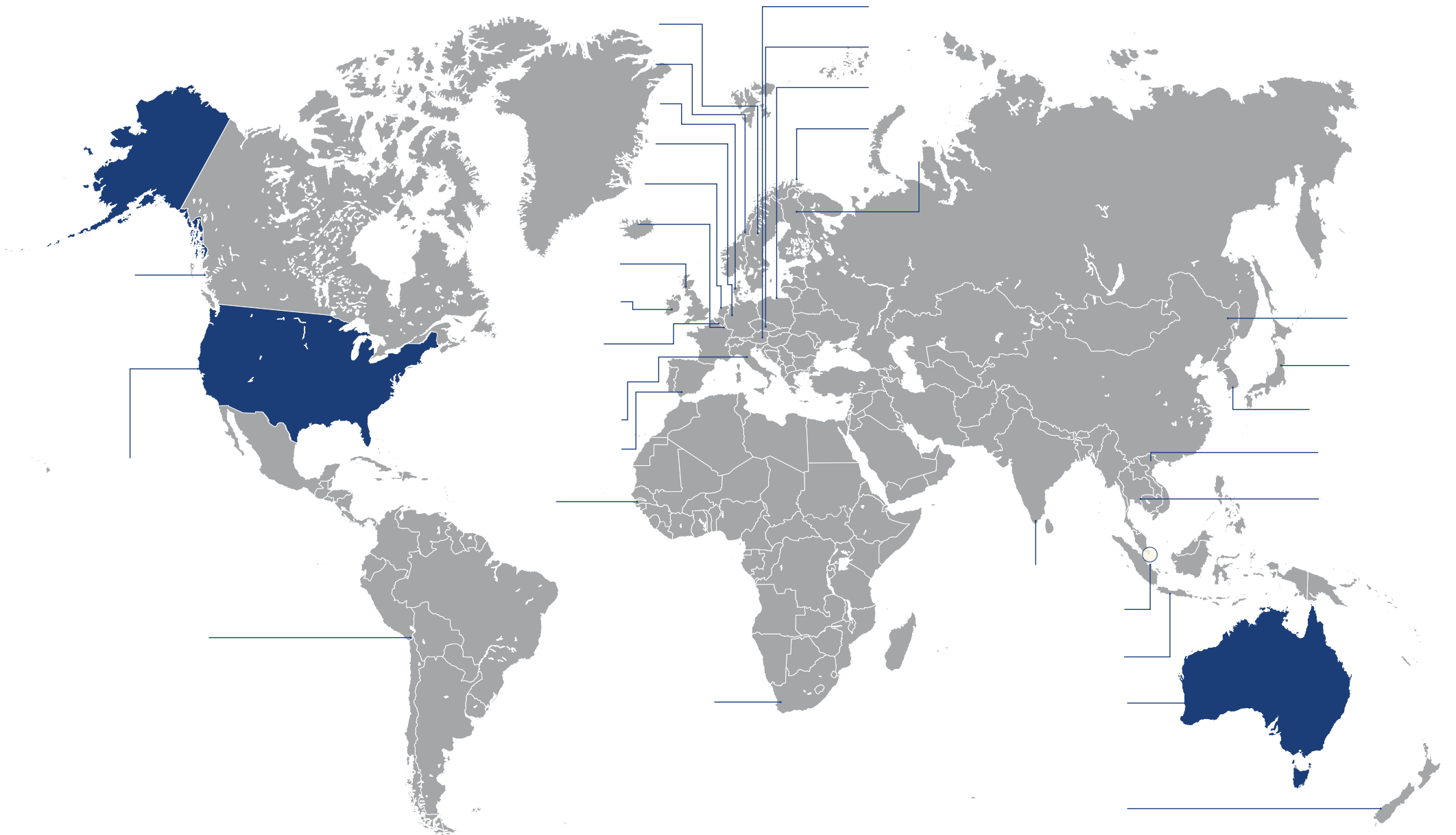




HERBERT  
SMITH  
FREEHILLS

# Foreign investment regulation: country by country guide

 Interactive map





# Foreign investment regulation: country by country guide

## Australia

### Key applicable laws

Foreign Acquisitions and Takeovers Act 1975 (**FATA**).

Foreign Acquisitions and Takeovers Regulation 2015 (**FATR**).

### Competent authority

The Foreign Investment Review Board (**FIRB**) reviews qualifying foreign investments and advises on implications for the national interest and/or national security. The Treasurer, advised by FIRB, takes the decision as to whether to permit, impose conditions on, or prohibit the transaction.

The process is separate to the merger control review process before the Australian Competition and Consumer Commission.

### Sectors covered

All sectors.

National security businesses and land, and businesses/corporations/assets in specified sensitive sectors (media, agriculture, telecoms, defence/military, transport, encryption and security technologies, communication systems, extraction of uranium/plutonium, and operation of nuclear facilities) are subject to stricter regulation.

Acquisitions of agricultural, commercial and residential land, and mining/production tenements, also fall within the scope of FATA.



### Transactions covered

### Monetary thresholds

Investor	Form of investment in Australian <sup>1</sup> business/assets <sup>2</sup>	Target valuation threshold <sup>3</sup>
All investors	National security businesses	≥ A\$0
Foreign government investor	All businesses	≥ A\$0
Foreign person	Media business	≥ A\$0
	Agribusiness	≥ A\$67m (£36m/US\$45m approx.)
	Non-sensitive business	≥ A\$310m (£165m/US\$206m approx.)
	Service businesses (non-sensitive and for India only)	≥ A\$500m (£267m/US\$332m approx.)
Foreign person from Canada, Chile, China, Japan, Hong Kong, Malaysia, Mexico, New Zealand, Peru, Singapore, South Korea, USA, Vietnam	Media business	≥ A\$0
	Agribusiness	Canada, China, Japan, Hong Kong, Malaysia, Mexico, Peru, Singapore, South Korea, Vietnam: ≥ A\$67m (£36m/US\$45m approx.)  Chile, New Zealand, USA: ≥ A\$1,339m (£714m/US\$889m approx.)
	Sensitive business	≥ A\$310m (£165m/US\$206m approx.)
	Non-sensitive business	≥ A\$1,339m (£714m/US\$889m approx.)

For control thresholds see 'Notification' below.

<sup>1</sup> May cover foreign-to-foreign transactions where target has Australian subsidiaries/assets.

<sup>2</sup> Separate thresholds apply to land acquisitions.

<sup>3</sup> Calculated by reference to (i) consideration for the acquisition, (ii) target assets (total asset value/assets of entities or businesses), or (iii) total issued securities value, depending on the type of action taken.



### Transactions covered cont.

#### Foreign person

This is defined as:

- an individual not ordinarily resident in Australia; or
- a foreign government or foreign government investor; or
- a corporation<sup>4</sup> in which an individual not ordinarily resident in Australia, foreign corporation or foreign government holds  $\geq 20\%$ ; or
- a corporation<sup>5</sup> in which two or more foreign persons hold  $\geq 40\%$ .

#### Foreign government investor

This is defined as:

- an entity in which:
  - a foreign government or separate government entity holds  $\geq 20\%$ ; or
  - foreign governments or separate government entities of more than one foreign country hold  $\geq 40\%$ , except where:
    - the entity operates a passive investment fund or scheme for members; and
    - no individual member can influence any individual investment management or decisions; and
    - no foreign government investor holds  $\geq 20\%$  in the entity.

<sup>4</sup> Or trustee of a trust or general partner of a limited partnership.

<sup>5</sup> Or trustee of a trust or general partner of a limited partnership.



### Notification

#### Notifiable actions

For notifiable actions, pre-completion notification and approval is **mandatory**.

Notifiable actions include acquisitions by a foreign person of  $\geq 20\%$  in a target's securities<sup>6</sup> if the target is:

- an Australian corporation carrying on an Australian business; or
- an Australian trust unit; or
- an Australian holding entity of either of them,

and the applicable monetary threshold set out above is met.

#### Notifiable national security actions

For notifiable national security actions, pre-completion notification and approval is **mandatory**.

Notifiable national security actions include the following actions taken by a foreign person:

- starting a national security business; or
- acquiring  $\geq 10\%$  in a national security business.

A **nil monetary threshold** applies to notifiable national security actions.

A **national security business** is one that is:

- carried on wholly or partly in Australia; and
- publicly known (or could reasonably be known) that the business concerns:
  - critical infrastructure; or
  - telecommunications; or
  - critical goods, technology, or services for military/intelligence; or
  - classified information or sensitive personal information or defence or intelligence personnel.

<sup>6</sup> Stricter rules apply in relation to foreign government investors and sensitive sectors (for example holdings of  $\geq 10\%$  in an agribusiness and  $\geq 5\%$  in a media business require notification).



<b>Notification cont.</b>	<b>Significant actions and reviewable national security actions</b> For significant actions which do not constitute notifiable actions, or reviewable national security actions which do not constitute notifiable actions, notifiable national security actions, or significant actions, notification is <b>voluntary</b> , but the Treasurer has broad powers to intervene in the absence of notification.
<b>Review procedure and time limits</b>	<b>Notification and review procedure</b> Notifications are made to FIRB, which consults with relevant government departments and agencies before advising the Treasurer. The Treasurer will then decide whether to grant a (conditional or unconditional) 'no objection' notification or to prohibit the transaction. <b>Time limits</b> The Treasurer has 30 calendar days from notification to make a decision plus 10 calendar days to notify the applicant (subject to potential extension on various grounds).
<b>Substantive test</b>	Whether or not the proposal is in the 'national interest', taking into account factors including national security, competition, other Australian government policies (including tax), economic impact, community impact, employees, and the character of the investor. National security-related proposals are assessed against a narrower 'national security' test including consultation with defence and intelligence agencies.
<b>Enforcement powers and penalties</b>	<b>Call-in power</b> The Treasurer may review significant actions or reviewable national security actions that are not notified to FIRB, if the Treasurer considers that the action may pose a national security concern. The Treasurer cannot review actions that have been notified to, or approved by, FIRB. Following the review, the Treasurer may grant a (conditional or unconditional) 'no objection' notification, prohibit the action, or require divestment. The call-in power is subject to a 10-year time limit.



### Enforcement powers and penalties cont.

#### Last resort power

The Treasurer may review any actions (including actions approved by FIRB) to determine whether a national security risk relating to the action exists.

The Treasurer may exercise this power only if there has been a false or misleading statement by the investor or material changes to the business, activities, or market in which the investor operates.

The Treasurer must obtain and have regard to advice from national intelligence agencies and negotiate with the investor to reduce the risk.

If the risk is not adequately reduced or eliminated, the Treasurer may impose, vary or revoke conditions, prohibit or undo an action, or require divestment.

#### Enforcement mechanisms

FIRB has a range of enforcement powers and mechanisms including:

- infringement notices for all actions;
- monitoring and investigative powers;
- enforceable undertakings;
- compliance directions;
- revoking approvals for false or misleading information; and
- requiring notification of actions taken under a no objections notice.

#### Criminal penalties

Criminal sanctions ( $\leq 10$  years' imprisonment, a fine of  $\leq$  A\$4.695m for individuals (£2.8m/US\$3.0m approx.) or a fine of  $\leq$  A\$46.95m for corporations (£28m/US\$30m approx.)) may be imposed if:

- an investor gives false or misleading information to FIRB;
- a notifiable action or notifiable national security action is taken without receipt of a no objection notification; or
- a significant action or reviewable national security action is notified, and that action is taken without receipt of a no objection notification or before expiration of the period 10 days after the decision period; or
- an investor fails to comply with a power or contravenes an order of the Treasurer, or a condition of that order.



### Enforcement powers and penalties cont.

Liability extends to parties that incite others to commit an offence (which could include company officers). Civil sanctions of ≤ A\$782.5m (£410m/US\$503m approx.) may also apply.

#### Orders

The Treasurer may make orders prohibiting an action from being taken if the Treasurer deems the proposed action to be contrary to the national interest or national security (as applicable).

If an action has already been taken without FIRB approval, and the Treasurer deems the action contrary to the national interest or national security (as applicable), the Treasurer may make a 'disposal order' to effectively unwind the action by requiring disposal of the interest held.

### Judicial review

No right to appeal/judicial review.

### Current trends and outlook

#### Increased FIRB filing fees

On 22 July 2022, a suite of amendments were introduced to the FIRB application fee regime. The amending regulations provided for an increase in FIRB application fees, with the result that the maximum fee cap was doubled from approximately A\$500k (£267k/US\$332k approx.) to A\$1.045m (£566k/US\$705k approx.). On 1 July 2023, the maximum fee cap was further increased from A\$1.045m to A\$1,119,100 (£584k/US\$713k approx.).

Substantial increases to FIRB application fees and penalties for non-compliance (with associated increased audit, investigation and enforcement rights) are consistent with a general view that there has been a change in philosophy with FIRB taking on a greater watchdog role akin to the approach of the Australian competition regulator, ACCC, and the Australian corporate regulator, ASIC. Proactive and open engagement with FIRB will continue to be of increasing importance to foreign investors throughout the lifespan of a transaction.

#### FIRB approval conditions continuing to trend

It is increasingly common for the Treasurer to impose conditions on a FIRB application, with conditions being attached to 38% of FIRB approvals in the quarter ending 31 December 2023. Foreign investors should engage with FIRB early in the investment process about any likely conditions that may be imposed, so that these can be ventilated and agreed early on to prevent holding up an investment timeline, which can cause angst for all parties involved. Transaction documents for M&A deals are also increasingly addressing common FIRB approval conditions, which enables the parties to pre-agree specific FIRB conditions which are deemed to be acceptable – thereby enhancing certainty around a FIRB condition precedent.





### Current trends and outlook cont.

#### Foreign capital inflows into Australia: the US dethroned as the largest source country for commercial investment proposals

The United Kingdom and the Netherlands were the top two sources of proposed foreign direct investment into Australia for the quarter ended 31 March 2023, representing \$4.2 billion and \$3.6 billion in foreign investment respectively.

The United States was dethroned as the largest source country for commercial investment proposals – a position it held for the quarters ending 30 September 2022 and 31 December 2022. The total value for foreign investment for the United States in the most recent quarter reduced from \$16.7 billion in the previous quarter to \$3.3 billion, representing an 80.2% decrease in value. Interestingly, this significant decrease in value only coincided with a 10.8% decrease in the number of investment proposals by the United States.

#### FIRB processing timelines – a return to the past?

The statutory deadline for FIRB applications is generally 30 days (which commences once the FIRB application fee has been paid). In the March quarter, the Treasury’s median processing time increased to 42 days from 38 days in the previous quarter. Although, the upward trend is not ideal, the year-to-date median processing time was also 42 days – significantly lower than the median processing times of 52 days in 2021-22 and 51 days in 2020-21.

It is important that efficient and timely processing times are maintained for FIRB applications noting the critical role that foreign capital plays in the Australian economy. As a result, it is hoped that median processing times will be kept at or around 40 days going forward.

### Contact



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# Foreign investment regulation: country by country guide

## United States (US)

### Key applicable laws

Section 721 of the Defense Production Act of 1950 (50 U.S.C. § 4565), as amended by the Foreign Investment and National Security Act of 2007 (**FINSA**) (Public Law 110-49) (26 July 2007)

Executive Order 11858 (as amended by Executive Order 13456)

Foreign Investment Risk Review Modernization Act of 2018 (**FIRMA**) (Public Law 115-232) (13 August 2018)

Export Control Reform Act of 2018 (**ECRA**) (13 August 2018)

US Department of Treasury implementing regulations (31 CFR Parts 800 and 802) (as amended)

US Department of Treasury interim regulation (Subpart K to 31 CFR Parts 800 and 802) (establishing filing fees for formal notices of transactions filed with CFIUS on or after 1 May 2020)

CFIUS Enforcement and Penalty Guidelines (20 October 2022)

Guidance Concerning the National Security Review Conducted by CFIUS (73 Fed. Reg. 74567, 8 December 2008)

US Department of Treasury interim Pilot Program regulations (31 CFR Part 801) (originally effective 10 November 2018; these regulations have been incorporated into, and became effective as part of, the revised regulations implementing FIRMA on 13 February 2020).

### Competent authority

Committee on Foreign Investment in the United States (**CFIUS**).

CFIUS is a federal inter-agency body whose 9 voting members include the: (i) US Departments of Treasury (chair), Commerce, Defense, Energy, Homeland Security, Justice, and State; (ii) Office of the US Trade Representative; and (iii) White House Office of Science and Technology Policy. The US Department of Labor and the Director of National Intelligence are non-voting ex officio members. A further 5 White House offices have observer status. Other federal government departments and agencies may be included in reviews of specific transactions.

Ultimately, the President makes the final decision and generally approves the CFIUS determination with regard to a transaction.

### Sectors covered

All sectors: CFIUS can review any “covered transaction” which may impact US national security.

National security is not strictly defined and thus can be broadly interpreted, but CFIUS is particularly concerned with transactions involving:

- Critical infrastructure
  - This is assessed on a case-by-case basis, but is generally defined as a “systems and assets, whether physical or virtual, so vital to the United States that the incapacity or destruction of such systems or assets would have a debilitating impact on national security”. (In the context of covered investments in TID US businesses, discussed below, critical infrastructure includes enumerated items in a variety of sectors including telecommunications services, submarine cables and related systems, utilities, energy, internet protocol networks and transport-related systems.)



# Foreign investment regulation: country by country guide

## United States (US)

### Sectors covered cont.

- Critical technologies
  - This is defined to include export controlled defence articles or services covered by the United States Munitions List (USML) (as set out in the International Traffic in Arms Regulations (ITAR)), items on the Commerce Control List (CCL), set forth in the Export Administration Regulations (EAR), certain nuclear-related equipment and facilities, items covered by Select Agents and Toxins regulations, and per FIRRMA “emerging and foundational technologies” controlled under ECRA. As such technology becomes further controlled under export control regimes via future regulations, it will be captured under FIRRMA and thus subject to CFIUS jurisdiction. Per regulations issued by the US Department of Commerce’s Bureau of Industry and Security (BIS), “emerging” technologies (referred to as ECRA “Section 1758 technologies”) include the following, with future regulations anticipated:
    - discrete microwave transistors (eg a major component of wideband semiconductors)
    - continuity of operation software (software designed to restore operations following electromagnetic pulse (EMP) disruption)
    - post-quantum cryptographic algorithms
    - underwater transducers designed to operate as hydrophones
    - air-launch platforms for space launch vehicles
    - chemical weapons precursor chemicals (24 chemicals)
    - single-use cultivation chambers with rigid walls
    - hybrid additive manufacturing (AM)/computer numerically controlled (CNC) tools
    - computational lithography software designed for the fabrication of extreme ultraviolet (EUV) masks
    - technology for finishing wafers for 5nm production
    - digital forensics tools that circumvent authentication or authorization controls on a computer (or communications device) and extract raw data
    - software for monitoring and analysis of communications and metadata acquired from a telecommunications service provider via a handover interface
    - sub-orbital craft
    - software specially designed to automate analysis of geospatial imagery classification



# Foreign investment regulation: country by country guide

## United States (US)

### Sectors covered cont.

- software designed for nucleic acid assemblers and synthesizers
- certain marine toxins (brevetoxins, gonyautoxins, nodularins and palytoxin)
- gallium oxide and diamond substrates of ultra-wide bandgap semiconductors, and related technologies
- electronic computer-aided design (ECAD) software specially designed for the development of integrated circuits with Gate-All Around Field-Effect Transistor (GAAFET) structure
- pressure gain combustion (PGC) technology for the production and development of gas turbine engine components or systems
- sub-orbital craft
- software specially designed to automate analysis of geospatial imagery classification
- software designed for nucleic acid assemblers and synthesizers
- certain marine toxins (brevetoxins, gonyautoxins, nodularins and palytoxin)
- gallium oxide and diamond substrates of ultra-wide bandgap semiconductors, and related technologies
- electronic computer-aided design (ECAD) software specially designed for the development of integrated circuits with Gate-All Around Field-Effect Transistor (GAAFET) structure
- pressure gain combustion (PGC) technology for the production and development of gas turbine engine components or systems
- instruments for the automated synthesis of peptides (automated peptide synthesizers).
- Sensitive personal data
  - “Sensitive personal data”, under the revised regulations, includes various enumerated categories of data that may be maintained or collected by a US business that (i) “targets or tailors” products or services to US federal agency employees (including contractors) and US military members with intelligence, national security or homeland security responsibilities; (ii) collects or maintains such data on at least one million individuals in the year before the earliest of the transaction closing date or other significant dates (eg the execution of a binding written agreement establishing the material terms of the transaction) or the date of filing a CFIUS notice or declaration, unless the US business can demonstrate that at the time of closing it will have neither the capability to maintain nor the capability to collect any identifiable data within the enumerated categories on greater than one million individuals; or



# Foreign investment regulation: country by country guide

## United States (US)

### Sectors covered cont.

- has a “demonstrated business objective” to maintain or collect such data on greater than one million individuals and such data is an integrated part of the US business’s primary products or services.
- Sensitive personal data includes certain financial data, consumer report data, health information, geolocation data, biometric data and genetic testing information (though the regulations carve out genetic testing data derived from databases maintained by the US Government and routinely provided to private parties for research).

In addition to transactions in the military/defence/aerospace industries, CFIUS frequently reviews and can investigate transactions in the following areas:

- Telecommunications
- Energy (eg oil and gas refining and transmission, power generation, and nuclear)
- Computers/software/semiconductors/information technology/sensitive data
- Banking and financial services
- Agriculture and food
- Transportation (including bridges and ports)
- Mining
- Water/water treatment
- Chemicals
- Manufacturing

The process is separate to the US antitrust Hart Scott Rodino (**HSR**) merger control review process before the US Federal Trade Commission or Department of Justice.

### Transactions covered

CFIUS has jurisdiction to review: (1) “covered transactions” resulting in control of US businesses by foreign persons; (2) certain non-controlling “covered investments” in technology, infrastructure, and data (“TID”) US businesses; and (3) “covered real estate transactions”. The analysis is transaction-specific, and no turnover or deal value thresholds apply.



### Transactions covered cont.

#### Covered transactions (controlling investments)

CFIUS has jurisdiction over “any transaction... by or with any foreign person, which could result in foreign control of any US business, including such a transaction carried out through a joint venture.”

- “Control” for these purposes is not defined by reference to a particular shareholding or Board representation.
  - Control exists where the transaction will enable the non-US person, either directly or indirectly, to “determine, direct, or decide important matters” affecting the US business.
  - This includes the power to make decisions regarding: the sale, lease or transfer of the US business’ assets; reorganisation, merger or dissolution of the US business; closing or relocating US production, operational or research facilities; major expenditures or investments; issuance of debt or equity; appointment/dismissal of officers or senior personnel; and execution or termination of contracts.
  - The control threshold for CFIUS is lower than would apply under the HSR merger control regime and could certainly apply to a holding of < 50% of voting securities or voting board representation.
- A “foreign person” is defined as: (i) any foreign national, foreign government, or foreign entity; or (ii) any entity over which control is exercised or exercisable by a foreign national, foreign government, or foreign entity.
- The US business need not be the direct target of the transaction – thus, transactions between non-US deal parties can still implicate CFIUS jurisdiction to the extent the transaction would result in non-US control of the target’s US subsidiary or affiliate.

#### Covered investments (non-controlling investments)

FIRRMA expanded CFIUS jurisdiction to include non-controlling “covered investments” in TID US businesses. A non-controlling investment is considered a covered investment, and thus within CFIUS jurisdiction, if it involves a TID US business and affords the non-US investor certain rights, including (i) access to any material non-public technical information in the possession of the TID US business (including technical know-how); (ii) membership or observer rights in the US business; or (iii) any involvement (other than voting shares) in the business’s “substantive decision making” (which includes pricing for the sale of sensitive personal data, supply arrangements, corporate strategy, R&D, and access to critical technologies or infrastructure, etc.).

A “TID US business” is one that (i) produces, designs, tests, manufactures, fabricates or develops critical technology; (ii) performs enumerated functions with respect to covered investment critical infrastructure; or (iii) maintains or collects sensitive personal data of US citizens that, if exploited, could threaten US national security.



# Foreign investment regulation: country by country guide

## United States (US)

### Transactions covered cont.

#### Covered real estate transactions

CFIUS has jurisdiction to review the purchase or lease of “covered real estate” that affords at least three of the following rights: the right to (i) physically access, (ii) exclude, (iii) improve or develop real property, or (iv) to attach fixed structures or objects. Covered real estate encompasses real estate that is located within, or will function as part of, a “covered port”; is located within “close proximity” of certain military installations or other US Government property, within the “extended range” of certain military installations, or in certain counties or geographic areas; or is any part of certain military installations. (Subsequent US Department of Transportation lists will identify the relevant airports and maritime ports.) The regulations limit “close proximity” to locations within one mile of the facility, with a lower security profile potentially attaching to foreign investments in real estate located within an “extended range” (between one to 99 miles) of the location.

Relevant lists of airports and maritime ports can be found via the Treasury Department’s [website](#). CFIUS also maintains a “**Geographic Reference Tool**” to help parties determine whether a real estate transaction includes or is near potentially sensitive US locations. CFIUS has stated that the tool is solely for reference and should not be considered an advisory opinion from CFIUS.

Under the regulations, real estate transactions that are part of a “covered transaction” under the general (part 800) regulations (discussed above) are excluded from the real estate regulations. Additionally, certain transactions in urban areas, the purchase, lease or concession of single housing units, and certain commercial office space transactions are excluded from the real estate regulations.

CFIUS also has jurisdiction over transactions resulting in 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 (1) a covered control transaction or (2) a covered investment, as described above. CFIUS also has jurisdiction over any transaction, transfer, agreement or arrangement designed to “evade or circumvent” CFIUS jurisdiction, and any covered transaction, covered investment, covered change in control, or evasive transaction that arises pursuant to a bankruptcy proceeding or other form of default on debt.

### Transactions not covered

#### General exceptions

Certain transactions fall outside CFIUS jurisdiction, including:

- Solely passive investments where the non-US investor holds <10% of the voting interest in the US business (subject to the “covered investment” provisions described above).
- Asset acquisitions unless the acquired assets constitute a US business.



# Foreign investment regulation: country by country guide

## United States (US)

### Transactions not covered cont.

- Passive, indirect investments by foreign persons in TID US businesses via investment funds (eg PE funds), where the foreign investors receive memberships (as limited partners) on the fund advisory board. To be exempt, the investment fund must meet the following criteria: the fund must be exclusively managed by a US general partner; (2) the fund's advisory board cannot approve, disapprove or control the fund's investment decisions, or decisions by the US general partner regarding the fund's portfolio companies; and (3) the foreign limited partner: (a) does not and cannot control the investment fund (which includes the ability to approve, disapprove or control investment decisions, decisions of the US general partner related to entities in which the fund invests, or the selection/dismissal/compensation of the US general partner); (b) does not have access to material non-public technical information of the TID US business; and (c) does not have membership or observer rights on the board of the TID US business, or any involvement (other than by voting shares) in the TID US business's substantive decisions.
- Greenfield or start-up investments, to the extent not captured by the recent CFIUS real estate regulations (see above).
- Long-term leases unless the non-US lessee controls the leased US business, to the extent not captured by CFIUS' real estate jurisdiction (see above).
- Debt transactions unless the loan conveys an interest in the profits of the US business, the right to appoint members of the board of directors of the US business, or other comparable financial or governance rights characteristic of any equity investment but not of a typical loan. Likewise, an acquisition of voting interest or assets of a US business upon default or other condition involving a loan is not a covered transaction, provided that the loan was made by a syndicate of banks in a loan participation where the foreign lenders need the majority consent of the US participants in the syndicate to take action, and cannot initiate unilateral action vis-à-vis the debtor; do not have a lead role in the syndicate; and are subject to a provision in the loan or financing documents limiting their ability to control (as that term is defined by CFIUS) the debtor, and to exercise any access, rights, or involvement identified in the covered investment provisions (above).
- Non-controlling covered investments by "excepted investors" (see below).

### Excepted foreign states/Excepted investors

The regulations create limited filing exemptions for covered investments in TID US businesses (and covered real estate transactions) by "excepted investors", defined as investors with substantial ties to "excepted foreign states". Because of the potentially significant implications for US national security, CFIUS initially designated only three countries as "excepted foreign states": Australia, Canada, and the United Kingdom, each a long-time US ally that maintains, per CFIUS, "robust intelligence-sharing and defense industrial base integration mechanisms with the United States". (For purposes of the CFIUS excepted foreign state designation, the UK does not include the British Overseas Territories or the Crown Dependencies.) New Zealand was added to the list of excepted foreign states as of January 2022, which resulted in each of the US Government's "Five Eyes" partners having secured excepted foreign state status. CFIUS may expand this list further in the future, but there is no timetable as to when that might occur or what countries may be designated. Critically, investments from all foreign persons and entities, including qualified excepted investors from Australia, Canada, the UK and New Zealand, remain subject to CFIUS jurisdiction when engaging in transactions that could result in foreign control of a US business, though such investors are exempt from mandatory CFIUS filing requirements.





# Foreign investment regulation: country by country guide

## United States (US)

### Transactions not covered cont.

“Excepted investor” means a foreign investor that is:

- A national of an excepted foreign state (above), and not also a national of a non-excepted foreign state;
- The government of an excepted foreign state; or
- An entity that meets each of the following conditions with respect to itself and each of its parents (if any):
  - It is organized in the United States or in an excepted foreign state;
  - It has a principal place of business in the United States or in an excepted foreign state;
  - It has a board comprised of 75% or more members, and 75% or more observers, that are nationals of excepted foreign states (and not nationals of non-excepted foreign states) or US nationals;
  - Any foreign person, and each foreign person that is part of a group of foreign persons that in the aggregate, holds 10% or more of the outstanding voting interests of such entities; holds the right to 10% or more of the profits of such entities; holds the right in the event of dissolution to 10% or more of the entities; or otherwise could exercise control over such entities, is a national of an excepted foreign state, the government of the same, or an entity incorporated there and with its principal place of business there or in the United States; and
  - Its “minimum excepted ownership” is held by a US person, a national of an excepted foreign state, the government of the same, or an entity incorporated there and with its principal place of business there or in the United States. With respect to public companies, minimum excepted ownership means a majority of voting interests, a right to the majority of profits, and the right to a majority of assets in dissolution; with respect to private companies, it means 80% or more of the same criteria.
  - As noted above, all of the conditions for companies, including the minimum excepted ownership conditions, apply to each parent of the foreign entity.

Foreign individuals or entities that have violated (or whose corporate parents or subsidiaries have violated) certain US laws or regulations, made material misstatements in a CFIUS filing or breached a CFIUS-related undertaking, will not be considered excepted investors.



### Notification

#### Mandatory filings

Notification to CFIUS is largely voluntary. CFIUS filings are mandatory, however, in two scenarios: (i) covered transactions that are covered investments in, or that could result in foreign control of, certain TID US businesses, and (ii) certain foreign government transactions in TID US businesses.

##### 1. Covered transactions or investments in TID US businesses

A mandatory declaration or filing is required for covered transactions that are covered investments 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 for which a “US regulatory authorization” (eg US export control licenses under the ITAR or EAR, among other items) would be required for the export, re-export, transfer (in-country) or retransfer of such critical technology to foreign persons that are parties to the transaction; and
- Those foreign persons: (i) could directly control such TID US business as a result of an acquisition; (ii) are directly acquiring an interest that is a covered non-controlling investment in such TID US business; (iii) have existing ownership rights in the TID US business and changes to those rights could result in a covered control transaction or a covered non-controlling investment; (iv) are a party to any transaction, transfer, agreement, or arrangement designed to evade CFIUS jurisdiction with respect to such TID US business; or (v) individually hold, or are part of a group of foreign persons that, in the aggregate, holds a voting interest of 25% or more in a foreign person described in (i) through (iv), above.

**Note on prior regulations:** For transactions in which key transaction events (eg signing) occurred on or after 13 February 2020 and before 15 October 2020, a mandatory declaration or filing is required for covered investments in, or transactions that could result in foreign control of, a TID US business that produces, designs, tests, manufactures, fabricates, or develops one or more critical technologies that are: (i) utilized in connection with the TID US business’ activity in one or more enumerated industries identified by reference to North American Industry Classification System (NAICS) codes; or (ii) designed by the TID US business specifically for use in one or more enumerated industries by reference to NAICS codes, regardless of whether the critical technology also has application for other industries. The enumerated NAICS codes encompass 27 industries and are set out in Appendix B to the Part 800 regulations. These industries include aircraft, electronics, military technologies, nuclear, optics, chemical/petrochemical, power, batteries, nano- and bio-technology, aluminum smelting, and semiconductor manufacturing. An entity’s NAICS code is typically self-identified by reference to the code that best characterizes the entity’s primary sources of revenue. (CFIUS’s Pilot Program Regulations require a mandatory declaration of filing in the same scenario, and would apply to transactions for which certain key transaction events occurred from 10 November 2018 through to 12 February 2020.)



### Notification cont.

The 15 October 2020 regulations, discussed above, do not change the definition of “critical technology” or “TID US business,” but rather change the focus of a critical technology mandatory filing from NAICS code industries to US export control authorizations.

Additionally, the regulations carve out certain transactions from the mandatory filing requirement, including a covered transaction by investment funds managed exclusively by and ultimately controlled by US nationals, a covered control transaction by excepted investors, and covered transactions in which the foreign person’s indirect investment in the TID US business is held solely and directly via certain foreign ownership, control of influence (“FOCI”) mitigated entities.

### 2. Foreign government transactions in TID US businesses

A mandatory declaration or filing is also required for covered transactions resulting in the acquisition of a “substantial interest” in a TID US business by a foreign person in which the national or sub-national governments of a single foreign state have a “substantial interest” (ie a 25% or more voting interest of the foreign person in the TID US business, and a 49% or greater interest of the foreign government in the foreign person, respectively). Regulations effective 15 October 2020 clarify that for a non-US entity whose activities are “primarily directed, controlled, or coordinated” by a general partner, a non-US Government will be considered to have a “substantial interest” in such entity only if such government holds 49 percent or more of the interest in that general partner. The rule also provides that when determining the percentage of interest held indirectly by one entity in another entity, any interest of a parent (eg a majority owner) will be deemed to be a 100 percent interest in any entity of which it is a parent. The term “substantial interest” applies to a single foreign government, which includes both national and subnational governments and their respective departments and agencies. The regulations also exclude the governments of excepted foreign states (to date, Australia, Canada, the UK and New Zealand), and covered transactions by investment funds (if the fund is managed exclusively by a general partner, who is not a foreign person).

Under current CFIUS regulations, all mandatory declarations or filings (where required) must be submitted at least 30 days before the completion date of the transaction.

CFIUS has 30 days to respond to a mandatory declaration. (Deal parties can elect to file, in a mandatory filing scenario, a full voluntary notice in lieu of a declaration.) In response, CFIUS can either (i) clear the transaction; (ii) request (in effect, “require”) the parties to file a formal notice if it believes the transaction may raise national security considerations; (iii) neither clear the transaction nor request a formal notice (colloquially referred to as the CFIUS “shrug” whereby CFIUS advises it cannot reach a decision based on the declaration and the parties may file a formal notice); or (iv) initiate a unilateral review. Thus, to the extent the CFIUS response to a declaration is anything other than outright clearance, it is quite possible that the declaration process may in fact extend the timing of the overall review process.

Parties that do not file a mandatory declaration or notice when required to do so may be assessed a civil monetary penalty not to exceed US\$250,000 or the value of the transaction, whichever is greater.



### Review procedure and time limits

#### Voluntary declarations

While imposing filing requirements on some investors, CFIUS regulations also provide a mechanism to give certain transactions an expedited path to CFIUS clearance.

Parties are able to file voluntary short-form declarations in lieu of full voluntary notices (which require significant amounts of information). Using these declarations, parties to transactions with low national security risk profiles may be able to receive CFIUS clearance more quickly — after a 30-day review period (as opposed to a minimum 45 day review for a full filing) — and still receive “safe harbor” generally insulating such transactions from further CFIUS review. As with mandatory declarations, a voluntary declaration can result in a clearance, a CFIUS request that the parties file a formal notice, neither clearance nor a request for a formal notice (the “shrug” response), or the initiation of CFIUS’s own review.

Although these declarations require the parties to provide less information than a full, voluntary notice, declarations involving the acquisition of a US business that produces, designs, tests, manufactures, fabricates, or develops one or more critical technologies must describe the items and their export control classification/category.

#### Draft joint voluntary notice

Parties normally submit a draft filing in advance of filing a formal joint voluntary notice (“JVN”) (which draft filing process allows for engagement with CFIUS).

CFIUS is required to provide the parties with comments (often in the form of additional information requests) on a draft filing within 10 business days and to accept formal JVN filings within 10 business days (or else advise if such filings are deemed incomplete), but only if the filing parties stipulate that the deal is a “covered transaction” and thus within CFIUS jurisdiction.

#### Formal JVN filing

The procedure following submission of a formal JVN filing is as follows:

- 45 calendar day initial review period.
  - If no national security risks are identified, or if such risks are resolved, no further action is taken.
- 45 calendar day factual investigation period if national security risks are not resolved in initial review (regulations enable CFIUS to extend the investigation for an additional 15 days in “extraordinary circumstances”, ie “circumstances for which extending an investigation is necessary and the appropriate course of action, in the [CFIUS] Chairperson’s discretion, due to a force majeure event or to protect the national security of the United States”).



# Foreign investment regulation: country by country guide

## United States (US)

### Review procedure and time limits cont.

- CFIUS will require an investigation if the transaction raises significant national security issues.
- Investigation is generally required if a non-US Government would obtain control of the US business or for major energy or critical infrastructure transactions.
- 15 calendar day Presidential review period.
  - If CFIUS cannot reach a decision, or recommends that the transaction be blocked, the transaction is referred to the President (in practice, Presidential referral is rare).

Many cases close at the conclusion of the initial review, although CFIUS is increasingly requiring second-stage investigations. Parties can withdraw, and if warranted, resubmit CFIUS notifications at any time during the process.

CFIUS submissions are confidential and the process generally has been non-transparent (eg CFIUS does not disclose whether a notice has been filed or the results of its review), though Presidential determinations are public. FIRRMA requires CFIUS, in its annual report to the US Congress (a non-classified version of which is made public) to include greater details about the CFIUS reviews of the covered transactions, including “basic information” about the deal parties and the time required to complete each review.

### CFIUS filings and “safe harbor”

Even if a transaction is not subject to mandatory filing requirements, CFIUS can commence an investigation of such transaction on its own initiative at any time (ie before or after a transaction closes), and CFIUS monitors public statements and filings relating to investment activity that is not notified to the Committee. There is no “statute of limitations” on the period which CFIUS can “look back,” and CFIUS has increasingly devoted resources to the investigation of non-notified transactions. In practice, then, seeking CFIUS approval via a voluntary filing is generally advisable in cases where deal parties can foresee CFIUS raising potential US national security concerns (in particular as CFIUS has the power to unwind completed deals (see below)).

Transactions submitted to CFIUS, which CFIUS determines may proceed, generally receive “safe harbor” insulating such transactions from further CFIUS review (though CFIUS is empowered to review a subsequent investment by a foreign person in a previously cleared non-controlling covered investment where the subsequent investment would give the foreign person control over the US business).



# Foreign investment regulation: country by country guide

## United States (US)

### Filing fees

Filing fees are required when submitting, on or after 1 May 2020, formal notices for non-US acquisitions of a US business (both control transactions and non-controlling covered investments) and for covered real estate transactions. Receipt of payment generally will be required before CFIUS will accept a formal notice and commence its review of the transaction. Filing fees are required when (i) deal parties elect to file a formal notice for a transaction subject to mandatory filing requirements, or (ii) choose to submit a formal notice for a transaction that is not subject to mandatory filing requirements (eg since absent a filing, there is no “safe harbor” from CFIUS review, and CFIUS retains the authority to block a deal, or unwind a closed transaction, that was not previously notified to it). Fees are not required in connection with submission of a draft filing for CFIUS review and comment. CFIUS may, in currently undefined “extraordinary circumstances” relating to national security, waive the filing fee.

Filing fees are not required when parties file a short form declaration, either as a voluntary filing or in compliance with mandatory filing requirements. If CFIUS is unable to clear a transaction based on review of a declaration, it may request or suggest that the parties file a formal notice, in which case a filing fee will be required.

CFIUS filing fees will be assessed as a function of total transaction value as follows:

Total Transaction Value	Filing Fee
Less than \$500,000	No fee
\$500,000 but less than \$5 million	\$750
\$5 million but less than \$50 million	\$7,500
\$50 million but less than \$250 million	\$75,000
\$250 million but less than \$750 million	\$150,000
\$750 million +	\$300,000

The value of a transaction generally will be calculated based on the entire value of the deal, even if the US business being acquired is only one part of a larger cross-border transaction. CFIUS will impose a nominal fee (\$750.00) in a larger cross-border transaction if the value of the US business being acquired is less than \$5 million.



# Foreign investment regulation: country by country guide

## United States (US)

### Filing fees cont.

CFIUS will refund filing fees if it determines that it lacks jurisdiction over the notified transaction. The regulations do not provide for the return of fees should the parties withdraw the filing and abandon the transaction, or if CFIUS (via the President) blocks the deal. However, where CFIUS permits parties to withdraw and resubmit a notice (which deal parties, mindful of the tight statutory deadlines for CFIUS to review a transaction, may do to give CFIUS more time to assess a deal), parties are not required to pay an additional filing fee unless CFIUS determines that a material change to the transaction has occurred, or the initial notice contained material inaccuracies or omissions.

### Substantive test/ grounds for intervention

The test for CFIUS intervention is whether a covered transaction presents a threat to US national security.

National security is assessed on a case-by-case basis, and generally involves:

- “Threat” assessment (acquirer)
  - CFIUS reviews the non-US acquirer’s prior record or intent with respect to US national security issues, taking into account whether it is, or is controlled by, a non-US Government entity.
- “Vulnerability” assessment (target)
  - CFIUS reviews the importance of the target US business to US national security, with focus on the following: classified information or materials; critical infrastructure or technologies; sole source US Government contracts; and proximity of the US business to sensitive US Government facilities.
- Risk assessment/“consequences to national security” (acquirer and target)
  - CFIUS evaluates potential US national security consequences if vulnerabilities are exploited by a non-US acquirer.

### Enforcement powers and penalties

CFIUS can prohibit a transaction pre-closing (with Presidential approval) if US national security concerns are not resolved to its satisfaction.

CFIUS can impose pre-closing mitigation remedies (which will often be negotiated with the parties), designed to reduce US national security risks, such as:

- Establishing guidelines for handling US Government contracts and other sensitive information or sensitive personal data.
- Ensuring only US citizens handle certain products and services, and/or ensuring that such products and services are located only in the US.
- Notifying the US Government in advance for approval of non-US nationals’ visits to the acquired US business.
- Providing the US Government with the right to review (and object to) certain business decisions that raise US national security issues.



# Foreign investment regulation: country by country guide

## United States (US)

### Enforcement powers and penalties cont.

FIRRMA provides CFIUS with the authority to suspend covered transactions that pose national security risks pending the completion of CFIUS review.

CFIUS can unwind a transaction post-closing (with Presidential approval) if US national security concerns are not resolved to its satisfaction.

Compliance with mitigation remedies is monitored by the US Government post-closing, with penalties for violations (including civil monetary penalties not to exceed US\$250,000 per violation or the value of the transaction, whichever is greater).

Parties that do not notify CFIUS of a transaction for which notification is mandatory can be assessed a civil monetary penalty not to exceed US\$ 250,000 or the value of the transaction, whichever is greater.

### Judicial review

Findings and decisions of the President are not subject to judicial review. However, the process that CFIUS/the President apply in reaching a determination can be subject to a due process (constitutional) challenge. Per FIRRMA, such civil action must be brought in the Federal Appellate Court in Washington, DC.

### Current trends and outlook

There continues to be a general upward trend in CFIUS filings, with 286 notices and 154 declarations filed in 2022, compared to 272 notices and 164 declarations in 2021 (and looking back ten years, 114 notices submitted to CFIUS in 2012). CFIUS is devoting increased resources to investigating non-notified transactions, via its Office of Investment Security Monitoring & Enforcement. This will continue. Per its 2022 (unclassified) Annual Report, CFIUS is now primarily focused on monitoring more recent foreign investments for potential non-notified transactions, but will continue to assess pre-FIRRMA transactions should new information becomes available. Deal parties should anticipate heightened CFIUS scrutiny of transactions, particularly in the technology, semiconductor and telecommunications sectors, even where there are no US deal parties (but the transaction would result in non-US control of the target's US subsidiary and/or US technology portfolio).

Despite continued focus on attracting overseas investment in the US, certain US officials remain sceptical of proposed acquisitions by Chinese state owned enterprises (and many privately owned Chinese entities), and thus any attempt by such enterprises to acquire a US business (particularly one operating in the technology sector) may encounter significant CFIUS scrutiny.

In October 2022, CFIUS issued its first-ever Enforcement and Penalty Guidelines, which outline how CFIUS will assess the scope of, and potential penalties for, violations of regulations governing CFIUS reviews of proposed acquisitions of and/or certain investments in US businesses by non-US parties. CFIUS will also assess breaches of mitigation agreements or undertakings entered into between deal parties and the US Government as a condition for CFIUS transaction clearance.





# Foreign investment regulation: country by country guide

## United States (US)

### Current trends and outlook cont.

CFIUS focus on technology and data-focused foreign investments will continue with equal if not greater vigour. In September 2022, President Biden issued an Executive Order on Ensuring Robust Consideration of Evolving National Security Risks by CFIUS that directs increased CFIUS scrutiny of foreign acquisitions and investments in what the US Government has deemed particularly sensitive sectors of the US economy. While the Executive Order did not expand CFIUS jurisdiction nor change its review process, it nevertheless sends a clear signal to deal makers and their advisers that CFIUS will continue to scrutinize such foreign acquisitions/investments especially where the US target business operates in the technology or data sectors.

US efforts to enact or impose an outbound investment restriction and/or notification regime reach back to at least 2018, when such restrictions were debated but ultimately not included in the final FIRRMA legislation. More recently, the National Critical Capabilities Defense Act, initially proposed as part of other legislation in 2021 and then revised in 2022, would have established a Committee on National Critical Capabilities to screen investments in certain countries that involve a “national critical capability,” which broadly would have included sectors such as semiconductors, artificial intelligence, defense, aerospace, medical, among others, as well as related areas and supply chains. In July 2023, the US Senate passed legislation (the Outbound Investment Transparency Act) that, if passed by the full Congress and signed into law, would require US companies and investors to notify the US Government in advance of investments in certain sensitive technology businesses in “countries of concern” (defined to include China, Iran, North Korea and the Russian Federation). The covered sectors specifically targeted by this legislation are: advanced semiconductors and microelectronics; artificial intelligence; quantum information science and technology; hypersonics; satellite-based communications; and networked laser scanning systems with dual-use applications.

Such legislative efforts look to have been supplanted, at least for now, by President Biden’s “Executive Order on Addressing US Investments in Certain National Security Technologies and Products in Countries of Concern” (the **EO**), which declared a “national emergency” under federal law to address what the EO deems an “unusual and extraordinary threat to [US] national security” in respect of China’s advancement in sensitive technologies and products critical to military, intelligence, surveillance, or cyber-enabled capabilities. Issued 9 August 2023, the EO directs the US Treasury Department to establish via regulation an outbound investment program that would (i) require US persons to provide notification of certain transactions involving covered foreign persons that “may contribute” to a threat to US national security (notifiable transactions), and (ii) prohibit US persons from engaging directly or indirectly in a narrower set of transactions involving covered foreign persons that are determined to pose “a particularly acute national security threat because of their potential to significantly advance the military, intelligence, or surveillance, or cyber-enabled capabilities of countries of concern” (prohibited transactions). At present, the only “country of concern” identified is China (including the Hong Kong and Macau administrative regions), and per its terms the EO is effectively limited to US investment in Chinese entities engaged in semiconductors and microelectronics, quantum information technologies, and artificial intelligence.



# Foreign investment regulation: country by country guide

## United States (US)

### Current trends and outlook cont.

At present, no outbound restrictions or notification requirements are in effect. The Treasury Department recently concluded a public consultation on the potential scope and contours of the outbound investment program. Consistent with US administrative procedures, the Treasury Department will review the comments, issue proposed regulations, receive further comments, and then issue final regulations that implement the EO, likely at some point in 2024. The Treasury Department has indicated that its eventual regulations will not have retroactive effect, though it may “request information” about transactions by US persons completed or agreed to after the EO was issued but before the effective date of the regulations “to better inform the development and implementation of the program.” Additional information on the EO, the Treasury Department consultation and potential next steps can be found [here](#).

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