

Global Trade & Policy

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What the Changes to CFIUS Mean for Foreign Investment

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CFIUS is a U.S. federal interagency committee (“Committee”). The Committee reviews and approves foreign direct investment in U.S.-based businesses. Investment is restricted if it impairs national security. Under the new Foreign Investment Risk Review Modernization Act of 2018 (FIRRMA), what the Committee considers to be “national security” has recently changed to include emerging and critical technologies and sensitive personal data. Additionally, established considerations have been codified into law, and certain mandatory filing requirements have been put in place. As these developments are brand-new, much of the implementing regulatory language has yet to be drafted. What we do know is that a pilot program has been established targeting 27 specific industries, and the penalties for noncompliance can be as high as the value of the deal.

Notably, “Research and Development in Biotechnology” is one of the pilot program industries. It is possible that many life sciences companies could fall under this category and therefore deemed to be involved in the CFIUS pilot program industry. Organizations will need to determine whether they have critical technologies that are subject to the CFIUS pilot program, including items controlled under the Export Administration Regulations (EAR), select agents and toxins, and emerging technologies that will be identified in the coming months.

Mandatory filings are required for certain transactions, starting this month. So what do foreign investors and U.S. parties with potential foreign buyers need to know and do right now?

1. Gather information including:

- Specific product/service of the target (include NAICS code)

- Location(s) of the business
- Likely ownership structure and management plan
- Description of the buyer/investor’s rights post-closing

2. Determine whether a mandatory filing is required:

- Is the business connected to one of the 27 target industries?
- Will the buyer have any of the following:
 - Control
 - Access to any Material Nonpublic Technical Information
 - Board rights
 - Involvement in decision-making regarding the use, development, acquisition, or release of Critical Technology

3. Determine whether a voluntary filing is mandated due to national security concerns such as:

- Critical Infrastructure
- Access to sensitive personal data
- Access to Material Nonpublic Technical Information
- Location of real estate

4. Discuss with CFIUS counsel whether the structure of the transaction and the critical technology at issue may fall outside of the CFIUS parameters. This is especially important for financial companies and funds where the structure can determine CFIUS applicability.

5. Start the process as early as possible, and include it as a condition precedent to closing.

Contacts

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