

CFIUS Pilot Program

New Mandatory Filings for Non-passive Foreign Investments

On October 10, 2018, the Committee on Foreign Investment in the United States (CFIUS) issued an interim rule, set to take effect on November 10, 2018, creating a “Pilot Program” that will require certain non-passive foreign investments to file an abbreviated “Declaration” filing with CFIUS. The rule is currently open for comments until November 10.

Authority to Create Mandatory Filings and Pilot Programs Under FIRRMA

The Foreign Investment Risk Review Modernization Act (FIRRMA), signed into law on August 13, 2018, reformed the process by which CFIUS reviews foreign investments for potential national security reasons, as codified in Section 721 of the Defense Production Act. Some of the procedural changes took effect immediately (e.g., the increase to a 45-day review period, the new covered transaction authority), while other changes are pending implementation by CFIUS (e.g., filing fees, country-specific exemptions). One authority granted to CFIUS was the ability to specify the “types of covered transactions” that would be required to file the new abbreviated Declaration filing to CFIUS. Pursuant to FIRRMA, CFIUS issued an interim rule implementing a mandatory Declaration filing requirement through a Pilot Program (see [FIRRMA](#), Secs. 1706(v)(IV)(aa), 1727(c)).

Filings Required for All Pilot Program Covered Transactions

The following are “Pilot Program Covered Transactions” that require a mandatory declaration filing:

- 1 Any direct or indirect acquisition of an equity interest or contingent equity interest by a foreign person in a “Pilot Program US Business” (defined below) that would afford the foreign person investor any of the rights listed below (such an acquisition is called a “Pilot Program Covered Investment”).

Access Rights

- The right to access any material non-public technical information in the Pilot Program possession of the US Business
- The right to appoint a membership or observer to the board of directors (or similar body)
- The right to be involved in substantive decision-making (other than voting shares) regarding critical technology (including designations as emerging technologies under Section 1758 of the Export Control Reform Act)

- 2 Any transaction granting the foreign person additional access rights in a Pilot Program US Business of a previously cleared transaction in (1) above.
- 3 Any transaction that could result in foreign control of any Pilot Program US Business, including such a transaction carried out through a joint venture. Unlike the transactions in (1) and (2) above, which were **not** covered transactions under the prior CFIUS regime (i.e., non-controlling minority investments), this Pilot Program Covered Transaction was already a covered transaction under the prior CFIUS regime. The difference is that this transaction now requires a mandatory declaration filing.

The parties may elect to voluntarily file a full notice to CFIUS, rather than filing the mandatory declaration. The advantage to a full filing is that CFIUS may require the full filing to clear the transaction in appropriate cases, thereby avoiding the additional step of a declaration filing followed by a full notice filing.

Pilot Program US Businesses

A Pilot Program US Business is “any US business that produces, designs, tests, manufactures, fabricates, or develops a critical technology,” and that critical technology is either (a) used “in connection with” the US business’s activity in any “Pilot Program Industries”; or (b) designed by the US business “specifically for use in” any Pilot Program Industries. The CFIUS defined Pilot Program Industries are focused on technology and sectors relevant to defense industrial base. (A list of the CFIUS designated Pilot Program Industries, defined by six-digit North American Industry Classification System industry codes, is attached to this summary.)

Thus, to be a Pilot Program US Business, the business must be involved with a critical technology **and** in a Pilot Program Industry.

Critical Technology	Pilot Program Industry	Pilot Program US Business
Yes	Yes	Yes
No	Yes	No
Yes	No	No

Declaration Filings, Timing and Content

The FIRRMA legislation referred to Declarations as “abbreviated” filings, but these filings will still require the parties to submit substantial information, including details about the parties’ operations and ownership; the transaction structure and all relevant control rights and access acquired in the US business; any direct or indirect foreign government ownership; and details about all relevant critical technologies and government contracts of the US business.

Declarations must be filed 45 days before the parties intend to close. CFIUS is required to “promptly” inspect and “accept” the Declaration (or reject it for any deficiencies along with an explanation to the parties). Once accepted, CFIUS has 30 days to take one of the following actions:

- Clear the transaction
- Request the parties file a full notice to CFIUS
- Inform the parties that they cannot complete review without a full notice
- Initiate unilateral review

What If a Deal Has Not Closed by November 10, 2018?

The filing obligations of the Pilot Program will be required for any deal that has not yet signed a definitive agreement, made a public tender offer, or requested conversion of convertible voting securities as of October 11, 2018. For those transactions pending as of November 10, 2018, and that intend to close prior to December 25, 2018 (i.e., 45 days after the effective start date of the Pilot Program), the interim rule requires parties to file on “November 10, 2018, or promptly thereafter.”

Investment Fund Exemption to the Pilot Program

The Pilot Program implements a limited exemption for certain investment funds, in line with the investment fund exemption in FIRRMA. Any investment fund with a foreign person “limited partner or equivalent on an advisory board or a committee of the fund” is exempt from the Pilot Program if:

- The fund is exclusively managed by a general partner or equivalent
- A general partner or equivalent is not a foreign person
- The foreign person limited partner or equivalent on any advisory board or committee does not have the ability to approve or control any investment decisions
- The foreign person does not have the ability to approve or control any investment decisions, have access to non-public technical information or otherwise have the ability to control the investment fund

Penalties for Not Complying with Pilot Program

For failing to file a mandatory declaration under the Pilot Program, the interim rules authorize civil penalties up to, but not exceeding, the value of the entire transaction.

Please contact a member of our team with any questions regarding the Pilot Program.

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Industry	NAICS Code
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

Industry	NAICS Code
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

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