

CFIUS Launches FIRRMA Pilot Program—Mandatory Filings for Foreign Investment in U.S. Critical Technologies

The Foreign Investment Risk Review Modernization Act of 2018 (FIRRMA) became law on August 13, 2018. Under FIRRMA, the Committee of Foreign Investment in the United States (CFIUS) is authorized to conduct pilot programs. On October 10, 2018, CFIUS issued interim pilot program regulations to review foreign investments in critical technologies to consider whether foreign investment might be eroding U.S. technological superiority. Broadly speaking, the pilot program:

- Expands the scope of transactions subject to review by CFIUS to include minority investments by foreign persons in U.S. businesses in specific industries.
- Effective November 10, 2018, requires the parties to all transactions falling within the pilot program to file *mandatory* declarations with CFIUS, representing a significant change from the standard CFIUS notice process which is voluntary.

CFIUS also issued other FIRRMA regulations that are not addressed by this update.

Pilot Program Scope

The pilot program includes minority investments by foreign persons in certain U.S. businesses in one or more "pilot program industries," where the U.S. business is involved in "critical technologies." Any U.S. business that meets these requirements are "pilot program U.S. businesses." Any foreign investment in these U.S. businesses requires that mandatory declarations be filed with CFIUS.

Pilot Program Industries. [Table 1 below](#) identifies the 27 industries included in the pilot program.

Critical Technologies. "Critical technologies" include any:

- Defense items subject to the International Traffic in Arms Regulations (ITAR).
- Commercial or dual use items controlled under the Export Administration Regulations (EAR).
- Emerging and foundational technologies controlled pursuant to section 1758 of the Export Control Reform Act of 2018.
- Certain nuclear items and select agents and toxins.

Non-Controlling Investments. Previously, CFIUS's authority was limited to transactions that could result in foreign control of a U.S. business. Under FIRRMA, CFIUS now has authority to review non-controlling interest investments in pilot program U.S. businesses. To fall within the pilot program, the transaction must afford the foreign person any of the following investment rights:

- Access to any material nonpublic technical information in the possession of the pilot program U.S. business;
- Membership or observer rights on the board of directors or the right to nominate an individual to the board of directors; or
- Any involvement, other than by voting its shares, in substantive decision making regarding the use, development, acquisition or release of critical technology by the U.S. business.

Excluded Transactions. The pilot program interim regulations do not apply to transactions:

- Completed prior to November 10, 2018; or
- Where before October 11, 2018, the parties (1) executed a binding written agreement; (2) a party has made a public offer to shareholders to buy shares; or (3) a party has solicited proxies in connection with a board election or has requested the conversion of convertible voting securities.

Mandatory Declarations

Mandatory Declarations are required for all pilot program transactions which are (a) any transactions that could result in control by a foreign person of a pilot program U.S. business, and (b) any pilot program covered investment (described above).

Timing for Filing the Mandatory Declaration. For pilot program covered transactions closing between November 10 and December 25, 2018, the declaration must be filed promptly after November 10. For pilot program covered transactions closing after December 25, 2018, a declaration must be filed 45 days before closing of the transaction.

CFIUS must take action on a declaration within 30 days of receipt of the declaration.

Information Required in the Declaration. Declarations are generally not to exceed 5 pages in length. Required information includes a discussion of the parties, the transaction, the nature of the businesses involved and other information as set forth in the interim regulations.

CFIUS Response. CFIUS may take any of the following actions in response to the declaration:

- Request that the parties file the full CFIUS notice;
- Inform the parties that CFIUS cannot complete action based on the declaration and that the parties may file the full notice with CFIUS;
- Initiate a unilateral review of the transaction; or
- Notify the parties that CFIUS has completed its review.

Penalties

The interim rule provides for potential significant civil penalties *up to the value of the transaction* for failure to comply with the pilot program's mandatory declaration requirements.

Table 1 - Pilot Program Industries

1. **Aircraft Manufacturing** (NAICS 336411)
2. **Aircraft Engine and Engine Parts Manufacturing** (NAICS 336412)
3. **Alumina Refining and Primary Aluminum Production** (NAICS 331313)
4. **Ball and Roller Bearing Manufacturing** (NAICS 332991)
5. **Computer Storage Device Manufacturing** (NAICS 334112)
6. **Electronic Computer Manufacturing** (NAICS 334111)
7. **Guided Missile and Space Vehicle Manufacturing** (NAICS 336414)
8. **Guided Missile and Space Vehicle Propulsion Unit and Propulsion Unit Parts Manufacturing** (NAICS 336415)
9. **Military Armored Vehicle, Tank, and Tank Component Manufacturing** (NAICS 336992)
10. **Nuclear Electric Power Generation** (NAICS 221113)

11. **Optical Instrument and Lens Manufacturing** (NAICS 333314)
12. **Other Basic Inorganic Chemical Manufacturing** (NAICS 325180)
13. **Other Guided Missile and Space Vehicle Parts and Auxiliary Equipment Manufacturing** (NAICS 336419)
14. **Petrochemical Manufacturing** (NAICS 325110)
15. **Powder Metallurgy Part Manufacturing** (NAICS 332117)
16. **Power, Distribution, and Specialty Transformer Manufacturing** (NAICS 335311)
17. **Primary Battery Manufacturing** (NAICS 335912)
18. **Radio and Television Broadcasting and Wireless Communications Equipment Manufacturing** (NAICS 334220)
19. **Research and Development in Nanotechnology** (NAICS 541713)
20. **Research and Development in Biotechnology** (except Nanobiotechnology) (NAICS 541714)
21. **Secondary Smelting and Alloying of Aluminum** (NAICS 331314)
22. **Search, Detection, Navigation, Guidance, Aeronautical, and Nautical System and Instrument Manufacturing** (NAICS 334511)
23. **Semiconductor and Related Device Manufacturing** (NAICS 334413)
24. **Semiconductor Machinery Manufacturing** (NAICS 333242)
25. **Storage Battery Manufacturing** (NAICS 335911)
26. **Telephone Apparatus Manufacturing** (NAICS 334210)
27. **Turbine and Turbine Generator Set Units Manufacturing** (NAICS 333611)

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