

New regulations expand CFIUS' jurisdiction and mandate filings

12 October 2018

The Department of the Treasury (the Treasury) has released two new interim rules that (i) [update existing regulations](#) regarding the Committee on Foreign Investment in the United States (CFIUS) pursuant to the Foreign Investment Risk Review Modernization Act of 2018 (FIRRMA), and (ii) [establish a pilot program](#) implementing a discrete set of FIRRMA provisions related to foreign investments in U.S. critical technology companies. Importantly, beginning 10 November 2018, the pilot program mandates the submission of a short-form CFIUS filing for certain critical technology investments.

Parties can submit public comments by 10 November 2018, and any comments will be taken into account during the process of promulgating the final rule (probably sometime next year) and will not immediately affect the two new interim rules.

The Treasury Department chairs CFIUS, a U.S. government interagency committee that conducts national security reviews of foreign investments. The Treasury's amendments to CFIUS' existing regulations take effect 11 October 2018 (31 C.F.R. Part 800), and the interim pilot program will take effect on 10 November 2018 (31 C.F.R. Part 801). These two sets of temporary regulations do not reflect the full scope of the regulations that ultimately will be promulgated pursuant to FIRRMA.

Pilot program

CFIUS has longstanding power to review transactions in which a foreign person could gain control of a U.S. business, but the new pilot program expands this power to cover investments in certain industries involving critical technology and partially implements FIRRMA's mandatory declaration provisions. Under the pilot program, CFIUS will now have authority to review certain non-controlling investments in so-called pilot program industries, which include, among others, aerospace/defense, nuclear power, petrochemical manufacturing, telecommunications, battery manufacturing, nanotechnology, biotechnology, and semiconductors. The Treasury's complete list of these pilot program industries is included below.

The pilot program expands CFIUS' jurisdiction to cover so-called *pilot program covered investments* – namely, non-controlling foreign investments in a U.S. business that meet these criteria:

- The U.S. business is a *pilot program U.S. business*, meaning that it is a U.S. business that

- “produces, designs, tests, manufactures, fabricates, or develops” critical technology that is used in the business’s activity in a pilot program industry (see list of 27 pilot program industries below); or
- designs such technology for use in such an industry.
- The investment affords the foreign investor
 - access to any material nonpublic technical information of the U.S. business;
 - membership or observer rights on the U.S. business’s board of directors or the right to nominate a member of the U.S. business’s board of directors; or
 - involvement, other than by shareholder voting, in the U.S. business’s decision-making regarding critical technology.

Critical technologies include

- many items subject to the Export Administration Regulations, including those controlled for reasons of national security (NS), chemical and biological weapons proliferation (CB), nuclear nonproliferation (NP), missile technology (MT), regional stability (RS), or surreptitious listening (SL);
- all defense articles and defense services subject to the International Traffic in Arms Regulations;
- nuclear-related items covered by 10 C.F.R. part 810 and 10 C.F.R. part 110;
- select agents and toxins covered by 7 C.F.R. part 331, 9 C.F.R. part 121, or 42 C.F.R. part 73; and
- emerging and foundational technologies (which ultimately will be identified and controlled pursuant to the Export Control Reform Act of 2018).

The pilot program also mandates the submission of a declaration (short-form filing) for any controlling or non-controlling investment in a pilot program U.S. business. Parties must submit the declaration (i) 45 days prior to closing or (ii) if the closing will occur between 10 November 2018 and 25 December 2018, on 10 November 2018 or “promptly thereafter.” CFIUS has not previously mandated filings. Parties that are required to file a mandatory declaration under the pilot program but fail to do so can face steep penalties – up to the value of the transaction.

As noted above, the pilot program will go into effect on 10 November 2018. The interim rule provides, however, that parties will not be subject to the pilot program regulations if

- the closing of the transaction occurs before 10 November 2018; or
- before 11 October 2018
 - the parties executed a binding written agreement establishing material transaction terms;
 - a party has made a public offer to shareholders to buy shares of the U.S. business; or

- a shareholder has solicited proxies in connection with an election of the board of directors of the U.S. business or requested the conversion of convertible voting securities.

Revisions to existing CFIUS regulations

The Treasury's interim rule updating the existing CFIUS regulations implements certain other provisions of FIRRMA, including, among others, an extended initial review period lasting 45 (rather than 30) days and CFIUS' ability to extend investigations by 15 days in "extraordinary circumstances." Both of these provisions in particular went into effect immediately when FIRRMA was signed into law on 13 August 2018. These amended regulations took effect on 11 October 2018.

Hogan Lovells is continuing to monitor developments in this area and will provide updates, as warranted. Please contact us if you would like assistance in determining how these new CFIUS regulations affect your business or investment plans and whether your contemplated transactions might mandate the filing of a declaration.

Pilot program industries

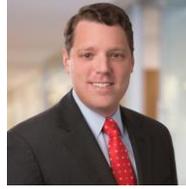
- Aircraft Manufacturing
NAICS Code: 336411
- Aircraft Engine and Engine Parts Manufacturing
NAICS Code: 336412
- Alumina Refining and Primary Aluminum Production
NAICS Code: 331313
- Ball and Roller Bearing Manufacturing
NAICS Code: 332991
- Computer Storage Device Manufacturing
NAICS Code: 334112
- Electronic Computer Manufacturing
NAICS Code: 334111
- Guided Missile and Space Vehicle Manufacturing
NAICS Code: 336414
- Guided Missile and Space Vehicle Propulsion Unit and Propulsion Unit Parts Manufacturing
NAICS Code: 336415
- Military Armored Vehicle, Tank, and Tank Component Manufacturing
NAICS Code: 336992
- Nuclear Electric Power Generation
NAICS Code: 221113
- Optical Instrument and Lens Manufacturing
NAICS Code: 333314
- Other Basic Inorganic Chemical Manufacturing
NAICS Code: 325180
- Other Guided Missile and Space Vehicle Parts and Auxiliary Equipment Manufacturing
NAICS Code: 336419
- Petrochemical Manufacturing
NAICS Code: 325110
- Powder Metallurgy Part Manufacturing
NAICS Code: 332117
- Power, Distribution, and Specialty Transformer Manufacturing
NAICS Code: 335311

- Primary Battery Manufacturing
NAICS Code: 335912
- Radio and Television Broadcasting and Wireless Communications Equipment Manufacturing
NAICS Code: 334220
- Research and Development in Nanotechnology
NAICS Code: 541713
- Research and Development in Biotechnology (except Nanobiotechnology)
NAICS Code: 541714
- Secondary Smelting and Alloying of Aluminum
NAICS Code: 331314
- Search, Detection, Navigation, Guidance, Aeronautical, and Nautical System and Instrument Manufacturing
NAICS Code: 334511
- Semiconductor and Related Device Manufacturing
NAICS Code: 334413
- Semiconductor Machinery Manufacturing
NAICS Code: 333242
- Storage Battery Manufacturing
NAICS Code: 335911
- Telephone Apparatus Manufacturing
NAICS Code: 334210
- Turbine and Turbine Generator Set Units Manufacturing
NAICS Code: 333611

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