

# FOREIGN INVESTMENT RESTRICTIONS IN U.S. BUSINESS

What U.S. Companies and Foreign Investors Need to Know



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## Key Takeaways

- CFIUS has the authority to review certain minority foreign investments in U.S. businesses involving critical technology or infrastructure and sensitive personal data of U.S. citizens.
- Fund managers must ensure that their fund documents do not trigger a CFIUS review if they provide foreign parties and limited partners with certain governance rights and access to certain nonpublic information.
- Many transactions are covered, including M&A, traditional investments, contingent equity, IPOs, SPACs and restructurings.
- CFIUS filings may be mandatory for certain foreign investments and acquisitions in which a foreign government holds a substantial interest in the foreign party as well as for investments in companies with certain critical technology.
- Filers have the option to file a “short form” declaration rather than a full-blown filing for all transactions. CFIUS reviews such declarations within 30 days.
- CFIUS has had a significant impact on investment in large segments of U.S. technology.

## What Foreign Investments Are Covered?

**Control** — CFIUS continues to have jurisdiction over transactions that could result in foreign “control” of a U.S. business that raises national security concerns.

**National Security** — The definition of national security is interpreted broadly and remains fluid, constantly changing under the sole discretion of CFIUS to accommodate advancements in technology and evolving geopolitical climates.

**Sectors of High Interest** (not an exhaustive list) — This includes technologies such as semiconductors, AI, biotech, robotics, big data, analytics and microprocessors as well as infrastructure such as telecommunications, energy, financial services, transportation, water, critical manufacturing and defense sectors. The U.S. government is heavily focused on the national security aspects of cybersecurity and U.S. citizens’ sensitive data as well as supply chain.

**Minority Investments** — CFIUS also has jurisdiction to review minority “covered investments” in any “TID U.S. Business” (short for Technology, Infrastructure and Data). A transaction falls under CFIUS jurisdiction if it satisfies both the “covered investment” and the “TID U.S. Business” prongs.

**First Prong: Covered Investments** — Direct or indirect investment by a foreign person in a TID U.S. Business that affords the foreign person any of the following:

- Access to any material nonpublic technical information in the possession of the TID U.S. Business.
- Membership or observer rights on the board of directors 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.
- Any involvement, other than through voting of shares, in certain substantive decision-making of the TID U.S. Business.

**Second Prong: TID U.S. Business** — A U.S. business that:

- Produces, designs, tests, manufactures, fabricates or develops one or more critical technologies.
- Performs certain functions with respect to critical infrastructure.
- Maintains or collects, directly or indirectly, sensitive data of U.S. citizens.
- Although these terms are specifically defined, the definitions remain fluid and are updated often.

#### **Golden Rules**

- If possible, structure your transaction and documents to avoid triggering CFIUS jurisdiction.
- If you cannot avoid CFIUS jurisdiction, err on the side of caution and submit a filing. The government has been aggressive with enforcement and with its own diligence on parties that close without filing.
- Conduct a CFIUS analysis at the outset of your deal and plan accordingly.

### **International Trade & National Security Practice**

Fox Rothschild's knowledgeable International Trade team assists clients with the full range of domestic and international trade compliance concerns. Whether through representation before regulatory agencies or customized compliance reviews, we help companies reduce exposure and maximize cross-border return on investment. We're one of the few law firms with integrated CFIUS and corporate practices, which enables us not only to counsel clients on compliance when investing or acquiring U.S. companies, but also to help them negotiate and structure transactions to facilitate CFIUS approval.

Our attorneys also guide U.S. and international companies through the maze of export control regulations that govern the flow of products, technology, services and data across borders, including ITAR, EAR and international sanctions enforced by the Office of Foreign Assets Control (OFAC). Importers rely on our international trade team to navigate anti-dumping and countervailing duty proceedings before the U.S. Department of Commerce and the U.S. International Trade Commission.



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