



U.S. CHAMBER OF COMMERCE



AdvaMed

Advanced Medical Technology Association

Implementation of the “Country Specification” provision and the Scope of Mandatory Filings Under the Final Foreign Investment Risk Review Modernization Act (FIRRMA) Regulations

Foreign Person Definition¹

Summary: This regulatory language would frame the criteria and application of an exception to certain jurisdictional provisions by defining “foreign person” in a more limited manner for those provisions (i.e., the real estate and “other investment” provisions), consistent with the authorities provided by Section 1703(a)(4)(E), i.e., the Country Specification provision. Parties who meet all of the identified criteria will not be foreign persons for the purposes of the

¹ To be clear, this suggested process is in addition to the recommendations and feedback provided by the American Investment Council (“AIC”), the Biotechnology Innovation Organization (“BIO”), the Organization for International Investment (“OFII”), the National Venture Capital Association (“NVCA”), and the U.S. Chamber of Commerce in their November 2018 letters to Treasury regarding the “Interim Rule Regarding Temporary Provisions Pertaining to a Pilot Program to Review Certain Transactions Involving Foreign Persons and Critical Technologies”, TREAS-DO-2018-0021. For example, as NVCA raised in its letter, it is important to get clarification regarding the application of various definitions, including particularly definitions that will likely outlast the Pilot Program, such as “material nonpublic technical information” and “foreign entity.” Relatedly, as AIC raised in its letter, it is also important to both update the foreign entity definition, to recognize the unique nature of where control lies in fund structures, and provide limited exceptions to the foreign person definition as outlined below. Both can help ensure that CFIUS is properly focused on transactions likely to introduce national security risk, while limiting uncertainty and delays for transactions that do not introduce such risks.

identified provisions and thus transactions that would otherwise be captured by such provisions shall not be covered transactions. Transactions that could result in control of a U.S. business by the foreign person would remain within the Committee's jurisdiction, however, even where an entity meets the below criteria and is therefore deemed not to be a foreign person for the purposes of the real estate and "other investment" provisions. Parties and their counsel would be required to determine whether an exception applies in any specific case.

§ 800.xxx Foreign person

(a) For purposes of § 800.xxx [the real estate provision] and § 800.xxx [the "other investments" provision], any person that meets all the requirements of this section at the time that the transaction is completed shall not be considered a foreign person for purposes of that transaction:

(1) The foreign person is organized under the laws of a country that has a mutual defense treaty or a defense cooperation agreement with the United States, including member states of the North Atlantic Treaty Organization ("NATO"); has been designated as a major non-NATO ally pursuant to section 517 of the Foreign Assistance Act of 1961; has a bilateral treaty with the United States and is a member of the European Union or the European Free Trade Association; or other such countries as CFIUS publicly designates;

(2) All headquarters of the foreign person are located in a country that has a mutual defense treaty or a defense cooperation agreement with the United States, including member states of the North Atlantic Treaty Organization ("NATO"); has been designated as a major non-NATO ally pursuant to section 517 of the Foreign Assistance Act of 1961; has a bilateral treaty with the United States and is a member of the European Union or the European Free Trade Association; or other such countries as CFIUS publicly designates;

(3) The principal location of the management of the foreign person is in a country that has a mutual defense treaty or a defense cooperation agreement with the United States, including member states of the North Atlantic Treaty Organization ("NATO"); has been designated as a major non-NATO ally pursuant to section 517 of the Foreign Assistance Act of 1961; has a bilateral treaty with the United States and is a member of the European Union or the European Free Trade Association; or other such countries as CFIUS publicly designates;

(4) The foreign person is not otherwise under the control of any person or entity that is organized, headquartered, or managed in a country subject to a U.S. arms embargo, and no such person holds a substantial interest in the foreign person;

(5) The foreign person has never been found to be in material violation of any national security mitigation agreement entered into with any CFIUS member agency.

Scope of Mandatory Filings Under the Final Regulations

Recognizing that FIRRMA obligates CFIUS to implement a mandatory filing regime with regards to investments that result in the acquisition of a substantial interest in a U.S. business by a foreign person in which a foreign government has a substantial interest, we encourage CFIUS to limit mandatory filings to this set of transactions and to narrowly scope such transactions through its definition of what constitutes a substantial interest.