

# A STARTUP'S GUIDE TO CFIUS



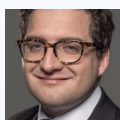
Everything you **don't** want to know, and would rather **ignore** and leave to your lawyers.

a quick-read primer published by  
**FOREIGN INVESTMENT WATCH**

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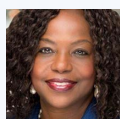
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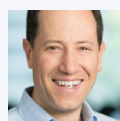
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We provide key definitions and easy-to-access provisions, most taken directly from the Treasury Department's own list of “frequently asked questions” regarding CFIUS.

# The last thing you want to do

right now is read about an obscure federal committee that could put the kibosh on your ability to exit or raise capital.

Trust us, we get it. We write about this stuff for a living, and, well, let's just say it's less-than-scintillating.

But hey, it's business. So we're going to help you get through this quickly.

We've reached out to some of the country's top experts to help spell out everything you need to know about The Committee on Foreign Investment in the United States.

We've asked them to provide details, advice and guidance where they can, and asked

them to use plain English, avoiding "legalese" or complicated jargon that would just make your life harder.

So good luck, and let us know if we can help you untangle this stuff in any way.



Scott S. Cohen  
Editor & Publisher  
Foreign Investment Watch

# CFIUS 101: What the beep?

New York lawyer Tytus Cytowski, whose eponymous firm has helped startups raise over a billion dollars, walks us through the basics.

## **What the heck is CFIUS?**

Even though it's pronounced "SIFF-ee-iss" and sounds like a communicable disease, CFIUS has nothing to do with the pandemic. Rather, the acronym stands for The Committee on Foreign Investment in the United States.

## **So, again, what is it?**

CFIUS is a federal interagency committee that has the authority to review, approve and block certain foreign investments in your startup, or even block a foreign acquisition of your startup, if it believes that investment could

impact U.S. national security.

## **Good Lord ... Why?!**

The U.S. government is rightly concerned that foreign governments, particularly China, may gain access to "critical technologies" and "sensitive personal data" of U.S. citizens.

## **Is it new?**

Nope. CFIUS dates back to the 1970s, but it was given new teeth under a new rule called the Foreign Investment Risk Review Modernization Act of 2018, which has its own catchy acronym (FIRRMA). I'm going to let Nicole

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Lamb-Hale go into the details on FIRRMA (see page eight); we're going to stay with "101" stuff here.

### **Who sits on CFIUS?**

Do you really care? Ok. Chaired by the U.S. Secretary of the Treasury, CFIUS includes the heads of the Departments of Defense, State, Homeland Security, Justice, Energy, and others. So yes, it's a serious group, and the President of the U.S. may also get involved.

### **So what does CFIUS do?**

Put most simply, the Committee reviews acquisitions and investments by foreign entities, particularly those that could result in foreign control of a U.S. business that has access to critical technologies or sensitive personal data of U.S. citizens. That's oversimplified, of course, but, again, this is a 101 column. Remember, CFIUS is mostly concerned with U.S. businesses that — if they fell into the hands of a foreign enemy — could impact national security.

### **So, do I have to worry?**

Well, CFIUS doesn't really publish a roadmap on this, but, in general, CFIUS would likely be concerned with foreign acquisition or control of your startup if you:

- Have contracts with the U.S. government, particularly related to national security;
- Have classified contracts with the U.S. Departments of Defense, Energy, etc;

*CFIUS reviews acquisitions and investment by foreign entities to ensure they don't impact national security.*

- Have export-controlled technology;
- Have "emerging" or "foundational" technologies, such as biotech, nanotech, artificial intelligence, machine learning, genetic engineering, or other technologies that could be essential to national security;
- Have or support "critical infrastructure," including data centers, airports, telecommunications, etc.
- Have sensitive personal data on more than one million Americans, including health data, location data, genetic data, etc.

### **Where has CFIUS intervened?**

The most recent high-profile example is TikTok, the social media app that has nearly 100 million U.S. users. Tiktok was acquired by China-based ByteDance in 2017 (although back then, TikTok was called Musical.ly), and CFIUS is concerned about the Chinese having detailed information on so many Americans.

CFIUS also forced a Chinese gaming company to sell dating app Grindr, for similar

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reasons. Most recently, President Trump issued an Executive Order prohibiting the Chinese acquisition of a software company called StayNTouch, which provides hotel-management software to hundreds of hotel chains. Why? Imagine the Chinese knowing exactly when certain U.S. business executives or government officials have checked into their hotels. Hmm....

### **So, what do I do?**

Talk to your lawyers, obviously. But, in general, *if* your startup indeed has what CFIUS considers critical technology or sensitive personal data on millions of Americans, and *if* you indeed are contemplating an investment or acquisition by a foreign entity, you would need to decide whether to notify CFIUS of the transaction, and get the Committee's approval and safe harbor protections.

### **What does a filing entail?**

The submission of a voluntary "Notice" is prescribed by legislation, and your lawyers could help you. But, basically, the filing includes a description of the deal, the parties involved, how control of the business would change, and lots of other information. And CFIUS typically wants to learn specific details, not broad generalizations: They want to know what the org chart will look like after the deal, what's the rationale for the transaction, who will have decision-making authority, etc.

*Technically, CFIUS  
could initiate a review of  
your deal at any time, even  
after the closing of the  
transaction.*

### **What if we don't file?**

Well, technically, CFIUS could initiate a review of the deal at any time, including after the closing of the transaction. That's what happened at TikTok, and it wasn't the first time: President Obama forced a Chinese company to sell a bunch of U.S. wind farms they acquired, because CFIUS decided they were located too close to a U.S. Naval training facility.

### **How long does CFIUS take?**

Not long. By regulation, they have 45 days to get back to you, but they usually do it in under 30 days. Unless, of course, a more thorough investigation is required, or if CFIUS wants you to undertake mitigation measures as part of the deal (Nicole covers mitigation on page 11).

### **Could my venture round be impacted?**

Potentially. But again, only if your investor is foreign-controlled, and your technology meets

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the criteria of being a “covered transaction” to CFIUS. Check with your lawyers. But it has happened in the past; for example, CFIUS blocked an investment by Chinese firm Tencent in U.S. healthcare startup Patients Like Me, because they didn’t want private health information of U.S. citizens in the hands of the Chinese government.

### **Are there any exceptions?**

Yes, of course, but this was just a short 101 column, so we haven’t gotten into the details. Investors in the UK, Canada and Australia, for example, are considered “excepted foreign states,” so technically an investment or acquisition from an entity in those countries wouldn’t be subject to CFIUS review (again, not always). As you can imagine, there’s lots of subtlety, fine print, and legal finesse involved here, on topics ranging from your specific technology to the amount of “control” a foreign actor would have if they acquired or invested in you. We also haven’t really discussed the difference between “voluntary” and “mandatory” filings, but those are covered elsewhere in this special section.

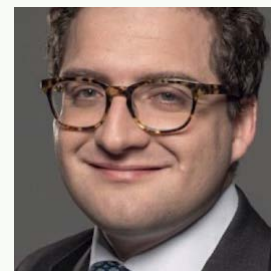
### **Next steps**

Now that you know the basics, I recommend two things. First, flip to the next page and read Nicole’s piece, which has specific strategies to manage and mitigate CFIUS risks. And second, talk to your lawyers; if they’re good, they’re up-to-speed on these issues and can provide necessary guidance. Good luck!

*Remember, CFIUS is mostly concerned with U.S. businesses that — if they fell into the hands of a foreign enemy — could impact national security.*

### **About the author**

Tytus Cytowski is the founder of Cytowski & Partners, a New York-based law firm that focuses on helping startups scale and fundraise in



Silicon Valley. Prior to founding his own firm, Tytus worked for a venture capital fund, and as a financial-service lawyer at a leading international law firm in New York City. His clients include startups from Y Combinator, 500 Startups, and Techstars, and he has significant experience working with global clients, particularly those in Central and Eastern Europe. He is a graduate of Harvard Law School. Email: [tcytowski@cytlaw.com](mailto:tcytowski@cytlaw.com).

# Seven tactics for managing CFIUS risk

Nicole Lamb-Hale, a well-known CFIUS expert and former Presidential appointee at the U.S. Commerce Department, offers practical tips.

Now that you've read Tytus' column on "CFIUS 101," (see page three if you haven't), let's address practical steps to manage and mitigate CFIUS risks.

Let's assume, for the sake of this column, that you have successfully launched your technology startup, and that your focus is on scaling your business. Scaling your business will likely include finding additional investors for your company.

If you've done your job well, your technology may be attractive to foreign investors. Those foreign investors may be strategic buyers, who might be looking to add

your technology to their current platform, or financial buyers, who may be seeking a direct monetary return on their investment.

In either case, before closing an investment from a foreign entity, you and your outside counsel will need to analyze whether the transaction will require review and clearance by CFIUS.

As Tytus explained, CFIUS is a federal, interagency committee that reviews transactions involving foreign investment in U.S. companies for national security risk. Tytus also mentioned "FIRRMA" briefly. What you need to know about FIRRMA is that it extended

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the jurisdiction of CFIUS to include the review of non-controlling foreign investments in U.S. critical technologies companies, critical infrastructure companies, and companies that maintain or collect sensitive, personally identifiable information on U.S. citizens.

That was a mouthful, so let me clarify two things, because they're important:

First, by “non-controlling,” CFIUS is referring to a foreign investor who could gain access to confidential non-public information, or could be involved in important decision making, even if it does not “control” your company in the corporate sense. This is an important change, because previously CFIUS only had jurisdiction over deals in which a foreign entity controlled your business. For businesses in the three industries described below, that's not the case anymore.

Second, CFIUS would generally be interested in a non-controlling foreign investment in your company if it operates in the spaces Tytus described on page five:

- *Critical Technologies* (i.e., if your technology is controlled under U.S. export laws and regulations);
- *Critical Infrastructure Companies* (i.e., if your company serves or supports U.S. energy, communications, or transportation networks); or
- *Sensitive Personal Data* (i.e., your company collects genetic, financial, medical, biometric, location, or other similar “personally identifiable information” on

*Under certain circumstances, you'll need to consider whether the transaction requires review and clearance by CFIUS.*

more than one million Americans).

Clearly, many subtleties and nuances are at play here, so you should seek advice from experienced CFIUS counsel. However, understand that *if* a non-controlling foreign investor could gain access to, or control of, your company, and *if* your company's business falls into the categories above, you'll need to consider whether the transaction will require review and clearance by CFIUS.

In doing so, consider the following seven strategies to manage and mitigate your CFIUS risk:

### **1. Know Your Business**

What is clear from the 2018 expansion of CFIUS's jurisdiction is the U.S. government's concern that investments by foreign persons in key “sensitive industries” pose a potential threat to the national security of the United States. Therefore, as a technology startup, proactively understanding whether your

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technology is viewed as sensitive for national security purposes by CFIUS is critical, especially as you consider transactions with foreign investors.

Factors to consider include the extent to which the technology has defense applications, can be used to maintain or collect personally identifiable information on U.S. citizens, or can be utilized in connection with U.S. infrastructure (e.g., power generation systems).

## **2. Know Your Investor**

You should understand that CFIUS will evaluate, among other things, how your potential foreign investor is connected to a foreign country or foreign government. That means CFIUS will research and determine whether the foreign investor is controlled by, for example, the Chinese government, and whether your foreign investor has a history of complying with U.S. laws and regulations. Again, CFIUS's goal is understanding whether the investor's connection to you could affect the national security of the U.S.

As a result, startups should conduct their own robust due diligence on potential foreign investors and should understand the investor's ties to a foreign country or foreign government, as well as their regulatory compliance record. Because CFIUS will conduct its own threat assessment on your potential foreign investor, learning what you can in advance will be helpful to your transaction planning and timeline.

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foreign government.*

## **3. Craft Investor Terms**

In addition to knowing your potential foreign investor, startups should consider including language in investor rights agreements that address CFIUS issues.

For example, startups can preempt CFIUS concerns by codifying “information carveouts” for investors. These carveouts could exclude, for example, investor access to certain non-material technical information. Similarly, startups can remove observer rights or certain board-level voting rights to demonstrate to CFIUS that the foreign investor will have no control over decision making.

At a simple level, startups can include covenants in investor documents specifying that both parties will agree to cooperate in good faith with any prospective CFIUS review.

## **4. Structure the Deal to Minimize Risk**

Armed with an understanding of your proposed foreign investor and whether CFIUS would be concerned if your technology is

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accessed or controlled by a foreign investor, you will be better positioned to mitigate your CFIUS risk.

For example, you may structure your transaction to take advantage of the safe harbor under the legislation, which may result in your transaction being exempt from CFIUS review. If, however, the foreign investment must be structured in such a way that triggers CFIUS review, you may develop and propose to CFIUS strategies to mitigate the national security risk. Those mitigation strategies could include, for example, limiting the foreign entity's access to sensitive data.

## 5. Remember Loans and Notes

Sometimes loans from a foreign lender trigger CFIUS review. This typically occurs when a foreign lender obtains a “contingent equity interest” in a U.S. business. In other words, if the loan could convert into an equity interest, or if it provides a right to acquire an equity interest, then it could be subject to CFIUS jurisdiction. This includes “SAFEs,” or “Simple Agreements for Future Equity.”

To be clear, if the terms of your loan or note provide that eventually the foreign investor could gain control of your company, or could convert that loan into a non-controlling equity interest, then — assuming your lending arrangement meets the criteria for being a “covered transaction” — CFIUS would have jurisdiction over the transaction.

Again, many nuances exist, but the point is

*If a loan from a foreign lender could convert into an equity interest, it could trigger CFIUS jurisdiction*

to be careful — and not to forget about — any debt instruments that could convert into equity interests for a foreign entity.

## 6. Be Mindful of Compliance Costs

It is not uncommon for CFIUS reviews to result in mitigation agreements. Let me explain:

As Assistant Attorney General for National Security John Demers has noted, very few transactions reviewed by CFIUS are actually blocked. This does not mean that the deals did not pose a national security risk; rather, it means that mitigation measures may have been crafted to enable CFIUS to resolve the national security risk without blocking the deal.

Should CFIUS impose a mitigation agreement as part of your deal, you will need to ensure that your company has internal controls in place to facilitate compliance with CFIUS requirements. Keep in mind that these requirements could add compliance costs for

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your company.

Such controls could, for example, be in the form of cyber and operational security, which could limit access to information or systems at the heart of the national security concern. Compliance may also require full-time personnel who are dedicated to ensuring that your company is following CFIUS directives. Moreover, agreements with CFIUS to mitigate the national security risk often require the appointment of an independent third-party auditor and/or monitor who reports directly to CFIUS on an agreed-upon schedule, and whose fees are paid by the parties.

These costs should also be considered up front, when you are evaluating a foreign investor.

## **7. Engage Experienced CFIUS Advisors**

Finally, when evaluating the CFIUS implications of a foreign investor, engaging experienced CFIUS advisors is prudent. Companies who do not take CFIUS compliance seriously face reputational and financial risks. For example, since the amendments to CFIUS legislation became effective in 2018, a company was fined \$1 million for failing to comply with CFIUS imposed mitigation terms.

A short-term investment in experienced advisors will produce long term gains and peace of mind as you take your company to the next level.

*Agreements with CFIUS to mitigate the national security risk of a foreign investment could add compliance costs.*

### **About the author**

Nicole Y. Lamb-Hale is a Managing Director at Kroll, a division of Duff & Phelps. Nicole was previously the Assistant



Secretary of Commerce for Manufacturing and Services, U.S. Department of Commerce, International Trade Administration, where she served on CFIUS on behalf of the Commerce Department. Prior to her government service, Nicole was a partner with two international law firms. A member of the Council on Foreign Relations, Nicole recently served on its Independent Task Force for Innovation and National Security. She earned her J.D. from Harvard Law School. She can be reached at: [nicole.lamb-hale@kroll.com](mailto:nicole.lamb-hale@kroll.com)



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# A case study in frustration

CFIUS expert Stephen Heifetz, who spent time at the CIA, Homeland Security, and the Dept. of Justice, walks through a “what if” scenario.

Imagine this: You run an early-stage U.S. biotech company making progress on life-saving technology, but you're burning cash. Fortunately, several investors are willing to provide \$10 million collectively for a total stake in your company of 20%. You have to move fast to close the deal: The company soon will run out of money to pay salaries.

The investors include a wealthy friend and two funds run by friends-of-those-friends. Your outside corporate counsel, though, says that some of these investors might “trigger CFIUS.”

You know what she means, because you're

even more enlightened than Silicon Valley's Denpok\* (and because you read Tytus' column on page four, and Nicole's on page eight). One of the wealthy friends is from Italy, and one of the funds, though a U.S. fund, is managed by several Europeans. This ‘foreign-ness’ might cause a CFIUS review. That would be annoying.

Your corporate counsel arranges a call with a “CFIUS specialist.” Talk about annoying. The CFIUS specialist holds forth:

Are there foreign investors? There are three investors that may be viewed as

\* [bit.ly/sec-denpok](https://bit.ly/sec-denpok)

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foreign: your Italian friend; the U.S. fund that is managed by Europeans; and another fund that is a U.S. fund but has only one limited partner – that fund's money comes almost entirely from a Japanese corporation. All three investors likely will be viewed by CFIUS as foreign.

Great. A minute ago there seemed to be just two foreign investors, the Italian friend and European-managed fund; the CFIUS specialist, throwing into that bucket the U.S. fund filled with Japanese money, has just increased your problems by 50%. But he's not stopping there . . .

Is a filing mandatory? With respect to each of these foreign persons, we need to determine whether a filing with CFIUS is mandatory. There are two types of mandatory filings: (i) mandatory filings involving “critical technology”; and (ii) mandatory filings involving a foreign government “substantial interest.”

You ask for definitions of “critical technology” and “substantial interest” and get this piece of perfect clarity in reply:

Critical technology is defined by cross references to six different government lists, one of which is several hundred pages. So we'd need to take some time to determine whether the company's technology would

*“Critical Technology” is defined by cross references to six different government lists, one of which is several hundred pages.*

be classified as “critical technology.” Many biotech companies do not have critical technology, but we'd need to ask detailed questions to know for sure.

Substantial interest by a foreign government may be found when the investor will obtain a 25% voting stake (or greater) in the company *and* a foreign government holds a 49% voting stake (or greater) in the investor. This “substantial interest” mandatory filing only applies when your company is a “TID U.S. business,” meaning a business involved with “critical **t**echnology” (the “T”), “critical **i**nfrastructure” (the “I”), or “sensitive personal **d**ata” (the “D”). All of these terms also have complex definitions, but since no investor will obtain a 25% stake in the company, we don't need to worry about a “substantial interest” mandatory filing.

Given the choice between your corporate

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counsel and this CFIUS specialist, you'd rather spend all your time talking to your corporate counsel. You ask, "can we structure the investments so that we don't have to worry about CFIUS at all?"

Pure passivity as a CFIUS cure. If the foreign investors are willing to forego all "triggering rights," then you don't have to worry about CFIUS. That means they cannot obtain: (i) more than a 10% voting stake or significant veto rights, (ii) a board seat, observer seat, or nomination rights; (iii) access to "material non-public technical information"; or (iv) involvement in substantive decision-making.

That's not gonna fly, because all of the investors are insisting on observer seats, and the fund with Japanese money is insisting on a board seat. But, comforted by the comment that the company "likely" does not have critical technology, you say "if it's confirmed that we don't have critical technology, are we good to go?" The reply is a real downer:

CFIUS's discretionary jurisdiction. Even when there is no mandatory filing, CFIUS may exercise jurisdiction over many transactions if CFIUS becomes aware of those transactions and has concerns. In the extreme, CFIUS can force divestment or impose conditions on the operations and governance of the company. *Most instances*

*In the extreme, CFIUS  
can force divestment or  
impose conditions on the  
operations and governance  
of your company.*

*of adverse CFIUS action have not involved mandatory filings – they have involved CFIUS's exercise of its discretionary jurisdiction.*

WHAT?! You ask, "what are the types of transactions for which CFIUS can exercise this discretionary jurisdiction?"

Control transactions. Even if there is no mandatory filing requirement, CFIUS has jurisdiction over any transaction in which a foreign investor obtains indicia of "control," generally meaning more than a 10% voting stake, or a board seat, or significant veto rights.

Non-controlling investments in TID U.S. businesses. CFIUS also has jurisdiction over a foreign person's equity investment into a TID U.S. business, no matter how small the investment, if the investor will obtain any of the aforementioned triggering rights.

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You have the urge to pull the trigger on the aforementioned CFIUS specialist, but you resist.

**Risk Factors.** Even though CFIUS can exercise jurisdiction over these control and non-controlling investments, historically it has done so with respect to a small percentage, focusing on investments where there are substantial concerns about the sensitivity of the U.S. business and/or concerns about the foreign investor. These days, investors with Chinese and Russian ties often spark significant CFIUS concern. To extinguish risk of adverse CFIUS intervention, the parties can make a filing to try to get CFIUS approval, which would provide a safe harbor against future adverse CFIUS action.

And how long would it take to get that safe harbor?

**Timing.** The CFIUS review process can take as little as a month, but it also can take many months. CFIUS personnel generally believe the process, though sometimes cumbersome, is important for security.

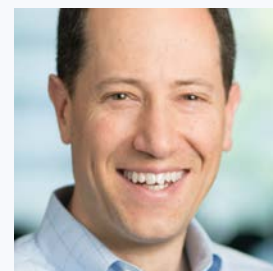
You remind the CFIUS specialist that there are no Chinese or Russian investors at issue, that the company soon will run out of money to pay salaries, and that the company accordingly cannot wait for a multi-month review process.

So you say, “We’ll just have to hope that we don’t have ‘critical technology’ and, as for CFIUS’ discretionary jurisdiction, trust that CFIUS appreciates that we are trying to make the world a better place.” \*

\* There may be a better option than taking the CFIUS risk and hoping for the best. A two-stage investment (aka the “CFIUS two-step”) may allow investors to inject capital immediately (receiving up to a 10% voting stake), while deferring all triggering rights; a CFIUS filing then can be made, with all triggering rights (e.g., a board seat) and any voting stake in excess of 10% contingent upon CFIUS clearance. Contact your beloved CFIUS specialist for more information.

### About the author

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Previously served as Deputy Assistant Secretary for Policy Development at the U.S. Department of Homeland Security. A former attorney at the CIA and counsel at the U.S. Department of Justice, Stephen has been involved in more than 1,000 CFIUS matters, and serves as CFIUS counsel to the National Venture Capital Association. He can be reached at [sheifetz@wsgr.com](mailto:sheifetz@wsgr.com).

\* [bit.ly/a-better-place](https://bit.ly/a-better-place)

# Straight from the horse's mouth

Here we provide key definitions and easy-to-access provisions, most taken directly from the Treasury Department's own CFIUS FAQs.

## **Provisions on Non-Controlling Investments**

FIRRMA expands CFIUS's jurisdiction beyond transactions that could result in foreign control of a U.S. business to also include non-controlling investments, direct or indirect, by a foreign person in certain U.S. businesses that affords the foreign person:

- access to any material nonpublic technical information in the possession of the U.S. business;
- membership or observer rights on, or the right to nominate an individual to a position on, the board of directors or equivalent governing body of the U.S. business; or
- any involvement, other than through voting of shares, in substantive decision making of the U.S. business regarding —
  - the use, development, acquisition, safekeeping, or release of sensitive personal data of U.S. citizens maintained or collected by the U.S. business;
  - the use, development, acquisition, or release of critical technologies; or
  - the management, operation, manufacture, or supply of critical infrastructure.

*Source: U.S. Department of Treasury*

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This new authority applies only to non-controlling investments in U.S. businesses that:

- produce, design, test, manufacture, fabricate, or develop one or more **critical technologies**;
- own, operate, manufacture, supply, or service **critical infrastructure**; or
- maintain or collect **sensitive personal data** of U.S. citizens that may be exploited in a manner that threatens national security.

FIRRMA also requires that CFIUS prescribe regulations that further define the term “foreign person” in the context of non-controlling investments by specifying criteria to limit its applicability over certain categories of foreign persons.

### **Key Aspects of the Regulations Regarding “Covered Investments”**

- **Types of investments covered:** Non-controlling investments that afford a foreign person certain access, rights, or involvement in certain U.S. businesses (referred to as “covered investments”).
- **Largely a voluntary process:** The process remains largely voluntary, where parties may file a notice or submit a short-form declaration notifying CFIUS of an investment in order to receive a potential “safe harbor” letter (which limits CFIUS from subsequently initiating a review of a transaction except in certain limited circumstances). In some circumstances, filing a declaration for a transaction is mandatory. In particular, the regulations implement FIRRMA’s mandatory declarations for covered transactions where a foreign government is acquiring a “substantial interest” in certain U.S. businesses, as discussed below. Additionally, the regulations require declarations for covered transactions involving certain U.S. businesses that produce, design, test, manufacture, fabricate, or develop one or more critical technologies.
- **U.S. businesses covered:** The new provisions on covered investments apply only to investments in U.S. businesses involved in specified ways with critical technologies, critical infrastructure, or sensitive personal data—referred to as “TID U.S. businesses” for technology, infrastructure, and data.
  - **Critical technologies:** CFIUS may review certain transactions involving U.S. businesses that design, test, manufacture, fabricate, or develop one or more critical technologies. “Critical technologies” is defined to include certain items subject to export controls and other existing regulatory schemes, as well as emerging and foundational technologies controlled pursuant to the Export Control Reform Act of 2018.
  - **Critical infrastructure:** CFIUS may review certain transactions involving U.S. businesses

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that perform specified functions—owning, operating, manufacturing, supplying, or servicing—with respect to critical infrastructure across subsectors such as telecommunications, utilities, energy, and transportation, each as identified in an appendix to the regulations.

- **Sensitive personal data:** CFIUS may review certain transactions involving U.S. businesses that maintain or collect sensitive personal data of U.S. citizens that may be exploited in a manner that threatens national security. “Sensitive personal data” is defined to include ten categories of data maintained or collected by U.S. businesses that (i) target or tailor products or services to certain populations, including U.S. military members and employees of federal agencies with national security responsibilities, (ii) collect or maintain such data on at least one million individuals, or (iii) have a demonstrated business objective to maintain or collect such data on greater than one million individuals and such data is an integrated part of the U.S. business’s primary products or services. The categories of data include types of financial, geolocation, and health data, among others.
- **Foreign person and excepted investor:** The regulations create an exception from covered investments for investments by certain foreign persons defined as “excepted investors” based on their ties to certain countries identified as “excepted foreign states,” and their compliance with certain laws, orders, and regulations. Importantly, investments from all foreign persons remain subject to CFIUS’s jurisdiction over transactions that could result in foreign control of a U.S. business.

## More Information

For complete downloadable copies of related rules, in both PDF and HTML formats, visit the “Resources” section of Foreign Investment Watch at <http://www.foreigninvestmentwatch.com>. There you can find key definitions and terms as they pertain to FIRREA and CFIUS, including:

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|---------------------------|--|
| ▪ Control                 | ▪ Material nonpublic technical information |
| ▪ Covered investment      | ▪ Minimum excepted ownership               |
| ▪ Covered transaction     | ▪ Principal place of business              |
| ▪ Critical infrastructure | ▪ Sensitive personal data                  |
| ▪ Critical technologies   | ▪ Substantive decisionmaking               |
| ▪ Excepted foreign state  | ▪ TID U.S. businesses                      |
| ▪ Foreign person          | ▪ Voting interest                          |

# FOREIGN INVESTMENT WATCH