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DEPARTMENT OF THE TREASURY

Office of the Secretary

31 CFR Part 1

RIN 1505-AC66

Committee on Foreign Investment in the United States Case Management System

Privacy Act of 1974; Proposed Implementation

AGENCY: Departmental Offices, Department of the Treasury.

ACTION: Proposed rule.

SUMMARY: In accordance with the requirements of the Privacy Act of 1974, as amended, the Department of the Treasury, Departmental Offices (DO) gives notice of a proposed exemption for a new system of records entitled “Department of the Treasury, Departmental Offices .227 - Committee on Foreign Investment in the United States (CFIUS) Case Management System,” maintained by the Committee on Foreign Investment in the United States from certain provisions of the Privacy Act. The exemption is intended to comply with the legal prohibitions against the disclosure of certain kinds of information and to protect certain information maintained in this system of records.

DATES: Written comments must be received by [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

ADDRESSES: Written comments on this proposal may be submitted electronically through the Federal government eRulemaking portal at <http://www.regulations.gov>.

Electronic submission of comments allows the commenter maximum time to prepare and

submit a comment, ensures timely receipt, and enables the Department of the Treasury (Treasury) to make the comments available to the public. Please note that comments submitted through <https://www.regulations.gov> will be public, and can be viewed by members of the public. Due to COVID-19-related restrictions, Treasury has temporarily suspended its ability to receive public comments by mail.

In general, Treasury will post all comments to <https://www.regulations.gov> without change, including any business or personal information provided, such as names, addresses, email addresses, or telephone numbers. All comments received, including attachments and other supporting material, will be part of the public record and subject to public disclosure. You should only submit information that you wish to make publicly available.

FOR FURTHER INFORMATION CONTACT: For questions about this proposed rule and privacy issues, contact: Deputy Assistant Secretary for Privacy, Transparency, and Records at U.S. Department of the Treasury, 1500 Pennsylvania Avenue NW, Washington, DC 20220; telephone: (202) 622-5710.

SUPPLEMENTARY INFORMATION: As background, in 2018, the Foreign Investment Risk Review Modernization Act of 2018 (FIRRMA), Subtitle A of Title XVII of Public Law 115-232, 132 Stat. 2173, was enacted. FIRRMA amends section 721 of the Defense Production Act of 1950, as amended (Section 721), which delineates the authorities and jurisdiction of the Committee on Foreign Investment in the United States (CFIUS). FIRRMA maintains CFIUS's jurisdiction over any transaction that could result in foreign control of any U.S. business, and broadens the authorities of the President and CFIUS under Section 721 to review and take action to address any national security

concerns arising from certain non-controlling investments and certain real estate transactions involving foreign persons.

Executive Order 13456, 73 FR 4677 (January 23, 2008), directs the Secretary of the Treasury to issue regulations implementing Section 721. On January 17, 2020, Treasury published two rules broadly implementing FIRREA, and those rules took effect on February 13, 2020. 85 FR 3112 and 85 FR 3158. Subsequent amendments were made to the regulations in 2020. 85 FR 8747 and 85 FR 45311.

In addition to the exemptions proposed below, pursuant to section 721(c) of the Defense Production Act of 1950, as amended, 50 U.S.C. 4565(c) and subject to certain exceptions provided therein, any information or documentary material filed with CFIUS under Section 721 is exempt from disclosure under the Freedom of Information Act, as amended (FOIA), 5 U.S.C. 552, and no such information or documentary material may be made public.

Treasury is publishing separately the proposed rule of the new system of records to be maintained by CFIUS.

Under 5 U.S.C. 552a(k)(1), the head of a Federal agency may promulgate rules to exempt a system of records from certain provisions of 5 U.S.C. 552a if the system of records is subject to the exemption contained in section 552(b)(1) of this title. (Freedom of Information Act, exemption (b)(1) protects from disclosure information that has been deemed classified “under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy” and is “in fact properly classified pursuant to such Executive order.”)

Under 5 U.S.C. 552a(k)(2), the head of a Federal agency may promulgate rules to exempt a system of records from certain provisions of 5 U.S.C. 552a if the system of records contains investigatory materials compiled for law enforcement purposes that are not within the scope of subsection (j)(2) of the Privacy Act (which applies to agencies and components thereof that perform as their principal function any activity pertaining to the enforcement of criminal laws).

To the extent that this system of records contains classified information protected by 5 U.S.C.552a(k)(1) or investigatory materials compiled for law enforcement purposes protected by 5 U.S.C. 552a(k)(2), Treasury proposes to exempt the following system of records from various provisions of the Privacy Act:

DO .227 CFIUS Case Management System

Under 5 U.S.C. 552a(k)(1) and (k)(2), Treasury proposes that certain records in the above-referenced system of records be exempt from 5 U.S.C. 552a(c)(3), (d)(1), (2), (3), and (4), (e)(1), (e)(4)(G), (H),and (I), and (f) of the Privacy Act. See 31 CFR 1.36.

The following are the reasons why the classified records and investigatory materials contained in the above-referenced systems of records maintained by CFIUS may be exempted from various provisions of the Privacy Act pursuant to 5 U.S.C. 552a(k)(1) and (k)(2).

(1) From 5 U.S.C. 552a(c)(3) (Accounting for Disclosures) because release of the accounting of disclosures of the records in this system could alert individuals whether they have been identified as a national security threat or the subject of an analysis related to the national security interests of the United States, to the existence of the analysis, and reveal the interest on the part of Treasury or CFIUS as well as the recipient agency.

Disclosure of the accounting would present a serious impediment to efforts to protect national security interests by giving individuals an opportunity to learn whether they have been identified as subjects of a national security-related analysis. As further described in the following paragraph, access to such knowledge would impair Treasury's ability to carry out its mission, since individuals could:

- (i) take steps to avoid analysis;
- (ii) inform associates that a national security analysis is in progress;
- (iii) learn the nature of the national security analysis;
- (iv) learn the scope of the national security analysis;
- (v) begin, continue, or resume conduct that may pose a threat to national security upon inferring they may not be part of a national security analysis because their records were not disclosed; or
- (vi) destroy information relevant to the national security analysis.

(2) From subsection 5 U.S.C. 552a(d)(1), (d)(2), (d)(3), and (d)(4) (Access to Records), because access to a portion of the records contained in this system of records could inform individuals whether they have been identified as a national security threat or the subject of an analysis related to the national security interests of the United States, to the existence of the analysis and reveal the interest on the part of Treasury, CFIUS or another agency. Access to the records would present a serious impediment to efforts to protect national security interests by permitting the individual who is the subject of a record to learn whether they have been identified as subjects of a national security-related analysis. Access to such knowledge would impair Treasury's ability to carry out its mission, since individuals could take steps to impede the analysis and avoid detection,

including the steps described in paragraph (1)(i)-(vi) of this section. Amendment of the records would interfere with ongoing analysis and impose an impossible administrative burden given CFIUS's statutory deadlines. The information contained in the system may also include classified information, the release of which would pose a threat to the national security of the United States. In addition, permitting access and amendment to such information could disclose sensitive security information that could be detrimental to Treasury.

(3) From subsection 5 U.S.C. 552a(e)(1) (Relevance and Necessity of Information), because in the course of its operations, CFIUS must be able to review information from a variety of sources. What information is relevant and necessary may not always be apparent until after the evaluation is completed. In the interests of national security, it is appropriate to include a broad range of information that may aid in identifying and assessing the nature and scope of foreign threats to the United States. Additionally, the accuracy of information obtained or introduced occasionally may be unclear, or the information may not be strictly relevant or necessary to a specific analysis. In the interests of national security, it is appropriate to retain all information that may aid in establishing patterns of suspicious foreign investment activity.

(4) From subsection 5 U.S.C. 552a(e)(4)(G), (H), and (I) (Agency Requirements), and 5 U.S.C. 552a(f), because portions of this system are exempt from the access and amendment provisions of subsection (d). The reason for invoking the exemption is to protect material authorized to be kept secret in the interest of national security pursuant to Executive Orders 12968, 13526, successor or prior Executive Orders, and other legal authorities relevant to the intelligence responsibilities of Treasury.

Any information from a system of records for which an exemption is claimed under 5 U.S.C. 552a(k)(1) or 5 U.S.C. 552a(k)(2) which is also included in another system of records retains the same exempt status such information has in the system of records for which such exemption is claimed.

This proposed rule is not a “significant regulatory action” under Executive Order 12866.

Pursuant to the requirements of the Regulatory Flexibility Act (RFA), 5 U.S.C. 601-612, it is hereby certified that this proposed rule will not have significant economic impact on a substantial number of small entities. The term “small entity” is defined to have the same meaning as the terms “small business,” “small organization” and “small governmental jurisdiction” as defined in the RFA.

The proposed regulation, issued under sections (k)(1) and (k)(2) of the Privacy Act, is to exempt certain information maintained by Treasury in the above-referenced systems of records from certain Privacy Act requirements in this system of records by individuals who are United States citizens or aliens lawfully admitted for permanent residence. In as much as the Privacy Act rights are personal and apply only to U.S. citizens or an alien lawfully admitted for permanent residence, small entities, as defined in the RFA, are not provided rights under the Privacy Act and are outside the scope of this regulation.

List of Subjects in 31 CFR Part 1

Courts, Freedom of Information, Government Employees, Privacy.

For the reasons stated in the preamble, part 1 of title 31 of the Code of Federal Regulations is proposed to be amended as follows:

PART 1--[AMENDED]

1. The authority citation for part 1 continues to read as follows:

Authority: 5 U.S.C. 301 and 31 U.S.C. 321. Subpart A also issued under 5 U.S.C. 552, as amended. Subpart C also issued under 5 U.S.C. 552a, as amended.

2. Section 1.36 is amended in the tables in paragraphs (c)(1)(ii) and (g)(1)(ii) by adding in alphanumeric order an entry for “DO .227 CFIUS Case Management System” to read as follows:

§1.36 Systems exempt in whole or in part from provisions of 5 U.S.C. 522a and this part.

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(c) * * *

(1) * * *

(ii) * * *

Number System name

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DO .227 CFIUS Case Management System

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(g) * * *

(1) * * *

(ii) * * *

Number System name

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DO .227 CFIUS Case Management System

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U.S. Department of the Treasury.
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