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Report from Washington

Treasury Publishes Long-Awaited Proposed Regulations to Implement CFIUS Reform Legislation (FIRRMA)

September 19, 2019

Introduction

Long-awaited by foreign investors, U.S. companies and investment firms, the proposed regulations offer a great deal of color on the means by which CFIUS expects to exercise its new jurisdictional authorities.

On September 17, 2019, the Office of Investment Security of the U.S. Department of the Treasury issued two proposed regulations intended to fully implement the Foreign Investment Risk Review Modernization Act of 2018 ("FIRRMA"). FIRRMA was enacted to expand the jurisdiction of the Committee on Foreign Investment in the United States ("CFIUS" or "Committee") and modernize its procedures. Long-awaited by foreign investors, U.S. companies and investment firms, the proposed regulations offer a great deal of color on the means by which CFIUS expects to exercise its new jurisdictional authorities. However, the proposed regulations leave open a number of key issues that have been the focus of debate since FIRRMA's passage, including the identification of specific countries that may be exempted from CFIUS's expanded jurisdiction over non-controlling "covered investments" and "covered real estate transactions." They also do not suggest how the Committee's "Pilot Program" requiring mandatory declarations for investments in critical technology companies may be amended in the final rules. Nevertheless, with the publication of these proposed rules CFIUS has taken a major step towards fully implementing its new powers by February 2020.

Background

CFIUS is an inter-agency, executive branch committee tasked with the review of foreign investments in U.S. businesses for potential national security concerns. CFIUS has long had, and will continue to have, broad jurisdiction to review certain transactions such as mergers, acquisitions, or takeovers that could result in control by a foreign person over a U.S. business ("covered transactions"). The CFIUS review process generally involved a voluntary filing regime whereby parties could submit a notice to the Committee seeking clearance for proposed covered transactions. This voluntary filing process was enforced through two primary mechanisms: (1) the Committee's authority to initiate its own review of transactions

whether or not the parties formally notified the Committee; and (2) the President's statutory authority to block or unwind any covered transaction, even if already consummated.

Signed into law in August 2018, FIRRMA was the most significant reform legislation affecting CFIUS's jurisdiction and review process in more than a decade. With the passage of FIRRMA, the definition of "covered transaction" was expanded to include non-controlling "other investments" in U.S. businesses involving critical technologies, critical infrastructure, or sensitive personal data on U.S. citizens. Additionally, FIRRMA brought transactions involving real estate (but no U.S. business) in close physical proximity to sensitive U.S. government or military facilities and other locations within CFIUS's jurisdiction.

FIRRMA also granted CFIUS the discretion to conduct pilot programs to implement any authorities or provisions provided under FIRRMA. Pursuant to this authority, and clearly concerned about possible transfers of sensitive and advanced technologies to China, CFIUS enacted a Pilot Program in November 2018 to review both control transactions and non-controlling investments by foreign persons (whether or not government owned or controlled) in U.S. businesses involving critical technologies in 27 specified industries, including in the semiconductor, nanotechnology and biotechnology sectors. Whereas before CFIUS filings were submitted pursuant to a voluntary regime, transactions falling within the scope of the Pilot Program must now be notified to the Committee pursuant to a mandatory declaration or formal notice.

Pursuant to the authorizations set forth in FIRRMA, the proposed regulations expand CFIUS jurisdiction to include certain non-controlling "covered investments" by foreign persons in U.S. businesses that are involved in critical Technologies, critical Infrastructure, and sensitive personal Data, referred to in the regulations by the new acronym "TID."

Many important elements of FIRRMA remained subject to the formal regulatory rulemaking process—meaning that until now, significant details on FIRRMA's implementation had yet to be defined.

Non-Controlling Investments in a "TID" U.S. Business

Pursuant to the authorizations set forth in FIRRMA, the proposed regulations expand CFIUS jurisdiction to include certain non-controlling "covered investments" by foreign persons in U.S. businesses that are involved in critical Technologies, critical Infrastructure, and sensitive personal Data, referred to in the regulations by the new acronym "TID." Under FIRRMA, a non-controlling "covered investment" is any investment that permits a foreign person to appoint a director or observer, to access material non-public technical information of the target, or to be involved (indeed even consulted) regarding the target's substantive decision making. Filings with respect to "covered investments" will still be voluntary unless the transaction is subject to the mandatory declaration requirement either because it is a

critical technology company Pilot Program investment or because, as discussed below, it involves the acquisition by a foreign government owned or controlled investor of a "substantial interest" in a TID U.S. business.

A TID U.S. business is one that falls within one or more of the following categories:

- **Critical Technology:** The U.S. business produces, designs, tests, manufactures, fabricates, or develops one or more critical technologies. The regulations define critical technologies to include those that are controlled by the International Traffic in Arms Regulations, certain items controlled on the Commerce Control List of the Export Administration Regulations, nuclear-related controls administered by the Nuclear Regulatory Commission and Department of Energy, select agents and toxins, and emerging and foundational technologies controlled pursuant to the Export Control Reform Act of 2018. Emerging and foundational technologies is a term that will be defined by a separate rulemaking process undertaken by the U.S. Department of Commerce Bureau of Industry and Security.

  The scope of this definition for Critical Technologies is not surprising—it tracks the definition used in both FIRRMA as well as the Pilot Program enacted in 2018. This list of products is particularly broad, and any items or technologies that are the subject of any meaningful export controls are usually covered as a Critical Technology. U.S. companies are in practice often surprised that items they consider ordinary course products are in fact considered a critical technology under the regulations.

- **Critical Infrastructure**: This is a U.S. business that performs certain functions with respect to critical infrastructure. Critical infrastructure is defined to mean systems and assets, whether physical or virtual, so vital to the U.S. that the incapacity or destruction of such systems or assets would have a debilitating impact on national security—a definition that was previously set forth under FIRRMA. However, the proposed regulations also offer a great deal of granularity on the types of assets that will trigger the Committee's expanded jurisdiction over non-controlling "covered investments" in critical infrastructure businesses through an Appendix that lists a variety of specific infrastructure assets considered critical, as well as the particular functions for each type of asset that will cause it to be identified as a TID U.S. business. The list of infrastructure assets includes certain internet protocol networks, internet exchange points, submarine cable systems, electric generation and transmission assets, oil refineries and pipelines, LNG terminals, exchanges registered under the Securities Exchange Act, air and maritime ports, and public

The list of infrastructure assets includes certain internet protocol networks, internet exchange points, submarine cable systems, electric generation and transmission assets, oil refineries and pipelines, LNG terminals, exchanges registered under the Securities Exchange Act, air and maritime ports, and public water systems, among many others.

water systems, among many others. The complete Appendix of critical infrastructure assets and corresponding functions that trigger jurisdiction is reproduced in an Appendix to this report. While the list is arguably overbroad and will no doubt spark many comments, the specificity provided by the Committee is welcome news—particularly given the FIRMMA requirement of mandatory declarations by foreign government investors acquiring a "substantial interest" in a TID U.S. business.

- **Sensitive Personal Data:** The U.S. business maintains or collects, directly or indirectly, sensitive personal data of U.S. citizens that could be exploited in a manner threating U.S. national security. Because most U.S. businesses collect and store some personal data of U.S. citizens, the drafters of the proposed rules have sought to limit the definition of Sensitive Personal Data. It is "identifiable" data (that is, data that can be used to distinguish or trace an individual's identity) that is "genetic information" or data maintained or collected by a U.S. business that (i) targets or tailors products or services to certain national security-focused agencies or military departments of the U.S. government, (ii) maintains or collects data on greater than one million individuals in the past twelve months, or (iii) has a demonstrated business objective of maintaining or collecting such data on greater than one million individuals and such data is an integrated part of the U.S. business's primary products or services. As to such U.S. businesses, the proposed definition of Sensitive Personal Data would require that it fall within one of several categories of data such as data that "could be used to analyze or determine an individual's financial distress or hardship," data contained in an application for health, long-term care, life, mortgage or professional liability insurance, non-public electronic communications (such as email, messaging or chat communications) between or among users of a U.S. business's products or services (think "WhatsApp"), geolocation data, biometric enrollment data, data stored and processed for generating a state or federal government identification card, non-public electronic communications, geolocation data, and biometric enrollment data, among others. The definition would carve out publicly available data as well as data on the employees of the U.S. business unless it pertained to employees of U.S. government contractors who hold personal security clearances. Again, the effort by the Committee to provide some parameters and limitations around the data to be protected from a national security standpoint is to be welcomed and appears intended to ward off the possibility of a large number of filings on investments in retail and other businesses that do not present material national security concerns.

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Exceptions: Certain Passive Investments and Carve Out for U.S. Person Managed Investment Funds

Not all investments in TID U.S. businesses by foreign persons are necessarily subject to CFIUS jurisdiction. As noted, to be a non-controlling "covered investment," the transaction must afford the foreign person access to material nonpublic technical information in the possession of the TID U.S. business; membership or observer rights on the board of directors; or certain other rights to be involved in the substantive decision making process of the TID U.S. business. The limitations in the proposed regulations generally track the contours of what was established previously in the FIRRMA legislation although the Committee has clearly defined "involvement" in decision making to include not only consents rights but also consultation rights.

Another key feature from FIRRMA that has been reproduced in the proposed regulations relates to the U.S. person managed and controlled investment firms, including private equity firms, which secured a significant carve out from the expanded jurisdiction during the passing of the FIRRMA legislation. The proposed regulations track the carve out set forth in FIRRMA, and generally exempt U.S. national managed investment funds from the expanded authority over covered investments in TID U.S. businesses. On the other hand, foreign person controlled investment funds will be subject to the Committee's expanded jurisdiction over such investments and will need to assess the advisability of voluntary filings. For such firms and other investors from countries friendly to the U.S., it will be of keen interest to watch for the Committee's identification (but not for another two years) of "excepted" foreign states and investors.

New Mandatory Declaration Requirements

As noted above, CFIUS previously implemented a Pilot Program that calls for mandatory filings for investments involving certain U.S. business engaged in activities that pertain to critical technologies. Once fully implemented, the proposed regulations will expand on the universe of circumstances under which mandatory declarations are required. In particular, a covered transaction that involves the acquisition of a "substantial interest" in a TID U.S. business by a foreign person in which a foreign government has a "substantial interest" must be notified to the Committee either through a short-form declaration or a standard voluntary notice. The definition of "substantial interest" depends on the context as follows:

- A foreign person's "substantial interest" in a TID U.S. business means a voting interest (whether direct or indirect) of 25% or more.

- A foreign government's "substantial interest" in a foreign person investing in a TID U.S. business means a voting interest (whether direct or indirect) of 49% or more.

As with the carve out for the jurisdictional scope of non-controlling covered investments, transactions involving certain passive limited partner investments through an investment fund controlled by U.S. nationals are similarly exempted from the mandatory declaration requirements.

Failure to abide by the mandatory declaration requirements can be costly, and can result in civil penalties of up to $250,000 or the value of the transaction, whichever is greater.

Sensitive Real Estate

Failure to abide by the mandatory declaration requirements can be costly, and can result in civil penalties of up to $250,000 or the value of the transaction, whichever is greater.

FIRRMA also expanded CFIUS's jurisdiction to reach acquisitions and leaseholds by foreign persons of real estate in the United States if located in a port, or in "close proximity" to a U.S. military installation or other sensitive U.S. government facility, even if no U.S. business is conducted on the property in question.

To be a covered real estate transaction under the proposed regulations, the foreign person must acquire at least three of the following four property rights: (1) physical access to the real estate; (2) ability to exclude others from physical access; (3) ability to improve or develop the real estate; and (4) ability to attach fixed or immovable structures or objects to the real estate. A foreign person need not acquire the full ownership interests in the real estate in order for it to be covered if at least three of these property rights are acquired as part of the transaction.

The proposed regulations also offer additional clarity on what real estate is covered by this jurisdictional authority, including surprisingly granular detail on facilities considered to be sensitive and an explanation of what is to be considered in "close proximity." To be covered real estate, the property must be located: (1) within or function as an airport or maritime port; (2) within one mile of 132 specified military and government installations; (3) within one hundred miles of 32 other specified military and government facilities identified in the regulations; (4) within 12 nautical miles of 23 specified coastal military installations; or (5) within 24 specific counties and other similar geographic areas that are near intercontinental ballistic missile sites of the U.S. Air Force. The proposed regulations include a number of exemptions for certain transactions. With some limitations, real estate in "urban clusters" or "urbanized areas," housing units, retail establishments, certain commercial office space, and Native American and Alaskan lands are generally excepted from the scope of this new jurisdictional authority.

Given the complexity of performing the searches required to complete this proximity analysis, the proposed regulations contemplate the establishment of a tool administered by CFIUS that will assist in this process. The proposed regulations do not specify what type of tool may be implemented, but welcome comments from the public on the matter.

Unlike transactions involving TID U.S. businesses, FIRRMA and the proposed regulations do not impose any form of mandatory filing requirements relating to covered real estate transaction. However, parties may elect to file a declaration with respect to a covered real estate transaction in lieu of a formal written notice if the parties determine that a filing is advisable.

Excepted Investors From Specified Countries

Under the proposed regulations, foreign persons from certain countries may be excepted from the scope of the new jurisdictional authorities relating to TID U.S. businesses and covered real estate transactions.

One of the widely-anticipated provisions in the proposed regulations relates to certain exemptions from the new jurisdictional authorities for foreign investors from close U.S. allies, colloquially referred to by CFIUS as a "white list" of exempted countries.

Specifically, under the proposed regulations, foreign persons from certain countries may be excepted from the scope of the new jurisdictional authorities relating to TID U.S. businesses and covered real estate transactions. Excepted investors include foreign nationals, governments, and certain entities of any country designated as an "excepted foreign state." With some limitations, a foreign entity is considered under the proposed regulations to be a foreign national of a certain excepted foreign state if each of the following apply to it and each of its parent entities: (1) it is organized under the laws of an excepted foreign state, (2) it maintains its principal place of business in an excepted foreign state or the United States, (3) each member or observer of the board of directors is either a U.S. national or a national of only excepted foreign states, (4) each foreign person that controls or holds five percent or more of the outstanding voting or equity interests in the investor is a foreign national, government, or foreign entity of a foreign state, and (5) a "minimum excepted ownership" of the investor is held by U.S. nationals or persons, governments, or entities of excepted foreign states. Minimum excepted ownership is defined to mean a majority of any public company listed on an exchange in an excepted foreign state or the United States, or 90% of the voting or equity interests for any other entity not so listed on such an exchange.

Investors from an excepted foreign state are not automatically considered excepted investors. They must also be in good standing with the Committee and meet certain other requirements such as maintaining an absence of OFAC penalties, BIS violations, debarment actions and felony convictions within the five years prior to the completion date of the transaction.

Importantly, however, the proposed regulations do not presently identify which countries would be considered excepted. Much to the frustration of many foreign investors, the proposed rules indicate that the list will not be forthcoming for a period of two years following the effective date of the final rules. Given the significant national security implications, CFIUS initially intends to designate a small number of excepted foreign states and to publish factors it expects to use in determining eligible countries at a later date.

Key Takeaways

The proposed regulations offer a significant level of detail on how CFIUS expects to implement its new jurisdictional authorities articulated in FIRRMA. In so doing, members of the business and investment communities can gain a much better understanding of the extent to which contemplated transactions may warrant CFIUS review in the future. That being said, some of the key aspects of FIRRMA's implementation—notably, the list of excepted foreign countries—still leaves some foreign investors from countries such as the United Kingdom, Canada, Australia and Japan in limbo. The investment community must also wait on proposed regulations that address filing fees,[1] as well as the extent to which the existing Pilot Program will continue indefinitely in its current form or if any tailoring is deemed appropriate by CFIUS.

Some of the key aspects of FIRRMA's implementation—notably, the list of excepted foreign countries—still leaves some foreign investors from countries such as the United Kingdom, Canada, Australia and Japan in limbo.

One outcome is for sure: the decision to notify CFIUS of a transaction will be a much more labor intensive analysis once the final version of these regulations is promulgated. Determining the extent to which an investment target falls within these new jurisdictional authorities, coupled with the increasingly complex review of the nature of the investor, will likely require much more attention during transaction diligence from both buyer and seller, as well as a heightened level of cooperation in coordinating this analysis. And pursuant to the new authorities under FIRRMA, it is highly likely that the Committee's case load will multiply, possibly exponentially, in the years to come.

It is important to note that these are not final regulations. The proposed regulations do not make any immediate changes to the CFIUS review process or the CFIUS Pilot Program, and instead are open for public comment until October 17, 2019. Treasury will then be able to consider those comments until the February 13, 2020 statutory deadline imposed by FIRRMA to release the final version of the regulations.

[1] While filing fees are not addressed in the proposed regulations, the rules do implement certain FIRRMA provisions relating to penalties. In particular, any person who submits a material misstatement or omission in a declaration or notice or makes a false certification faces a civil penalty of up to $250,000 under the proposed regulations. The proposed regulations specifically remove the pre-FIRRMA qualifier "intentionally or through gross negligence," as called for in the legislation.

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Appendix A to Part 800:

Covered Investment Critical Infrastructure and Functions Related to Covered Investment Critical Infrastructure

Column 1 – Covered investment critical infrastructure	Column 2 – Functions related to covered investment critical infrastructure
(i) Any: (a) internet protocol network that has access to every other internet protocol network solely via settlement-free peering; or (b) telecommunications service or information service, each as defined in section 3(a)(2) of the Communications Act of 1934 (47 U.S.C. 153), as amended, or fiber optic cable that directly serves any military installation identified in § 802.229.	(i) Own or operate any: (a) internet protocol network that has access to every other internet protocol network solely via settlement-free peering; or (b) telecommunications service or information service, each as defined in section 3(a)(2) of the Communications Act of 1934 (47 U.S.C. 153), as amended, or fiber optic cable that directly serves any military installation identified in § 802.229.
(ii) Any internet exchange point that supports public peering.	(ii) Own or operate any internet exchange point that supports public peering.
(iii) Any submarine cable system requiring a license pursuant to section 1 of the Cable Landing Licensing Act of 1921 (47 U.S.C. 34), as amended, which includes any associated submarine cable, submarine cable landing facilities, and any facility that performs network management, monitoring, maintenance, or other operational functions for such submarine cable system.	(iii) Own or operate any submarine cable system requiring a license pursuant to section 1 of the Cable Landing Licensing Act of 1921 (47 U.S.C. 34), as amended, which includes any associated submarine cable, submarine cable landing facilities, and any facility that performs network management, monitoring, maintenance, or other operational functions for such submarine cable system.
(iv) Any submarine cable, landing facility, or facility that performs network management, monitoring, maintenance, or other operational function that is part of a submarine cable system described above in item (iii) of Column 1 of appendix A to part 800.	(iv) Supply or service any submarine cable, landing facility, or facility that performs network management, monitoring, maintenance, or other operational function that is part of a submarine cable system described above in item (iii) of Column 1 of appendix A to part 800.
(v) Any data center that is collocated at a submarine cable landing point, landing station, or termination station.	(v) Own or operate any data center that is collocated at a submarine cable landing point, landing station, or termination station.
(vi) Any satellite or satellite system providing services directly to the Department of Defense or any component thereof.	(vi) Own or operate any satellite or satellite system providing services directly to the Department of Defense or any component thereof.
(vii) Any industrial resource other than commercially available off-the-shelf items, as defined in section 4203(a) of the National Defense Authorization Act for Fiscal Year 1996 (41 U.S.C. 104), as amended, that is manufactured or operated for a Major Defense Acquisition Program, as defined in section 7(b)(2)(A) of the Defense Technical Corrections Act of 1987 (10 U.S.C. 2430), as amended, or a Major System, as defined in 10 U.S.C. 2302d, as amended and: (a) the U.S. business is a "single source," "sole source," or "strategic multisource," to the extent the U.S. business has been notified of such status; or (b) the industrial resource:	(vii) As applicable, manufacture any industrial resource other than commercially available off-the-shelf items, as defined in section 4203(a) of the National Defense Authorization Act for Fiscal Year 1996 (41 U.S.C. 104), as amended, or operate any industrial resource that is a facility, in each case, for a Major Defense Acquisition Program, as defined in section 7(b)(2)(A) of the Defense Technical Corrections Act of 1987 (10 U.S.C. 2430), as amended, or a Major System, as defined in 10 U.S.C. 2302d, as amended and: (a) the U.S. business is a "single source," "sole source," or "strategic multisource," to the extent the U.S. business has been notified of such status; or

Column 1 – Covered investment critical infrastructure	Column 2 – Functions related to covered investment critical infrastructure
(1) requires 12 months or more to manufacture; or (2) is a "long lead" item, to the extent the U.S. business has been notified that such industrial resource is a "long lead" item.	(b) the industrial resource: (1) requires 12 months or more to manufacture; or (2) is a "long lead" item, to the extent the U.S. business has been notified that such industrial resource is a "long lead" item.
(viii) Any industrial resource, other than commercially available off-the-shelf items, as defined in section 4203(a) of the National Defense Authorization Act for Fiscal Year 1996 (41 U.S.C. 104), as amended, that is manufactured pursuant to a "DX" priority rated contract or order under the Defense Priorities and Allocations System regulation (15 CFR part 700, as amended) in the preceding 24 months.	(viii) Manufacture any industrial resource, other than commercially available off-theshelf items, as defined in section 4203(a) of the National Defense Authorization Act for Fiscal Year 1996 (41 U.S.C. 104), as amended, pursuant to a "DX" priority rated contract or order under the Defense Priorities and Allocations System regulation (15 CFR part 700, as amended) within 24 months of the transaction in question.
(ix) Any facility in the United States that manufactures: (a) specialty metal, as defined in section 842(a)(1)(i) of the John Warner National Defense Authorization Act for Fiscal Year 2007 (10 U.S.C. 2533b), as amended; (b) covered material, as defined in 10 U.S.C. 2533c, as amended; (c) chemical weapons antidote contained in automatic injectors, as described in 10 U.S.C. 2534, as amended; or (d) carbon, alloy, and armor steel plate that is in Federal Supply Class 9515 or is described by specifications of the American Society for Testing Materials or the American Iron and Steel Institute.	(ix) Manufacture any of the following in the United States: (a) specialty metal, as defined in section 842(a)(1)(i) of the John Warner National Defense Authorization Act for Fiscal Year 2007 (10 U.S.C. 2533b), as amended; (b) covered material, as defined in 10 U.S.C. 2533c, as amended; (c) chemical weapons antidote contained in automatic injectors, as described in 10 U.S.C. 2534, as amended; or (d) carbon, alloy, and armor steel plate that is in Federal Supply Class 9515 or is described by specifications of the American Society for Testing Materials or the American Iron and Steel Institute.
(x) Any industrial resource other than commercially available off-the-shelf items, as defined in 41 U.S.C. 104, as amended, that has been funded, in whole or in part, by any of the following sources in the last 60 months: (a) Defense Production Act of 1950 Title III program (50 U.S.C 4501, et seq.), as amended; (b) Industrial Base Fund pursuant to section 896(b)(1) of the Ike Skelton National Defense Authorization Act for Fiscal Year 2011 (10 U.S.C. 2508), as amended; (c) Rapid Innovation Fund pursuant to section 1073 of Ike Skelton National Defense Authorization Act for Fiscal Year 2011 (10 U.S.C. 2359a), as amended; (d) Manufacturing Technology Program pursuant to 10 U.S.C. 2521, as amended; (e) Defense Logistics Agency Warstopper Program, as described in DLA Instruction 1212, Industrial Capabilities Program – Manage the WarStopper Program; or	(x) As applicable, manufacture any industrial resource other than commercially available off-the-shelf items, as defined in 41 U.S.C. 104, as amended, or operate any industrial resource that is a facility, in each case, that has been funded, in whole or in part, by any of the following sources within 60 months of the transaction in question: (a) Defense Production Act of 1950 Title III program (50 U.S.C. 4501, et seq.), as amended; (b) Industrial Base Fund pursuant to section 896(b)(1) of the Ike Skelton National Defense Authorization Act for Fiscal Year 2011 (10 U.S.C. 2508), as amended; (c) Rapid Innovation Fund pursuant to section 1073 of Ike Skelton National Defense Authorization Act for Fiscal Year 2011 (10 U.S.C. 2359a), as amended; (d) Manufacturing Technology Program pursuant to 10 U.S.C. 2521, as amended; (e) Defense Logistics Agency Warstopper Program, as described in DLA Instruction 1212, Industrial Capabilities Program – Manage the WarStopper Program; or

Column 1 – Covered investment critical infrastructure	Column 2 – Functions related to covered investment critical infrastructure
(f) Defense Logistics Agency Surge and Sustainment contract, as described in Subpart 17.93 of the Defense Logistics Acquisition Directive.	(f) Defense Logistics Agency Surge and Sustainment contract, as described in Subpart 17.93 of the Defense Logistics Acquisition Directive.
(xi) Any system, including facilities, for the generation, transmission, distribution, or storage of electric energy comprising the bulk-power system, as defined in section 215(a)(1) of the Federal Power Act (16 U.S.C. 824o(a)(1)), as amended.	(xi) Own or operate any system, including facilities, for the generation, transmission, distribution, or storage of electric energy comprising the bulk-power system, as defined in section 215(a)(1) of the Federal Power Act (16 U.S.C. 824o(a)(1)), as amended.
(xii) Any electric storage resource, as defined in 18 CFR § 35.28(b)(9), as amended, that is physically connected to the bulk-power system.	(xii) Own or operate any electric storage resource, as defined in 18 CFR § 35.28(b)(9), as amended, that is physically connected to the bulk-power system.
(xiii) Any facility that provides electric power generation, transmission, distribution, or storage directly to or located on any military installation identified in § 802.229.	(xiii) Own or operate any facility that provides electric power generation, transmission, distribution, or storage directly to or located on any military installation identified in § 802.229.
(xiv) Any industrial control system utilized by: (a) system comprising the bulk-power system as described above in item (xi) of Column 1 of appendix A to part 800; or (b) a facility directly serving any military installation as described above in item (xiii) of Column 1 of appendix A to part 800.	(xiv) Manufacture or service any industrial control system utilized by: (a) system comprising the bulk-power system as described above in item (xi) of Column 1 of appendix A to part 800; or (b) a facility directly serving any military installation as described above in item (xiii) of Column 1 of appendix A to part 800.
(xv) Any: (a) any individual refinery with the capacity to produce 300,000 or more barrels per day (or equivalent) of refined oil or gas products; or (b) collection of one or more refineries owned or operated by a single U.S. business with the capacity to produce, in the aggregate, 500,000 or more barrels per day (or equivalent) of refined oil or gas products.	(xv) Own or operate: (a) any individual refinery with the capacity to produce 300,000 or more barrels per day (or equivalent) of refined oil or gas products; or (b) one or more refineries with the capacity to produce, in the aggregate, 500,000 or more barrels per day (or equivalent) of refined oil or gas products.
(xvi) Any crude oil storage facility with the capacity to hold 30 million barrels or more of crude oil.	(xvi) Own or operate any crude oil storage facility with the capacity to hold 30 million barrels or more of crude oil.
(xvii) Any: (a) liquefied natural gas (LNG) import or export terminal requiring: (1) approval pursuant to section 3(e) of the Natural Gas Act (15 U.S.C. 717b(e)), as amended, or (2) a license pursuant to section 4 of the Deepwater Port Act of 1974 (33 U.S.C. 1503), as amended; or (b) natural gas underground storage facility or LNG peak-shaving facility requiring a certificate of public convenience and necessity pursuant to section 7 of the Natural Gas Act (15 U.S.C. 717f), as amended.	(xvii) Own or operate any: (a) liquefied natural gas (LNG) import or export terminal requiring: (1) approval pursuant to section 3(e) of the Natural Gas Act (15 U.S.C. 717b(e)), as amended, or (2) a license pursuant to section 4 of the Deepwater Port Act of 1974 (33 U.S.C. 1503), as amended; or (b) natural gas underground storage facility or LNG peak-shaving facility requiring a certificate of public convenience and necessity pursuant to section 7 of the Natural Gas Act (15 U.S.C. 717f), as amended.

Column 1 – Covered investment critical infrastructure	Column 2 – Functions related to covered investment critical infrastructure
(xviii) Any financial market utility that the Financial Stability Oversight Council has designated as systemically important pursuant to section 804 of the Dodd-Frank Wall Street Reform and Consumer Protection Act (12 U.S.C. 5463), as amended.	(xviii) Own or operate any financial market utility that the Financial Stability Oversight Council has designated as systemically important pursuant to section 804 of the Dodd-Frank Wall Street Reform and Consumer Protection Act (12 U.S.C. 5463), as amended.
(xix) Any exchange registered under section 6 of the Securities Exchange Act of 1934 (15 U.S.C. 78f), as amended, that facilitates trading in any national market system security, as defined in 17 CFR § 242.600, as amended, and which exchange during at least four of the preceding six calendar months had: (a) with respect to all national market system securities that are not options, ten percent or more of the average daily dollar volume reported by applicable transaction reporting plans; or (b) with respect to all listed options, fifteen percent or more of the average daily dollar volume reported by applicable national market system plans for reporting transactions in listed options.	(xix) Own or operate any exchange registered under section 6 of the Securities Exchange Act of 1934 (15 U.S.C. 78f), as amended, that facilitates trading in any national market system security, as defined in 17 CFR § 242.600, as amended, and which exchange during at least four of the preceding six calendar months had: (a) with respect to all national market system securities that are not options, ten percent or more of the average daily dollar volume reported by applicable transaction reporting plans; or (b) with respect to all listed options, fifteen percent or more of the average daily dollar volume reported by applicable national market system plans for reporting transactions in listed options.
(xx) Any technology service provider in the Significant Service Provider Program of the Federal Financial Institutions Examination Council that provides core processing services.	(xx) Own or operate any technology service provider in the Significant Service Provider Program of the Federal Financial Institutions Examination Council that provides core processing services.
(xxi) Any rail line and associated connector line designated as part of the Department of Defense's Strategic Rail Corridor Network.	(xxi) Own or operate any rail line and associated connector line designated as part of the Department of Defense's Strategic Rail Corridor Network.
(xxii) Any interstate oil pipeline that: (a) has the capacity to transport: (1) 500,000 barrels per day or more of crude oil, or (2) 90 million gallons per day or more of refined petroleum product; or (b) directly serves the strategic petroleum reserve, as defined in section 152 of the Energy Policy and Conservation Act (42 U.S.C. 6232), as amended.	(xxii) Own or operate any interstate oil pipeline that: (a) has the capacity to transport: (1) 500,000 barrels per day or more of crude oil, or (2) 90 million gallons per day or more of refined petroleum product; or (b) directly serves the strategic petroleum reserve, as defined in section 152 of the Energy Policy and Conservation Act (42 U.S.C. 6232), as amended.
(xxiii) Any interstate natural gas pipeline with an outside diameter of 20 or more inches.	(xxiii) Own or operate any interstate natural gas pipeline with an outside diameter of 20 or more inches.
(xxiv) Any industrial control system utilized by: (a) an interstate oil pipeline as described above in item (xxii) of Column 1 of appendix A to part 800; or (b) an interstate natural gas pipeline as described above in item (xxiii) of Column 1 of appendix A to part 800.	(xxiv) Manufacture or service any industrial control system utilized by: (a) an interstate oil pipeline as described above in item (xxii) of Column 1 of appendix A to part 800; or (b) an interstate natural gas pipeline as described above in item (xxiii) of Column 1 of appendix A to part 800.

Column 1 – Covered investment critical infrastructure	Column 2 – Functions related to covered investment critical infrastructure
(xxv) Any airport identified in § 802.201.	(xxv) Own or operate any airport identified in § 802.201.
(xxvi) Any: (a) maritime port identified in § 802.228; or (b) any individual terminal at such maritime ports.	(xxvi) Own or operate any: (a) maritime port identified in § 802.228; or (b) any individual terminal at such maritime ports.
(xxvii) Any public water system, as defined in section 1401(4) of the Safe Drinking Water Act (42 U.S.C. 300f(4)(A)), as amended, or treatment works, as defined in section 212(2)(A) of the Clean Water Act (33 U.S.C. 1292(2)), as amended, which: (a) regularly serves 10,000 individuals or more, or (b) directly serves any military installation identified in § 802.229.	(xxvii) Own or operate any public water system, as defined in section 1401(4) of the Safe Drinking Water Act (42 U.S.C. 300f(4)(A)), as amended, or treatment works, as defined in section 212(2)(A) of the Clean Water Act (33 U.S.C. 1292(2)), as amended, which: (a) regularly serves 10,000 individuals or more, or (b) directly serves any military installation identified in § 802.229.
(xxviii) Any industrial control system utilized by a public water system or treatment works as described above in item (xxvii) of Column 1 of appendix A to part 800.	(xxviii) Manufacture or service any industrial control system utilized by a public water system or treatment works as described above in item (xxvii) of Column 1 of appendix A to part 800.

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