

Goodmans^{LLP} Update

Win for Canadian Investors in U.S. Tech: Canada Exempt From new U.S. Regulations on Foreign Investment

The U.S. Department of the Treasury's Committee on Foreign Investment in the United States ("CFIUS") recently published the final version of new regulations made under the Foreign Investment Risk Review Modernization Act ("FIRRMA"), revealing Canada will be exempt from the new rules applying to foreign investments in certain U.S. businesses and real estate assets. These regulations will provide for automatic review and mandatory filings in connection with foreign investments in U.S. businesses focused on critical technologies, infrastructure and sensitive personal data ("TID U.S. Businesses"), as well as investments in certain U.S. real estate assets such as airports, maritime ports and other property within range of a military facility. In contrast to other investments that may be subject to discretionary review, CFIUS will be required to review foreign investment in TID U.S. Businesses and grant clearance to foreign investors before these investments are made. Investments by Canadians in these and other industries may still be subject to a discretionary CFIUS review.

Background

FIRRMA was enacted to address national security concerns related to foreign investment in certain U.S. businesses and real estate assets. The legislation provides for CFIUS review of certain non-controlling "covered investments" by foreign persons in TID U.S. Businesses. Additionally, regulatory filings will be required for acquisitions of 25% or more voting interest in a TID U.S. Business by a foreign company of which a foreign government owns 49% or more voting interest.

At the time of FIRRMA's enactment, CFIUS invited the public to comment on the new legislation. Many in the Canadian investment community expressed concerns that FIRRMA could serve as a significant impediment to investments by Canadians in U.S. businesses. Specifically, many believed the enhanced scrutiny and red tape surrounding investments in businesses involving "critical technologies" would create major roadblocks for Canadian venture capital investors seeking to invest in U.S. technology companies. As a result, in July, 2019, the Canadian Venture Capital and Private Equity Association, BIOTECanada, the Canadian Chamber of Commerce and Medtech Canada joined forces to submit an open letter to the U.S. Department of the Treasury arguing that the legislation unduly harmed U.S. allies. They urged for an exemption from the new regulations for Canadian investors who, they submitted, do not present the national security threat the regulations were designed to protect against.

New Regulations

The recently released regulations added Canada, the United Kingdom and Australia (the "Excepted Foreign States") to a list of allied nations that will be exempt from certain provisions of FIRRMA providing for automatic CFIUS review of foreign investments and related mandatory filing requirements. Canada's status as an Excepted Foreign State will apply until February, 2022, at which point the exemption will be re-evaluated based on Canada's national security and bilateral cooperation with the U.S. CFIUS indicated that more countries may be granted an exemption from the regulations in future. The exemption should quell the immediate fears of, among others, Canadian venture capital investors looking to invest in the U.S. The exemptions will be revisited in February, 2022.

Authors



Allan Goodman
agoodman@goodmans.ca
416.597.4243



Michael Koch
mkoch@goodmans.ca
416.597.5156



Andrew Schipper
aschipper@goodmans.ca
416.849.6006

The author would like to thank Daniela Cerrone, Student-at-Law, for her assistance in writing this Update.

Goodmans Tech Group

To assist clients in the technology sector, Goodmans brings together our acknowledged expertise in corporate/commercial, private equity, corporate finance, mergers and acquisitions, outsourcing, licensing, intellectual property, privacy, regulatory and media, cleantech, tax, litigation, human resources, corporate restructuring and administrative law. We do so both for innovative businesses in their start-up phase and for well-established businesses of all types. Goodmans continues to lead in the technology sector and is partnered with the DMZ at Ryerson University. The DMZ is a leading business incubator (selected by UBI as the top-ranked university incubator in the world), which connects its start-ups with resources, customers, advisors, investors, and other entrepreneurs. Goodmans is also a proud partner of IDEABoost, an initiative of the Canadian Film Centre's Media Lab; building the next generation of technology-based media entertainment products, services and brands. Through these partnerships, Goodmans provides legal advice, mentorship and networking opportunities to assist start-ups in maximizing their potential.

Goodmans is also an internationally recognized leader in other aspects of technology law and transactions. From our thought leadership, through participation on the Boards of associations such as CanTech (Canadian Technology Law Association), CORE (Centre for Outsourcing Research and Education), CIEG (Canadian Institute for Exponential Growth, which organized the Summit) and iTechLaw (International Technology Law Association), to our involvement in major technology procurement, joint venture and outsourcing transactions, to our representation, in court proceedings and in arbitrations, of major technology providers, and users of technology, in ground-breaking cases, our Technology Group is consistently at the forefront of leading technology transactions and cases.

Members of our Technology Group are recognized as leading technology lawyers in Chambers Global, Lexpert, Legal 500 Canada, Legal Media Group's The Best of the Best, The Best Lawyers in Canada, Law Business Research's The International Who's Who of Business Lawyers, and The Lexpert/American Lawyer Guide to the Leading 500 Lawyers in Canada, teach internet and communications law at Canada's largest law schools, are regular lecturers at technology industry events and legal conferences, and have published articles in the technology law field.

For more information about this update, please contact any member of our [Technology Group](#) or [Corporate and Commercial Group](#).