

# Newly Effective CFIUS Pilot Program for Critical Technology Requires Mandatory Review of Covered Transactions Involving Foreign Investments

By Debra G. Hatter / Dec 03, 2018

The Foreign Investment Risk Review Modernization Act of 2018 ("FIRRMA"), which recently amended the Exon-Florio amendments to the Defense Production Act of 1950 (together, "Exon-Florio") was signed into law on August 13, 2018 to expand the jurisdiction of the Committee on Foreign Investment in the United States ("CFIUS"). Pursuant to FIRRMA, CFIUS is conducting a pilot program relating to critical technology which became effective on November 10, 2018.

**Important take-aways** – As parties engage in transactions, we now need to give additional consideration as to whether it may be a covered transaction subject to review by CFIUS. 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]

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

- Access to any material nonpublic technical information in the possession of the target U.S. business;
- 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
- 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.

**Foreign persons covered:** The pilot program covers all foreign persons and is not country-specific.

**U.S. businesses covered:** The pilot program covers any U.S. business that produces, designs, tests, manufactures, fabricates, or develops a critical technology that is: (1) utilized in connection with the U.S. business's activity in one or more Pilot Program Industries (discussed below); or (2) designed by the U.S. business specifically for use in one or more Pilot Program Industries ("Pilot Program U.S. Businesses").

**Industries covered:** The pilot program covers 27 industries, identified by their respective North American Industry Classification System (NAICS) code ("Pilot Program Industries"). The industry codes impacted by this new Pilot Program are the following: 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

**HSR Reminder:** For transactions exceeding the Hart Scott Rodino Antitrust Improvements Act of 1976, as amended, premerger notification reporting threshold --\$84.8 million for 2018 but revised annually-- remember to consider whether there may be a requirement to have a transaction reviewed by the FTC and DOJ prior to closing.

Other key provisions of FIRRMA include:

- **Expands the scope of covered transactions**—FIRRMA broadens the purview of CFIUS by explicitly adding four new types of covered transactions: (1) a purchase, lease, or concession by or to a foreign person of real estate located in proximity to sensitive government facilities; (2) "other investments" in certain U.S. businesses that afford a foreign person access to material nonpublic technical information in the possession of the U.S. business, membership on the board of directors, or other decision-making rights, other than through voting of shares; (3) any change in a foreign investor's rights resulting in foreign control of a U.S. business or an "other investment" in certain U.S. businesses; and (4) any other transaction,

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- transfer, agreement, or arrangement designed to circumvent CFIUS jurisdiction.
- **Declarations**—Provides for an abbreviated filing or “light filing” process through a new “declarations” procedure that could result in shorter review timelines. It also allows CFIUS some discretion to require parties to file with CFIUS before closing a transaction.
  - **Expands CFIUS’s timelines**—Expands CFIUS’s review period from 30 to 45 days and allows an investigation to be extended for an additional 15-day period under extraordinary circumstances.
  - **Mitigation**—Strengthens requirements on the use of mitigation agreements, including the addition of compliance plans to inform the use of such agreements.
  - **Special hiring authority and funding**—Grants special hiring authority for CFIUS and establishes a fund for collection of new CFIUS filing fees.
  - **Delayed effective date and pilot programs**—Delays the applicability of some of the bill’s most significant provisions until 18 months following enactment of FIRRMA or 30 days after the Secretary of the Treasury publishes in the Federal Register a determination that the necessary regulations, organizational structure, personnel, and other resources are in place to administer those provisions, whichever is sooner. This section also authorizes CFIUS to conduct pilot programs to implement any authority provided under this bill.
  - **Legal Opinions** – Opinion issuers should confirm that exclusions for federal law are sufficient to exclude this from legal opinions.
  - [More information can be found on the CFIUS webpage.](#)

[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.