

October 7, 2019

## CFIUS Modernization

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### Treasury Proposes CFIUS Regulations to Implement Reforms Enacted Under the Foreign Investment Risk Review Modernization Act of 2018

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#### SUMMARY

The U.S. Department of the Treasury has issued proposed regulations to implement CFIUS reforms enacted under the Foreign Investment Risk Review Modernization Act of 2018 (“FIRRMA”).<sup>1</sup> Certain provisions of FIRRMA went into effect immediately upon its adoption in August 2018, but many of the provisions of the legislation require regulations to be prescribed by CFIUS before becoming effective.

The proposed rules, which would implement most of the provisions of FIRRMA that have not already gone into effect,<sup>2</sup> have been issued in two separate proposals, both of which are covered in this memorandum:

- **TID Businesses.** The first set of regulations would replace the existing CFIUS regulations codified at part 800 of title 31 of the Code of Federal Regulations, and among other things would implement the provisions of the FIRRMA legislation pertaining to certain non-control but non-passive investments in critical technology, critical infrastructure and sensitive personal data businesses (so-called “TID” businesses).<sup>3</sup>
- **Real Estate.** The second set of regulations, to be codified at a new part 802 of title 31 of the Code of Federal Regulations, would implement the expansion of CFIUS jurisdiction under FIRRMA to certain real estate transactions.<sup>4</sup>

#### Main Release

The proposed rules flesh out the concepts of non-control but non-passive investments in businesses in the areas of critical technology, critical infrastructure and sensitive personal data that marked one of FIRRMA’s key expansions of CFIUS jurisdiction. Prior to FIRRMA, only control transactions (albeit broadly and flexibly defined) were subject to CFIUS jurisdiction, and FIRRMA expanded CFIUS jurisdiction to encompass non-passive investments in these three areas of sensitivity.

- **Critical technology.** The CFIUS pilot program that has applied since November 10, 2018 to certain non-control investments in “critical technology” companies is not modified by the proposed rule and remains effective for now; however, the Treasury Department’s release notes that CFIUS received substantial comment on the previously released pilot program regulations, is still considering those comments and expects to address those comments in the final rules associated with these proposed rules.
- **Critical infrastructure.** With respect to critical infrastructure, the proposed rules focus on electricity assets that connect to the grid; certain energy midstream assets, including interstate oil and gas pipelines, storage facilities and refineries, in each case of a certain size; all LNG liquefaction and regasification assets; most public water systems; certain financial infrastructure businesses; rail, port and airport assets of a certain size or importance; certain telecommunication assets, including certain fiber assets, all intercontinental submarine cable systems, certain internet assets, certain data centers, certain defense-related satellite systems and some but not clearly all telecommunications services (since there is ambiguity about whether such services are limited to those that directly serve a military installation); certain industrial resources; and certain specialty metals. Non-passive investments in such businesses are proposed to be subject to CFIUS jurisdiction but not to a mandatory filing regime, the same for control transactions.
- **Sensitive personal data.** With respect to sensitive personal data, the proposed rules focus on identifiable data maintained or collected by U.S. businesses in specific circumstances – those that target U.S. executive branch or military personnel or contractors, and those that maintain or aspire to maintain data on more than one million individuals – in 10 categories of data, or, without a requirement of those circumstances or any of the 10 categories, genetic data. As with infrastructure, non-passive investments in such businesses are proposed to be subject to CFIUS jurisdiction but not to a mandatory filing regime, the same for control transactions.
- **Change in rights.** The proposed rules implement coverage of the new “change in rights” category of CFIUS jurisdiction by adding a prong to the definition of “covered transaction,” the term used for non-control but non-passive investment, and by adding a few examples of how the new rule will work.
- **Lending transactions.** The proposed rules also apply the existing rules on lending transactions to non-control but non-passive debt investments. Otherwise the CFIUS approach to debt investments remains the same: for plain vanilla debt investments with control features that do not become effective until a borrower has defaulted or otherwise suffered some credit event or breached a covenant, CFIUS would not want to review such investments until those events occur; but for more complex investments with equity-like or control features that are in effect at inception, it may be possible to make a CFIUS filing at the outset so that a lender whose investment has cleared CFIUS will have the assurance that it can take further steps without the need to get CFIUS approval (subject of course to any limitations that CFIUS clearance may have imposed).
- **Excepted foreign states.** The proposed rules create a special excepted category of non-control but non-passive investments that otherwise would be subject to CFIUS jurisdiction. The proposed rules introduce a regime under which such non-passive but non-control investments by certain investors would be excepted from jurisdiction by virtue of the country where such investors are located. The determination of which foreign states will be on that excepted list will be made on the basis of factors that have not yet been published. Beginning in February 2022, such foreign states will be required to satisfy additional requirements of cooperation with the United States on foreign investment matters. In addition, any investor seeking to take advantage of such exception will need to satisfy a detailed and complex set of conditions in order to do so.

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- **Investment funds.** The proposed rules also apply the private equity clarification that applied to control transactions under FIRRMA to the new non-passive investment regime. The elements of the provision are essentially the same as in the pilot program regulations for control transactions.
- **New mandatory declaration category.** The proposed rules implement a mandatory declaration requirement for any covered transaction, whether non-passive or control transaction, that results in the acquisition by a foreign person of 25 percent or more of a U.S. business when that foreign person is owned 49 percent or more by a foreign government. Mandatory filings triggered by this requirement would have to be made at least 30 days prior to closing, in contrast to the 45-day rule applicable to mandatory filings under the pilot program. Note that transactions entered into by certain investors from excepted foreign states, as described above, would not be covered transactions subject to this mandatory filing requirement. As with the pilot program, the parties have the option of submitting a joint voluntary notice rather than a short-form declaration.
- **Voluntary short-form declaration.** The proposed rules also establish a process for submission of a voluntary short-form declaration as opposed to a full joint voluntary notice, aligning the process with that available for the mandatory declaration process. As with the pilot program, CFIUS will be required to take one of four actions in response to a voluntary declaration: request that the parties file a full notice; inform the parties that CFIUS cannot complete action on the basis of the short-form declaration and that they may file a full notice; initiate a unilateral review of the proposed transaction; or clear the transaction.

### Real Estate Release

The proposed rules set forth in the separate release relating to real estate give effect to FIRRMA's expansion of CFIUS jurisdiction to cover the acquisition of undeveloped or non-commercial real estate – so-called “greenfield” investment. The rules are complex and wholly distinct from the regime applicable to control transactions and non-passive transactions in the TID Businesses, which regime is addressed in the release described above.

- **Scope of CFIUS jurisdiction.** The scope of CFIUS jurisdiction in the proposed rules is focused on the purchase or lease by, or concession to, a foreign person of private or public U.S. real estate that is connected to an air or maritime port or is in close proximity to, or in certain specified cases is within a 100-mile range of, a U.S. military installation or another facility or property of the U.S. Government that is sensitive from a national security point of view.
- **Voluntary filing regime.** The proposed rules do not impose a mandatory filing requirement, but instead confer jurisdiction on CFIUS with respect to investments that fit within the scope described above, subject to certain exceptions. Voluntary filings may be made either as joint voluntary notifications or, as in the case of the other release, voluntary short-form declarations.
- **Exceptions.** Exceptions from jurisdiction exist for real estate within urbanized areas or urban clusters outside the one-mile proximity buffer around a covered military installation, single housing units, certain commercial and retail real estate assets, and certain Native American lands.
- **Lending transactions.** As in the case of other covered transactions outside the real estate area, CFIUS generally would not have jurisdiction to review financings of real estate transactions unless a financing arrangement would constitute a purchase, lease or concession

at the time of extension or unless an imminent or actual default or other condition would result in a significant possibility that the lender may purchase or lease, or be granted a concession to, the real estate being financed.

The Treasury Department's release accompanying the proposed rules advises that, consistent with CFIUS processes generally, the proposed rules reflect extensive consultation with CFIUS member agencies, as well as other relevant agencies. There is a one-month comment period on the proposals, and comments must be received by October 17. The comment period will be the only formal opportunity to provide input on the proposed regulations. The final regulations are expected to be issued in January 2020, and, by statute, the regulations must be effective by February 13, 2020.

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## **MATERIAL CHANGES TO THE PART 800 REGULATIONS**

### **1. Covered Transactions: Implementation of Expanded Jurisdiction Under FIRRMA**

#### **a. Control Transactions**

The proposed regulations maintain the historical core CFIUS jurisdiction over control investments in a U.S. business<sup>5</sup> or, as defined in the regulations, “any transaction [including, without limitation, a transaction carried out through a joint venture] that is proposed or pending after August 23, 1988, by or with any foreign person that could result in foreign control of any U.S. business.” The prevailing functional concept of control investment, defined as “the power, direct or indirect, whether or not exercised, through the ownership of a majority or a dominant minority of the total outstanding voting interest in an entity, board representation, proxy voting, a special share, contractual arrangements, formal or informal arrangements to act in concert, or other means, to determine, direct, or decide important matters affecting an entity,” is not changed by the proposed regulations.<sup>6</sup> As applied, this definition provides CFIUS with an ability to assess control depending upon the facts and circumstances presented by a particular investment. The proposed regulations, however, introduce a new term to define this sort of transaction – the “covered control transaction.”

#### **b. Covered Investment**

The new term “covered control transaction” is employed to provide a contrast between control investments subject to CFIUS jurisdiction and the “covered investment” component of “covered transactions” that are subject to CFIUS jurisdiction after enactment of FIRRMA. Covered investment captures certain non-controlling but also non-passive investments in U.S. companies that deal in critical technology, critical infrastructure and personal data of U.S. citizens, referred to under the proposed regulations as a “TID U.S. business” for “Technology, Infrastructure, and Data.”

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The proposed regulations largely track the definition of “other investment” under FIRRMA to cover any non-controlling investment, direct or indirect and regardless of size, that affords the foreign person (other than an “excepted investor” as described below) any of the following:

- **Material nonpublic technical information.** Access to any material nonpublic technical information<sup>7</sup> in the possession of the TID U.S. business;
- **Board membership.** Membership or observer rights on the board or equivalent governing body of the TID U.S. business or the right to nominate an individual to a position on the board of directors or equivalent governing body of the TID U.S. business; or
- **Decisionmaking.** Any involvement (other than through voting of shares) in substantive decisionmaking<sup>8</sup> of the TID U.S. business regarding
  - the use, development, acquisition, safekeeping or release of sensitive personal data of U.S. citizens maintained or collected by the TID U.S. business;
  - the use, development, acquisition, or release of critical technologies; or
  - the management, operation, manufacture or supply of “covered investment critical infrastructure” (as explained below).

As FIRRMA provided CFIUS with the authority to review any “other investment” in any “unaffiliated” U.S. business, the proposed regulations require that the investment be in an “unaffiliated TID U.S. business” which means, with respect to a foreign person, a TID U.S. business in which that foreign person does not directly hold more than 50 percent of the outstanding voting interest or have the right to appoint more than half of the members of the board of directors or equivalent governing body.

A number of definitions are critical to the implementation of “covered investment” in the proposed regulations.

### i. TID U.S. Business

The term “TID U.S. business” means any U.S. business that

- produces, designs, tests, manufactures, fabricates or develops one or more critical technologies;
- performs the functions as set forth in column 2 of Appendix A to part 800 (set forth in Exhibit A to this memorandum) with respect to covered investment critical infrastructure; or
- maintains or collects, directly or indirectly, sensitive personal data of U.S. citizens.

### ii. Critical Technologies

The proposed regulations adopt the definition of “critical technologies” as set forth in FIRRMA and as used in the pilot program regulations. The term means any of the following:

- **International Traffic in Arms Regulations.** Defense articles or defense services included on the United States Munitions List set forth in the International Traffic in Arms Regulations;

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- **Commerce Control List.** Items included on the Commerce Department's Commerce Control List and controlled pursuant to multilateral regimes, including for reasons relating to national security, chemical and biological weapons proliferation, nuclear nonproliferation or missile technology, or for reasons relating to regional stability or surreptitious listening;
- **Nuclear equipment.** Specially designed and prepared nuclear equipment, parts and components, materials, software and technology covered by part 810 of title 10 of the Code of Federal Regulations (relating to assistance to foreign atomic energy activities);
- **Nuclear facilities.** Nuclear facilities, equipment and material covered by part 110 of title 10 of the Code of Federal Regulations (relating to export and import of nuclear equipment and material);
- **Agents and toxins.** Certain select agents and toxins; and
- **Emerging and foundational technologies.** Emerging and foundational technologies identified pursuant to section 1758 of the Export Control Reform Act of 2018. As to this last prong of the definition, although the Department of Commerce issued its advanced notice of proposed rule-making ("ANPRM") on the subject in November 2018,<sup>9</sup> no emerging technologies have yet been identified. The Commerce Department has not yet released an ANPRM focused on foundational technologies.

As noted above in the Summary, the proposed regulations have not altered the pilot program, which remains effective. Thus, while the proposed rules are pending, the question whether mandatory filings need to be made for transactions involving critical technologies must be assessed under the pilot program, and therefore still depends, in part, on whether the U.S. business's critical technologies are used in connection with the U.S. business's activities in one of the 27 identified pilot program industries or are designed by the U.S. business specifically for use in one of those 27 industries, which are defined by reference to North American Industry Classification System ("NAICS") codes.

### iii. Critical Infrastructure

A definition of, and the national security importance of, the term "critical infrastructure" was formalized as part of the CFIUS process with the enactment of the Foreign Investment and National Security Act of 2007 ("FINSNA"). FIRRMA retained the FINSNA definition of critical infrastructure, that is, "systems and assets, whether physical or virtual, so vital to the United States that the incapacity or destruction of such systems or assets would have a debilitating impact on national security," and the proposed rule revises the definition of the term for purposes of part 800 of the CFIUS regulations to conform to the language in FIRRMA.

FIRRMA, however, required CFIUS, by regulation, to constrain the application of expanded jurisdiction over certain non-control investments to a "subset of critical infrastructure that is likely to be of importance to the national security of the United States" and "enumerate specific types and examples of such critical infrastructure." In other words, for purposes of "control" transactions, the broader definition of "critical infrastructure" applies, but for "covered investment" (i.e., non-controlling but non-passive investments) a narrower definition applies. The proposed regulations limit the definition of "critical infrastructure" for purposes of "covered investment" by adding an appendix specific to covered investment critical

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infrastructure with two components: (1) a column for specific types of critical infrastructure that will be covered, and (2) a column that lists certain functions related to critical infrastructure that must be performed by the U.S. business with regard to that critical infrastructure.<sup>10</sup> The release provides that “Appendix A is integral to the proposed rule and key to determining whether a U.S. business is a TID U.S. business for purposes of critical infrastructure covered investment jurisdiction. Only a U.S. business that performs one of the specified functions listed in Column 2 of [A]ppendix A with respect to the enumerated specific type of covered investment infrastructure listed in Column 1 is a TID U.S. business for purposes of critical infrastructure covered investments.”

The two columns of the appendix operate to constrain the application of CFIUS jurisdiction in the following ways:

- **Column 1 – Systems and Assets.** The proposed regulations include the term “covered investment critical infrastructure,” which means, in the context of a particular covered investment, the systems and assets, whether physical or virtual, set forth in Column 1 of Appendix A to part 800 (Exhibit A to this memorandum). The covered infrastructure is limited to 28 detailed categories in the telecommunications, data, defense, power and energy, financial services, transportation and water utility sectors.
- **Column 2 – Functions.** As noted in the definition of TID U.S. business described above, “covered investment” jurisdiction will apply only in respect of a TID U.S. business that performs covered functions as set forth in Column 2 of Appendix A to part 800 (Exhibit A to this memorandum) with respect to covered investment critical infrastructure. For almost all the enumerated infrastructure categories, covered functions involve owning, operating or manufacturing such infrastructure, as opposed to supplying or servicing the infrastructure (subject to certain exceptions for supplying or servicing submarine cable and related facilities and servicing certain industrial control systems).

**Infrastructure Assets Covered.** The following is a non-exhaustive list of the types of systems and assets that could constitute “covered investment critical infrastructure”:

- **Electricity.** Electricity generation, transmission, distribution or storage systems, in each case connected to the grid or providing service directly to, or located on, any military installation;
- **Refineries.** Refinery with a production capacity (oil or gas products) of 300,000 bpd or more or multiple refineries where aggregate production capacity is 500,000 bpd or more;
- **Crude oil storage.** Crude oil storage facility with capacity to hold 30 million barrels or more;
- **LNG.** LNG import or export terminal;
- **Oil pipelines.** Interstate oil pipeline (and any industrial control system utilized by such pipeline) that has the capacity to transport 500,000 bpd of crude oil or more or 90 million gallons or more per day of refined petroleum product; and oil pipelines that serve the Strategic Petroleum Reserve;

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- **Gas pipelines.** Interstate natural gas pipeline (and any industrial control system utilized by such pipelines) with an outside diameter of 20 or more inches;
- **Water.** Public water system (including infrastructure related to the collection, pretreatment, treatment, storage, and distribution of water for human consumption and any industrial control system utilized by such system) that regularly serves 10,000 or more individuals or directly serves any military installation;
- **Financial market utilities.** Systemically important financial market utility;
- **Securities exchanges.** Securities exchange;
- **Financial technology service providers.** Certain technology service providers providing core bank processing services to financial institutions;
- **Rail.** Rail line or associated connector line that is part of the Department of Defense's Strategic Rail Corridor Network;
- **Airports.** Any "large hub airport" (i.e., any commercial service airport that has at least 1.0% of national passenger boardings), any airport with annual aggregate all-cargo landed weight greater than 1.24 billion pounds, or any joint-use airport (i.e., any airport owned by the Department of Defense, at which both military and civilian aircraft make shared use of the airfield);
- **Ports.** Any top 25 tonnage, container or dry bulk port in the U.S. (determined according to the most recent annual report submitted to Congress by the U.S. Department of Transportation); any port that is part of the National Port Readiness Network; and any terminal within any such port;
- **Telecommunications.** Telecommunications service or information service (the proposing release is ambiguous as to whether this is all telecommunications services or only those that serve any military installation); fiber optic cable that directly serves any military installation;
- **Internet protocol networks.** Internet protocol network that has access to every other internet protocol network solely via settlement-free peering;
- **Internet exchange points.** Internet exchange point that supports public peering;
- **Submarine cable systems.** Submarine cable system (including any associated submarine cables, landing facilities and facilities that perform network management, monitoring, maintenance, or other operational functions for such submarine cable system) that either directly or indirectly connects the U.S. with a foreign country or one part of the U.S. with another part (but not cables that lie entirely (including the terminals) within the continental U.S.);
- **Certain data centers.** Data center collocated at a submarine cable landing point, landing station, or termination station;
- **Certain satellite systems.** Satellite or satellite system providing services directly to the Department of Defense;
- **Certain industrial resources.** Any industrial resource that (i) is not off-the-shelf and is for a major defense acquisition program (\$115 million or more) and that is sole source or strategic multisource or takes more than 12 months to manufacture or has a long lead time, or (ii) is not off-the-shelf and is rated "DX", or (3) has been at least partly funded through a specified defense-related legislation, fund or program; and
- **Specialty metals.** Any specialty metal, covered material, certain chemical weapons antidotes, and certain types of carbon, alloy, and armor steel plates.

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***Infrastructure Assets Not Covered.*** The following is a non-exhaustive list of the types of systems and assets that appear not to constitute “covered investment critical infrastructure.” However, such systems and assets could still be considered critical infrastructure for the purposes of a controlling investment (i.e., a “covered control transaction”), that would therefore be subject to CFIUS jurisdiction. In addition, some of the systems and assets listed below could implicate CFIUS rules with respect to sensitive personal data of U.S. citizens (especially in the case of financial institutions), and therefore non-controlling but non-passive investments in such systems and assets could still be subject to CFIUS jurisdiction. Finally, some of such systems and assets could be subject to CFIUS jurisdiction under the new “covered real estate transaction” category, which is discussed in the second part of his memorandum. Nevertheless, the following appear not to constitute “covered investment critical infrastructure” and therefore a non-passive but non-controlling investment in them would not, subject to the qualifications just described, be subject to CFIUS jurisdiction:

- Local electricity distribution center;
- Electricity generation, transmission, distribution or storage system, in each case not connected to the grid (i.e., not part of the bulk power system) or providing service directly to, or located on, any military installation;
- Refinery with a production capacity (oil or gas products) of less than 300,000 bpd or multiple refineries where aggregate production capacity is less than 500,000 bpd;
- Crude oil storage facility with a capacity of less than 30 million barrels;
- Any intrastate oil pipeline;
- Any interstate oil pipeline that neither (A) has the capacity to transport 500,000 bpd or more of crude oil or 90 million gallons per day or more of refined petroleum product nor (B) serves the Strategic Petroleum Reserve;
- Intrastate natural gas pipeline;
- Interstate natural gas pipeline whose outside diameter is less than 20 inches;
- Mining projects except to the extent captured in the “Certain industrial resources” category in the “Infrastructure Assets Covered” section of this Memorandum above;
- Small-scale public water system (i.e., one that regularly serves fewer than 10,000 individuals) that does not directly serve any military installation;
- Wide range of (but not all) financial services institutions;
- Rail line or associated connector line that is not part of the Department of Defense’s Strategic Rail Corridor Network;
- Subway or other intracity rail transportation;
- Bus transportation;
- Non-major hub airport that is not joint-use;
- Port outside the top 25 tonnage, container and dry bulk ports that is not part of the National Port Readiness Network, or a terminal within such a port;
- Toll road (or any other road);

- Bridges;
- Social infrastructure (healthcare, stadiums, schools, etc.);
- Internet protocol network that does not have access to every other internet protocol network solely via settlement-free peering;
- Fiber optic cable not directly servicing the military;
- Submarine cable, including any terminal, wholly within the continental U.S.;
- Satellite or satellite system not directly servicing the Department of Defense; and
- A wide range of (but not all) industrial resources.

#### iv. Sensitive Personal Data of U.S. Citizens

The proposed rule sets forth a detailed definition for “sensitive personal data.” The release recognizes the potential overbreadth of this jurisdictional expansion, “given that most companies collect some type of data on individuals.” Accordingly, the proposed rule seeks to protect national security while attempting to minimize any chilling effect on beneficial foreign investment by focusing on the sensitivity of the data itself, as well as the sensitivity of the population about whom the data is maintained or collected. The text of the release again specifies that CFIUS anticipates periodically revising the regulations, potentially including revisions to this definition.

Under the proposed rules, “sensitive personal data” will be limited to (i) “identifiable data”<sup>11</sup> that is maintained or collected by a U.S. business in three specific circumstances and that falls within one of 10 categories of data and (ii) genetic information, as defined pursuant to the regulations implementing the Health Insurance Portability and Accountability Act.

- **Three specific circumstances.** The three maintenance or collection circumstances specified in the proposed rule are
  - A U.S. business that “targets or tailors” products or services to any U.S. executive branch agency or military department with intelligence, national security or homeland security responsibilities, or to personnel and contractors thereof;<sup>12</sup>
  - A U.S. business that has maintained or collected “identifiable data” on greater than one million individuals at any point over the preceding 12 months; and
  - A U.S. business that has 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.
- **10 categories of data.** The 10 categories of “sensitive personal data” are as follows:
  1. **Financial distress.** Data that could be used to analyze or determine an individual’s financial distress or hardship;<sup>13</sup>
  2. **Credit scoring.** The set of data in a consumer report, as defined in the Fair Credit Reporting Act, including an individual’s credit score and/or summaries of debts and payment histories, unless such data is obtained from a consumer reporting agency for one or more of the legitimate purposes described in the Fair Credit Reporting Act, and such

data is not substantially similar to the full contents of a consumer file, as defined in the Fair Credit Reporting Act;<sup>14</sup>

3. **Health or life insurance application data.** The set of data in an application for health insurance, long-term care insurance, professional liability insurance, mortgage insurance or life insurance;
4. **Health condition.** Data relating to the physical, mental or psychological health condition of an individual;
5. **Third-party communication.** Non-public electronic communications, including email, messaging or chat communications, between or among users of a U.S. business's products or services, if a primary purpose is to facilitate third-party user communication;<sup>15</sup>
6. **Geolocation data.** Geolocation data collected using positioning systems, cell phone towers, or WiFi access points such as via a mobile application, vehicle GPS, other onboard mapping tool or wearable electronic device;
7. **Biometric data.** Biometric enrollment data, including facial, voice, retina/iris and palm/fingerprint templates;
8. **Government identification.** Data stored and processed for generating a state or federal government identification card;
9. **Security clearance.** Data concerning U.S. Government personnel security clearance status; and
10. **Security clearance application data.** The set of data in an application for a U.S. Government personnel security clearance or an application for employment in a position of public trust.

None of the three specific circumstances requirement, the 10-category requirement, or the “identifiable data” requirement would apply to genetic information.

**Two Exclusions – Employees and Public Records.** The proposed rule also contains an exclusion from the definition of “sensitive personal data” for two categories of data, notwithstanding the applicability of the criteria described above. The exclusions apply to data maintained or collected by a U.S. business concerning its employees (unless the data pertains to employees of U.S. Government contractors who hold U.S. Government personnel security clearances) and to data that is a matter of public record, such as court records or other government records that are generally available to the public.

#### **c. Certain Transactions by Foreign Persons Involving Real Estate in the United States**

In addition to “covered investment” transactions, FIRRMA also expanded and clarified CFIUS jurisdiction by explicitly adding as a covered transaction the purchase or lease by, or concession to, a foreign person of certain real estate in the United States that occurs outside the context of an acquisition of control of a U.S. business. The Treasury Department proposed a separate set of rules to address covered real estate transactions. The proposed rules relating to real estate transactions do not operate in a vacuum; they reflect the general framework provided for control transactions and covered investment, and thus they offer

a consistent and familiar approach. At the same time, the proposed rules for real estate transactions have a variety of unique features, which are addressed in greater detail in the second part of this memorandum.

### **d. Certain Changes in a Foreign Person's Rights with Respect to its Investment in a U.S. Business**

FIRREA clarified that CFIUS jurisdiction extends to any change in the rights that a foreign person has with respect to a U.S. business in which the foreign person has an investment, if that change could result in foreign control of the U.S. business or a covered investment. The proposed rule implements coverage of these “change in rights” transactions by adding a prong to the definition of “covered transaction” and by adding a few examples to help illustrate how this prong applies. In one example, the proposed rule specifies that the transaction would be a covered control investment where a foreign person that holds a 10 percent ownership interest in a U.S. business later receives the right to appoint the Chief Executive Officer and the Chief Technical Officer of the U.S. business.<sup>16</sup> In another example, the proposed rule specifies that where a foreign person who holds a four percent non-controlling ownership interest in an unaffiliated TID U.S. business, without any access, rights or involvement (other than the voting associated with its interest), subsequently gains the right to appoint a member of the board of directors of the unaffiliated TID U.S. business, the change in rights would constitute a transaction that is a covered investment.

### **e. Treatment of Lending Transactions**

With respect to lending transactions, the proposed rules expand CFIUS jurisdiction to “covered investments” — the non-controlling but also non-passive investments in TID U.S. Businesses described above — but otherwise do not change the existing treatment of lending transactions. Thus, lending transactions generally will not be “covered transactions,” even if the lender is provided with a security interest in the securities or other assets of the U.S. business, except where the foreign person acquires economic or governance rights in the U.S. business “characteristic of an equity investment, but not of a typical loan.” The proposed rules also retain the provision of the existing rules that CFIUS will accept notices or declarations concerning a loan or a similar financing arrangement that does not, by itself, constitute a covered transaction only at the time that, because of imminent or actual default or other condition, there is a significant possibility that the foreign person may obtain control of a U.S. business, or acquire equity interest and access to, rights over or other covered involvement in a TID U.S. business, as a result of the default or other condition.

With respect to a debt instrument convertible into equity, the proposed rule would, consistent with existing rules, provide CFIUS with flexibility to assess whether the transaction would be subject to CFIUS review at acquisition, as opposed to only upon the conversion of the instrument, based on a series of factors including the imminence of conversion and whether conversion is within the control of the acquiring party.

## 2. Excepted Investors from Excepted Foreign States

FIRRMA included a requirement for CFIUS to specify criteria that would limit the application of FIRRMA's expanded jurisdiction over "other investments" to certain categories of foreign persons. The proposing release explains that the proposed rule implements this statutory requirement as applied to "covered investment" (i.e., non-controlling but non-passive investment) by excepting certain foreign persons from the provisions relating to covered investments if the foreign persons meet specified criteria set forth primarily in three new defined terms: first, "excepted investor," which in turn uses the terms "excepted foreign state," and finally "minimum excepted ownership." Together, these three terms operate to exclude from CFIUS's jurisdiction covered investments by certain foreign persons who meet certain criteria establishing sufficiently close ties to certain foreign states. If an investor qualifies as an "excepted investor," it will not be subject to the expansion of CFIUS jurisdiction to investment in an unaffiliated TID U.S. businesses.

### a. Excepted Foreign States

The starting point for eligibility for the exception to CFIUS jurisdiction is connection to an "excepted foreign state." The proposed rule provides that the definition of that term will operate as a two-factor conjunctive test. First, the foreign state will have to be identified by the Chairperson of CFIUS (i.e., the Secretary of the Treasury), with the agreement of two-thirds of the voting members of CFIUS. This group of eligible foreign states will be published on the Department of the Treasury's website. *No such foreign states have been identified at this time.* The proposing release provides that, because "this is a new concept with potentially significant implications for the national security of the United States, CFIUS initially intends to designate a limited number of eligible foreign states," but "CFIUS plans to review this group in the future and potentially expand the number of eligible foreign states."

The second part of the two-factor test will be delayed in implementation for two years after the rules are finalized, and thus is not expected to be effective until February 2022.<sup>17</sup> The proposing release provides that, "in furtherance of CFIUS's efforts to encourage partner countries to implement robust processes to review foreign investment in their countries and to increase cooperation with the United States," the Secretary of the Treasury, with the agreement of two-thirds of the voting members of CFIUS, will also make a determination for each eligible foreign state as to whether such foreign state "has established and is effectively utilizing a robust process to assess foreign investments for national security risks and to facilitate coordination with the United States on matters relating to investment security." This determination will be made pursuant to a new Section 1001(a) of the proposed regulations,<sup>18</sup> and the proposing release explains that, in making these determinations, CFIUS will consider factors that will be made available to the public on the Department of the Treasury's website. *The factors that CFIUS will consider are not yet available.* The name of each foreign state so identified as an excepted foreign state will be published in a notice in

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the Federal Register and incorporated into a CFIUS list of excepted foreign states, which will be made available on the Department of the Treasury website.

### b. Excepted Investor

The release explains that the proposed rule sets forth “a narrow definition of excepted investor in the interest of protecting national security, in light of increasingly complex ownership structures, and to prevent foreign persons from circumventing CFIUS’s jurisdiction.”

Indeed, the definition is detailed and complex, and a significant number of criteria must be met in order to qualify. As defined in the proposed rules, an excepted investor is:

- a **foreign national** who is a national of an “excepted foreign state” and not also a national of any foreign state that is not an excepted foreign state;
- a **foreign government** of an excepted foreign state; or
- a **foreign entity** that meets each of a series of conditions *with respect to itself and each of its parents (if any)* designed to confirm that the investor is sufficiently tied to an excepted foreign state and not to any foreign state that is not an excepted foreign state. The conditions applicable to the assessment of a foreign entity’s eligibility are listed below.
  - (1) **Jurisdiction of organization.** The entity must be organized under the laws of an excepted foreign state or in the United States.
  - (2) **Principal place of business.** The entity must have its principal place of business in an excepted foreign state or the United States.
  - (3) **Board.** Each member of the entity’s board of directors (including board observers) or similar body must be a U.S. national, or if not a U.S. national, must be a national of an excepted foreign state and not also a national of any foreign state that is not an excepted foreign state;
  - (4) **Equity ownership.** Any foreign person that individually, or each foreign person that is part of a group of foreign persons that, in the aggregate, (A) holds five percent or more of the outstanding voting interest of the entity, (B) holds the right to five percent or more of the profits of the entity, (C) holds the right in the event of dissolution to five percent or more of the assets of such entity or (D) could exercise control over such entity, must be (i) a foreign national who is a national of an excepted foreign state and not also a national of a foreign state that is not an excepted foreign state, (ii) a foreign government of an excepted foreign state or (iii) a foreign entity that is organized under the laws of an excepted foreign state and has its principal place of business in an excepted foreign state or the United States.<sup>19</sup>
  - (5) **Minimum excepted ownership.** The “minimum excepted ownership”<sup>20</sup> of the entity must be held, individually or in the aggregate, by one or more persons each of whom is (A) not a foreign person, (B) a foreign national who is a national of an excepted foreign state and not also a national of a foreign state that is not an excepted foreign state, (C) a foreign government of an excepted foreign state or (D) a foreign entity that is organized under the laws of an excepted foreign state and has its principal place of business in an excepted foreign state or in the United States.

**Exceptions.** A foreign person that meets all the criteria described above is nevertheless not an excepted investor if it or any of its parents or subsidiaries in the five years prior to the completion date of the transaction:

- Has received written notice from CFIUS that it has (A) submitted a material misstatement or made a material omission in a notice or declaration to CFIUS, (B) made a false certification to CFIUS in connection with a transaction review or (C) violated a material provision of a mitigation agreement entered into with, material condition imposed by, or an order issued by, the Committee or a lead CFIUS agency;
- Has been subject to action by the President under Section 721(d) of the Defense Production Act, which provides the President with authority to take such action for such time as the President considers appropriate to suspend or prohibit any covered transaction that threatens to impair the national security of the United States; or
- Has been convicted of a crime under, or has entered into a deferred prosecution agreement or nonprosecution agreement with the Department of Justice with respect to a violation of, any felony crime in any jurisdiction within the United States, or has been involved in any of a series of specified violations of U.S. laws that relate to national security matters.<sup>21</sup>

In addition, a foreign person will not be an excepted investor if it or any of its parents or subsidiaries is, on the date on which the parties to the transaction first execute a binding written agreement, or other binding document, establishing the material terms of the transaction, listed on either the Department of Commerce's Bureau of Industry and Security (BIS) Unverified List or Entity List.<sup>22</sup>

The proposed rule also has a provision regarding changes in status following the completion of a transaction. If, at any time during the three-year period following the completion date, the foreign person no longer meets all the criteria applicable to a foreign national, a foreign government or a foreign entity (excluding the five percent tests and the minimum excepted ownership tests), then the foreign person is not an excepted investor with respect to the transaction from the completion date onward, unless the excepted investor no longer meets any of the relevant criteria solely because a particular foreign state ceases to be an excepted foreign state.

### **3. Treatment of Investment Funds for Purposes of Indirect Covered Investment**

As described above, "covered investment" can include indirect investment by foreign persons, including through limited partnership and similar interests in investment funds. However, FIRREA included a "special clarification" for indirect investment through an investment fund where a foreign person is afforded membership as a limited partner or equivalent on an advisory board or a committee of the fund. The proposed regulations address investment funds in the context of "covered investment" in an unaffiliated TID U.S. business. If the conditions of the exception are met, the foreign person's service on the board or committee does not in and of itself render the foreign person's indirect investment in an unaffiliated TID U.S. business a covered investment.

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The elements of the provision for purposes of the proposed regulations are essentially the same as in the pilot program regulations. Limited partners on an advisory board or a committee of a fund qualify for the exception only if (i) the fund is managed exclusively by a general partner that is not the foreign person; (ii) the advisory board or committee on which the foreign person serves does not have the ability to control investment decisions of the fund or decisions made by the general partner related to entities in which the fund is invested; (iii) the foreign person does not otherwise have the ability to control the fund, including the authority to approve, disapprove, or otherwise control investment decisions of the investment fund and decisions made by the general partner and (iv) the foreign person does not have the power to unilaterally dismiss, prevent the dismissal of, select or determine the compensation of the general partner. In addition, the foreign person cannot have access to material nonpublic technical information as a result of its participation on the advisory board or committee, and the investment may not afford the foreign person access to material nonpublic information, membership or observer rights or involvement (other than through voting of shares) in certain substantive decisionmaking of the TID U.S. business. Also like the pilot program regulations, the proposed rule recognizes certain decisions that an advisory board or committee can undertake that do not constitute impermissible control of such decisions, such as waivers of potential conflicts of interest and allocation limitations and similar activities. And, as in the pilot program regulations, CFIUS does retain for itself discretion on these matters, indicating that it could find such activities to constitute control in “extraordinary circumstances.”

#### **4. Process Revisions: Mandatory Filings and the Implementation of Declarations**

##### **a. Mandatory Declarations – TID U.S. Businesses**

The proposed rules implement the FIRRMA requirement for a mandatory declaration for any covered transaction (whether a control investment, a covered investment or otherwise) that results in the acquisition of a “substantial interest” in a TID U.S. business by a foreign person in which a foreign government has a substantial interest.

The proposed rule defines “substantial interest” to mean a voting interest, direct or indirect, of 25 percent or more by a foreign person in a U.S. business, and a voting interest, direct or indirect, of 49 percent or more by a foreign government in a foreign person. The proposed rule further provides that, for any entity organized as a limited partnership, a foreign government will be considered to have a substantial interest if it holds more than 49 percent of the voting interest in the general partner or 49 percent or more of the “voting interest” of the limited partners. The term “voting interest” is defined to mean “any interest in any entity that entitles the owner or holder of that interest to vote for the election of directors of the entity (or, with respect to unincorporated entities, individuals exercising similar functions) or to vote on other matters affecting the entity.”

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The proposed rule includes a special provision for investment by investment funds. A mandatory declaration is not required with respect to an investment by an investment fund if:

- the fund is managed exclusively by a general partner, a managing member or an equivalent that in each case is not a foreign person; and
- the investment fund satisfies, with respect to any foreign person with membership as a limited partner on an advisory board or a committee of the fund, the criteria specified in the “special clarification” for indirect investment through a fund:
  - the foreign person may not have the ability to control investment decisions of the fund or decisions made by the general partner related to entities in which the fund is invested;
  - the foreign person may not otherwise have the ability to control the fund, including the authority to approve, disapprove or otherwise control investment decisions of the investment fund and decisions made by the general partner; and
  - the foreign person cannot have the power to unilaterally dismiss, prevent the dismissal of, select or determine the compensation of the general partner.

Mandatory filings triggered as a result of foreign government ownership would be required to be filed no later than 30 days before completion of the transaction (as compared to mandatory filings under the pilot program, which must be submitted no later than 45 days prior to the completion date of the transaction). Any person who fails to submit a mandatory declaration may be liable for a civil penalty of up to \$250,000 per violation or the value of the transaction, whichever is greater. The proposed rule further states that the amount of the penalty imposed for a violation will be based on the nature of the violation. As with the pilot program, the parties have the option of submitting a written notice of transaction rather than a declaration.

### **b. Voluntary Declarations**

The proposed rule establishes the process for submission of a voluntary declaration (as opposed to a full-form notice of transaction). The proposed rule aligns the voluntary declaration process with the mandatory declaration process. The proposing release provides that, in order to “facilitate the submission of declarations under the proposed rule, CFIUS intends to maintain a standard fillable form, making certain modifications to the form for use with respect to different types of transactions. Parties will be able to use the form to submit voluntary and mandatory declarations to the Committee.”

Consistent with the pilot program, upon completion of its review of a declaration, CFIUS must take one of four actions:

- request that the parties file a regular notice of transaction;
- inform the parties that CFIUS cannot complete action on the basis of the declaration and that they may file a regular notice of transaction to seek written notification from CFIUS that it has concluded all action with respect to the transaction;
- initiate a unilateral review of the transaction; or

- notify the parties that CFIUS has concluded all action under Section 721 of the Defense Production Act with respect to the transaction.

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## MATERIAL REGULATIONS RELATING TO REAL ESTATE TRANSACTIONS

Prior to FIRRMA, CFIUS could review an acquisition of real estate only if it was part of a transaction that could result in control by a foreign person of an entity engaged in interstate commerce in the United States. Transactions in which a foreign person acquired undeveloped or non-commercial real estate – so-called “greenfield” investments – were not subject to CFIUS review. FIRRMA expanded CFIUS’s jurisdiction to include certain types of real estate transactions involving the purchase or lease by, or a concession to, a foreign person of certain private or public real estate located in the United States.<sup>23</sup>

Rather than integrate the new real estate transactions provisions into the principal set of CFIUS rules, the Treasury Department’s rulemaking proposals bifurcate the process and, as proposed, a separate set of regulations will implement CFIUS jurisdiction over real estate transactions. This is because the Department of the Treasury determined that the technical and procedural aspects of CFIUS’s review of transactions involving real estate are sufficiently distinct from those related to control transactions and covered investments to warrant separate rulemaking.

The proposed regulations for real estate transactions are complex, but much of the complexity exists because not every real estate investment will be subject to CFIUS jurisdiction. Only what the proposed rules define as “covered real estate transactions” will be subject to review. In addition, key elements of the proposed rules described in the first part of this memorandum, for control transactions and covered investment, are utilized in the real estate transactions proposal, including an exception for excepted real estate investors with ties to an “excepted real estate foreign state” (a group of states to be identified using the same criteria as those used to identify “excepted foreign states” in the proposed Part 800 regulations described above). As proposed, no covered real estate transaction will be subject to mandatory filing; this means that parties to a covered real estate transaction may decide whether to voluntarily file a notice or submit a declaration to CFIUS.

A summary of the key provisions of the proposed rule follows.

### 1. Covered Real Estate

FIRRMA focused on two general categories of real estate: (1) real estate identified by its relation to airports and maritime ports and (2) real estate identified by its “close proximity” to U.S. military installations and other facilities or properties of the U.S. Government that are sensitive for national security reasons. Specifically, FIRRMA authorizes CFIUS review of the purchase<sup>24</sup> or lease<sup>25</sup> by a foreign person of, or a concession<sup>26</sup> offered to a foreign person with respect to, private or public real estate located in the United States that

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- (i) is located within, or will function as part of, an air or maritime port, or
- (ii) is in “close proximity” to a U.S. military installation or another facility or property of the United States Government that is
  - a. sensitive for reasons relating to national security;
  - b. could reasonably provide the foreign person the ability to collect intelligence on activities being conducted at such an installation, facility or property; or
  - c. could otherwise expose national security activities at such an installation, facility or property to the risk of foreign surveillance.

Real estate transactions involving the purchase, lease or concession of a single “housing unit” or real estate in “urbanized areas” are excepted, subject to regulations that CFIUS may adopt in consultation with the Department of Defense. FIRRMA further provides that CFIUS regulations are to ensure that the term “close proximity” refers only to a distance or distances within which the purchase, lease or concession of real estate could pose a national security risk in connection with the U.S. military installation or another facility or property of the U.S. Government, and FIRRMA authorizes CFIUS to add other criteria (but not to expand the categories of real estate to which this provision applies).

The proposed rule structures CFIUS’s real estate jurisdiction around the two general categories of real estate identified in FIRRMA – certain airports, maritime ports, military installations, and other facilities or properties of the U.S. Government – and specific areas in or around those sites.

The implementation of the first general category is relatively simple – “covered real estate” includes “real estate that is, is located within, or will function as part of, an airport or maritime port.” Airport and maritime port are defined as follows:

- ***Airports covered.*** The term “airport” means: (a) The following, in each case based on the most recent annual data reported by the Federal Aviation Administration from the Air Carrier Activity Information System: (1) Any “large hub airport,” as that term is defined in 49 U.S.C. 40102; or (2) Any airport with annual aggregate all-cargo landed weight greater than 1.24 billion pounds; or (b) Any “joint use airport,” as that term is defined in 49 U.S.C. 47175. The proposing release indicates that the definition captures “a subset of airports in the United States, specifically the major passenger and cargo airports in the United States based on volume, as well as ‘joint use airports’ where both military and civilian aircraft make shared use of the military airfield.”
- ***Maritime ports covered.*** The term “maritime port” means any: (a) Strategic seaport within the National Port Readiness Network, as identified by the Department of Transportation Maritime Administration; or (b) Top 25 tonnage, container, or dry bulk port according to the most recent annual report submitted to Congress by the U.S. Department of Transportation, Bureau of Transportation Statistics pursuant to 49 U.S.C. 6314. The proposing release explains that this

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definition is designed to capture a subset of maritime ports in the United States – “the top 25 tonnage, container, and dry bulk ports as well as strategic seaports.”

***Proximate real estate.*** Implementation of the second category, real estate identified by its proximity to sensitive U.S. military installations and other U.S. Government facilities or properties, is far more complex. As noted above, FIRRMA does not define what constitutes “close proximity,” instead tasking CFIUS with giving meaning to the term in this context through the regulations, but at the same time charging CFIUS, when developing regulations, to ensure that the term refers only to a distance or distances within which the purchase, lease or concession of real estate could pose a national security risk. In addressing this charge, CFIUS has proposed to identify in the regulations specific military installations and other U.S. facilities and property, together with proximity ranges, as the basis for CFIUS jurisdiction.

In essence, as described in greater detail below and subject to certain exceptions, CFIUS creates two different categories of military installations, one category of which (the “close proximity” category) has a one-mile buffer around it and the other of which (the “extended range” category) has a 100-mile buffer around it. Subject to certain exceptions, any real estate purchase, lease or concession within those ranges is a covered real estate transaction subject to review by CFIUS and possibly meriting a voluntary filing of a notice or submission of a declaration.

As detailed below, exceptions exist for (i) real estate within urbanized areas or urban clusters outside the one-mile close proximity buffer around a covered military installation, (ii) single housing units, (iii) certain commercial and retail real estate assets and (iv) certain Native American lands.

There are four components of the proximity concept.

***Location near or within military installation.*** First, “covered real estate” means real estate that is located within:

- (1) Close proximity of any military installation described in paragraphs (b) to (o) of the definition of “military installation” set forth in Exhibit B to this memorandum, or another facility or property of the U.S. Government, in each case as identified in the list in part 1 or part 2 of Exhibit C to this memorandum;
- (2) The extended range of any military installation described in paragraph (h), (k) or (m) of the definition of “military installation” set forth in Exhibit B to this memorandum, as identified in the list in part 2 of Exhibit C to this memorandum (i.e., U.S. Army combat training centers in the continental United States; certain major range and test facility base activities; certain U.S. Navy or Air Force military ranges; and joint forces training centers located in specified states);

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- (3) Any county or other geographic area identified in connection with any active Air Force ballistic missile field, as identified in the list in part 3 of Exhibit C to this memorandum; or
- (4) Any part of a U.S. Navy offshore range complex or offshore operating area that is identified in the list in part 4 of Exhibit C to this memorandum, provided that part is located within 12 nautical miles seaward of the coastline of the United States.

**Categories of military installations.** In order to understand and apply this first component of the definition, several other defined terms and concepts need to be explained. First and foremost is the definition of “military installation,” which is cross-referenced in each one of the prongs and is reproduced as Exhibit B to this memorandum.

**List of military installations.** The second element of the definition is a specific list of military installations in the United States, by name and location, attached as an appendix to the proposing release and attached as Exhibit C to this memorandum. The proposing release explains that the list of specific sites is being provided in order “to assist the public in identifying the specific sites that meet the definition of ‘military installation.’” While the structure of the proposed rule provides for coverage around other facilities or properties of the U.S. Government that are sensitive for national security reasons, no such facilities or properties are identified at this time in the appendix to the proposed rule – only military installations are covered. The proposing release also notes that the Department of the Treasury is considering whether to move the appendix to its website.

**Close proximity.** The third element of the definition is “close proximity.” The term “close proximity” means, with respect to a military installation or another facility or property of the U.S. Government, “the area that extends outward one mile from the boundary of such military installation, facility, or property.”

**Extended range.** The fourth element of the definition is “extended range,” which means, with respect to any military installation identified in paragraph (h), (k) or (m) of the definition of “military installation,” reproduced as Exhibit B to this memorandum, the area that extends 99 miles outward from the outer boundary of close proximity to such military installation, but, where applicable, no more than 12 nautical miles seaward of the coastline of the United States. As noted in the Exhibit, this includes U.S. Army combat training centers in the continental United States; certain major range and test facility base activities; certain U.S. Navy or Air Force military ranges; and joint forces training centers located in specified states.

**Property Rights Needed for a Covered Real Estate Transaction.** In order for a transaction to be a “covered real estate transaction,” the transaction must result in a foreign person acquiring three or more property rights, which is defined as any of the following rights or abilities, whether or not exercised, whether or not shared concurrently with any other person, and whether or not the underlying real estate is subject to an easement or other encumbrance

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- To physically access the real estate
- To exclude others from physical access to the real estate
- To improve or develop the real estate
- To attach fixed or immovable structures or objects to the real estate

A transaction also could be covered even if it does not involve three or more of these property rights if it is structured to evade or circumvent the application of CFIUS review as it relates to real estate.

***Excepted Real Estate Transactions.*** There are several categories of real estate transactions that, despite pertaining to real estate that otherwise meets the criteria above, will not be subject to CFIUS review. These include:

- ***Investment by “excepted real estate investors.”*** As in the Part 800 proposed regulations, the real estate transactions regulations also contain an exception for investment by “excepted real estate investors” with sufficient ties to an “excepted real estate foreign state.”
- ***Certain urban areas.*** Transactions involving real estate in an “urbanized area”<sup>27</sup> or an “urban cluster,”<sup>28</sup> as those areas are identified by the U.S. Census Bureau in the most recent U.S. Census, will not be subject to CFIUS review unless the real estate is in “close proximity” to a military installation or another sensitive facility or property identified in part 1 or 2 of the Appendix (i.e., is within one mile of the perimeter) or is within or will function as a part of a covered airport or maritime port. As stated in notes to the definitions of “urbanized area” and “urban cluster,” the Census Bureau maintains an interactive map on its website allowing the user to filter by various criteria, including urban clusters and urbanized areas according to the most recent U.S. Census.
- ***Single housing units.*** Transactions involving real estate that is used for a single “housing unit,” as defined by the Census Bureau, as well as any fixtures and adjacent land that is incidental to the intended use of the real estate as a housing unit, will not be subject to CFIUS review.
- ***Retail trade, accommodation or food service.*** Where airport or maritime port leases and concessions are the subject of a real estate transaction but the terms of such leases or concessions permit only retail trade, accommodation or food service sector establishment, the transactions will not be subject to CFIUS review.
- ***Commercial office space.*** The purchase or lease by, or concession to, a foreign person of commercial office space within a multi-unit commercial office building will not be subject to CFIUS review so long as, at the completion of the transaction, the foreign person and its affiliates will neither (i) hold, lease or have a concession with respect to more than 10 percent of the total square footage of the commercial office space of such building nor (ii) represent more than 10 percent of the total number of tenants in the building (with the foreign person and each of its affiliates counted separately).
- ***American Indian and Alaska Native lands.*** Transactions involving real estate that is owned by certain Alaska Native entities or held in trust by the United States for American Indians, Indian tribes, Alaska Natives or Alaska Native entities will not be subject to CFIUS review.

***Selected Illustrative Examples.*** The proposed regulations include 10 examples to help illustrate the applications of the real estate transactions rules. For example:

- *Example 6.* A foreign person purchases real estate. The nearest military installation is one that is identified in part 2 of Appendix A to this part and is 40 miles away (i.e., in the extended range) from the real estate. The real estate is located in a statistical geographic area with a population of 125,000 individuals. Assuming no other relevant facts, the real estate purchase is not a covered real estate transaction because the real estate is located in an urbanized area.
- *Example 8.* A foreign person purchases real estate that is 0.25 miles from a military installation identified in part 1 of Appendix A to this part. The real estate is located in an urbanized area. Assuming no other relevant facts, the real estate transaction is a covered real estate transaction because it is in close proximity to a military installation listed in part 1 of Appendix A to this part.

The examples provided of course do not answer every possible question about potential application of the real estate transactions rules, but they do provide helpful illustrations about the application of the rules as applied to certain particular fact patterns.

## 2. Treatment of Lending Transactions

Under the proposed rule, CFIUS would generally not have jurisdiction to review the extension of a mortgage, loan or similar financing arrangement for the purpose of the purchase, lease or concession of covered real estate unless the financing arrangement would constitute a purchase, lease or concession as defined in the proposed rule. Unless a financing arrangement would constitute a purchase, lease or concession at the time of its extension, CFIUS will accept notices or declarations concerning financing arrangements only at the time that, because of imminent or actual default or other condition, there is a significant possibility that lender may purchase or lease, or be granted a concession to, the real estate as a result of the default or other condition in a manner that would constitute a covered real estate transaction under the rule. The release accompanying the proposed rule states that, in determining whether such a purchase, lease or concession has occurred, CFIUS will look to, among other things, whether the lender has obtained the property rights described above.

\* \* \*

ENDNOTES

- <sup>1</sup> For additional information regarding FIRRMA, please see our Memorandum to Clients entitled *FIRRMA Significantly Expands CFIUS Jurisdiction and Makes Certain Transactions Subject to Mandatory Declarations; Significant Details to Follow in Forthcoming Regulations* (Aug. 7, 2018), available at <https://www.sullcrom.com/cfius-reformthe-foreign-investment-risk-review-modernization-act-of-2018>.
- <sup>2</sup> On October 11, 2018, the Office of Investment Security and the Treasury Department adopted an interim rule implementing certain elements of FIRRMA. Determination and Temporary Provisions Pertaining to a Pilot Program To Review Certain Transactions Involving Foreign Persons and Critical Technologies, 83 FR 51322, available at <https://www.federalregister.gov/documents/2018/10/11/2018-22182/determination-and-temporary-provisions-pertaining-to-a-pilot-program-to-review-certain-transactions>. For additional information regarding the interim rule, see our Memorandum to Clients entitled *New Pilot Program Pursuant to Foreign Investment Risk Review Modernization Act of 2018 (FIRRMA) Will Require Filings With CFIUS for Controlling or Non-controlling Investments in Specified Critical Technologies Companies* (Oct. 18, 2018), available at <https://www.sullcrom.com/mandatory-cfius-filings-for-critical-technology-investments> (hereinafter “FIRRMA Memo”).

The currently proposed regulations are intended to fully implement the provisions of FIRRMA, with the exception of (1) CFIUS’s authority to impose filing fees and (2) CFIUS’s authority to mandate declarations for certain non-control investments involving critical technologies. The former will be the subject of a future rulemaking and the latter is the subject of a separate rulemaking.
- <sup>3</sup> Provisions Pertaining to Certain Investments in the United States by Foreign Persons, 84 FR 50174, available at <https://www.federalregister.gov/documents/2019/09/24/2019-20099/provisions-pertaining-to-certain-investments-in-the-united-states-by-foreign-persons>. Due to the number of changes needed to fully implement FIRRMA, the new part 800 is being restated in full, many of the substantive provisions of the existing part 800 are not being materially modified.
- <sup>4</sup> Provisions Pertaining to Certain Transactions by Foreign Persons Involving Real Estate in the United States, 84 FR 50214, available at <https://www.federalregister.gov/documents/2019/09/24/2019-20100/provisions-pertaining-to-certain-transactions-by-foreign-persons-involving-real-estate-in-the-united>.
- <sup>5</sup> As noted in our FIRRMA Memo described in Endnote 1, FIRRMA changed the definition of “U.S. business” to mean “a person engaged in interstate commerce in the United States.” In contrast, the definition in the existing CFIUS regulations includes a limiting clause “but only to the extent of its activities in interstate commerce.” Without this limiting clause from the existing CFIUS regulations, FIRRMA on its face appeared to create the potential to grant CFIUS jurisdiction to review elements of a transaction affecting an entity that provides goods or services in the United States without limiting that review to the entity’s U.S.-based activities, which could give CFIUS oversight over transactions with much less of a U.S. nexus than is the case under the existing regulations. The proposed rule simply incorporates the FIRRMA definition of “U.S. business” without providing additional clarity as to whether or how the practical scope of the revised definition will differ from the existing definition.
- <sup>6</sup> The existing definition of control includes a non-exclusive list of “important matters” affecting an entity; the proposed regulations would add two specific matters to this non-exclusive list – the appointment or dismissal of the general partner in a partnership, and the appointment or dismissal of employees with access to critical technology.
- <sup>7</sup> The proposed rule defines “material nonpublic technical information” in a manner similar to the definition used in the pilot program, with material enhancements. Like the pilot program definition, material nonpublic technical information means “information that is not available in the public domain, and is necessary to design, fabricate, develop, test, produce or manufacture a critical technology, including, without limitation, processes, techniques, or methods” (the proposed rule adds “without limitation” to the definition, but otherwise mirrors the pilot program definition). In addition, under the proposed rule,

## ENDNOTES (CONTINUED)

material nonpublic technical information also includes information that “provides knowledge, know-how, or understanding not available in the public domain, of the design, location, or operation of critical infrastructure, including, without limitation, vulnerability information such as that related to physical security or cybersecurity.” The proposed definition of “material nonpublic technical information” does not contain an added prong for specific application to a U.S. business that collects or maintains sensitive personal data. As with FIRRMA and the pilot program, the definition of “material nonpublic technical information” excludes financial information regarding the performance of an entity.

- <sup>8</sup> The proposed rule defines “substantive decisionmaking” as “the process through which decisions regarding significant matters affecting an entity are undertaken,” and provides a non-exclusive list of decisionmaking areas that would be captured, which cover a wide range of strategic and operational decisions of the U.S. business, including decisions related to pricing and sales; licensing or other transfer of sensitive personal data; supply arrangements; corporate strategy and business development; research and development, including location and budget allocations; manufacturing locations; access by customers, vendors or joint venture partners to critical technologies, covered investment critical infrastructure, material nonpublic technical information or sensitive personal data; physical and cyber security protocols; practices, policies, and procedures governing the collection, use and storage of sensitive personal data; and strategic partnerships. As proposed, strictly administrative decisions are not included.
- <sup>9</sup> 83 FR 58201.
- <sup>10</sup> As noted in Treasury’s release, FIRRMA specifically provides that any definition of “critical infrastructure” established under any provision of law other than the CFIUS authorities is not determinative for the purposes of CFIUS authorities, and the release further clarified that the subset of critical infrastructure identified in Appendix A is not intended to alter the definition of “critical infrastructure” as used in any other regulatory regime or context. The release further notes that “the Department of the Treasury anticipates periodically revising the regulations, potentially including revisions” to the list set forth in Appendix A.
- <sup>11</sup> The proposed rules define “identifiable data” as “data that can be used to distinguish or trace an individual’s identity, including, without limitation, through the use of any ‘personal identifier,’” which in turn means “name, physical address, email address, social security number, phone number or other information that identifies a specific individual.” “Identifiable data” does not include “aggregated data” (data that has been combined or collected in such a way that it cannot be used to identify an individual), “anonymized data” (data from which all personal identifiers have been completely removed) or “encrypted data” (data to which National Institute of Standards and Technology-allowed cryptographic techniques have been applied). However, aggregated data or anonymized data will constitute “identifiable data” if any party to the transaction has, or as a result of the transaction will have, the ability to disaggregate or de-anonymize the data, or if the data is otherwise capable of being used to distinguish or trace an individual’s identity, and encrypted data will be deemed “identifiable data” if the U.S. business has the means to de-encrypt the data so as to distinguish or trace an individual’s identity.
- <sup>12</sup> The term “targets or tailors” is defined as “customizing products or services for use by a person or group of persons or actively marketing to or soliciting a person or group of persons.” The proposed regulations also provide several examples to illustrate the meaning of the term as applied to particular facts. For example, pursuant to those examples, a U.S. business that operates facilities throughout the United States that offer healthcare-related products and services which has some facilities within metropolitan areas that also include U.S. military facilities will not be targeting or tailoring its products and services, absent additional relevant facts; however, if that U.S. business operates a facility on the premises of a U.S. military base, it will be deemed to be targeting or tailoring its products or services. Another set of examples illustrate that if a U.S. business offers a discount solely to uniformed U.S. military personnel, as opposed to public sector employees more broadly, or if the U.S. business distributes marketing materials that promote the particular usefulness of its products to military personnel, it will be deemed to be targeting or tailoring under the proposed definition.

## ENDNOTES (CONTINUED)

- <sup>13</sup> The release provides that the types of data the proposed rule seeks to capture include bank account statements or detailed financial information included in an application for a home mortgage or credit card, but that information regarding ordinary consumer transactions, such as a record of a credit card purchase at a retail establishment, would not generally fall into this category.
- <sup>14</sup> The release provides that the intent of the provision is to capture information collected by consumer reporting agencies, such as an individual's credit score or summaries of debts and payment histories, but to exclude from the scope of the definition a limited set of information about an individual's credit provided by a consumer reporting agency, such as a credit score, for the legitimate purposes described in the Fair Credit Reporting Act.
- <sup>15</sup> The release explains that, for example, email communications between a U.S. business and its own customers would not be covered. Rather, the intent of the provision is to describe the situation where a U.S. business offers email, chat, or messaging services, a primary purpose of which is to allow third parties to communicate with each other.
- <sup>16</sup> The control transaction example was previously added as an example of a covered transaction in interim regulations issued by CFIUS on October 11, 2018, but at that time the definition of covered transaction was not specifically modified. See 83 FR 51328-29.
- <sup>17</sup> The release explains that CFIUS has proposed to delay the effectiveness of the second prong of the requirement in order to provide the eligible foreign states time to enhance their foreign investment review processes and bilateral cooperation.
- <sup>18</sup> The Secretary of the Treasury may also rescind a determination of an excepted foreign state under Section 1001(a) if the Chairperson decides, with the agreement of two-thirds of voting members of CFIUS, that rescission is appropriate.
- <sup>19</sup> For purposes of this element of the test, the proposed regulations also contain a statement about when CFIUS will consider aggregation of ownership interests where more than one person holds an ownership interest in an entity. As proposed, CFIUS will consider factors such as whether the persons holding the ownership interests are related or have formal or informal arrangements to act in concert, whether the investors are agencies or instrumentalities of the national or subnational governments of a single foreign state, and whether a given foreign person and another foreign person that has an ownership interest in the entity are both controlled by any of the national or subnational governments of a single state.
- <sup>20</sup> With respect to an entity whose equity securities are primarily traded on an exchange in an excepted foreign state or the United States, the proposed rule defines "minimum excepted ownership" to mean a majority of the entity's voting interest, the right to a majority of its profits, and the right in the event of dissolution to a majority of its assets. With respect to an entity whose equity securities are not primarily traded on an exchange in an excepted foreign state or the United States, minimum excepted ownership means 90 percent or more of the entity's voting interest, the right to 90 percent or more of its profits, and the right in the event of dissolution to 90 percent or more of its assets.
- <sup>21</sup> The following violations are covered: (1) receiving a written finding of violation or penalty notice imposing a civil monetary penalty from the Department of the Treasury's Office of Foreign Assets Control ("OFAC"), or entering into a settlement agreement with OFAC with respect to apparent violations of U.S. sanctions laws administered by OFAC, including, without limitation, the International Emergency Economic Powers Act, the Trading With the Enemy Act, the Foreign Narcotics Kingpin Designation Act or of any executive order, regulation, order, directive, or license issued pursuant thereto; (2) receiving a written notice of debarment from the Department of State's Directorate of Defense Trade Controls, as described in 22 CFR parts 127 and 128; (3) being a respondent or party in a final order, including a settlement order, issued by the Department of Commerce's Bureau of Industry and Security (BIS) regarding violations of U.S. export control laws administered by BIS, including, without limitation, the Export Control Reform Act of 2018 (Title XVII, Subtitle B of Pub. L. 115-232, 132 Stat. 2208, 50 U.S.C. 4801 *et seq.*), the Export Administration Regulations, 15 CFR parts 730-774, or

ENDNOTES (CONTINUED)

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- of any executive order, regulation, order, directive or license issued pursuant thereto; or (4) receiving a final decision from the Department of Energy's National Nuclear Security Administration imposing a civil penalty with respect to a violation of section 57 b. of the Atomic Energy Act of 1954, as implemented under 10 CFR part 810.
- <sup>22</sup> See 15 CFR part 744. The Entity List is set forth in Supplement No. 4 to part 744 of the Export Administration Regulations, and the Unverified List is set forth in Supplement No. 6 to Part 744 of the Export Administration Regulations.
- <sup>23</sup> The proposing release emphasizes that a transaction involving real estate could potentially be a covered transaction under the CFIUS part 800 regulations; for example, transactions involving certain long-term leases and certain collections of assets. Any transaction that could result in control of a U.S. business by a foreign person remains subject to the part 800 regulations, and is not a covered real estate transaction under this proposed rule, even if real estate is a component of the transaction.
- <sup>24</sup> The term "purchase" means "an arrangement conveying an ownership interest of real estate to a person in exchange for consideration."
- <sup>25</sup> The term "lease" means "an arrangement conveying a possessory interest in real estate, short of ownership, to a person for a specified time and in exchange for consideration" and includes subleases.
- <sup>26</sup> The term "concession" means "an arrangement, other than a purchase or lease, whereby a U.S. public entity grants a right to use real estate for the purpose of developing or operating infrastructure for an airport or maritime port." The term includes assignment of a concession by a party who is not the U.S. public entity. U.S. public entity for this purpose essentially includes any level of government in the United States, whether federal, state or local.
- <sup>27</sup> An "urbanized area" consists of "a densely settled core created from census tracts or blocks and contiguous qualifying territory that together have a minimum population of at least 50,000 individuals."
- <sup>28</sup> An "urban cluster" consists of "a densely settled core created from census tracts or blocks and contiguous qualifying territory that together have at least 2,500 individuals but fewer than 50,000 individuals."

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**Exhibit A: Proposed Appendix A to Part 800—Covered Investment Critical Infrastructure and Functions Related to Covered Investment Critical Infrastructure**

**Column 1—Covered investment critical infrastructure**

**Column 2—Functions related to covered investment critical infrastructure**

(i) Any:

(a) internet protocol network that has access to every other internet protocol network solely via settlement-free peering; or

(b) telecommunications service or information service, each as defined in section 3(a)(2) of the Communications Act of 1934 (47 U.S.C. 153), as amended, or fiber optic cable that directly serves any military installation identified in § 802.229.

(ii) Any internet exchange point that supports public peering.

(iii) Any submarine cable system requiring a license pursuant to section 1 of the Cable Landing Licensing Act of 1921 (47 U.S.C. 34), as amended, which includes any associated submarine cable, submarine cable landing facilities, and any facility that performs network management, monitoring, maintenance, or other operational functions for such submarine cable system.

(iv) Any submarine cable, landing facility, or facility that performs network management, monitoring, maintenance, or other operational function that is part of a submarine cable system described above in item (iii) of Column 1 of appendix A to part 800.

(v) Any data center that is collocated at a submarine cable landing point, landing station, or termination station.

(vi) Any satellite or satellite system providing services directly to the Department of Defense or any component thereof.

(vii) Any industrial resource other than commercially available off-the-shelf items, as defined in section 4203(a) of the National Defense Authorization Act for Fiscal Year 1996 (41 U.S.C. 104), as amended, that is manufactured or operated for a Major Defense Acquisition Program, as defined in section 7(b)(2)(A) of the Defense Technical Corrections Act of 1987 (10 U.S.C. 2430), as amended, or a

(i) Own or operate any:

(a) internet protocol network that has access to every other internet protocol network solely via settlement-free peering; or

(b) telecommunications service or information service, each as defined in section 3(a)(2) of the Communications Act of 1934 (47 U.S.C. 153), as amended, or fiber optic cable that directly serves any military installation identified in § 802.229.

(ii) Own or operate any internet exchange point that supports public peering.

(iii) Own or operate any submarine cable system requiring a license pursuant to section 1 of the Cable Landing Licensing Act of 1921 (47 U.S.C. 34), as amended, which includes any associated submarine cable, submarine cable landing facilities, and any facility that performs network management, monitoring, maintenance, or other operational functions for such submarine cable system.

(iv) Supply or service any submarine cable, landing facility, or facility that performs network management, monitoring, maintenance, or other operational function that is part of a submarine cable system described above in item (iii) of Column 1 of appendix A to part 800.

(v) Own or operate any data center that is collocated at a submarine cable landing point, landing station, or termination station.

(vi) Own or operate any satellite or satellite system providing services directly to the Department of Defense or any component thereof.

(vii) As applicable, manufacture any industrial resource other than commercially available off-the-shelf items, as defined in section 4203(a) of the National Defense Authorization Act for Fiscal Year 1996 (41 U.S.C. 104), as amended, or operate any industrial resource that is a facility, in each case, for a Major Defense Acquisition Program, as defined in section 7(b)(2)(A) of the Defense Technical Corrections Act of 1987 (10

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Major System, as defined in 10 U.S.C. 2302d, as amended and:

(a) the U.S. business is a “single source,” “sole source,” or “strategic multisource,” to the extent the U.S. business has been notified of such status; or

(b) the industrial resource:

(1) requires 12 months or more to manufacture; or

(2) is a “long lead” item, to the extent the U.S. business has been notified that such industrial resource is a “long lead” item.

(viii) Any industrial resource, other than commercially available off-the-shelf items, as defined in section 4203(a) of the National Defense Authorization Act for Fiscal Year 1996 (41 U.S.C. 104), as amended, that is manufactured pursuant to a “DX” priority rated contract or order under the Defense Priorities and Allocations System regulation (15 CFR part 700, as amended) in the preceding 24 months.

(ix) Any facility in the United States that manufactures:

(a) specialty metal, as defined in section 842(a)(1)(i) of the John Warner National Defense Authorization Act for Fiscal Year 2007 (10 U.S.C. 2533b), as amended;

(b) covered material, as defined in 10 U.S.C. 2533c, as amended;

(c) chemical weapons antidote contained in automatic injectors, as described in 10 U.S.C. 2534, as amended; or

(d) carbon, alloy, and armor steel plate that is in Federal Supply Class 9515 or is described by specifications of the American Society for Testing Materials or the American Iron and Steel Institute.

(x) Any industrial resource other than commercially available off-the-shelf items, as defined in 41 U.S.C. 104, as amended, that has been funded, in whole or in part, by any of the following sources in the last 60 months:

U.S.C. 2430), as amended, or a Major System, as defined in 10 U.S.C. 2302d, as amended and:

(a) the U.S. business is a “single source,” “sole source,” or “strategic multisource,” to the extent the U.S. business has been notified of such status; or

(b) the industrial resource:

(1) requires 12 months or more to manufacture; or

(2) is a “long lead” item, to the extent the U.S. business has been notified that such industrial resource is a “long lead” item.

(viii) Manufacture any industrial resource, other than commercially available off-the-shelf items, as defined in section 4203(a) of the National Defense Authorization Act for Fiscal Year 1996 (41 U.S.C. 104), as amended, pursuant to a “DX” priority rated contract or order under the Defense Priorities and Allocations System regulation (15 CFR part 700, as amended) within 24 months of the transaction in question.

(ix) Manufacture any of the following in the United States:

(a) specialty metal, as defined in section 842(a)(1)(i) of the John Warner National Defense Authorization Act for Fiscal Year 2007 (10 U.S.C. 2533b), as amended;

(b) covered material, as defined in 10 U.S.C. 2533c, as amended;

(c) chemical weapons antidote contained in automatic injectors, as described in 10 U.S.C. 2534, as amended; or

(d) carbon, alloy, and armor steel plate that is in Federal Supply Class 9515 or is described by specifications of the American Society for Testing Materials or the American Iron and Steel Institute.

(x) As applicable, manufacture any industrial resource other than commercially available off-the-shelf items, as defined in 41 U.S.C. 104, as amended, or operate any industrial resource that is a facility, in each case, that has been funded, in whole or in part, by any of the following sources within 60 months of the transaction in question:

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(a) Defense Production Act of 1950 Title III program (50 U.S.C. 4501, et seq.), as amended;

(b) Industrial Base Fund pursuant to section 896(b)(1) of the Ike Skelton National Defense Authorization Act for Fiscal Year 2011 (10 U.S.C. 2508), as amended;

(c) Rapid Innovation Fund pursuant to section 1073 of Ike Skelton National Defense Authorization Act for Fiscal Year 2011 (10 U.S.C. 2359a), as amended;

(d) Manufacturing Technology Program pursuant to 10 U.S.C. 2521, as amended;

(e) Defense Logistics Agency Warstopper Program, as described in DLA Instruction 1212, Industrial Capabilities Program—Manage the WarStopper Program; or

(f) Defense Logistics Agency Surge and Sustainment contract, as described in Subpart 17.93 of the Defense Logistics Acquisition Directive.

(xi) Any system, including facilities, for the generation, transmission, distribution, or storage of electric energy comprising the bulk-power system, as defined in section 215(a)(1) of the Federal Power Act (16 U.S.C. 824o(a)(1)), as amended.

(xii) Any electric storage resource, as defined in 18 CFR § 35.28(b)(9), as amended, that is physically connected to the bulk-power system.

(xiii) Any facility that provides electric power generation, transmission, distribution, or storage directly to or located on any military installation identified in § 802.229.

(xiv) Any industrial control system utilized by:

(a) system comprising the bulk-power system as described above in item (xi) of Column 1 of appendix A to part 800; or

(b) a facility directly serving any military installation as described above in item (xiii) of Column 1 of appendix A to part 800.

(xv) Any:

(a) any individual refinery with the capacity to produce 300,000 or more barrels per day (or

(a) Defense Production Act of 1950 Title III program (50 U.S.C. 4501, et seq.), as amended;

(b) Industrial Base Fund pursuant to section 896(b)(1) of the Ike Skelton National Defense Authorization Act for Fiscal Year 2011 (10 U.S.C. 2508), as amended;

(c) Rapid Innovation Fund pursuant to section 1073 of Ike Skelton National Defense Authorization Act for Fiscal Year 2011 (10 U.S.C. 2359a), as amended;

(d) Manufacturing Technology Program pursuant to 10 U.S.C. 2521, as amended;

(e) Defense Logistics Agency Warstopper Program, as described in DLA Instruction 1212, Industrial Capabilities Program—Manage the WarStopper Program; or

(f) Defense Logistics Agency Surge and Sustainment contract, as described in Subpart 17.93 of the Defense Logistics Acquisition Directive.

(xi) Own or operate any system, including facilities, for the generation, transmission, distribution, or storage of electric energy comprising the bulk-power system, as defined in section 215(a)(1) of the Federal Power Act (16 U.S.C. 824o(a)(1)), as amended.

(xii) Own or operate any electric storage resource, as defined in 18 CFR § 35.28(b)(9), as amended, that is physically connected to the bulk-power system.

(xiii) Own or operate any facility that provides electric power generation, transmission, distribution, or storage directly to or located on any military installation identified in § 802.229.

(xiv) Manufacture or service any industrial control system utilized by:

(a) system comprising the bulk-power system as described above in item (xi) of Column 1 of appendix A to part 800; or

(b) a facility directly serving any military installation as described above in item (xiii) of Column 1 of appendix A to part 800.

(xv) Own or operate:

(a) any individual refinery with the capacity to produce 300,000 or more barrels per day (or

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equivalent) of refined oil or gas products; or

(b) collection of one or more refineries owned or operated by a single U.S. business with the capacity to produce, in the aggregate, 500,000 or more barrels per day (or equivalent) of refined oil or gas products.

(xvi) Any crude oil storage facility with the capacity to hold 30 million barrels or more of crude oil.

(xvii) Any:

(a) liquefied natural gas (LNG) import or export terminal requiring.

(1) approval pursuant to section 3(e) of the Natural Gas Act (15 U.S.C. 717b(e)), as amended, or

(2) a license pursuant to section 4 of the Deepwater Port Act of 1974 (33 U.S.C. 1503), as amended; or

(b) natural gas underground storage facility or LNG peak-shaving facility requiring a certificate of public convenience and necessity pursuant to section 7 of the Natural Gas Act (15 U.S.C. 717f), as amended.

(xviii) Any financial market utility that the Financial Stability Oversight Council has designated as systemically important pursuant to section 804 of the Dodd-Frank Wall Street Reform and Consumer Protection Act (12 U.S.C. 5463), as amended.

(xix) Any exchange registered under section 6 of the Securities Exchange Act of 1934 (15 U.S.C. 78f), as amended, that facilitates trading in any national market system security, as defined in 17 CFR § 242.600, as amended, and which exchange during at least four of the preceding six calendar months had:

(a) with respect to all national market system securities that are not options, ten percent or more of the average daily dollar volume reported by applicable transaction reporting plans; or

(b) with respect to all listed options, fifteen percent or more of the average daily dollar volume reported by applicable national market system plans for reporting transactions in listed options.

(xx) Any technology service provider in the

equivalent) of refined oil or gas products; or

(b) one or more refineries with the capacity to produce, in the aggregate, 500,000 or more barrels per day (or equivalent) of refined oil or gas products.

(xvi) Own or operate any crude oil storage facility with the capacity to hold 30 million barrels or more of crude oil.

(xvii) Own or operate any:

(a) liquefied natural gas (LNG) import or export terminal requiring:

(1) approval pursuant to section 3(e) of the Natural Gas Act (15 U.S.C. 717b(e)), as amended, or

(2) a license pursuant to section 4 of the Deepwater Port Act of 1974 (33 U.S.C. 1503), as amended; or

(b) natural gas underground storage facility or LNG peak-shaving facility requiring a certificate of public convenience and necessity pursuant to section 7 of the Natural Gas Act (15 U.S.C. 717f), as amended.

(xviii) Own or operate any financial market utility that the Financial Stability Oversight Council has designated as systemically important pursuant to section 804 of the Dodd-Frank Wall Street Reform and Consumer Protection Act (12 U.S.C. 5463), as amended.

(xix) Own or operate any exchange registered under section 6 of the Securities Exchange Act of 1934 (15 U.S.C. 78f), as amended, that facilitates trading in any national market system security, as defined in 17 CFR § 242.600, as amended, and which exchange during at least four of the preceding six calendar months had:

(a) with respect to all national market system securities that are not options, ten percent or more of the average daily dollar volume reported by applicable transaction reporting plans; or

(b) with respect to all listed options, fifteen percent or more of the average daily dollar volume reported by applicable national market system plans for reporting transactions in listed options.

(xx) Own or operate any technology service

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Significant Service Provider Program of the Federal Financial Institutions Examination Council that provides core processing services.

(xxi) Any rail line and associated connector line designated as part of the Department of Defense's Strategic Rail Corridor Network.

(xxii) Any interstate oil pipeline that:

(a) has the capacity to transport:

(1) 500,000 barrels per day or more of crude oil, or

(2) 90 million gallons per day or more of refined petroleum product; or

(b) directly serves the strategic petroleum reserve, as defined in section 152 of the Energy Policy and Conservation Act (42 U.S.C. 6232), as amended.

(xxiii) Any interstate natural gas pipeline with an outside diameter of 20 or more inches.

(xxiv) Any industrial control system utilized by:

(a) an interstate oil pipeline as described above in item (xxii) of Column 1 of appendix A to part 800; or

(b) an interstate natural gas pipeline as described above in item (xxiii) of Column 1 of appendix A to part 800.

(xxv) Any airport identified in § 802.201.

(xxvi) Any:

(a) maritime port identified in § 802.228; or

(b) any individual terminal at such maritime ports.

(xxvii) Any public water system, as defined in section 1401(4) of the Safe Drinking Water Act (42 U.S.C. 300f(4)(A)), as amended, or treatment works, as defined in section 212(2)(A) of the Clean Water Act (33 U.S.C. 1292(2)), as amended, which:

provider in the Significant Service Provider Program of the Federal Financial Institutions Examination Council that provides core processing services.

(xxi) Own or operate any rail line and associated connector line designated as part of the Department of Defense's Strategic Rail Corridor Network.

(xxii) Own or operate any interstate oil pipeline that:

(a) has the capacity to transport:

(1) 500,000 barrels per day or more of crude oil, or

(2) 90 million gallons per day or more of refined petroleum product; or

(b) directly serves the strategic petroleum reserve, as defined in section 152 of the Energy Policy and Conservation Act (42 U.S.C. 6232), as amended.

(xxiii) Own or operate any interstate natural gas pipeline with an outside diameter of 20 or more inches.

(xxiv) Manufacture or service any industrial control system utilized by:

(a) an interstate oil pipeline as described above in item (xxii) of Column 1 of appendix A to part 800; or

(b) an interstate natural gas pipeline as described above in item (xxiii) of Column 1 of appendix A to part 800.

(xxv) Own or operate any airport identified in § 802.201.

(xxvi) Own or operate any:

(a) maritime port identified in § 802.228; or

(b) any individual terminal at such maritime ports.

(xxvii) Own or operate any public water system, as defined in section 1401(4) of the Safe Drinking Water Act (42 U.S.C. 300f(4)(A)), as amended, or treatment works, as defined in section 212(2)(A) of the Clean Water Act (33 U.S.C. 1292(2)), as amended, which:

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(a) regularly serves 10,000 individuals or more, or

(b) directly serves any military installation identified in § 802.229.

(xxviii) Any industrial control system utilized by a public water system or treatment works as described above in item (xxvii) of Column 1 of appendix A to part 800.

(a) regularly serves 10,000 individuals or more, or

(b) directly serves any military installation identified in § 802.229.

(xxviii) Manufacture or service any industrial control system utilized by a public water system or treatment works as described above in item (xxvii) of Column 1 of appendix A to part 800.

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## Exhibit B: Proposed Section 802.228 – Definition of “Military Installation”

The term military installation means any site that meets the following category descriptions, as identified in the list at Appendix A to this part [included as Exhibit C to this memorandum]:

- (a) Active Air Force ballistic missile fields;
- (b) Air Force bases administering active Air Force ballistic missile fields;
- (c) Air Force bases and major annexes thereof containing a unit from the Air Force Air Combat Command;
- (d) Air Force bases and major annexes thereof containing an Air Force research laboratory or test unit and associated sites;
- (e) Air Force bases and major annexes thereof containing a unit of the North American Aerospace Defense Command and its regions;
- (f) Air Force bases and Air Force stations and major annexes thereof containing satellite, telemetry, tracking or commanding systems;
- (g) Army bases, ammunition plants, centers of excellence and research laboratories and major annexes thereof, excluding depots, arsenals and airfields that are not collocated with an Army installation included in this section;
- (h) Army combat training centers located in the continental United States;
- (i) Headquarters of the Office of the Secretary of Defense and Defense Advanced Research Projects Agency and major offices and annexes thereof;
- (j) Long range radar sites and major annexes thereof in any of the following states: Alaska, North Dakota, California, or Massachusetts;
- (k) Major range and test facility base activities as defined in 10 U.S.C. 196;
- (l) Marine Corps bases and air stations and major annexes thereof, excluding detachments, installations, logistics battalions, recruit depots, and support facilities;
- (m) Military ranges as defined in 10 U.S.C. 101(e)(1) owned by the U.S. Navy or U.S. Air Force, or joint forces training centers that are located in any of the following states: Oregon, Nevada, Idaho, Wisconsin, Mississippi, North Carolina, or Florida;
- (n) Naval bases and air stations containing squadrons and supporting commands of the Submarine Force Atlantic or Submarine Force Pacific and major offices thereof;
- (o) Naval surface, air, and undersea warfare centers and research laboratories and major annexes thereof; and
- (p) U.S. Navy off-shore range complexes and off-shore operating areas.

**Exhibit C: Proposed Appendix A to Part 802—List of Military Installations**

Site name	Location
<b>Part 1</b>	
Adelphi Laboratory Center	Adelphi, MD.
Air Force Maui Optical and Supercomputing Site	Maui, HI.
Air Force Office of Scientific Research	Arlington, VA.
Andersen Air Force Base	Yigo, Guam.
Army Futures Command	Austin, TX.
Army Research Lab—Orlando Simulations and Training Technology Center	Orlando, FL.
Army Research Lab—Raleigh Durham	Raleigh Durham, NC.
Arnold Air Force Base	Coffee County and Franklin County, TN.
Beale Air Force Base	Yuba City, CA.
Biometric Technology Center (Biometrics Identity Management Activity)	Clarksburg, WV.
Buckley Air Force Base	Aurora, CO.
Camp MacKall	Pinebluff, NC.
Cape Cod Air Force Station	Sandwich, MA.
Cape Newenham Long Range Radar Site	Cape Newenham, AK.
Cavalier Air Force Station	Cavalier, ND.
Cheyenne Mountain Air Force Station	Colorado Springs, CO.
Clear Air Force Station	Anderson, AK.
Creech Air Force Base	Indian Springs, NV.
Davis-Monthan Air Force Base	Tucson, AZ.
Defense Advanced Research Projects Agency	Arlington, VA.
Eareckson Air Force Station	Shemya, AK.
Eielson Air Force Base	Fairbanks, AK.
Ellington Field Joint Reserve Base	Houston, TX.
Fairchild Air Force Base	Spokane, WA.
Fort Benning	Columbus, GA.
Fort Belvoir	Fairfax County, VA.

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Fort Bliss	El Paso, TX.
Fort Campbell	Hopkinsville, KY.
Fort Carson	Colorado Springs, CO.
Fort Detrick	Frederick, MD.
Fort Drum	Watertown, NY.
Fort Gordon	Augusta, GA.
Fort Hood	Killeen, TX.
Fort Knox	Fort Knox, KY.
Fort Leavenworth	Leavenworth, KS.
Fort Lee	Petersburg, VA.
Fort Leonard Wood	Pulaski County, MO.
Fort Meade	Anne Arundel County, MD.
Fort Riley	Junction City, KS.
Fort Shafter	Honolulu, HI.
Fort Sill	Lawton, OK.
Fort Stewart	Hinesville, GA.
Fort Yukon Long Range Radar Site	Fort Yukon, AK.
Francis E. Warren Air Force Base	Cheyenne, WY.
Guam Tracking Station	Inarajan, Guam.
Hanscom Air Force Base	Lexington, MA.
Holloman Air Force Base	Alamogordo, NM.
Holston Army Ammunition Plant	Kingsport, TN.
Joint Base Anacostia-Bolling	Washington, DC.
Joint Base Andrews	Camp Springs, MD.
Joint Base Elmendorf-Richardson	Anchorage, AK.
Joint Base Langley-Eustis	Hampton, VA and Newport News, VA.
Joint Base Lewis-McChord	Tacoma, WA.
Joint Base McGuire-Dix-Lakehurst	Lakehurst, NJ.
Joint Base Pearl Harbor-Hickam	Honolulu, HI.
Joint Base San Antonio	San Antonio, TX.
Joint Expeditionary Base Little Creek-Fort Story	Virginia Beach, VA.

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Kaena Point Satellite Tracking Station	Waianae, HI.
King Salmon Air Force Station	King Salmon, AK.
Kirtland Air Force Base	Albuquerque, NM.
Kodiak Tracking Stations	Kodiak Island, AK.
Los Angeles Air Force Base	El Segundo, CA.
MacDill Air Force Base	Tampa, FL.
Malmstrom Air Force Base	Great Falls, MT.
Marine Corps Air Ground Combat Center Twentynine Palms	Twentynine Palms, CA.
Marine Corps Air Station Beaufort	Beaufort, SC.
Marine Corps Air Station Cherry Point	Cherry Point, NC.
Marine Corps Air Station Miramar	San Diego, CA.
Marine Corps Air Station New River	Jacksonville, NC.
Marine Corps Air Station Yuma	Yuma, AZ.
Marine Corps Base Camp Lejeune	Jacksonville, NC.
Marine Corps Base Camp Pendleton	Oceanside, CA.
Marine Corps Base Hawaii	Kaneohe Bay, HI.
Marine Corps Base Hawaii, Camp H.M. Smith	Halawa, HI.
Marine Corps Base Quantico	Quantico, VA.
Mark Center	Alexandria, VA.
Minot Air Force Base	Minot, ND.
Moody Air Force Base	Valdosta, GA.
National Capital Region Coordination Center	Herndon, VA.
Naval Air Station Joint Reserve Base New Orleans	Belle Chasse, LA.
Naval Air Station Oceana	Virginia Beach, VA.
Naval Air Station Oceana Dam Neck Annex	Virginia Beach, VA.
Naval Air Station Whidbey Island	Oak Harbor, WA.
Naval Base Guam	Apra Harbor, Guam.
Naval Base Kitsap Bangor	Silverdale, WA.
Naval Base Point Loma	San Diego, CA.
Naval Base San Diego	San Diego, CA.

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Naval Base Ventura County—Port Hueneme Operating Facility	Port Hueneme, CA.
Naval Research Laboratory	Washington, DC.
Naval Research Laboratory—Blossom Point	Welcome, MD.
Naval Research Laboratory—Stennis Space Center	Hancock County, MS.
Naval Research Laboratory—Tilghman	Tilghman, MD.
Naval Station Newport	Newport, RI.
Naval Station Norfolk	Norfolk, VA.
Naval Submarine Base Kings Bay	Kings Bay, GA.
Naval Submarine Base New London	Groton, CT.
Naval Surface Warfare Center Carderock Division—Acoustic Research Detachment	Bayview, ID.
Naval Support Activity Crane	Crane, IN.
Naval Support Activity Orlando	Orlando, FL.
Naval Support Activity Panama City	Panama City, FL.
Naval Support Activity Philadelphia	Philadelphia, PA.
Naval Support Facility Carderock	Bethesda, MD.
Naval Support Facility Dahlgren	Dahlgren, VA.
Naval Support Facility Indian Head	Indian Head, MD.
Naval Weapons Station Seal Beach Detachment Norco	Norco, CA.
New Boston Air Station	New Boston, NH.
Offutt Air Force Base	Bellevue, NE.
Oliktok Long Range Radar Site	Oliktok, AK.
Orchard Combat Training Center	Boise, ID.
Peason Ridge Training Area	Leesville, LA.
Pentagon	Arlington, VA.
Peterson Air Force Base	Colorado Springs, CO.
Picatinny Arsenal	Morris County, NJ.
Piñon Canyon Maneuver Site	Tyrone, CO.
Pohakuloa Training Area	Hilo, HI.
Point Barrow Long Range Radar Site	Point Barrow, AK.
Portsmouth Naval Shipyard	Kittery, ME.

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Radford Army Ammunition Plant	Radford, VA.
Redstone Arsenal	Huntsville, AL.
Rock Island Arsenal	Rock Island, IL.
Rome Research Laboratory	Rome, NY.
Schriever Air Force Base	Colorado Springs, CO.
Seymour Johnson Air Force Base	Goldsboro, NC.
Shaw Air Force Base	Sumter, SC.
Southeast Alaska Acoustic Measurement Facility	Ketchikan, AK.
Tin City Long Range Radar Site	Tin City, AK.
Tinker Air Force Base	Midwest City, OK.
Travis Air Force Base	Fairfield, CA.
Tyndall Air Force Base	Bay County, FL.
U.S. Army Natick Soldier Systems Center	Natick, MA.
Watervliet Arsenal	Watervliet, NY.
Wright-Patterson Air Force Base	Dayton, OH.
<b>Part 2</b>	
Aberdeen Proving Ground	Aberdeen, MD.
Camp Shelby	Hattiesburg, MS.
Cape Canaveral Air Force Station	Cape Canaveral, FL.
Dare County Range	Manns Harbor, NC.
Edwards Air Force Base	Edwards, CA.
Eglin Air Force Base	Valparaiso, FL.
Fallon Range Complex	Fallon, NV.
Fort Bragg	Fayetteville, NC.
Fort Greely	Delta Junction, AK.
Fort Huachuca	Sierra Vista, AZ.
Fort Irwin	San Bernardino County, CA.
Fort Polk	Leesville, LA.
Fort Wainwright	Fairbanks, AK.
Hardwood Range	Necehuenemedah, WI.
Hill Air Force Base	Ogden, UT.

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Mountain Home Air Force Base	Mountain Home, ID.
Naval Air Station Meridian	Meridian, MS.
Naval Air Station Patuxent River	Lexington Park, MD.
Naval Air Weapons Station China Lake	Ridgecrest, CA.
Naval Base Kitsap—Keyport	Keyport, WA.
Naval Base Ventura County—Point Mugu Operating Facility	Point Mugu, CA.
Naval Weapons Systems Training Facility Boardman	Boardman, OR.
Nellis Air Force Base	Las Vegas, NV.
Nevada Test and Training Range	Tonopah, NV.
Pacific Missile Range Facility	Kekaha, HI.
Patrick Air Force Base	Cocoa Beach, FL.
Tropic Regions Test Center	Wahiawa, HI.
Utah Test and Training Range	Barro, UT.
Vandenberg Air Force Base	Lompoc, CA.
West Desert Test Center	Dugway, UT.
White Sands Missile Range	White Sands Missile Range, NM.
Yuma Proving Ground	Yuma, AZ.

Site name	County	Township/range
<b>Part 3</b>		
90th Missile Wing Francis E. Warren Air Force Base Missile Field (Colorado, Nebraska, and Wyoming)	Chase County, NE	All.
	Dundy County, NE	All.
	Goshen County, WY	All.
	Hitchcock County, NE	All.
	Laramie County, WY	All.
	Logan County, CO	All.
	Platte County, WY	All.
	Weld County, CO	All.

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<b>Site name</b>	<b>County</b>	<b>Township/range</b>
341st Missile Wing Malmstrom Air Force Base Missile Field (Montana)	Cascade County, MT	All.
	Chouteau County, MT	All, except lands located north of Township 22 North and east of Range 7 East based on the Bureau of Land Management's Public Lands Survey System.
	Fergus County, MT	All.
	Judith Basin County, MT	All.
	Lewis and Clark County, MT	All, except lands located south of Township 14 North and west of Range 9 West based on the Bureau of Land Management's Public Lands Survey System.
	Pondera County, MT	All, except lands located west of Range 9 West based on the Bureau of Land Management's Public Lands Survey System.
	Teton County, MT	All, except lands located west of Range 9 West based on the Bureau of Land Management's Public Lands Survey System.
	Toole County, MT	All.
	Wheatland County, MT	All.
	91st Missile Wing Minot Air Force Base Missile Field (North Dakota)	Bottineau County, ND
Burke County, ND		All.
McHenry County, ND		All.
McLean County, ND		All.
Mountrail County, ND		All.
Renville County, ND		All.
Ward County, ND		All.

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Site name	Location
<b>Part 4</b>	
Boston Range Complex	Offshore Massachusetts, New Hampshire, Maine.
Boston Operating Area	Offshore Massachusetts, New Hampshire, Maine.
Charleston Operating Area	Offshore North Carolina, South Carolina.
Cherry Point Operating Area	Offshore North Carolina, South Carolina.
Corpus Christi Operating Area	Offshore Texas.
Eglin Gulf Test and Training Range	Offshore Florida.
Gulf of Mexico Range Complex	Offshore Mississippi, Alabama, Florida.
Hawaii Range Complex	Offshore Hawaii.
Jacksonville Operating Area	Offshore Florida, Georgia.
Jacksonville Range Complex	Offshore Florida.
Key West Operating Area	Offshore Florida.
Key West Range Complex	Offshore Florida.
Narragansett Bay Range Complex	Offshore Connecticut, Massachusetts, New York, Rhode Island.
Narragansett Bay Operating Area	Offshore Connecticut, Massachusetts, New York, Rhode Island.
New Orleans Operating Area	Offshore Louisiana.
Northern California Range Complex	Offshore California.
Northwest Training Range Complex	Offshore Oregon, Washington.
Panama City Operating Area	Offshore Florida.
Pensacola Operating Area	Offshore Alabama, Florida.
Point Mugu Sea Range	Offshore California.
Southern California Range Complex	Offshore California.
Virginia Capes Operating Area	Offshore Delaware, Maryland, North Carolina, Virginia.
Virginia Capes Range Complex	Offshore Delaware, Maryland, North Carolina, Virginia.