



**Catching up on
CFIUS: A Look at
the Latest
Developments
Affecting Foreign
Investment in U.S.
Businesses**



**To listen to the audio portion of the webinar, dial 800-536-9136;
Access Code 4925722**

Materials and sign-in were included in the reminder email sent Tuesday, March 24.

To submit a question before or during the webinar, email Dorseyu@dorsey.com and your question will be addressed by the presenter by email.

**If you want CLE, sign and return your sign-in.
Thanks!**

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Your Presenter



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In the News



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BACKGROUND ON SECTION 721 AND CFIUS



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Section 721 of the Defense Production Act of 1950 (Section 721)

- Authorizes President to take action to suspend or prohibit “any **covered transaction** that threatens to impair” U.S. national security
- **Covered transaction** = certain acquisition/investment transactions of/in **U.S. businesses** by **foreign persons**
- **ONLY** statutory means to eliminate Section 721 power is to file mandatory declaration or voluntary notice with **Committee on Foreign Investment in the United States (CFIUS)**
- Recently amended through Foreign Investment Risk Review Modernization Act (FIRRMA)



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What is CFIUS?



- 1 Secretary of Labor and Director of National Intelligence are non-voting, ex officio members
- 2 Office of Management & Budget, Council of Economic Advisors, National Security and Economic Councils, Homeland Security Council observe and participate as appropriate
- 3 Other U.S. Government agencies involved on case-by-case basis



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National Security Risk Assessment

The foreign person presents a **threat**.

- The buyer is from a country of concern
- The buyer has close commercial ties to a country of concern
- The buyer is controlled by or has connections to a foreign government
- The buyer has a history of noncompliance with U.S. laws and regulations

The U.S. business exposes a **vulnerability**.

- The U.S. business serves government customers, directly or indirectly
- The U.S. business deals in export-controlled goods or technologies
- The U.S. business may constitute “critical infrastructure” or serve “critical infrastructure” customers
- The U.S. business collects personal information of U.S. citizens



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Regulatory Provisions

31 CFR Part 800	31 CFR Part 801	31 CFR Part 802
<p>CFIUS jurisdiction over certain investments in U.S. businesses by foreign persons</p> <ul style="list-style-type: none"> • Covered control transaction • Covered investment 	<p>CFIUS jurisdiction over Pilot Program transactions</p> <ul style="list-style-type: none"> • Effective between November 10, 2018 and February 12, 2020 • Essentially incorporated into Part 800 	<p>CFIUS jurisdiction over certain transactions by foreign persons involving U.S. real estate</p>



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PART 800 REGULATIONS

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Covered Transaction under Part 800

Covered control
transaction

Covered investment

Change in foreign
person's rights to
U.S. business if
result in either

Transaction
structured to evade
or circumvent
Section 721

Covered Control Transaction

Any transaction by or with any foreign person that could result in foreign control of any U.S. business, including if carried out through joint venture



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Who is a Foreign Person? What is a U.S. Business?

Foreign Person

- Any foreign national, government, or entity
- Any entity over which control is exercised or exercisable by foreign national, government, entity

U.S. Business

- Any entity, irrespective of nationality of persons that control it, engaged in U.S. interstate commerce, but only to extent of its activities in interstate commerce
- Interpreted by CFIUS more broadly to cover “assets” involved in U.S. interstate commerce



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Transactions that are Covered Control Transactions

Irrespective of actual arrangements for control, results or could result in control of U.S. business by foreign person

Foreign person conveys its control of U.S. business to another foreign person

Results or could result in control by foreign person of any part of entity or its assets if constitutes U.S. business

Results in change in foreign person's rights to U.S. business if such change results in control

Joint venture but only if U.S. business is contributed and foreign person could control U.S. business through joint venture



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Transactions that are Not Covered Control Transactions

Stock split or pro rata stock dividend that does not involve change in control

Results in foreign person holding 10% or less of outstanding voting interest in U.S. business but only if transaction is “solely for the purpose of passive investment”

Acquisition of any part of entity or of assets if does not constitute U.S. business

Acquisition of securities by securities underwriter in ordinary course of business and in underwriting process

Acquisition pursuant to condition in contract of insurance relating to fidelity, surety, or casualty obligations if contract made by insurer in ordinary course of business



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What Constitutes *Control*?

Control means direct or indirect power, whether or not exercised, through ownership of majority or “dominant minority” of total outstanding voting interest in entity to determine its “important business matters”

No definitive regulatory guidance on what constitutes “dominant minority”

Certain minority shareholder protections shall not in themselves be deemed control



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Illustrative List of Important Business Matters

Sale, lease, mortgage, pledge, or other transfer of assets

Reorganization, merger, or dissolution

Closing, relocation, or substantial operation of facilities

Major expenditures, approval of operating budget, or selection of new business lines or ventures

Amendment of key organizational documents

Entry into, termination, or non-fulfillment of significant contracts

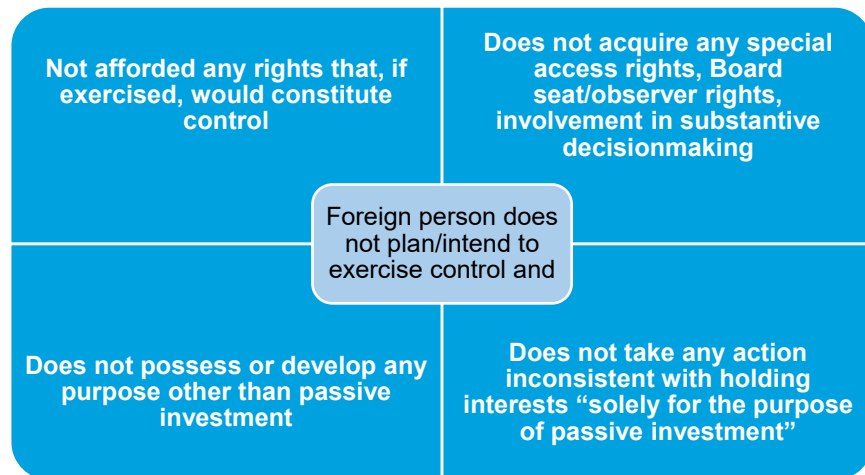
Appointment or dismissal of officers or senior managers or of employees with access to critical or sensitive technology or classified U.S. Government information

Policies or procedures governing treatment of non-public technical, financial, or other proprietary information



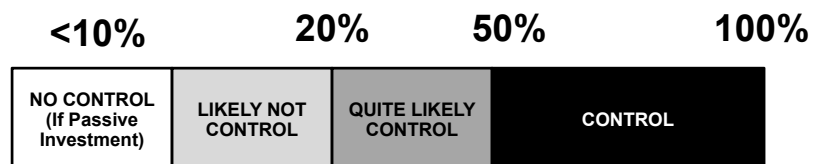
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Safe Harbor – Under 10% and “Solely for the Purpose of Passive Investment”



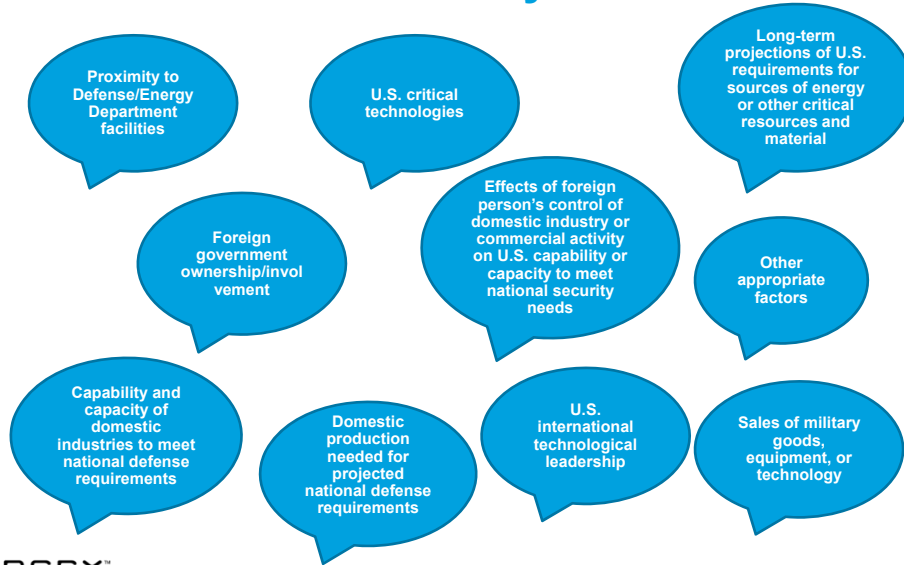
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Suggested Grey Scale Approach



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National Security Factors



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Diligence Checklist

- ✓ U.S. Government Contracts?
- ✓ Classified Work?
- ✓ Registered with Directorate of Defense Trade Controls (DDTC)?
- ✓ Critical Technologies?
- ✓ Proximity to U.S. Defense or Energy Department Facilities?
- ✓ Sensitive Personal Data?
- ✓ Regulated Industry?
- ✓ Other U.S. Government regulatory filings?
- ✓ Critical Infrastructure Industry Sector?



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Homeland Security – Critical Infrastructure Industry Sectors



Chemical Sector



Commercial Facilities Sector



Communications Sector



Critical Manufacturing Sector



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Critical Infrastructure (cont.)



Dams Sector



Defense Industrial Base Sector



Emergency Services Sector



Energy Sector



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Critical Infrastructure (cont.)



Financial Services Sector



Food and Agriculture Sector



Government Facilities Sector



Healthcare and Public Health Sector



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Critical Infrastructure (cont.)



Information Technology Sector



Nuclear Reactors, Materials, and Waste Sector



Transportation Systems Sector



Water and Wastewater Systems Sector



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Decision Time



1. File joint voluntary notice with CFIUS
2. File one-sided notice with CFIUS
3. Make no filing with CFIUS



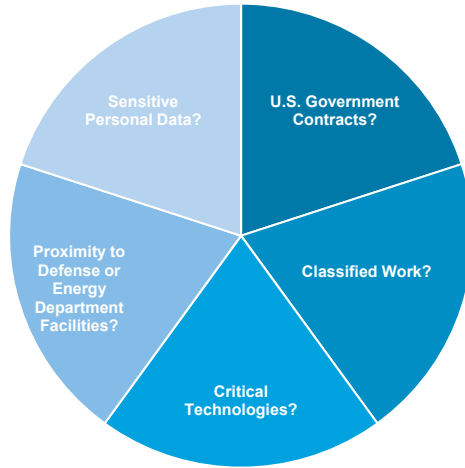
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Factors to Consider – About Transaction



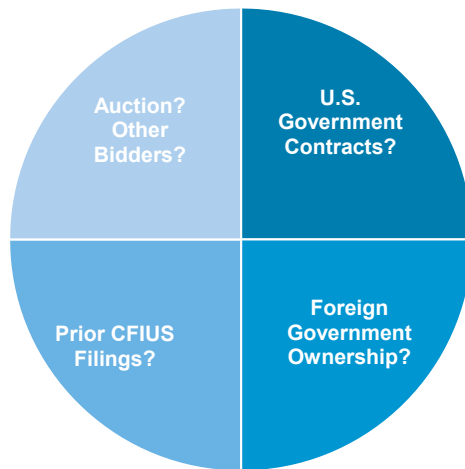
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Factors to Consider – About U.S. Business



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Factors to Consider – About Foreign Person



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Covered Investment

Investment, direct or indirect, by foreign person (other than excepted investors) in unaffiliated TID U.S. business that

- Is not covered control transaction
- Affords certain rights to foreign person



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TID U.S. Business



Critical Technologies

Produces, designs, tests, manufactures, fabricates, or develops one or more critical Technologies



Critical Infrastructure

Performs certain functions as to covered investment critical Infrastructure



Sensitive Data

Maintains or collects, directly or indirectly, sensitive Data



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Rights Pertinent to Covered Investment

Access to any material nonpublic technical information in TID U.S. business's possession

Membership or observer rights on TID U.S. business governing body (or right to nominate individual to such body)

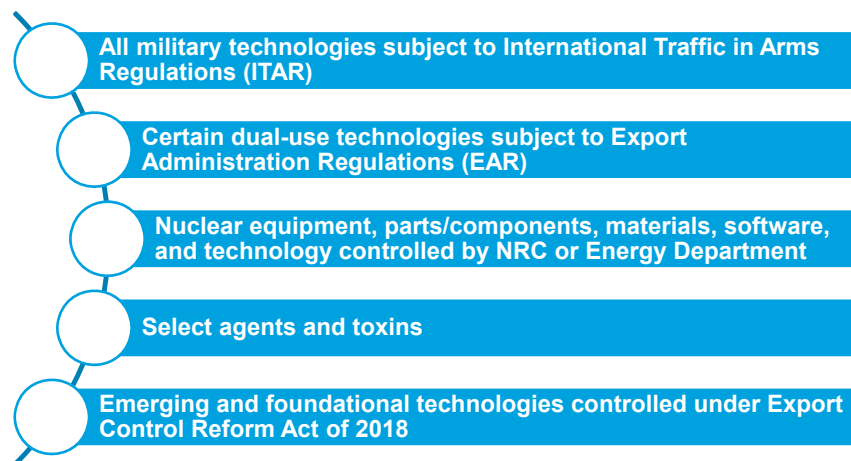
Any involvement, other than through voting of shares, in substantive decisionmaking of TID U.S. business regarding

- Use, development, acquisition, safekeeping, or release of sensitive personal data
- Use, development, acquisition, or release of critical technologies
- Management, operation, manufacture, or supply of covered investment critical infrastructure



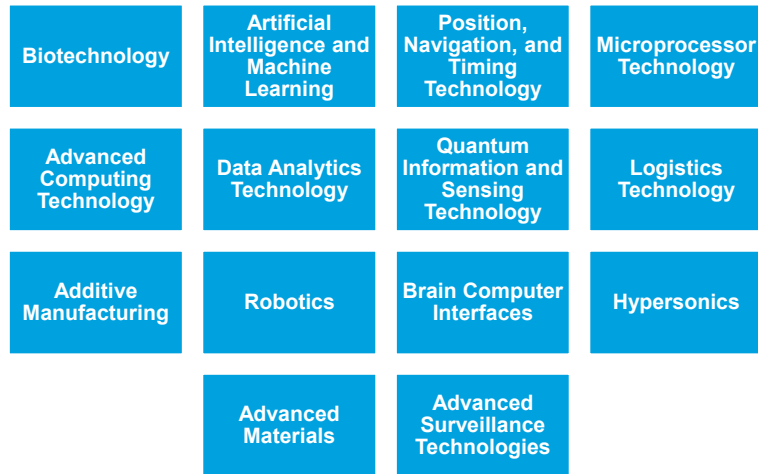
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Critical Technologies



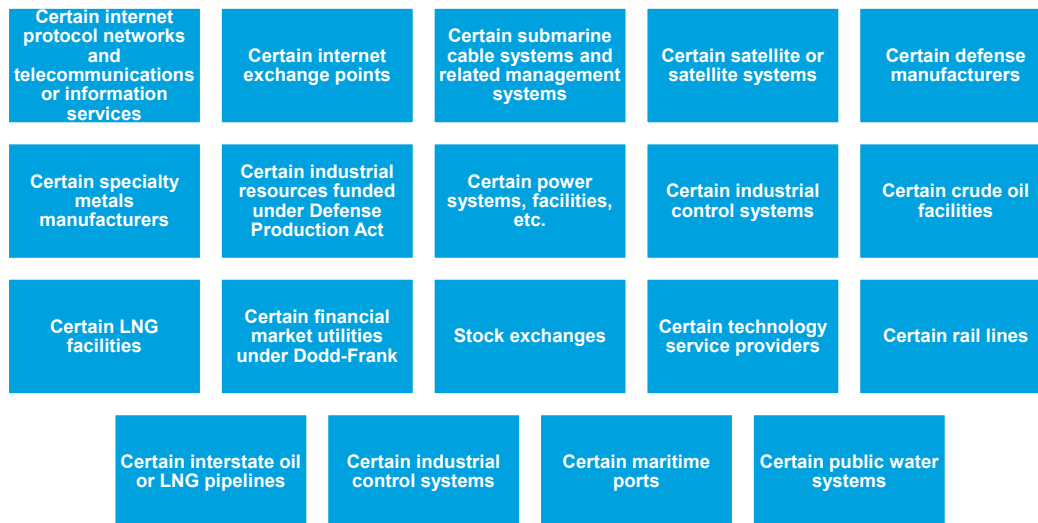
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Emerging and Foundational Technologies



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Covered Investment Critical Infrastructure



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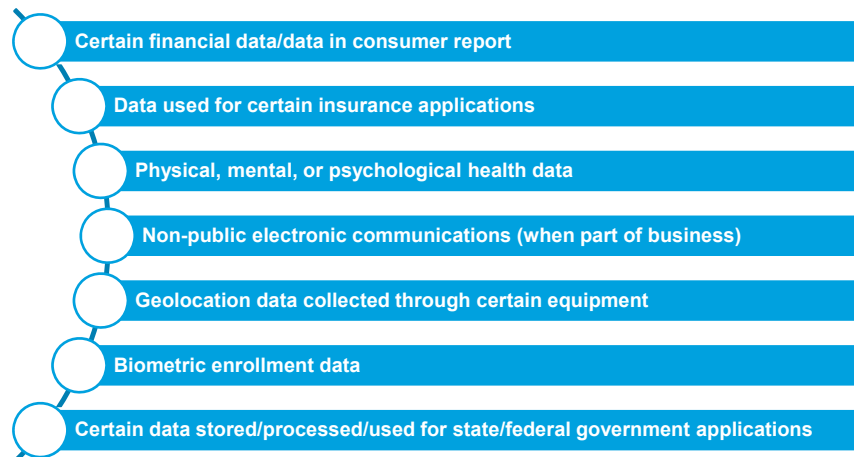
Sensitive Personal Data

- **Identifiable data maintained or collected by U.S. business**
 - Targets/tailors products/services to certain U.S. Government agencies
 - Has maintained or collected any identifiable data within one or more categories on greater than 1,000,000 individuals at any point over a 12 month period preceding underlying transaction
 - Has demonstrated business objective to maintain or collect data within one or more categories on greater than 1,000,000 individuals and such data integrated part of U.S. business's primary products/services
- **Results of individual's genetic tests, including genetic sequencing data**
- **Does not include data that is matter of public record or data concerning employees of U.S. business**



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Categories of Sensitive Personal Data

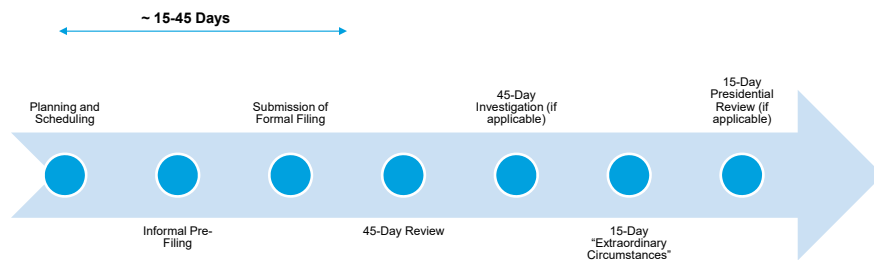


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PROCEDURES OF FILING WITH CFIUS UNDER PART 800 REGULATIONS

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Timeline for Voluntary Notice Filings under Part 800



Mandatory Declarations

- **Must be filed if**
 - Covered transaction results in acquisition of substantial interest in TID U.S. business by foreign person in which national or subnational governments of single foreign state other than excepted foreign state (currently Australia, Canada, United Kingdom)
 - Covered transaction that is covered investment in, or could result in foreign control of TID U.S. business that produces, designs, tests, manufacturers, fabricates, or develops one or more critical technologies
 - Used in connection with TID U.S. business's activity in one or more identified industry sectors (currently 27 sectors)
 - Designed by TID U.S. business specifically for use in one or more identified industry sectors
- **Limited exceptions**
- **Voluntary declarations may be filed**



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Critical Technologies – Industries

Aircraft Manufacturing	Aircraft Engine and Engine Parts Manufacturing	Alumina Refining and Primary Aluminum Production
Ball and Roller Bearing Manufacturing	Computer Storage Device Manufacturing	Electronic Computer Manufacturing
Guided Missile and Space Vehicle Manufacturing	Guided Missile and Space Vehicle Propulsion Unit and Propulsion Unit Parts Manufacturing	Military Armored Vehicles, Tank, and Tank Component Manufacturing



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Critical Technologies – Industries (cont.)

Nuclear Electric Power Generation	Optical Instrument and Lens Manufacturing	Other Basic Inorganic Chemical Manufacturing
Other Guided Missile and Space Vehicle Parts and Auxiliary Equipment Manufacturing	Petrochemical Manufacturing	Petrochemical Manufacturing Powder Metallurgy Part Manufacturing
Power, Distribution, and Specialty Transformer Manufacturing	Primary Battery Manufacturing	Radio and Television Broadcasting and Wireless Communications Equipment Manufacturing



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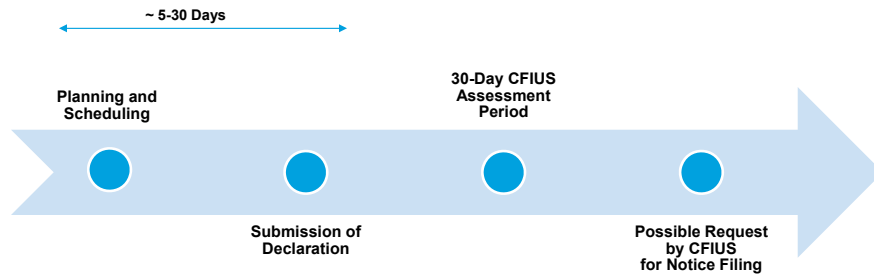
Critical Technologies – Industries (cont.)

R&D in Biotechnology	R&D in Nanotechnology	Secondary Smelting and Alloying of Aluminum
Search, Detection, Navigation, Guidance, Aeronautical, and Nautical System and Instrument Manufacturing	Semiconductor and Related Device Manufacturing	Semiconductor Machinery Manufacturing
Storage Battery Manufacturing	Telephone Apparatus Manufacturing	Turbine and Turbine Generator Set Units Manufacturing



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Timeline for Mandatory Declaration Filings



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Planning and Scheduling

- If transaction involves foreign person, parties should consider CFIUS impact
- If weighed early in due diligence, CFIUS process should not materially affect desired closing schedule
- No “early termination” procedure at CFIUS



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Proposed Filing Fees

No Fee	• Less than \$500,000
\$750	• \$500,000 or greater but less than \$5,000,000
\$7,500	• \$5,000,000 or greater but less than \$50,000,000
\$75,000	• \$50,000,000 or greater but less than \$250,000,000
\$150,000	• \$250,000,000 or greater but less than \$750,000,000
\$300,000	• \$750,000,000 or greater



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Mitigation Agreements

- **Structured by lead agency**
- **Based on risk-based analysis, of threat to national security of covered transaction**
- **Contractually binding**
- **Regulations permit Attorney General to enforce against parties**
- **May limit foreign person's management prerogatives to protect certain U.S. national security interests**



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CONTENT OF CFIUS NOTICE AND MANDATORY DECLARATION UNDER PART 800 REGULATIONS

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Content of CFIUS Notice

Detailed
business
description
of parties

Detailed
summary
of
transaction

Organizational
charts

Detailed
information
about foreign
person
ownership /
involvement

Market share
information

Export
control
information
on target
company's
items

Target
company's
defense or
other U.S.
Government
contractors

Military
applications
of target
company's
technology

Foreign person's
plans, if any, to
close or relocate
any of target
company's U.S.
facilities

Detailed
information about
U.S. business's
licenses, permits,
or other
authorizations
granted by U.S.
agency

Copy of most
recent version of
transaction
document, annual
reports, audited
financial
statements

Personal
identifier
information

Content of Mandatory Declaration



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PART 802 REGULATIONS

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Real Estate Regulations

- Entirely new set of regulations but based on proximity concerns raised for years in certain foreign investment transactions
- Focuses on specified covered real estate transactions
- Filing process is voluntary and can be done through notice filing or declaration



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Covered Real Estate Transaction

Any purchase or lease by, or concession to, foreign person of covered real estate that affords foreign person three of four property rights

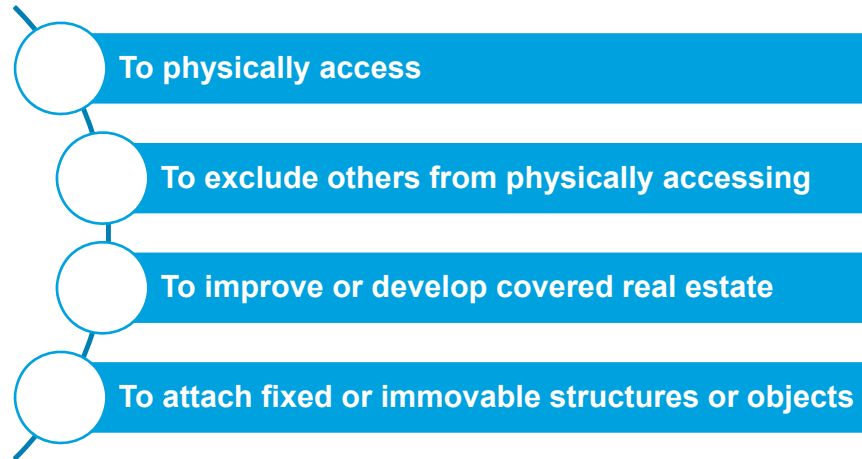
Transaction through which foreign person's rights to covered real estate changes and results in three of enumerated property rights

Transaction intended to evade/circumvent Section 721

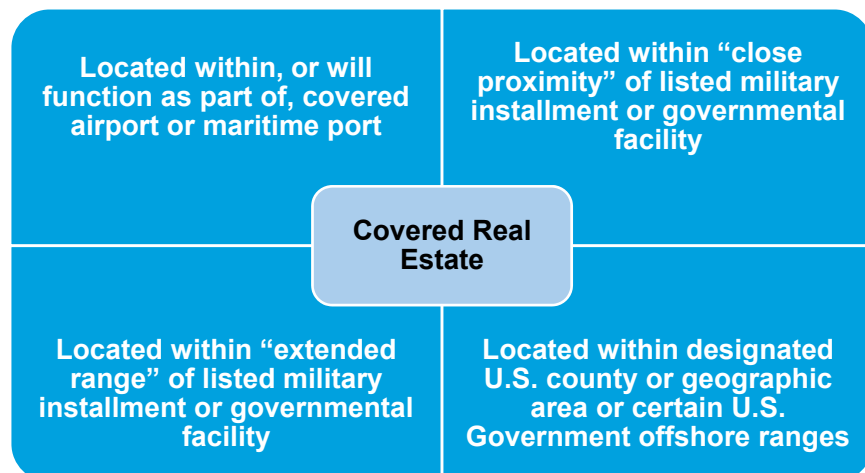


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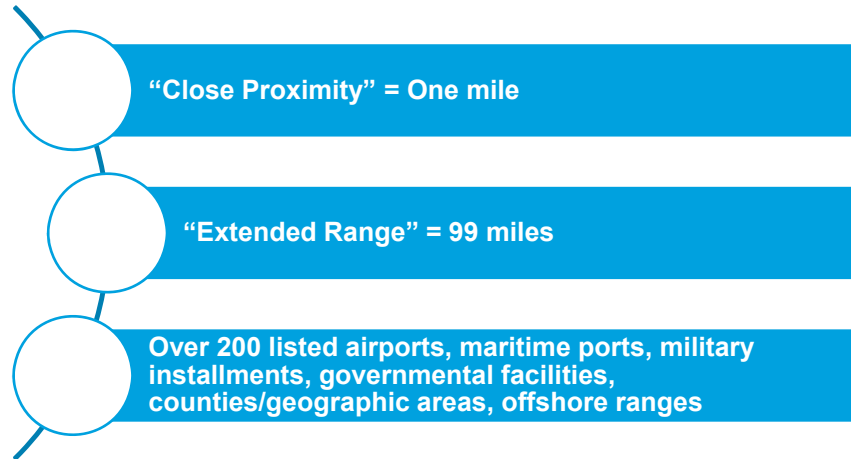
Property Rights



Covered Real Estate



Relevant Distances and Locations



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Transactions that are Covered Real Estate Transactions

Foreign person enters into purchase or lease or obtains concession to covered real estate (or portion thereof) directly or indirectly

Foreign person acquires less than full ownership of covered real estate but obtains three property rights

Foreign person purchases or leases or obtains concession to covered real estate from another foreign person

Subsequent change to existing rights that affords foreign person three property rights

Transaction designed to evade or circumvent



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Transactions that are Not Covered Real Estate Transactions

Excepted real estate

Purchase or lease or concession that does not afford at least three property rights

Acquisition of securities by underwriter in ordinary course of business and in process of underwriting

Acquisition pursuant to condition in contract of insurance relating to fidelity, surety, or casualty obligations if made by insurer in ordinary course of business



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Limited Exceptions

Excepted real estate investor

Acquisitions in "urbanized areas"

Acquisition of single housing unit

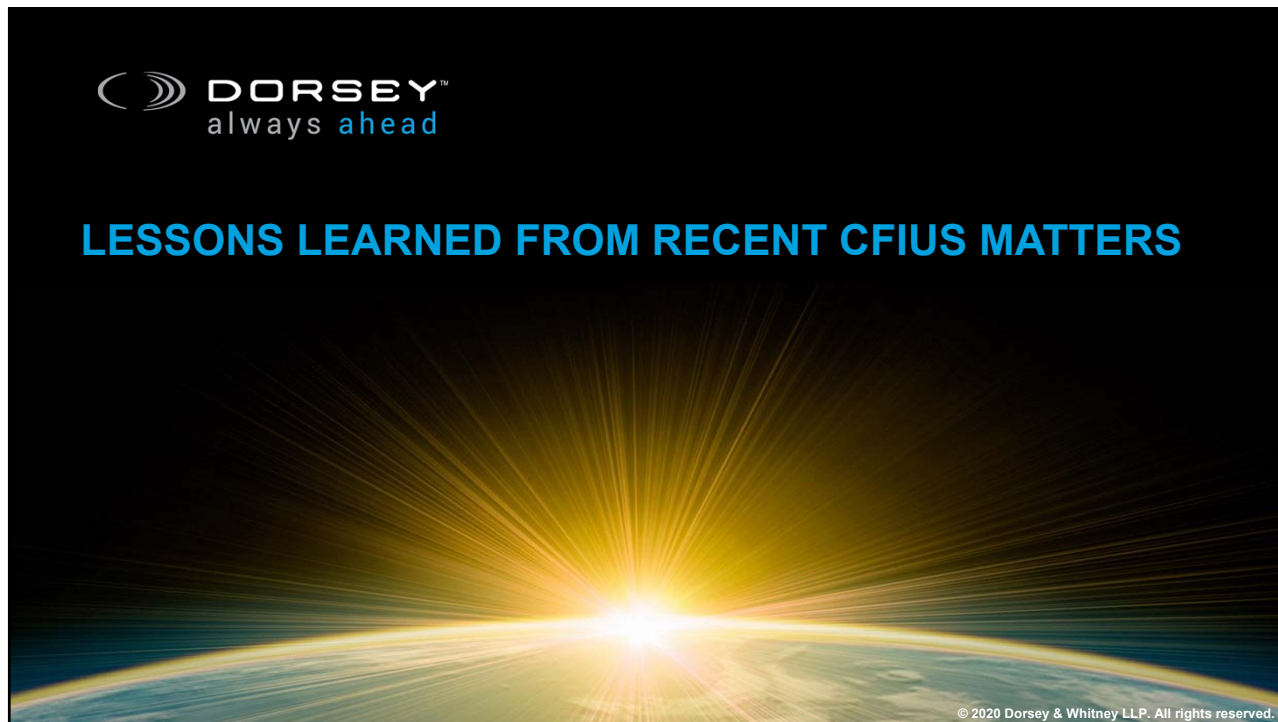
Certain post-related transactions

Certain transactions involving "commercial office space"



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LESSONS LEARNED FROM RECENT CFIUS MATTERS



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Lessons about Foreign Party

Transactions involving foreign person owned or controlled by government heighten national security concerns

CFIUS seemingly more concerned about certain countries

CFIUS member agencies consider implications of conflicting foreign policy

Lessons about U.S. Business



- ***Proximity concerns and sensitive personal data concerns have become increasingly important factor to CFIUS's determination***
- ***Detailed due diligence is necessary to truly uncover national security concerns***
- ***Certain industry sectors present heightened concerns***
- ***CFIUS member agencies can request that CFIUS review and investigate – Congress increasingly taking role***



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Importance of Strategic Planning



- ***Understand that full communications plan is essential and, if resources available, consider hiring public/government relations experts to handle media and government scrutiny***
- ***Be prepared to work patiently through Section 721 mitigation plans and procedures with CFIUS and other lead agencies***
- ***Bulk of notices do not actually present unresolvable/unsolved national security concerns***



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THANK YOU!

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