

International Trade Update

October 2018

Department of the Treasury Releases Interim Rules Expanding Scope of CFIUS and Creating Pilot Program for Certain Transactions

Key Notes:

- New pilot program effective November 10, 2018, applies to all foreign persons engaging in investment with certain U.S. industries.
- Mandatory declarations now required for certain transactions; risk of civil penalty if ignored.
- Export control compliance is essential to understand if transaction involves any critical, emerging or foundational technology.

Overview

On October 10, 2018, the U.S. Department of the Treasury issued several amendments and temporary regulations expanding the authority of the Committee on Foreign Investment in the United States (CFIUS or Committee). This important first step comes after the passage of the Foreign Investment Risk Review Modernization Act (FIRRMA), enacted this past August, which laid the initial framework for the expansion of the Committee's authority.

FIRRMA, which passed as part of the broader John S. McCain National Defense Authorization Act for Fiscal Year 2019 (NDAA 2019), received bi-partisan support as congressional leaders aimed to address national security concerns within the context of foreign investment activities in the United States that have historically fallen outside of the Committee's purview. Treasury Secretary Steven Mnuchin announced in a [press release](#), "These temporary regulations address specific risks to U.S. critical technology

while informing the development of final regulations that will fully implement FIRRMA."

The amendments can be found in the *Federal Register* notice concerning "[Provisions to Certain Investments in the United States by Foreign Persons](#)." The pilot program regulations can be found in the *Federal Register* notice concerning "[Determination and Temporary Provisions Pertaining to a Pilot Program To Review Certain Transactions Involving Foreign Persons and Critical Technologies](#)."

New Pilot Program Framework

In past years, filing notices on foreign investment with CFIUS has been a voluntary process aimed at reviewing only transactions resulting in foreign direct investment and control of a U.S. business. Effective November 10, 2018, certain transactions will now require immediate notification to the Committee through the traditional or a new abridged reporting process that the interim rule creates.

Pilot Program Covered Investments

The rule designates certain activity as a "pilot program covered investment" and outlines distinct non-controlling foreign direct or indirect investment scenarios that trigger the requirement to report the transaction to CFIUS:

1. Access to any material nonpublic technical information in the possession of the pilot program U.S. business.

2. Membership or observer rights on the board of directors or equivalent governing body of the pilot program U.S. business or the right to nominate an individual to a similar position.
3. Any involvement, other than through voting of shares, in substantive decision making of the pilot program U.S. business regarding the use, development, acquisition or release of critical technology.

Critical, Emerging and Foundational Technology

The interim rule defines “critical technologies” as follows:

1. Defense articles or defense services included on the United States Munitions List set forth in the International Traffic in Arms Regulations (ITAR).
2. Items included on the Commerce Control List set forth in the Export Administration Regulations (EAR) and controlled for certain reasons.
3. Specially designed and prepared nuclear equipment, parts and components, materials, software, and technology relating to assistance to foreign atomic energy activities and under the regulatory authority of the Department of Energy.
4. Nuclear facilities, equipment, and material relating to export and import of nuclear equipment and material and under the regulatory authority of the Nuclear Regulatory Commission.
5. Select agents and toxins regulated by the U.S. Department of Agriculture or by the Department of Health and Human Services.
6. Certain controlled emerging and foundational technologies.

The Export Control Reform Act of 2018 (ECRA, part of the NDAA 2019) outlines a process that various U.S. government agencies are to undertake to identify emerging and foundational technologies that are “essential to the national security of the United States.” This process considers technologies available in foreign countries and the effectiveness that export controls have in “limiting the proliferation of emerging and foundational technologies to foreign countries.” The agencies are then required to report to both CFIUS and Congress any actions taken, progress made in identifying pertinent technologies and whether additional export control measures are warranted.

While the text of ECRA does not define the term “emerging and foundational technologies,” the following industry sectors could be included:

- artificial intelligence
- augmented reality
- automated machine tools and other robotics
- additive manufacturing
- autonomous vehicles
- advanced battery technology
- biotechnology and nanotechnology
- hydrogen and fuel cells
- integrated circuits, semiconductors and microelectronics

The Department of Commerce’s Bureau of Industry and Security (BIS) is expected to publish a notice in the near future, seeking public comment about the categories of technologies that may warrant control under the ECRA.

Pilot Program Covered Businesses

A “pilot program covered investment” under these interim regulations pertaining to FIRRMA means an investment, direct or indirect, by a foreign person in an unaffiliated pilot program U.S. business, including any entity 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 of the pilot program industries; or (2) designed by the U.S. business specifically for use in one or more pilot program industries. The rule currently does not capture any businesses that simply use critical technologies, only those that are involved in their development or production. Further, the U.S. government has selected 27 covered industries in which “certain strategically motivated foreign investment could pose a threat to U.S. technological superiority and national security.” The list of covered industries can be found in Annex A to the *Federal Register* notice, referenced above.

Mandatory Declaration Requirements, Timing and Penalties

Should a transaction meet the new CFIUS requirements, it will now be mandatory for a declaration or filing to be submitted to CFIUS. Parties will have 45 days before the

completion of the transaction to submit their notification to the Committee. The interim regulations allow a party to file a declaration that includes the following provisions:

- Name of foreign person(s) and parties to the transaction, the subject of the transaction and contact information of the parties involved;
- Brief description of the nature and details of the transaction along with its proposed structure, along with the percentage of the voting interest and economic interest to be acquired;
- A statement affirming that the transaction is subject to the jurisdiction of the CFIUS pilot program or that it is a foreign government-controlled transaction;
- A statement as to whether a foreign person will acquire anything subject to the covered definition of “pilot program covered investment”; and
- A statement acknowledging whether the pilot program U.S. business has any classified or unclassified U.S. government contracts, received funding or participated in any collaborative Department of Defense or Department of Energy programs, or whether the business received or placed any contracts under the Defense Priorities and Allocations System (DPAS).

Once the Committee receives a declaration, a 30-day assessment period will commence. The Committee then has the discretion to: (1) clear the transaction, (2) request that the parties to the transaction file a full written notice (if the transaction is too complex for the short form declaration), or (3) initiate a unilateral review of the transaction if the parties are uncooperative or do not provide enough substantiating information.

For any entity that does not comply with the mandatory declaration requirement, a civil penalty may apply up to the value of the pilot program covered transaction.

Effective Date

The effective date of the CFIUS pilot program is November 10, 2018. The Department of the Treasury has noted that the pilot program regulations will not apply to transactions that have closed prior to November 11, 2018, or to certain transactions for which the parties have signed a binding

agreement or other binding document establishing the material terms prior to October 11, 2018.

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