

Alert | Export Controls & Economic Sanctions



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CFIUS Requires Mandatory Filing for Foreign Investments in Critical Technology Under New Pilot Program

On Oct. 11, 2018, the Committee on Foreign Investment in the United States (CFIUS) implemented a **pilot program** requiring mandatory notification of foreign investment in U.S. businesses engaged in certain “critical technologies.” The measures follow the enactment of the Foreign Investment Risk Review Modernization Act (FIRRMA) on Aug. 13, 2018 (see **GT Alert**, Aug. 14, 2018), and will mark the first time CFIUS has imposed mandatory filing requirements for qualifying transactions. The pilot program regulations go into effect on Nov. 10, 2018 and apply to transactions completed after that date, making it important to evaluate any pending transactions for compliance with the regulations as soon as possible.

What is Covered?

The new pilot program expands the scope of transactions that are covered and/or ripe for notification to CFIUS. For the first time, the pilot program will require mandatory, short-form declarations to CFIUS for certain transactions involving foreign buyers/investors and “Pilot Program U.S. Businesses,” which include U.S. businesses that produce, design, test, manufacture, fabricate, or develop “Critical Technology” used in a “Pilot Program Industry.”

In addition to transactions that result in foreign ownership/control over a U.S. business, the pilot program will also cover an expanded universe of foreign direct investment in the United States, including for the first time “access/decision-making transactions.” Specifically, the pilot program will capture transactions that will provide the foreign investor:

- a) Access to material nonpublic technical information in possession of a Pilot Program U.S. Business; or
- b) Membership or observer rights (or right to nominate) on the board of directors or governing body of a Pilot Program U.S. Business; or
- c) Any involvement in substantive decision-making of a Pilot Program U.S. Business regarding the use, acquisition, or release of critical technology.

The pilot program, issued as an “interim rule,” goes into effect Nov. 10, 2018 and will end no later than March 5, 2020. The results of the pilot program will shape the final implementation of FIRRMA and its requirement to reshape the CFIUS review process.

What are Critical Technologies?

“Critical Technologies” include:

- Defense articles or services subject to the International Traffic in Arms Regulations (ITAR);
- Certain categories of items subject to dual-use export controls of the Export Administration Regulations (EAR) as enumerated on the Commerce Control List (CCL);
- Specially designed and prepared nuclear-related items subject to regulations of the Nuclear Regulatory Commission or the Department of Energy;
- Select agents and toxins; and
- Emerging and foundational technologies controlled under the newly enacted Export Control Reform Act of 2018.

What are Pilot Program Industries?

The pilot program applies to businesses in 27 enumerated “pilot program industries,” as defined by their North American Industry Classification System (NAICS) codes and include the following:

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

Powder Metallurgy Part Manufacturing	332117
Power, Distribution, and Specialty Transformer Manufacturing	335311
Primary Battery Manufacturing	335912
Radio and Television Broadcasting and Wireless Communications Equipment Manufacturing	334220
Research and Development in Nanotechnology	541713
Research and Development in Biotechnology (except nanobiotechnology)	541714
Secondary Smelting and Alloying of Aluminum	331314
Search, Detection, Navigation, Guidance, Aeronautical, and Nautical System and Instrument Manufacturing	334511
Semiconductor and Related Device Manufacturing	334413
Semiconductor Machinery Manufacturing	333242
Storage Battery Manufacturing	335911
Telephone Apparatus Manufacturing	334210
Turbine and Turbine Generator Set Units Manufacturing	333611

The list includes many industries that would traditionally be expected to involve U.S. national security touchpoints (aircraft manufacturing and missile manufacturing, for example) as well as industries where national security concerns have grown in recent years and were featured during Congressional debate over FIRRMA (e.g., computer and computer storage device manufacturing, biotechnology).

Mandatory Declaration Requirements

A party or parties are required to submit a declaration of a pilot program-covered transaction by providing certain details about the parties, the nature of the transaction, whether the transaction will result in foreign control, the nature of the access or membership to be acquired by the foreign person, and other relevant details. The declarations are intended to be abbreviated versions of a full CFIUS notice that, according to FIRRMA, should “not generally exceed 5 pages in length.” Parties required to file declarations under the pilot program may instead elect to file a full joint voluntary notice.

Timing of Mandatory Declarations

For transactions to be completed between Nov. 10, 2018 and Dec. 25, 2018 – mandatory declarations must be submitted no later than Nov. 10, 2018 “or promptly thereafter.”

For transactions to be completed after Dec. 25, 2018 – mandatory declarations must be submitted 45 days before the completion date of the transaction. Once CFIUS has accepted a complete declaration, it has 30 days to complete its assessment. Upon receipt, CFIUS may:

- Request that the parties submit a “notice of pilot program covered transaction,” a new type of CFIUS notice created in the regulations, that takes the form of a typical CFIUS notice but requires certain additional information for pilot program transactions;
- Inform the parties that the Committee is unable to complete the action based on the declaration but allow the parties to file a full CFIUS notice;
- Initiate a unilateral review of the transaction; or
- Notify the parties that the Committee has concluded all action under section 721 of the Defense Production Act of 1950.

However, in cases where the Committee concludes all action under section 721 on the basis of a declaration, the regulatory “safe harbor” available to parties that file a full notice will not be extended to pilot program-covered transactions.

Opportunity for Public Comment

While the pilot program is not subject to the rulemaking requirements of the Administrative Procedure Act (APA), CFIUS is providing an opportunity for public comment on the interim rule and will consider and address such comments in the process of promulgating any final rule.

What Do the Changes Mean for New Deals?

For transactions that will be completed between Nov. 10 and Dec. 25, 2018, it is imperative for parties to determine whether they will be subject to the mandatory declaration process, in which case a declaration must be submitted by or soon after Nov. 10, 2018.

For new deals that will be completed after Dec. 25, 2018, it will likewise be imperative to review the transactions to determine whether they are subject to the mandatory declaration requirements and plan accordingly for preparing and filing.

Additionally, the pilot program makes clear that parties to the transaction cannot obtain “safe harbor” from the declaration process, as they would with a formal notification to CFIUS. Accordingly, if the parties to a transaction believe that the transaction is a covered transaction involving critical technologies, and timelines are tight, it may be more efficient to simply file a formal notification and begin the formal CFIUS process rather than starting with a short-form declaration only to be requested later by CFIUS to file a formal notification thereafter. Any analysis will need to be completed early enough in the transaction timeline to allow the CFIUS declarations or notifications to be timely prepared and filed.

Greenberg Traurig’s [Export Controls & Economic Sanctions](#) team has wide-ranging CFIUS experience, counseling both potential foreign investors as well as the U.S. targets of investment from the initial stages of proposed transactions through the conclusion of a CFIUS review. The team provides integrated CFIUS advice, taking into account operational and deal objectives, as well as transactional timelines, all the while anticipating U.S. government regulatory requirements and policy concerns. In addition, the team helps clients to design and implement mitigation measures.

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