

Update on CFIUS, FIRREA and Emerging Technologies

April 2021

Our CFIUS and National Security Practice

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

- Handled a significant number of all transactions reviewed by CFIUS annually
- 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 and the FCC, as well as foreign investment reviews in other jurisdictions.

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 Legislation

Recent Legislation

- 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)
 - On October 15, 2020, new mandatory filing rules came into effect changing the test for a mandatory filing based on the use of critical technology at the US business
- ECRA
 - Several rules defining control parameters for certain emerging technologies and ANPRM for foundational technology

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)

Export Control Reform Act of 2018

Foundational Technology ANPRM

- Items subject to control for military end-use or military end-user reasons under Supplement No. 2 to part 744
- AT level or as EAR99 items
- Technologies that have been the subject of illicit procurement attempts

Some examples:

- Possibly the following EAR99 or AT controlled items:
 - Equipment, materials and software for semiconductor manufacturing
 - Lasers and sensors for vision-guided manufacturing robotics
 - Non-military underwater sonar and mapping equipment
 - Specialty materials that can be used in aerospace applications
 - Software that allows for intelligence gathering, data mining, artificial or disguised personas on the internet



Comparison of FDI Reviews: Key Elements

United States

- Review controlling and non-controlling investments in US
- Mandatory filing if US business has certain export controlled technology
- CFIUS can initiate its own review, even years after closing if no safe harbor
- Up to 90 day review
- Significant filing fees
- Transaction can be blocked or divested; or CFIUS can impose terms on parties as condition of clearance

EU

- No direct authority to approve or reject proposed investments -- member states retain decision-making power (15 of 27 have national security reviews)
- Coordination role --Member States required to notify the European Commission and other Member States of ongoing FDI reviews
- Mandatory filing requirement varies by country
- Process and timeline vary by country

China

- Covers all types of investment (including greenfield) and many sectors without clear definitions
- Review controlling interest, except for defense sector
- Up to 105 working days review
- Transaction can be blocked or be imposed conditions to closing
- The rules were recently amended and expanded; Very few cases in the past



CFIUS Process Overview and Assessment

CFIUS Process Overview and Assessment

CFIUS Assessment:

- Is the transaction a covered transaction?
- If so, is filing with CFIUS mandatory or voluntary?
- Should the parties submit a short form declaration or a long form notice?
- Or, if the filing is voluntary, should parties not file at all?
- How is this assessment impacted? If the buyer or investor is from China (or controlled by a Chinese interest)?

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 (results in safe harbor from future CFIUS authority)
 - Blocked (withdraw and abandon)
 - Mitigation





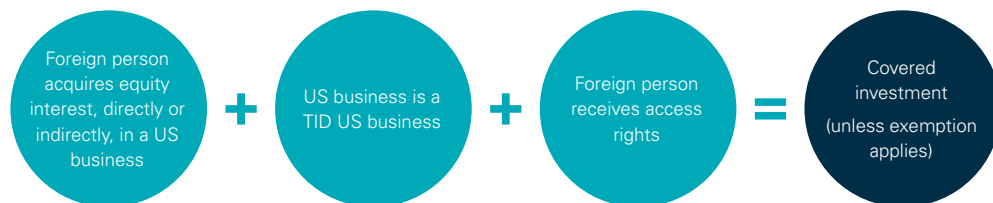
CFIUS Covered Transactions and Mandatory Filings

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
 - Covered real estate transactions (discussed later)

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 – 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.



Critical Infrastructure

- 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

Mandatory Declaration

- Foreign government substantial interest – 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)
- Critical technology US business – A covered transaction that:
 - Is a covered investment (with access rights) in, or that could result in foreign control of, a TID US business that produces, designs, tests, manufactures, fabricates, or develops one or more critical technologies
 - US government authorizations would be required to export, reexport, transfer (in-country), or retransfer the critical technology or technologies produced, designed, tested, manufactured, fabricated, or developed by the US business to foreign persons in the control chain of the foreign person investor

Elements of a Mandatory Declaration for Covered Investment in Designated Industry



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

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)
- A TID US business learns that a foreign person will acquire a minority interest in the company with rights to one board observer and
- The investor is an SOE or at least 49% owned by a foreign government indirectly, or
- The U.S. Business has products that would require a license to export to the foreign person investor
- Foreign person A will acquire foreign person B where foreign person B has a US subsidiary that uses critical technology that would require a license to export for most countries, including the domiciles of foreign persons A & B.
- 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 JV involves the use of critical technology that would require a license to export.

Mandatory Filing: Investment Fund Exception

- A mandatory filing is not required for a **foreign government substantial interest** 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 **critical technology US business** investment through an investment fund limited partnership (or similar arrangement) if:
 - The above apply
 - The general partner ultimately is controlled exclusively by US nationals

Excepted Investor

- A foreign national who is national of one or more excepted foreign states and not also national of any foreign state that is not 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 United States
 - Principal place of business in an excepted foreign state or in the United States
 - Members, shareholders and board qualify

Excepted foreign states

- UK, Canada and Australia (2 year – until February 13, 2022)
- Foreign state has established and is effectively utilizing a robust process to analyze foreign investments for national security risks and to facilitate coordination with the United States on matters relating to investment security

Mandatory Filing: Other Exceptions

- A mandatory filing is not required for a **critical technology US business** 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
- A mandatory filing is not required for a **foreign government substantial interest** if:
 - The foreign government substantial interest is held by an excepted foreign state

Filing Options and Business Considerations

Long form notice

Pros

- Safe harbor for transaction

Cons

- 45 day review plus 45 day investigation
- Filing fee

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

Short form declaration

Pros

- 30 day review
- No filing fee
- Abbreviated data collections and form
 - No PII

Cons

- May not result in safe harbor
 - Clearance
 - No action
 - Require full notice

No filing (or no closing condition)

Pros

- No delay to closing

Cons

- 45 day review plus 45 day investigation
 - CFIUS has authority to review transaction after closing, even years later
 - Changes in business or geopolitical environment may create future risk to business

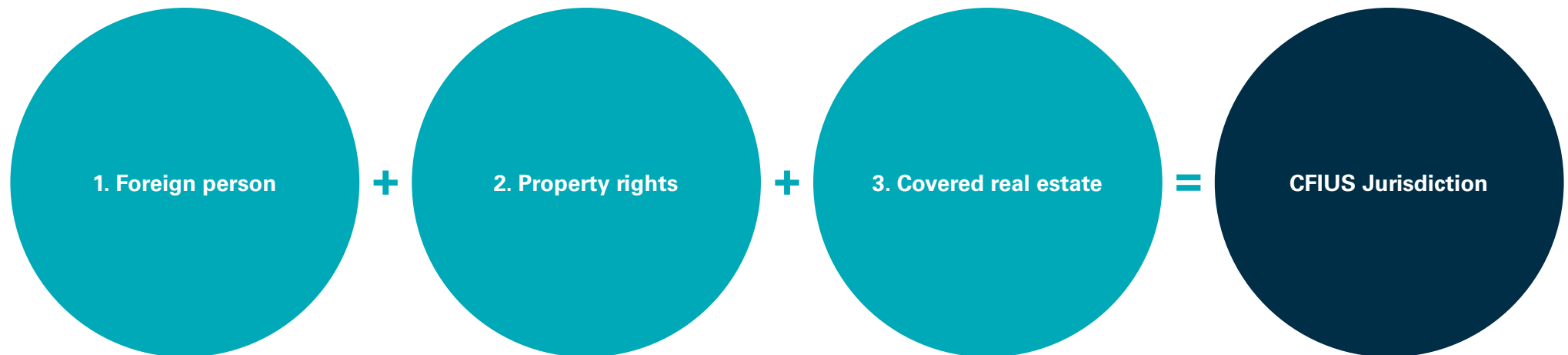




CFIUS Real Estate Covered Transactions

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:**
 - “Covered Ports”: Certain key airports and maritime ports that handle significant volume of trade or are joint-use facilities
 - Proximity to military facilities – the proposed regulations group US military facilities into four categories, each with specific proximity triggers (Real Estate – Appendix A)



Covered Real Estate

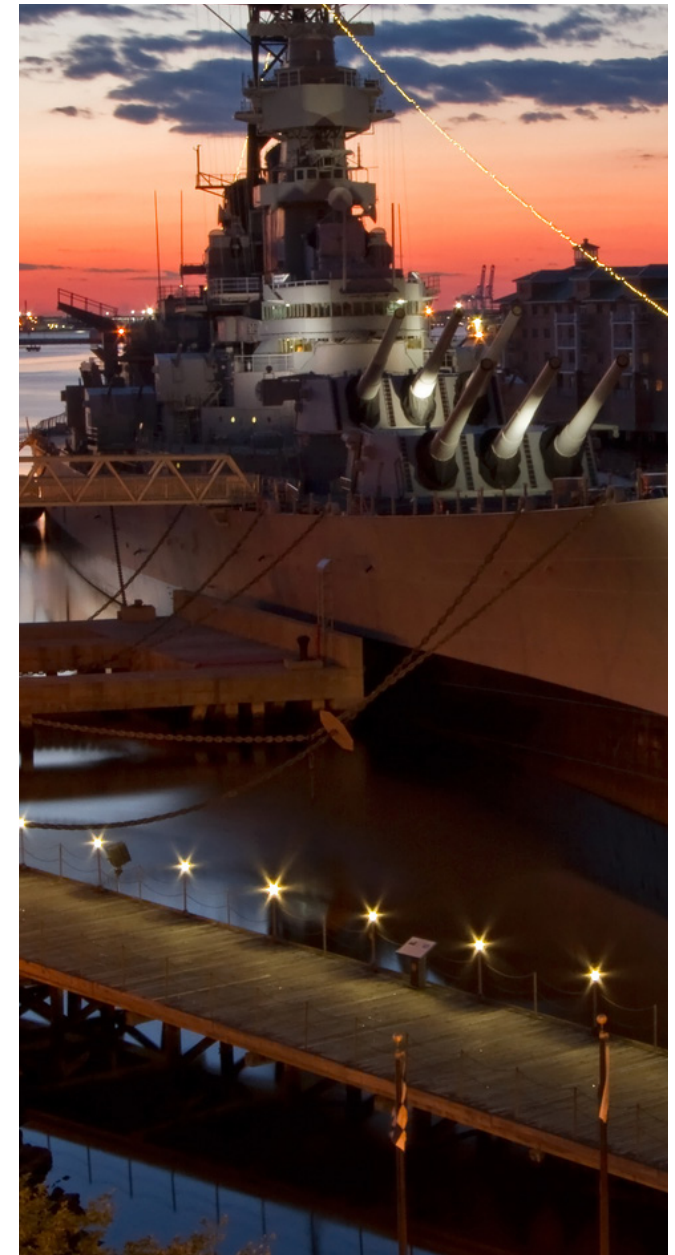
Covered ports include the following airports and maritime ports (Note: we maintain a complete list of the current US airports and maritime ports that meet this criteria)

- Airports listed a large hub airports as determined annually by the Federal Aviation Administration (FAA)
- Airports handling greater than 1.24 billion pounds of cargo as determined annually by the FAA
- Airports designed by as joint civilian/military ("Joint-Use") airports by the FAA
- Maritime ports designated as a commercial strategic seaport within the National Port Readiness Network
- Maritime ports rated as either a top 25 tonnage, container, or dry bulk port as determined by the Maritime Administration
- Military Facilities
 - 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, typically sensitive air force facilities
 - Part 3 – Within the county or other geographic area
 - e.g. Missile ranges
 - Part 4 – Any part of the installation within territorial seas of the US
 - Offshore military facilities/training areas

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)
- Involving real estate that otherwise falls within CFIUS covered transaction authority involving US businesses (i.e., Part 800 authority)
- 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, including fixtures and land incidental to the single housing unit
- By a foreign air carrier of property interests in covered ports
- For the commercial retail of consumer goods or services in covered ports
- For a multiunit building if not more than 10% of square footage and not more 10% of tenants
- For Native American lands



A blue-tinted photograph of a grand classical interior, likely a museum or a large hall. The image features several tall, fluted columns that converge towards a high, vaulted ceiling. The architecture is highly detailed, with ornate capitals and decorative elements. The perspective is from a low angle, looking up at the columns and ceiling, creating a sense of height and grandeur. The text "Other Filings" is overlaid in white on the left side of the image.

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
- Foreign investment in non-US jurisdictions
 - Depending on operations of the investment target, CFIUS-like reviews could be triggered in other jurisdictions





US Business National Security Risk Assessment

US Business National Security Assessment

- ☐ 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?

Database of Prior CFIUS Actions

See our database of prior CFIUS actions on the [Trade Practitioner blog](#).



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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Regional Desks and Strategic Alliances

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