

New Regulations Implement Significant Expansion of CFIUS Jurisdiction – Mandatory Filings and Civil Penalties

October 10, 2018

On October 10, 2018, the U.S. Department of the Treasury took the first step toward implementing the recently enacted Foreign Investment Risk Review Modernization Act (FIRRMA) by publishing new regulations that empower the Committee on Foreign Investment in the United States (CFIUS) to review transactions that were not previously subject to CFIUS scrutiny. Treasury also implemented several conforming amendments to the existing CFIUS regulations. CFIUS is a multi-agency committee that reviews foreign investment in U.S. companies for national security considerations. Its rulings have significant impacts on U.S. investment policy and foreign investment flows into the U.S., especially those from China. On August 13, 2018, the President signed FIRRMA into law as part of the National Defense Authorization Act for Fiscal Year 2019 (NDAA). Our summary of the law's major provisions is available [here](#).

New “Pilot Program” Regulations

Whereas CFIUS was previously a voluntary process with authority to review only transactions that could result in foreign control of a U.S. business, ***effective November 10, 2018, CFIUS will now require reviews of even certain non-controlling critical technology investments from any country, including ANY acquisition of an equity interest*** that affords a foreign person with access to specified information or governance rights. Failure to file either a new short-form “Declaration” or a full CFIUS notice 45 days before closure of a deal could result in ***civil monetary penalties up to the value of the transaction.***^[1]

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Practice Areas

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Foreign investments covered under these “Pilot Program” regulations are those in which the foreign investor acquires any of the following powers:

1. Access to any material nonpublic technical information in the possession of the target U.S. business;
2. Membership or observer rights on the board of directors or equivalent governing body of the U.S. business, or the right to nominate an individual to a position on the board of directors or equivalent governing body of the U.S. business; or
3. Any involvement, other than through voting of shares, in substantive decision-making of the U.S. business regarding the use, development, acquisition, or release of critical technology.

The U.S. critical technology businesses covered under the Pilot Program are those that produce, design, test, manufacture, fabricate, or develop a critical technology that is either (1) utilized in connection with the U.S. business’s activity in one or more Pilot Program Industries or (2) designed by the U.S. business specifically for use in one or more Pilot Program Industries. Critical technology is defined by FIRRMA to include, among others, emerging and foundational technologies which will be later identified and controlled pursuant to the Export Control Reform Act of 2018. The Pilot Program only applies to U.S. critical technology businesses in the following 27 industries identified by their respective North American Industry Classification System (NAICS) code:

- 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

Conforming Amendments to Existing CFIUS Regulations

In addition to the new Pilot Program regulations which become effective on November 10, 2018, Treasury has also implemented several conforming amendments to the existing CFIUS regulations. These changes are effective October 11, 2018 and include the following amendments to 31 CFR Part 800:

- Section 800.103 is amended to provide clarity with respect to the applicability of the amendments, such as FIRRMA's extension of the CFIUS review period from 30 days to 45 days.
- Section 800.104 expands the definition of "covered transaction" to include transactions, transfers, agreements, or arrangements, the structure of which is designed or intended to evade or circumvent CFIUS.
- Section 800.202 expressly provides for criminal liability under 18 U.S.C. Section 1001 for all information provided to CFIUS.
- Section 800.207 revises the definition of "covered transaction" to be consistent with FIRRMA.
- Section 800.209 revises the definition of "critical technologies" to be consistent with FIRRMA and include emerging and foundational technologies controlled pursuant to the Export Control Reform Act of 2018.
- Section 800.224 revises the definition of "transaction" to be consistent with FIRRMA and includes certain changes in rights that a foreign person has with respect to a U.S. business in which the foreign person has an existing investment, as well as transactions structured to evade or circumvent CFIUS.
- Sections 800.301 and 800.302 add examples that illustrate the application of the expanded scope of "covered transactions."

- Section 800.401 implements a shift to electronic submissions of voluntary notices.
- Section 800.402 modifies certain of the requirements regarding the content of voluntary notices, including allowing parties to stipulate that a transaction is a covered transaction and, as relevant, a foreign government-controlled transaction.
- Section 800.502 revises the timing of the review period, extending the period from 30 days to 45 days consistent with FIRRMA.
- Section 800.506 defines the “extraordinary circumstances” pursuant to which an investigation period can be extended by one 15-day period.
- Section 800.702 incorporates additional exceptions with respect to information sharing by CFIUS.
- Section 800.801 removes the language “intentionally or through gross negligence” in the provisions allowing for the imposition of civil penalties.
- Section 800.802 authorizes the Committee to negotiate a remediation plan for lack of compliance with a mitigation agreement, require filings for future covered transactions, or seek injunctive relief.

Wiley Rein has an unparalleled CFIUS and national security practice that draws on senior government-level experience with CFIUS member agencies and numerous representations of domestic and international companies in complex transactions involving nearly every industry sector subject to CFIUS review. Should you have any questions regarding the immediate impact of this new CFIUS Pilot Program, please do not hesitate to contact one of the members of our CFIUS and national security practice listed on this alert.

[1] Note that these Pilot Program regulations do not apply to any transaction for which:

(1) The completion date is prior to November 10, 2018; or

(2) The following has occurred before October 11, 2018:

(i) The parties to the transaction have executed a binding written agreement or other document establishing the material terms of the transaction;

(ii) A party has made a public offer to shareholders to buy shares of a Pilot Program U.S. business; or

(iii) A shareholder has solicited proxies in connection with an election of the board of directors of a Pilot Program U.S. business or has requested the conversion of convertible voting securities.