

Update on CFIUS, FIRREA and Emerging Technologies

August 2020

Our CFIUS and National Security Practice

We have a preeminent Committee on Foreign Investment in the United States (CFIUS) team

- Handled approximately 5% of all CFIUS cases in 2019
- Developed and maintains what is considered to be the largest and most comprehensive database of publicly known CFIUS filings – [The Trade Practitioner](#)
- Unique analytics capability using a proprietary database to assess CFIUS risk based on country and industry
- Former US Congress and administration resources to assess and address policy considerations
- Leadership that has been involved in CFIUS cases from the inception of CFIUS and handled some of the most important CFIUS matters over the years

Experience with related notice and clearance issues before the US Department of State and the US Department of Defense, as well as the FCC

A truly “one-stop shop” with a global team known for its expertise in export controls, sanctions, government contracts and security clearance matters


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COMPLIANCE

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Recent Developments

Recent Developments

- August 2018, John S. McCain National Defense Authorization Act for Fiscal Year 2019 (NDAA) (H.R. 5515, 115th Cong. (2018))
Companion legislation: approaching the problem from different angles
 - Foreign Investment Risk Review Modernization Act (**FIRRMA**)
 - CFIUS – Reviews foreign investment in the US
 - Export Control Reform Act (**ECRA**)
 - BIS – Reviews exports, reexports and transfers (in country)
- Policy Objectives
 - Slowing down Chinese leadership in emerging technology
 - Maintaining the integrity of supply chains
 - Identifying trusted investors aligned with US national security and foreign policy interests
- FIRRMA
 - On November 10, 2018, the CFIUS Pilot Program came into effect, implementing mandatory declaration filings
 - On February 13, 2020, comprehensive new regulations came into effect implementing FIRRMA (and ending the pilot program)
- ECRA
 - Two rules defining control parameters for certain emerging technologies



Export Control Reform Act of 2018

- November 19, 2018. BIS advance notice of proposed rulemaking seeks public comments:
 - To define and identify emerging and foundational technologies critical to the national security of the US
 - On technologies that **should be** subject to US export controls
- Indicates BIS' intention to impose export licensing requirements on EAR99 technology to China and other countries
 - EAR99 and ECCNs xY9xx (controlled only for AT reasons)
- In identifying emerging and foundational technologies, consider:
 - The development of emerging technologies in foreign countries
 - The effect export controls may have on the development of such technologies in the US
 - The effectiveness of export controls on limiting the proliferation of emerging technologies in foreign countries



Emerging Technology ANPRM

- Biotechnology, such as:
 - Nanobiology
 - Synthetic biology
 - Genomic and genetic engineering
 - Neurotech
- Artificial intelligence (AI) and machine learning technology, such as:
 - Neural networks and deep learning (e.g., brain modeling, time series prediction, classification)
 - Evolution and genetic computation (e.g., genetic algorithms, genetic programming)
 - Reinforcement learning
 - Computer vision (e.g., object recognition, image understanding)
 - Expert systems (e.g., decision support systems, teaching systems)
 - Speech and audio processing (e.g., speech recognition and production)
 - Natural language processing (e.g., machine translation)
 - Planning (e.g., scheduling, game playing)
 - Audio and video manipulation technologies (e.g., voice cloning, deepfakes)
 - AI cloud technologies
 - AI chipsets
- Position, navigation and timing (PNT) technology
- Microprocessor technology, such as:
 - Systems-on-Chip (SoC)
 - Stacked Memory on Chip
- Advanced computing technology (e.g., memory-centric logic)
- Data analytics technology, such as
 - Visualization
 - Automated analysis algorithms
 - Context-aware computing
- Quantum information and sensing technology
- Logistics technology (e.g., mobile electric power, modeling and simulation, total asset visibility, or distribution-based logistics systems (DBLS))
- Additive manufacturing (e.g., 3D printing)
- Robotics
- Brain-computer interfaces
- Hypersonics
- Specialized materials (for structures, sensors, etc.)
- Advanced materials (e.g., adaptive camouflage, functional textiles (e.g., advanced fiber and fabric technology), and biomaterials)
- Advanced surveillance technologies (e.g., faceprint and voiceprint technologies)

Emerging Technology Rules

ECCN	Description of Controlled Technology
3A001.b.3.f	Discrete microwave transistors rated for operation with a peak saturated power output greater than 5W (37.0dBm) at all frequencies exceeding 8.5GHz up to and including 31.8GHz
3D005	Software that ensures continuity of operation when electronics are exposed to electromagnetic pulse (EMP) or electrostatic discharge (ESD)
5A002.a, a.4	Adds control on certain types of post-quantum cryptographic algorithms in paragraph 2.c of the Technical Notes that follow paragraph 5A002.a.4
6A001.a.2.a, a.2.a.6	Underwater acoustic transducers designed to operate as passive receivers are hydrophones, designed for operation at depths exceeding 1,000m and having a hydrophone sensitivity better than -230dB below 4kHz
9A004.g	Controls aircraft specially designed or modified to be air-launch platforms for space launch vehicles (SLV)
0D521	<p>Geospatial imagery software specially designed for training a Deep Convolutional Neural Network to automate the analysis of geospatial imagery and point clouds that:</p> <p>Provides a graphical user interface that enables the user to identify objects from within geospatial imagery and point clouds in order to extract positive and negative samples of an object of interest;</p> <p>Reduces pixel variation by performing scale, color, and rotational normalization on the positive samples;</p> <p>Trains a Deep Convolutional Neural Network to detect the object of interest from the positive and negative samples; and</p> <p>Identifies objects in geospatial imagery using the trained Deep Convolutional Neural Network by matching the rotational pattern from the positive samples with the rotational pattern of objects in the geospatial imagery.</p>



Overview: CFIUS

- What Is CFIUS?

An interagency committee authorized to review transactions and investments by **foreign persons** in **US business** or **US real estate interests** (i.e., a covered transaction) in order to determine the effect of such transactions or investments on the national security of the US

Organization Voting Members

- | | |
|---------------------------------------|--|
| 1. Department of the Treasury (chair) | 6. Department of State |
| 2. Department of Justice | 7. Department of Energy |
| 3. Department of Homeland Security | 8. Office of the US Trade Representative |
| 4. Department of Commerce | 9. Office of Science and Technology Policy |
| 5. Department of Defense | |

Observing Members

- | | |
|------------------------------------|------------------------------|
| 1. Office of Management and Budget | 4. National Economic Council |
| 2. Council of Economic Advisors | 5. Homeland Security Council |
| 3. National Security Council | |

Non-voting, Ex-officio Members

- | | |
|--------------------------------------|-----------------------|
| 1. Director of National Intelligence | 2. Secretary of Labor |
|--------------------------------------|-----------------------|



FIRRMA: Expanded Covered Transactions

CFIUS Review Authority – Takeovers or Investments in the US

- **Control** – Acquisition of control (or change of control) of a US business by a foreign person (pre-existing authority).
- **Real estate** – Purchase or lease of a real estate interest in proximity to a national security interest.
- **US businesses of specific concern** – Certain other equity “investments” in a US business that:
 - Owns, operates, manufactures, supplies or services **critical infrastructure**
 - Produces, designs, tests, manufactures, fabricates or develops one or more **critical technologies** (including emerging and foundational technologies) in relation to a designated industry
 - Maintains or collects **sensitive personal data** of US citizens
 - Defined in the regulations as a “**TID US business**” (an abbreviation for critical technology, critical infrastructure and personal data).



CFIUS Filing Forms and Outcomes

- Two forms:
 - Short-form declaration – 30-day review
 - Long-form written notice – 45-day review and a possible additional 45-day investigation
 - Why choose the long form?
 - After reviewing the short form, CFIUS can require a long form to clear the transaction
 - Short form could delay the transaction
- Filing can be voluntary or mandatory:
 - Mandatory only if:
 - Substantial SOE or foreign government ownership
 - US business involves critical technology supporting a designated industry
- Why file, if not mandatory?
 - Buyer protection against current and future CFIUS risks
 - Future risks – regulatory risk (emerging technology), business opportunity risk, geopolitical risk
 - If not cleared, CFIUS can review the transaction after closing – even years later
- Outcomes:
 - Clearance
 - Blocked (withdraw and abandon)
 - Mitigation

Filing Fee for Long-form Notice

- Fee based on the value of the notified transaction
 - The amount the foreign party is paying in the transaction (for US and non-US businesses)
 - Exception if the value of the US business is less than \$5M, only pay \$750
 - If the value cannot be determined at time of filing, the transaction value is fair market value of the assets being acquired in the transaction

- Lock-step fees:

Transaction Value	Fee
<\$500,000	no fee
≥\$500,000; <\$5M	\$750
≥\$5M; <\$50M	\$7,500
≥\$50M; <\$250M	\$75,000
≥\$250M; <\$750M	\$150,000
≥\$750M	\$300,000

- Payment must be received by CFIUS prior to acceptance of the notice

Examples of Possible Mandatory CFIUS Filings

- ITAR registered company:
 - Learns of a pending change in ultimate foreign ownership or control (or change in investor access rights)
 - Foreign owned or controlled and will acquire or make a non-controlling investment in a US business
- A TID US business learns that a foreign person will acquire a minority interest in the company and either:
 - The investor is an SOE or owned by a foreign government indirectly
 - The US business is in, or supports, a designated industry
- Foreign person A will acquire foreign person B where foreign person B has a US subsidiary that uses critical technology in (or in support of) a designated industry
- A US business will form a joint venture company in the US with a foreign person and the foreign person will have access rights where the joint venture involves the use of critical technology in (or in support of) a designated industry

Foreign Investment Risk Review Modernization Act of 2018

	Pre-FIRRMA	Post-FIRRMA Regulations (Effective as of February 13, 2020)	
Covered Transaction (i.e., “What Does CFIUS Review?”)	Transaction that results in, or could result in, control of a US business by a foreign person	Additional review authority: <ul style="list-style-type: none"> • Non-controlling investments in critical technology/infrastructure US businesses, or in US businesses with access to PII (referred to as TID US businesses) with “access rights” • Acquisitions of property interests in proximity to national security facilities 	
Filing	Written notice: <ul style="list-style-type: none"> • Voluntary • Buyer protection • Safe harbor against review post-closing 	Addition of mandatory declaration: <ul style="list-style-type: none"> • Investment or acquisition of a US business with critical technology in, or supporting, designated industries • Investments where a foreign government will hold a substantial interest in a TID US business (Parties have the option to submit a declaration or written notice)	
Processing Timeline	Review – 30 days Investigation – 45 days Presidential action – 15 days	Written notice: Review – 45 days Investigation – 45 days (CFIUS may extend by 15 days) Presidential action – 15 days	Declaration: 30 days
Filing Fee	None	Pending implementation, filing fee of 1 % of the transaction value or US\$300,000 (whichever is less)	



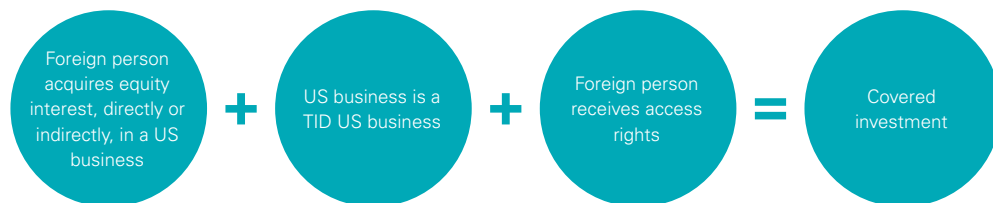
CFIUS Covered Transactions and Mandatory Filings

Covered Transactions

The term covered transaction means any of the following:

- Covered control transaction:
 - Any transaction by, or with, any foreign person that could result in foreign control of any US business, including such a transaction carried out through a joint venture
- Covered investment:
 - A non-controlling investment, direct or indirect, by a foreign person, other than an **excepted investor**, in an unaffiliated **TID US business** that affords a foreign person **access rights**
 - Investment means the acquisition of any equity interest (including any contingent equity interest)
- Change in foreign party rights:
 - A change in the rights that a foreign person has with respect to a US business in which the foreign person has an investment, if that change could result in a covered control transaction or a covered investment
- Evasion or circumvention:
 - Any other transaction, transfer, agreement or arrangement, the structure of which is designed or intended to evade or circumvent CFIUS authority

Elements of a Covered Investment



TID US Business

The term TID US business means any US business that:

- Critical **t**echnology – Produces, designs, tests, manufactures, fabricates or develops one or more critical technologies:
 - Defense articles or defense services included on the US Munitions List (USML)
 - Items on the Commerce Control List (CCL) with reason for control: NS, CB, MT, NP, RS, SL
 - Nuclear-related items under DOE or NRC
 - Select agents and toxins
 - Emerging and foundational technologies
- Critical **i**nfrastructure – Performs the functions as set forth in column 2 of appendix A to this part with respect to covered investment critical infrastructure (set forth in column 1 of appendix A); or systems and assets, whether physical or virtual, so vital to the US that the incapacity or destruction of such systems or assets would have a debilitating impact on national security.
- Personal **d**ata – Maintains or collects, directly or indirectly, sensitive personal data of US citizens.



Covered Investment Critical Infrastructure – Appendix A, Column 1 and 2

- Internet protocol network
- Internet exchange point
- Submarine cable system
- Data center collocated w/submarine cable
- Satellite services to DoD
- Power plants
- Electric storage connected to bulk system
- Electricity distribution to military installations
- Oil/gas refineries/storage
- LNG terminals/storage
- Financial market utility
- Security exchanges
- Core processing services of financial institutions
- Rail lines
- Oil/natural gas pipeline
- Airports
- Maritime ports
- Public water system
- Resources that are single/sole source, strategic multisource, or long-lead time items used in defense
- Resources sold under DX ratings
- Resources having US defense funding
- Specialty metals (e.g., certain steel, titanium and zirconium alloys)
- Covered materials (e.g., samarium-cobalt magnets; neodymium-iron-boron magnets; tungsten metal powder; tungsten heavy alloy)
- Chemical weapon antidotes
- Carbon alloys for armor plating
- Control system for power plants or electricity distribution to military installation
- Control system for public water systems
- Control system for oil or natural gas pipelines
- Submarine cable facility related to submarine cable systems

Sensitive Personal Data

- Includes data collected and maintained by a US business:
 - For any US executive branch agency or military department with intelligence, national security or homeland security responsibilities, or personnel and contractors
 - Large-scale collection and maintenance of:
 - Financial data, consumer report data
 - Health, life, long-term care, professional liability or mortgage insurance
 - Physical, mental or psychological health condition of an individual
 - Electronic communications, including email, messaging or chat communications
 - Geolocation data collected using positioning systems, cell phone towers or WiFi access
 - Biometric enrollment data, including facial, voice, retina/iris and palm/fingerprint templates
 - Data stored and processed for generating a state or federal government identification card
 - Data concerning US government personnel security clearance status or application
 - Results of an individual's genetic tests, including any related genetic sequencing data, whenever such results constitute identifiable data
- Does not include:
 - Data maintained or collected by a US business concerning its employees, unless it pertains to employees who hold US government personnel security clearances



Access Rights

- Access to any material nonpublic technical information in the possession of the TID US business
- Membership or observer rights on, or the right to nominate an individual to a position on, the board of directors or equivalent governing body of the TID US business
- Any involvement, other than through voting of shares, in the substantive decision-making of the TID US business regarding:
 - The use, development, acquisition, safekeeping or release of sensitive personal data of US citizens maintained or collected by the TID US business
 - The use, development, acquisition or release of critical technologies
 - The management, operation, manufacture or supply of covered investment critical infrastructure

Excepted Investor

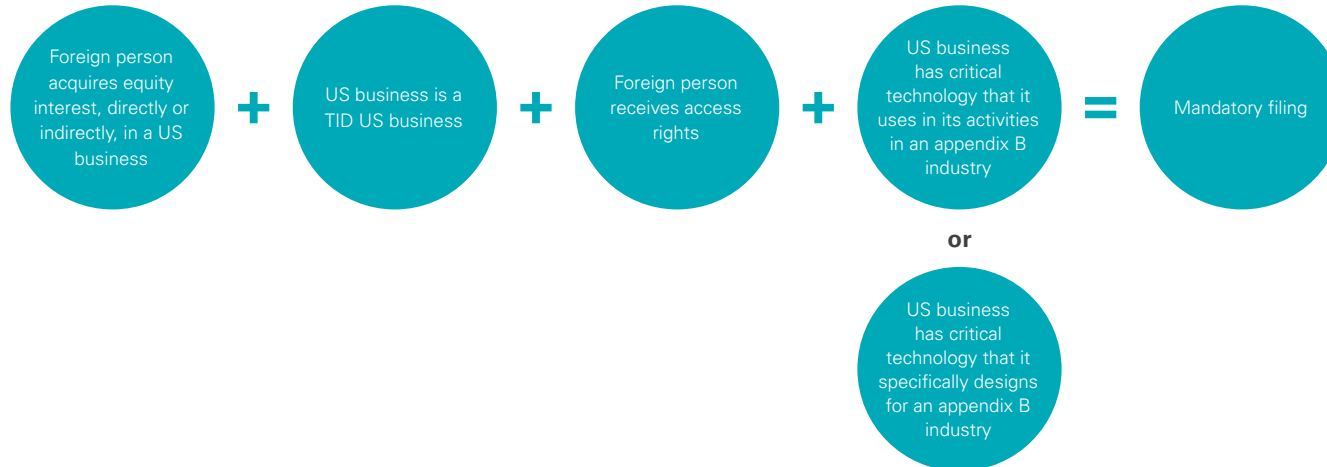
- A foreign national who is a national of one or more excepted foreign states and not also a national of any foreign state that is not an excepted foreign state
- A foreign government of an excepted foreign state
- A foreign entity (and its parents):
 - Organized under the laws of an excepted foreign state or in the US
 - Principal place of business is in an excepted foreign state or in the US
 - Members, shareholders and board qualify
- Excepted foreign states:
 - The UK, Canada and Australia (two years – until February 13, 2022)
 - Foreign state that has established and is effectively utilizing a robust process to analyze foreign investments for national security risks and to facilitate coordination with the US on matters relating to investment security



Mandatory Declaration

- Foreign government control – A covered transaction:
 - That results in the acquisition of a substantial interest ($\geq 25\%$ voting) in a TID US business by a foreign person
 - In which the national or subnational governments of a single foreign state (other than an excepted foreign state) have a substantial interest ($\geq 49\%$ voting)
- Designated industry – A covered transaction that:
 - Is a covered investment in, or that could result in foreign control of, a TID US business
 - Produces, designs, tests, manufactures, fabricates or develops one or more critical technologies:
 - Utilized in connection with the TID US business's activity in one or more industries identified in appendix B to this part by reference to the North American Industry Classification System (NAICS)
 - Designed by the TID US business specifically for use in one or more industries identified in appendix B to this part by reference to the NAICS, regardless of whether the critical technology also has application for other industries

Elements of a Mandatory Declaration for Covered Investment in Designated Industry



Designated Industries – Appendix B

INDUSTRY	NAICS Code
Aircraft Manufacturing	NAICS Code: 336411
Aircraft Engine and Engine Parts Manufacturing	NAICS Code: 336412
Alumina Refining and Primary Aluminum Production	NAICS Code: 331313
Ball and Roller Bearing Manufacturing	NAICS Code: 332991
Computer Storage Device Manufacturing	NAICS Code: 334112
Electronic Computer Manufacturing	NAICS Code: 334111
Guided Missile and Space Vehicle Manufacturing	NAICS Code: 336414
Guided Missile and Space Vehicle Propulsion Unit and Propulsion Unit Parts Manufacturing	NAICS Code: 336415
Military Armored Vehicle, Tank, and Tank Component Manufacturing	NAICS Code: 336992
Nuclear Electric Power Generation	NAICS Code: 221113
Optical Instrument and Lens Manufacturing	NAICS Code: 333314
Other Basic Inorganic Chemical Manufacturing	NAICS Code: 325180
Other Guided Missile and Space Vehicle Parts and Auxiliary Equipment Manufacturing	NAICS Code: 336419
Petrochemical Manufacturing	NAICS Code: 325110
Powder Metallurgy Part Manufacturing	NAICS Code: 332117
Power, Distribution, and Specialty Transformer Manufacturing	NAICS Code: 335311

INDUSTRY	NAICS Code
Primary Battery Manufacturing	NAICS Code: 335912
Radio and Television Broadcasting and Wireless Communications Equipment Manufacturing	NAICS Code: 334220
Research and Development in Nanotechnology	NAICS Code: 541713
Research and Development in Biotechnology (except Nanobiotechnology)	NAICS Code: 541714
Secondary Smelting and Alloying of Aluminum	NAICS Code: 331314
Search, Detection, Navigation, Guidance, Aeronautical, and Nautical System and Instrument Manufacturing	NAICS Code: 334511
Semiconductor and Related Device Manufacturing	NAICS Code: 334413
Semiconductor Machinery Manufacturing	NAICS Code: 333242
Storage Battery Manufacturing	NAICS Code: 335911
Telephone Apparatus Manufacturing	NAICS Code: 334210
Turbine and Turbine Generator Set Units Manufacturing	NAICS Code: 333611



Mandatory Filing: Investment Fund Exception

- A mandatory filing is not required for a foreign government control investment through an investment fund limited partnership (or similar arrangement) if:
 - Fund is exclusively managed by a general partner or equivalent
 - General partner, or equivalent, is not a foreign person
 - Any foreign person as a limited partner or as a member of an advisory board or a committee of the fund cannot approve/disapprove or otherwise control:
 - Investments decisions of the fund
 - Decisions of the general partner related to entities in which the fund is invested
 - The foreign person cannot unilaterally dismiss, prevent the dismissal of, select or determine the compensation of the general partner
- A mandatory filing is not required for a designated industry investment through an investment fund limited partnership (or similar arrangement) if:
 - The above apply
 - The general partner ultimately is controlled exclusively by US nationals

Mandatory Filing: Designated Industry Investment Exceptions

- A mandatory filing is not required for a designated industry investment if:
 - The investment is by an excepted investor
 - The investment is by a US-cleared facility under FOCI mitigation
 - The US business is a TID US business only because of encryption items eligible for license exception ENC

Mandatory Filing: Waiting Period, Form and CFIUS Actions

- Waiting period for mandatory filing:
 - Mandatory filings must be submitted to CFIUS 30 days before the completion date of the transaction (or sooner, if CFIUS concludes the review before 30 days)
- Form of mandatory filing:
 - Parties have the option to submit the short-form declaration or the long-form written notice
- Possible actions on a declaration:
 - CFIUS may clear the transaction
 - Inform the parties that CFIUS is not able to conclude action on the basis of the declaration and that the parties may file a written notice
 - If CFIUS has reason to believe that the transaction may raise national security considerations, request that the parties file a written notice
 - CFIUS may initiate a unilateral review of the transaction
- Penalty for failure to file or wait – up to the greater of US\$250,000, or the value of transaction

CFIUS Real Estate Covered Transactions

Covered Real Estate Transactions

- CFIUS authority over the purchase or lease by, or concession to, a foreign person of certain “**property rights**” relating to “**covered real estate**”
- **Property rights** – The foreign person must acquire, through the purchase, lease or concession of covered real estate, the property rights to do at least three of the following:
 - 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
- **Covered real estate:**
 - Airports – major passenger/cargo airports and joint-use airports (military/civilian aircraft usage)
 - Maritime ports – the top 25 tonnage, container and dry bulk ports, as well as strategic seaports
 - Proximity to military facilities – the proposed regulations group US military facilities into four categories, each with specific proximity triggers (Real Estate – Appendix A)



Military Facilities – Real Estate – Appendix A

- Part 1 – Close proximity, defined as within 1 mile
 - Lists numerous military facilities
- Part 2 – Extended range, defined as between 1 mile and 100 miles
 - Lists additional military facilities
- Part 3 – Within the county or other geographic area
 - Missile ranges
- Part 4 – Any part of the installation within territorial seas of the US
 - Offshore military facilities

Excepted Real Estate Transactions

Real estate transaction:

- By an excepted real estate investor (from the UK, Australia and Canada, and satisfying the criteria for eligibility)
- That is covered by a declaration or written notice in connection with the acquisition or investment of a US business
- Within an urbanized area or urban cluster (except for an air or sea port, or within 1 mile of part 1 or 2 military facilities)
- Involving a single housing unit
- By a foreign air carrier
- For the commercial retail of consumer goods or services
- For a multiunit building if not more than 10% of square footage and not more than 10% of tenants
- For Native American lands



Other Filings

Other Filing and Government Contracts

- US Business Registered With US Department of State, Directorate of Defense Trade Controls
 - 60-day notice prior to closing
 - 5-day notice post-closing
- US Business With Facility Security Clearance
 - Plan to address foreign ownership, control and influence vetted with the US Department of Defense, Defense Counterintelligence and Security Agency
- US Business With Government Contracts
 - Possible novation
 - No contract under a national security program may be awarded to an entity controlled by a foreign government if that entity requires access to proscribed information to perform the contract



Lessons Learned and Best Practices

US Business National Security Checklist

- ☐ Does the US business possess critical technology?
 - ☐ Defense articles or defense services included on the USML
 - ☐ Items on the CCL with reason for control: NS, CB, MT, NP, RS, SL
 - ☐ Nuclear-related items under DOE or NRC
 - ☐ Select agents and toxins
 - ☐ Emerging and foundational technologies
- ☐ Is the US business using critical technology in, or to support, a designated industry – produces, designs, tests, manufactures, fabricates or develops one or more critical technologies?
 - ☐ Utilized in connection with the TID US business's activity in one or more industries identified in appendix B to this part by reference to (NAICS)
 - ☐ Designed by the TID US business specifically for use in one or more industries identified in appendix B to this part by reference to the NAICS, regardless of whether the critical technology also has application for other industries
- ☐ Is the US business important to the US government supply chain or to critical infrastructure?
- ☐ Does the US business collect, process or maintain personal data?
- ☐ Does the US business hold real estate interests in proximity to military facilities or at airports or maritime ports?



About George N. Grammas



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- George Grammas is a partner in our global law practice
 - Chairs the firm's International Trade Practice, focusing on trade compliance and national security matters across our global network in 20 countries and more than 40 offices
 - Chair emeritus of the Aerospace, Defense & Government Services Industry Group
 - Served as advisor to various trade associations
 - Served as industry advisor to the US Department of State, Bureau of Politico-Military Affairs
- He spends 100% of his time representing clients in:
 - CFIUS clearance
 - Export controls, sanctions, anticorruption and other US and global international trade regulatory, compliance and national security matters
- With more than 30 years of practice:
 - He was involved in some of the earliest CFIUS clearances in the early 1990s under the Exon-Florio Amendment that established the current CFIUS process
 - He has deep national security policy and regulatory expertise to guide companies through the recent development of controls on emerging and foundational technologies, as well as to advise on the impact of the expanded CFIUS authority under FIRRMA
 - He is well regarded as a leading expert and a frequent speaker and commentator on US export control regulations (e.g., the ITAR, EAR)
- He guides the development of *The Trade Practitioner* blog that houses information on what is known to be the largest collection of publicly available information on CFIUS filings



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Washington DC

Regional Desks and Strategic Alliances

- Africa

Brazil

Caribbean/

Central America

India
- Israel

Mexico

Turkey

Ukraine

- Squire Patton Boggs Locations

● Regional Desks and Strategic Alliances

