations of Part 800,⁴ and (2) an investment by a foreign government resulting in the acquisition of a substantial interest in a TID US business (defined below)⁵ by a foreign person in which a foreign government has a substantial interest.⁶

Foreign Investment in Specified Pilot Program Industries

First, FIRRMA provides CFIUS the ability to implement temporary pilot programs and thereby field test the utility of certain mandatory filing requirements that may enhance the CFIUS process. The initial Pilot Program became effective on October 10, 2018⁷ and required the mandatory filing of a declaration for investments in a Pilot Program US Business⁸ that (1) produces, designs, tests, manufactures, fabricates, or develops critical technology and (2) utilizes that critical technology in connection with a Pilot Program industry⁹ as identified by NAICS code in Annex A of the initial Pilot Program.¹⁰ The initial Pilot Program is discontinued as of February 12, 2020, but the mandatory declaration filing requirements for transac-

tions within the scope of the initial Pilot Program are required by the primary CFIUS regulations of Part 800, which now integrate the filing requirements from the initial Pilot Program.¹¹

Foreign Investment in Specified TID Businesses

Second, CFIUS now requires the filing of a declaration for a covered transaction that results in the acquisition of a substantial interest in a TID US business by a foreign person in which a foreign government has a substantial interest.¹² A TID US business includes a US business that (1) produces, designs, tests, manufactures, fabricates, or develops one or more *critical technologies*, (2) performs the specific functions with respect to covered investment *critical infrastructure* set forth in Part 800, Appendix A, or (3) maintains or collects, directly or indirectly, *sensitive personal data* of US citizens.¹³ For example, TID businesses may include the following: a US business that operates a munitions plant producing a variety of military grade explosives listed on the United States Munitions List (critical technologies), a US business that manufactures pipe segments for a pipeline within the list of critical infrastructure (critical infrastructure), and a US business that operates as a credit reporting agency and maintains consumer credit reports on greater than one million individuals (sensitive personal data).

Major Changes for Foreign Investors under FIRRMA

In addition to the mandatory filing requirements, the final rules implementing FIRRMA bring other major changes to the CFIUS review of foreign direct investments:

Real Estate

First, CFIUS created a stand-alone set of real estate regulations within Part 802 that detail positive requirements for covered real estate over which CFIUS now has jurisdiction.¹⁴ Covered real estate must be (1) located within, or will function as part of, certain airports or maritime ports, or (2) located within: (a) “close proximity” (*i.e.*, one mile from the boundary) to specific military installations, (b) the “extended range” (*i.e.*, in most cases 99 miles from the boundary) of a subset thereof, (c) certain larger geographic areas identified in connection with other military installations, or (d) any part of certain military installations that is located within 12 nautical miles seaward of the coastline of the United States. The relevant military installations and categories are identified in Part 802, Appendix A.¹⁵

However, importantly, as to real estate (1) there are no mandatory filing requirements for the purchase of covered real estate by a foreign person, (2) no separate additional real estate filings are required for any transaction for which a joint voluntary notice or declaration is otherwise filed with CFIUS under Part 800, and (3) CFIUS maintains the traditional policy that

the extension of a loan by a foreign person to a US business does not result in a covered real estate transaction.

From Control only to MAD Rights as Well

Second, another major shift, CFIUS transitions under FIRRMA from using control of a US business as the only criterion to find CFIUS jurisdiction over a transaction, to now further extending CFIUS jurisdiction to foreign investments that do not provide control of a US business but rather provide a foreign person the following: (1) *access* to any material non-public technical information in the possession of the TID US business, (2) *membership* or observer rights on the board of directors or equivalent governing body of the TID US business, and (3) any involvement in substantive *decision-making* of the TID US business pertaining to the use, development, acquisition, safekeeping, or release of the sensitive personal data and critical technologies, or management or operation of critical infrastructure (the foregoing (1)-(3) are MAD Rights).¹⁶

So, transactions providing MAD Rights to foreign investors should be carefully screened for national security risks, and those raising capital should carefully evaluate the actual need to convey MAD Rights to foreign investors and thereby trigger CFIUS jurisdiction.

Investment Funds

Third, since CFIUS jurisdiction now extends review from control of a US business to the conveyance of MAD Rights, FIRRMA provides corresponding exclusions for those impacted investment funds that incorporate certain governing characteristics designed to limit the access and control of foreign person investors, such as the following examples:

1. the fund is managed exclusively by a general partner, a managing member, or an equivalent;
2. the foreign person is not the general partner, managing member, or equivalent;
3. the fund advisory board does not have the ability to approve, disapprove, or otherwise control the investment decisions of the investment fund;
4. the foreign person does not otherwise have the ability to control the investment fund;
5. the foreign person does not have access to material non-public technical information as a result of its participation on the advisory board or committee; or
6. the investment does not afford the foreign person any MAD rights.¹⁷

Consequently, those involved in fund creation and management should take due care at the onset of fund creation to confirm whether the fund intends to reduce the risk of creating

CFIUS jurisdiction over the foreign direct investment, and thereby, potentially eliminate the extension of MAD Rights to foreign investors from the outset within the fund governing documents.

Fees

Finally, CFIUS is authorized under FIRRMA to require filing fees that may not exceed the lesser of 1% of the value of a transaction or a maximum of \$300,000. The US Treasury has not yet published any rules implementing filing fees;¹⁸ rather, the US Treasury has confirmed that a separate proposed rule implementing the filing fee authority of CFIUS will be published at a later date.¹⁹

In sum, foreign investors are best served by approaching a CFIUS review with an initial focus on the US national security concerns presented by the transaction, then the impacted parties may take steps to address the complex jurisdictional questions now arising under FIRRMA. 🌐

About the Author

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Endnotes

- 1 President Bush’s Statement on Open Economies on May 10, 2007 and Executive Order 13456 of January 23, 2008 which provides further amendment of Executive Order 11858 of May 7, 1975. “International investment in the United States promotes economic growth, productivity, competitiveness, and job creation. It is the policy of the United States to support unequivocally such investment, consistent with the protection of the national security.” Exec. Order No. 13456, 3 C.F.R. 171 (2008).
- 2 Foreign Investment Risk Review Modernization Act H.R. 5515, 110th Cong. §1702(B)(1)-(3) (2018).
- 3 *Id.*
- 4 31 C.F.R §801.401 Mandatory declarations under the pilot program (the citations for 31 CFR Part §801 were initially issued as part of the Pilot Program Interim Rule, *see* 83 Fed. Reg. 51322 (Oct. 11, 2018), which became incorporated within 31 C.F.R Part §800 pursuant to 85 Fed. Reg. 3112 (Jan. 17, 2020).
- 5 31 C.F.R §800.248 (2020).
- 6 31 C.F.R §800.401(b)

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| <p>7 Pilot Program Interim Rule, <i>see</i> 83 Fed. Reg. at 51322.</p> <p>8 31 C.F.R. §801.213 (2018).</p> <p>9 31 C.F.R. §801.212</p> <p>10 <i>See</i> 31 C.F.R §801 Annex A to Part 801 for the 27 Pilot Program Industries and Appendix B to Part 800, Industries</p> <p>11 31 C.F.R. §801.401</p> <p>12 31 C.F.R. §800.401</p> <p>13 31 C.F.R. §800.248</p> <p>14 31 C.F.R. § 802.211 (2020).</p> | <p>15 <i>See</i> Appendix A to part 802 - List of Military Installations and other US Government Sites.</p> <p>16 31 C.F.R § 800.211</p> <p>17 31 C.F.R § 800.307.</p> <p>18 Foreign Investment Risk Review Modernization Act of 2018, H.R. 5515, 110th Cong. §1723(p)(3) (2018).</p> <p>19 Provisions Pertaining to Certain Transactions by Foreign Persons Involving Real Estate in the United States, <i>See</i> 85 Fed. Reg. 3158 (Jan. 17, 2020).</p> |
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International Law Section Treasurer's Report

For the three months ending January 31, 2020

	Current Activity January 2020	Year To Date January 2020	Year To Date January 2019
Revenue:			
International Law Section Dues	525.00	12,460.00	12,250.00
International Stud/Affil Dues		35.00	35.00
Total Revenue	525.00	12,495.00	12,285.00
Expenses:			
ListServ	25.00	75.00	750.00
Meetings		533.82	885.63
Total Expenses	25.00	608.82	960.63
Net Income	500.00	11,886.18	11,324.37
Beginning Fund Balance:		25,755.46	21,711.08
Total Beginning Fund Balance:		25,755.46	21,711.08
Ending Fund Balance:		37,641.64	33,035.45