

CFIUS reporting obligations

Cutting-edge life sciences companies have new reporting obligations under CFIUS

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On November 10, 2018, the U.S. Treasury Department's Committee on Foreign Investment in the United States (CFIUS) initiated a new pilot program as part of a major expansion of CFIUS's jurisdiction. Significantly, the pilot program – for the first time – makes CFIUS filings mandatory for the transactions covered by the pilot. There are substantial fines for companies that fail to make the mandatory filing, so understanding the new rules is critical.

The pilot program covers transactions in a wide variety of cutting-edge industries, such as biotechnology, nanotechnology, optical instrument and lens manufacturing, wireless communications, petrochemical manufacturing, and telephone apparatus manufacturing. The pilot covers any U.S. business that produces designs, tests, manufactures, fabricates, or develops critical technology that is:

- utilized in connection with the U.S. business's activity in one of these identified industries; or
- designed by the U.S. business for use in one of these industries.

The term "critical technologies" is fairly precisely defined in the CFIUS regulations, but a determination of whether technology is a critical technology turns in part on the technology's export classification. Unlike in the past, under the pilot program, a foreign entity does not need to assume "control" of the U.S. business to trigger CFIUS's jurisdiction. Instead, an investment, in addition to meeting the critical technology and industry criteria above, would only need to give the foreign investor:

- access to any material nonpublic technical information in the possession of the U.S. business;
- certain rights, such as membership or observer rights on the board of directors or the right to nominate a person to the board of directors; or
- any involvement, other than through voting shares, in substantive decision-making of the U.S. business, regarding the use, development, acquisition or release of critical technology.

This pilot program expands the reach of CFIUS beyond the traditional CFIUS scope to which companies are accustomed. This expansion was directed by the Foreign Investment Risk Review Modernization Act of 2018 (FIRRMA), passed by the U.S. Congress this summer. Companies need to familiarize themselves with the new mandates in the legislation to ensure they do not run afoul of the new law.

Does your transaction fall under the new pilot program, which imposes mandatory filing requirements? Does your transaction touch one of the specified industries covered by this new program, such as biotechnology? Does your transaction involve a technology that makes it subject to the CFIUS pilot program? Certainty over the answers to these questions is critical to avoid substantial penalties.

