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WHICH CRITICAL INFRASTRUCTURE FUNCTIONS ARE COVERED BY THE NEW CFIUS RULES?

New rules that became final on February 13, 2020 dramatically expand the jurisdiction of the Committee on Foreign Investment in the United States (CFIUS). Where CFIUS was once concerned only with transactions that would result in foreign control of a U.S. business, the Committee's authority now extends to non-controlling investments in a broad range of U.S. businesses involved with critical technology, critical infrastructure, or sensitive personal data – collectively denominated "TID U.S. businesses" – as well as in certain real estate.

In a previous **advisory**, we provided a flowchart for identifying CFIUS triggers in investment transactions. In this supplemental advisory, we offer a tool for better understanding the kinds of businesses that may be caught by the new rules' provisions regarding "critical infrastructure." The appendix of "covered investment critical infrastructure" (Appendix A to Part 800) provided with the rules is a frustrating maze of cross-references to other statutes and regulations that make it challenging to understand the scope of the new requirements and to know which types of critical infrastructure are and are not caught by the new rules.

In the table below, we have reorganized Appendix A by sector (e.g., telecommunications versus finance) and by function (e.g., own and operate versus manufacture), and added hyperlinks to the referenced statutes and regulations, along with footnotes reproducing definitions of scope-determinative terms. We hope this tool will save some time and spare some headaches for preliminary assessments of whether an investment involves "critical infrastructure." As always, parties should be sure to verify preliminary conclusions reached with the tool against the original regulatory text.

CONTINUED

WHICH CRITICAL INFRASTRUCTURE FUNCTIONS ARE COVERED BY THE NEW CFIUS RULES?

SECTOR	TYPE OF INFRASTRUCTURE	CONTROLLED FUNCTION	ROW IN 31 CFR 800, APP. A
Communications	Any IP network having access to every other IP network solely via settlement-free peering.	Own or operate	(i)(a)
Communications	Any internet exchange point that supports public peering.	Own or operate	(ii)
Communications	Any "information service" as defined by 47 U.S.C. 153 that directly serves any military installation identified in Appendix A to 31 C.F.R. 802. ¹	Own or operate	(i)(b)
Communications	Any "telecommunications service" as defined by 47 U.S.C. 153 that directly serves any military installation identified in Appendix A to 31 C.F.R. 802. ²	Own or operate	(i)(b)
Communications	Any fiber optic cable that directly serves any military installation identified in Appendix A to 31 C.F.R. 802.	Own or operate	(i)(b)
Communications	Any data center that is colocated at a submarine cable landing point, landing station, or termination station.	Own or operate	(v)
Communications	Any satellite or satellite system providing services directly to the Department of Defense or any component thereof.	Own or operate	(vi)
Communications	A submarine cable system requiring a license under 47 U.S.C. 34 , ³ including 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.	Own, operate, supply or service	(iii) and (iv)
IT/Finance	Any technology service provider that: (1) is in the Federal Financial Institutions Examination Council's Significant Service Provider Program; and (2) provides core processing services.	Own or operate	xx

¹ "[I]nformation service" means "the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications," which "includes electronic publishing, but does not include any use of any such capability for the management, control, or operation of a telecommunications system or the management of a telecommunications service." **47 U.S.C. 153(24).**

² "[T]elecommunications service" means "the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used." **47 U.S.C. 153(53).**

³ "[A]ny submarine cable directly or indirectly connecting the United States with any foreign country, or connecting one portion of the United States with any other portion thereof." **47 U.S.C. 34.**

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SECTOR	TYPE OF INFRASTRUCTURE	CONTROLLED FUNCTION	ROW IN 31 CFR 800, APP. A
Finance	Any financial market utility designated as systemically important by the Financial Stability Oversight Council under 12 U.S.C. 5463 . ⁴	Own or operate	xviii
Finance	Any exchange registered under Section 6 of the Securities Exchange Act of 1934 (15 U.S.C. 78f), that: (1) facilitates trading in any national market system security, ⁵ and (2) had, during at least four of the six calendar months before the transaction: a. with respect to all national market system securities that are not options, 10 percent or more of the average daily dollar volume reported by applicable transaction reporting plans; or b. with respect to all listed options, 15 percent or more of the average daily dollar volume reported by applicable national market system plans for reporting transactions in listed options	Own or operate	xix
Transport	Any rail line and associated connector line designated as part of the Department of Defense's Strategic Rail Corridor Network	Own or operate	xxi
Transport	Any airport identified in 31 CFR 802.210(a)(1) through (3) . ⁶	Own or operate	xxv
Transport	Any maritime port or terminal of a maritime port identified in §802.210(a)(4) or (5) . ⁷	Own or operate	xxvi

⁴ The list is available [here](#).

⁵ “[N]ational market system security” means “any security or class of securities for which transaction reports are collected, processed, and made available pursuant to an effective transaction reporting plan, or an effective national market system plan for reporting transactions in listed options.” **17 C.F.R. 242.600(a) and (b)(47)**.

⁶ This means an airport identified: (i) in the **FAA's annual final passenger boarding data** as a “large hub airport” (i.e., a commercial service airport that has at least 1.0 percent of the passenger boardings **49 U.S.C. 40102**), (ii) in the **FAA's annual final all-cargo landed weight data** as an airport with annual aggregate all-cargo landed weight greater than 1.24 billion pounds, or (iii) by the **FAA as a “joint use airport,”** i.e., an airport owned by the Department of Defense, at which both military and civilian aircraft make shared use of the airfield (**49 U.S.C. 47175**).

⁷ This means a port identified: (i) by the DOT Maritime Administration as a commercial strategic seaport within the **National Port Readiness Network**; or (ii) by the DOT Bureau of Transportation Statistics as a **top 25 tonnage, container, or dry bulk port**.

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SECTOR	TYPE OF INFRASTRUCTURE	CONTROLLED FUNCTION	ROW IN 31 CFR 800, APP. A
Oil and Gas	Any individual refinery with the capacity to produce 300,000 or more barrels per day (or equivalent) of refined oil or gas products; or	Own or operate	xv(a)
Oil and Gas	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.	Own or operate	xv(b)
Oil and Gas	Any crude oil storage facility with the capacity to hold 30 million barrels or more of crude.	Own or operate	xvi
Oil and Gas	Any interstate oil pipeline that: <ul style="list-style-type: none"> (1) has the capacity to transport <ul style="list-style-type: none"> a. 500,000 barrels/day or more of crude oil, or b. 90 million gallons/day or more of refined petroleum product; or (2) directly serves the Strategic Petroleum Reserve, as defined by section 152 of the Energy Policy and Conservation Act (42 U.S.C. 6232) 	Own or operate	xxii
Oil and Gas	Any interstate natural gas pipeline that has an outside diameter of 20 inches or more	Own or operate	xxiii
Oil and Gas	A liquefied natural gas (LNG) import or export terminal requiring: <ul style="list-style-type: none"> (1) approval under section 3(e) of the Natural Gas Act (15 U.S.C. 717b(e)), or (2) a license under section 4 of the Deepwater Port Act of 1974 (33 U.S.C. 1503); 	Own or operate	xvii(a)
Oil and Gas	A natural gas underground storage facility or LNG peak-shaving facility requiring a certificate of public convenience and necessity under the Natural Gas Act. Section 7 (15 U.S.C. 717f).	Own or operate	xviii(b)

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SECTOR	TYPE OF INFRASTRUCTURE	CONTROLLED FUNCTION	ROW IN 31 CFR 800, APP. A
Electricity	Any system, including facilities, for the generation, transmission, distribution, or storage of electric energy comprising the bulk-power system, as defined in 16 U.S.C. 824o(a)(1) . ⁸	Own or operate	xi
Electricity	Any electric storage resource, as defined in 18 C.F.R. 35.28(b)(9) , that is physically connected to the bulk-power system. ⁹	Own or operate	xii
Electricity	Any facility that provides electric power generation, transmission, distribution, or storage directly to or located on any military installation identified in Appendix A to 31 CFR 802 .	Own or operate	xiii
Public water	Any public water system ¹⁰ or treatment works ¹¹ , as defined in 42 U.S.C. 300f(4)(A) , and 33 U.S.C. 1292(2) , respectively, that: <ul style="list-style-type: none"> (1) regularly serves 10,000 individuals or more; or (2) directly serves any military installation identified in Appendix A to 31 C.F.R. 802. 		xxvii
Oil, gas, public water, electricity, military	Any industrial control system used by: <ul style="list-style-type: none"> (1) a system comprising the bulk-power system as described above; or (2) a facility directly serving any military installation as described above; (3) an interstate oil pipeline as described above; (4) an interstate natural gas pipeline as described above; or (5) a public water system or treatment works as described above. 	Manufacture or service	xiv, xxiv, xxviii

⁸ "Bulk power system" means (i) "facilities and control systems necessary for operating an interconnected electric energy transmission network (or any portion thereof)," and (ii) "electric energy from generation facilities needed to maintain transmission system reliability." It "does not include facilities used in the local distribution of electric energy." **16 U.S.C. 824o(a)(1)**.

⁹ "Electric storage resource" means "a resource capable of receiving electric energy from the grid and storing it for later injection of electric energy back to the grid." **18 C.F.R. 35.28(b)(9)**.

¹⁰ "Public water system" means "a system for the provision to the public of water for human consumption through pipes or other constructed conveyances, if such system has at least fifteen service connections or regularly serves at least twenty-five individuals. Such term includes (i) any collection, treatment, storage, and distribution facilities under control of the operator of such system and used primarily in connection with such system, and (ii) any collection or pretreatment storage facilities not under such control which are used primarily in connection with such system." **42 U.S.C. 300f(4)(A)**.

¹¹ "Treatment works" means "any devices and systems used in the storage, treatment, recycling, and reclamation of municipal sewage or industrial wastes of a liquid nature to implement section 1281 of this title, or necessary to recycle or reuse water at the most economical cost over the estimated life of the works, including intercepting sewers, outfall sewers, sewage collection systems, pumping, power, and other equipment, and their appurtenances; extensions, improvements, remodeling, additions, and alterations thereof; elements essential to provide a reliable recycled supply such as standby treatment units and clear well facilities; and any works, including site acquisition of the land that will be an integral part of the treatment process (including land used for the storage of treated wastewater in land treatment systems prior to land application) or is used for ultimate disposal of residues resulting from such treatment." **33 U.S.C. 1292(2)**.

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SECTOR	TYPE OF INFRASTRUCTURE	CONTROLLED FUNCTION	ROW IN 31 CFR 800, APP. A
Defense	Any industrial resource, including a facility, that: <ul style="list-style-type: none"> (1) is <i>not</i> a commercially available off-the-shelf item¹² as defined in 41 U.S.C. 104; and (2) is a Major System per 10 U.S.C. 2302d¹³ or is manufactured or operated for a Major Defense Acquisition Program per 10 U.S.C. 2430¹⁴; and (3) the U.S. business has been notified that it is a "single source," "sole source," or "strategic multisource; or (4) the industrial resource requires 12 months or more to manufacture; or (5) the U.S. business has been notified that the industrial resource is a "long lead item" 	Manufacture or, for an industrial resource that is a facility, operate	vii
Defense	Any industrial resource that: <ul style="list-style-type: none"> (1) is <i>not</i> a commercially available off-the-shelf item per 41 U.S.C. 104¹⁵; and (2) is manufactured under a "DX" priority rated contract or order under the Defense Priorities and Allocations System regulation (15 C.F.R. 700) 	Manufacture within 24 months of the transaction	viii

¹² "Commercially available off-the-shelf item" means "a commercial item as defined in [41 U.S.C. 103]," which "is sold in substantial quantities in the commercial marketplace," and "offered to the Federal Government, without modification, in the same form in which it is sold in the commercial marketplace." It does not include "bulk cargo, as defined in **section 40102(4) of Title 46** [i.e., "cargo that is loaded and carried in bulk without mark or count"], such as agricultural products and petroleum products." **41 U.S.C. 104**.

¹³ "Major system" means a system for which DoD is responsible and for which: (1) the total expenditures for research, development, test, and evaluation are estimated to be more than \$115,000,000 (based on fiscal year 1990 constant dollars); or (2) the eventual total expenditure for procurement for the system is estimated to be more than \$540,000,000 (based on fiscal year 1990 constant dollars)." **10 U.S.C. 2302d**.

¹⁴ "Major Defense Acquisition Program" means a DoD program that (i) "is not a highly sensitive classified program," and (ii) is designated by the Secretary of Defense as a major defense acquisition program, or is estimated by the Secretary of Defense to require an eventual total expenditure for research, development, test, and evaluation of more than \$300,000,000 (based on fiscal year 1990 constant dollars) or an eventual total expenditure for procurement, including all planned increments or spirals, of more than \$1,800,000,000 (based on fiscal year 1990 constant dollars). **10 U.S.C. 2430**.

¹⁵ See footnote 12.

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Defense	Any industrial resource, including a facility, that: <ol style="list-style-type: none"> (1) is <i>not</i> a commercially available off-the-shelf item per 41 U.S.C. 104¹⁶; and (2) received, <i>within 60 months of the transaction</i>, funds under any of: <ol style="list-style-type: none"> a) The Defense Production Act of 1950 Title III (50 U.S.C. 4501); b) Industrial Base Fund under section 896(b)(1) of the Ike Skelton National Defense Authorization Act for Fiscal Year 2011 (10 U.S.C. 2508); c) Rapid Innovation Fund under section 1073 of Ike Skelton National Defense Authorization Act for Fiscal Year 2011 (10 U.S.C. 2359a); d) Manufacturing Technology Program under 10 U.S.C. 2521; e) Defense Logistics Agency Warstopper Program, as described in DLA Instruction 1212, Industrial Capabilities Program—Manage the WarStopper Program; or f) Defense Logistics Agency Surge and Sustainment contract, as described in Subpart 17.93 of the Defense Logistics Acquisition Directive. 	Manufacture or, for an industrial resource that is a facility, operate	x
Materials	Specialty metal per 10 U.S.C. 2533b(l) ¹⁷	Manufacture, in the U.S.	ix(a)
Materials	Covered material per 10 U.S.C. 2533c(d) ¹⁸	Manufacture, in the U.S.	ix(b)
Pharma	Chemical weapons antidote contained in automatic injectors per 10 U.S.C. 2534	Manufacture, in the U.S.	ix(c)
Materials	Carbon, alloy, and armor steel plate that is: <ol style="list-style-type: none"> (1) in Federal Supply Class 9515; or (2) described by specifications of the American Society for Testing Materials or the American Iron and Steel Institute. 	Manufacture, in the U.S.	ix(d)

¹⁶ See footnote 12.

¹⁷ "Specialty metal" means: (1) steel having a maximum alloy content exceeding one or more of the following limits: manganese, 1.65 percent; silicon, 0.60 percent; or copper, 0.60 percent; (2) steel containing more than 0.25 percent of any of the following elements: aluminum, chromium, cobalt, columbium, molybdenum, nickel, titanium, tungsten, or vanadium; (3) metal alloys consisting of nickel, iron-nickel, and cobalt base alloys containing a total of other alloying metals (except iron) in excess of 10 percent; (4) titanium and titanium alloys; and (5) zirconium and zirconium base alloys. **10 U.S.C. 2533b(l)**.

¹⁸ "Covered material" means: (1) samarium-cobalt magnets; (2) neodymium-iron-boron magnets; (3) tungsten metal powder; and (4) tungsten heavy alloy or any finished or semi-finished component containing tungsten heavy alloy. **10 U.S.C. 2533c(d)**.