

## FIRRMA Significantly Expands CFIUS Review of Foreign Investment in the United States

### Mandatory Filing Requirements – Critical Technologies Pilot Program

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On August 13, 2018, President Trump signed into law the Foreign Investment Risk Review Modernization Act ("FIRRMA") to strengthen and modernize the powers and authorities of the Committee on Foreign Investment in the United States to review and remediate issues of national security raised by certain foreign investment transactions in the United States ("CFIUS"). Certain provisions of FIRRMA took effect immediately with the President's signature, but most of the FIRRMA modifications to CFIUS await the release of implementing regulations. The reason for this alert is that FIRRMA "Pilot Program" regulations regarding the first mandatory prior notification filing requirements under CFIUS were released by the Department of Treasury on October 10, 2018. These new "Pilot Program" implementing regulations require mandatory CFIUS prior notification filings for certain investments by foreign persons in U.S. businesses that produce, design, test, manufacture, fabricate, or develop one or more "critical technologies" that the U.S. business uses in connection with its own activities in, or designs specifically for use in, a "Pilot Program Industry". We have listed the current list of 27 NAICS-code defined Pilot Program on Appendix A.

The overall effect of FIRRMA is that it materially expands the CFIUS risk profile/exposure of our clients in business transactions involving foreign investments.

FIRRMA materially expands the reach and scope of covered transactions subject to CFIUS review and remedies and, for the first time, expressly imposes mandatory prior notification requirements for certain key foreign investment transactions. Whereas CFIUS-covered transactions used to focus on transactions that resulted in a foreign investor controlling a U.S. business concern with national security implications, with the FIRRMA changes, CFIUS-covered transactions may now include transactions that do not result in control by the foreign investor(s), as well as transactions that might not traditionally be considered of a national security concern, and can include passive investments, mergers, acquisitions of business, assets, or of real estate.

#### **Pilot Program Definitions; Key Terms**

As referenced above, the recently released Pilot Program regulations require mandatory notification filings with CFIUS prior to transactions involving certain types of foreign investments in US businesses (a "**Pilot Program US Business**") that produce, design, test, manufacture, fabricate, or develop one or more "*critical technologies*" that the U.S. business uses in connection with its activities in, or designs specifically for use in, a "*Pilot Program Industry*".

1. The **types of foreign investment that trigger** the Pilot Program mandatory notification requirements are generally investments that will either result in control over the Pilot Program US Business by the foreign investor(s); or non-controlling interests that nevertheless give the foreign investor(s):
  - a. Access to "*material nonpublic technical information*" that is related to "critical technologies" in the possession of the Pilot Program US Business. "**Material nonpublic technical information**" is defined as information that is not available in the public domain and which is "necessary to design, fabricate, develop, test, produce or manufacture critical technologies, including processes, techniques or methods";
  - b. Membership or observer rights (including rights of nomination) on the board of directors or equivalent governing body of the Pilot Program US Business; or
  - c. Any involvement in substantive decision making of the Pilot Program US Business regarding the use, development, acquisition, or release of critical technology.

Please note that an "**investment**" is expressly defined to mean the acquisition of an equity interest, including "**contingent equity interests**" (financial instruments that are convertible into equity interests with voting rights).

2. **Critical technologies** may be summarized as follows:
  - a. Export controlled ITAR (International Traffic in Arms Regulations) defense articles or defense services; as well as certain items subject to export control under the Nuclear Energy Commission;
  - b. Export controlled commercial, dual-use items controlled under EAR (the Export Administration Regulations) for reasons of regional stability or surreptitious listening as well as under multilateral regimes (including without limit for reasons of national security, nonproliferation of nuclear, or chemical and biological weapons, or missile technology);
  - c. Select agents and toxins; and
  - d. "**Emerging and foundational technologies**" to be export controlled under the EAR. The Department of Commerce regulations defining such "emerging and foundational technologies" have not yet been published.
3. Appendix A lists the 27 NAICS-code defined industries that comprise the **Pilot Program industries**. It is important to note that the targeted businesses under the mandatory filing Pilot Program are not limited to those that are leveraging critical technologies for their own activities in one of the 27 enumerated NAICS industry codes, but also include those businesses leveraging "critical technologies" to serve other companies in those 27 industries.

### **Mandatory Filing Requirements**

Please note that the FIRRMA mandatory pre-filing obligation is to provide pre-notification. This may be accomplished either through a short form filing called a "declaration", which is limited to no

more than five pages in length, or by submitting a more traditional “full” filing called a “notice”, which notice would begin the full/traditional CFIUS review timeline immediately. Because it is the new, short-form “declarations” that are being introduced, we focus here mainly on those declarations.

In general, mandatory declarations must be filed at least 45 days prior to a transaction’s anticipated completion date. Upon submission, the CFIUS Staff Chairperson must review the declaration and ensure that it is complete. Once the Staff Chairperson confirms that a declaration is complete, the CFIUS Committee has 30 days to respond to the declaration. CFIUS responses to a mandatory Pilot Program declaration may range from a rejection of the declaration as inadequate or not a covered Pilot Program transaction; requesting the parties to take further action under CFIUS (submit a full notice); initiate a unilateral review; or notifying the parties that CFIUS has completed its review without reservation.

Although mandatory declarations under the Pilot Program regulations, are not as extensive as a full filing under CFIUS (declarations are supposed to be typically limited to five pages in length), declarations nevertheless require a substantial amount of information regarding the business and investors involved in a transaction. Some of the required information for a declaration includes, but is not limited to, percentage of voting and economic interest acquired, total transaction value, all sources of financing involved in the transaction, all locations of the US business, descriptions of the US business's activities (including all subsidiaries), a statement regarding the access that a foreign person will obtain with regards to any material nonpublic technical information in possession of the Pilot Program U.S. business, and a brief explanation of the various types of access or information involved.

One of major considerations when deciding whether to file the short-form “declaration” or a full CFIUS notice is that, at the end of the 45-day review period for a declaration, the CFIUS reviewers may instruct the parties to file a full CFIUS filing and kick off a new CFIUS review timeline. Therefore, unless the parties have a long lead time prior to closing, the parties to any transaction that might be considered CFIUS sensitive should seriously consider a full notice filing, rather than the short-form “declaration”.

Failure to comply with mandatory declaration filing requirements, where applicable, can result in fines up to the entire transaction amount, and such fine is in addition to, and does not otherwise limit, any of the other traditional remedies that are available to address CFIUS review concerns. In other words, you could be fined up to the transaction amount for non-compliance with applicable mandatory filing requirements under the Pilot Program. Additionally, if CFIUS also determines that the same transaction also runs counter to U.S. national interests per CFIUS/FIRRMA, then the parties might also be subjected to the more traditional CFIUS remedies, all the way up to a forced unwinding of the transaction.

### **Exceptions**

Finally, there are important exceptions that would exempt certain types of transactions specifically from the Pilot Program mandatory filing requirements (not necessary from CFIUS review in general):

- a. Transactions that close prior to November 10, 2018; or those transactions in which (i) the involved parties executed a binding written agreement or other documents that establish the

material terms regarding a transaction; (ii) a party made a public offer to shareholders to buy shares of a Pilot Program US Business; or (iii) a shareholder has solicited proxies in connection with an election of the board of directors of a Pilot Program US Business or has requested the conversion of convertible voting securities, each prior to October 11, 2018;

- b. Foreign investors increasing qualifying, pre-existing majority or controlling ownership interests in Pilot Program US Businesses; and
- c. Private equity transactions involving investment funds where a foreign investor (i) does not control the investment fund; and (ii) will not wind up with access to material nonpublic technical information.

One last important note about timing: transactions that are subject to Pilot Program mandatory filing requirements that have completion dates between November 10, 2018 and December 25, 2018, must be filed no later than November 10, 2018.

### Closing Thoughts

FIRRMA substantially increases CFIUS-related risks for our clients involved in transactions that include foreign investors. Not only does FIRRMA expressly expand the subject matter scope of transactions subject to CFIUS review (the still-to-be-defined "emerging and foundational technologies" which can be expected to include robotics, artificial intelligence, additive manufacturing, etc. as well as real estate transactions affecting critical infrastructure), but mandatory filing requirements and extended timelines for CFIUS review and action mean that more lead time, forethought and planning must be provided for with respect to CFIUS in the early stages of foreign investment transactions.

For those who are interested, we have prepared a more detailed summary of the new Pilot Program regulations regarding mandatory filing requirements with respect to critical technologies and the 27 enumerated Pilot Program industries. We also note that we are still awaiting a second Pilot Program with respect to "critical infrastructure" that may include regulations that implement some, or all, of the express FIRRMA requirements that bring certain real estate transactions within the scope of CFIUS review. We are also preparing a more general overview of the changes to CFIUS that have resulted from the passage of FIRRMA.

If you have any questions about any of the above information, or wish to discuss a particular matter, please feel free to speak with any member of our International Business Practice by calling us at 412-297-4900 or visiting <https://www.cohenlaw.com/practices/international-business>. To receive future client alerts, please send an e-mail to [bulletins@cohenlaw.com](mailto:bulletins@cohenlaw.com).

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## APPENDIX A

- 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