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CFIUS Pilot Program to Require Mandatory Notification of Certain Transactions

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On October 10, 2018, the US Department of the Treasury issued a set of interim regulations for a pilot program implementing certain provisions of the Foreign Investment Risk Review Modernization Act of 2018, which President Trump signed into law August 13, 2018.

FIRRMA significantly reformed the existing regime pursuant to which the Committee on Foreign Investment in the United States reviews foreign investment transactions for potential national security risks. While not all of FIRRMA's provisions became immediately effective upon enactment, the legislation authorizes the Treasury Department to conduct "pilot programs" to implement on an expedited basis any authority provided for in the legislation.

A Treasury fact sheet explains that Treasury issued the interim regulations released Wednesday in order to "conduct a FIRRMA pilot program that addressees specific risks to US national security" and to "inform the Committee's work in drafting the final regulations that will fully implement FIRRMA." In its most significant aspects, the pilot program (a) expands CFIUS's jurisdiction to allow the Committee to review certain non-controlling investments by foreign persons in US businesses that work in critical technologies related to specific industries and (b) implements FIRRMA's mandatory declarations regime for certain transactions.

Pilot program covered investments

With respect to the "specific risks" referenced in the Treasury Department fact sheet, the pilot program focuses on foreign investments in expressly identified industries (listed in the table below) with respect to which strategically motivated foreign investors could pose a threat to US technological superiority and national security. Specifically, the pilot program covers investments in US businesses that produce, design, test, manufacture, fabricate or develop "*critical technology*" that is either used, or designed specifically for use, in connection with the particular industries identified in the table below (Pilot Program US Businesses).

The term "critical technologies" is defined in CFIUS's regulations, 31 C.F.R. § 800.209 (as amended effective October 11, 2018), to include, *inter alia*, technical data subject to the International Traffic in Arms Regulations, technology controlled under the Export Administration Regulations for reasons of national security, chemical and biological weapons proliferation, nuclear non-proliferation or missile technology, and "emerging and foundational technologies" that will be controlled pursuant to the Export Control Reform Act of 2018, section 1758.

Importantly, not all foreign investments in Pilot Program US Businesses will be subject to the pilot program. In order to be subject to CFIUS's newly expanded jurisdiction, a foreign investment in a Pilot Program US Business must afford a foreign investor:

1. Access to "material nonpublic technical information" of the Pilot Program US Business
2. Membership or observer rights on the US Pilot Program Business's board (or equivalent governing body) or the right to nominate a board member, or
3. "Any involvement, other than through voting of shares, in the substantive decisionmaking of the [Pilot Program] US business regarding the use, development, acquisition or release of critical technology"

Notably, the pilot program is not limited to foreign investments originating from particular countries (*e.g.*, China).

Impacted pilot program industries

The pilot program covers 27 industries, which the Treasury Department has identified with reference to the

industries' North American Industry Classification codes. A full chart of the NAICS codes and their corresponding descriptions is set forth below. However, some of the more notable industries covered are defense, aircraft and aircraft engine manufacturing, computer manufacturing, optical instruments and lens manufacturing, semiconductors and related device manufacturing, and biotechnology research and development.

Mandatory pilot program declarations

The pilot program implements a mandatory declarations process for foreign transactions that either constitute *non-controlling* investments covered by the pilot program or could result in *control* by a foreign person of a Pilot Program US Business. These mandatory declarations are designed to be abbreviated CFIUS Notices, generally no more than five pages, and must be filed at least 45 days before a transaction is expected to close. The interim regulations provide for a penalty for failure to file a declaration up to an amount equal to the value of the transaction that should have been declared.

CFIUS is developing an online template for parties to use for filing a mandatory declaration, which should be available in the coming days.

Once filed, CFIUS has 30 days to take action, including (i) asking the parties to file a complete (*i.e.*, non-abbreviated) CFIUS Notice, (ii) informing the parties that CFIUS cannot take action on the basis of the declaration alone and that they may file a complete Notice (which would initiate a full CFIUS review of the noticed transaction), (iii) initiating a review of the transaction or (iv) notifying the parties that CFIUS has completed all action.

Parties to a transaction may still elect to file a voluntary Notice using CFIUS's prior procedures instead.

Effective date and application

The pilot program will begin on November 10, 2018 (30 days following Treasury's publication of the interim regulations in the Federal Register on October 11, 2018). It is set to continue until Treasury implements the final FIRRMA regulations. The pilot program will not apply to transactions for which parties signed a binding agreement or other document establishing the material terms before October 11, 2018 or to transactions completed prior to November 11, 2018.

Pilot Program Industry Chart

No.	Pilot Program Industries	NAICS Code	Industry Description[1]	Reference to 2017 NAICS Manual

1.	Aircraft Manufacturing	336411	This US industry comprises establishments primarily engaged in one or more of the following: (1) manufacturing or assembling complete aircraft, (2) developing and making aircraft prototypes, (3) aircraft conversion (*i.e.*, major modifications to systems) and (4) complete aircraft overhaul and rebuilding (*i.e.*, periodic restoration of aircraft to original design specifications).	P294

2.	Aircraft Engine and Engine Parts Manufacturing	336412	This US industry comprises establishments primarily engaged in one or more of the following: (1) manufacturing aircraft engines and engine parts, (2) developing and making prototypes of aircraft engines and engine parts, (3) aircraft propulsion system conversion (*i.e.*, major modifications to systems) and (4) aircraft propulsion systems overhaul and rebuilding (*i.e.*, periodic restoration of aircraft propulsion system to original design specifications).	P294

3.	Alumina Refining and Primary Aluminum Production	331313	This US industry comprises establishments primarily engaged in one or more of the following: (1) refining alumina (*i.e.*, aluminum oxide) generally from bauxite, (2) making aluminum from alumina and/or (3) making aluminum from alumina and rolling, drawing, extruding or casting the aluminum they make into primary forms. Establishments in this industry may make primary aluminum or aluminum-based alloys from alumina.	P224
4.	Ball and Roller Bearing Manufacturing	332991	This US industry comprises establishments primarily engaged in manufacturing ball and roller bearings of all materials.	P244

5.	Computer Storage Device Manufacturing	334112	This US industry comprises establishments primarily engaged in manufacturing computer storage devices that allow the storage and retrieval of data from a phase change, magnetic, optical or magnetic/optical media. Examples of products made by these establishments are CD-ROM drives, floppy disk drives, hard disk drives and tape storage and backup units.	P267
6.	Electronic Computer Manufacturing	334111	This US industry comprises establishments primarily engaged in manufacturing and/or assembling electronic computers, such as mainframes, personal computers, workstations, laptops and computer	P267

			servers. Computers can be analog, digital or hybrid. Digital computers, the most common type, are devices that do all of the following: (1) store the processing program or programs and the data immediately necessary for the execution of the program, (2) can be freely programmed in accordance with the requirements of the user, (3) perform arithmetical computations specified by the user and (4) execute, without human intervention, a processing program that requires the computer to modify its execution by logical decision during the processing run. Analog computers are capable of simulating mathematical models and contain at least analog, control	

			and programming elements. The manufacture of computers includes the assembly or integration of processors, coprocessors, memory, storage and input/output devices into a user-programmable final product.	
7.	Guided Missile and Space Vehicle Manufacturing	336414	This US industry comprises establishments primarily engaged in (1) manufacturing complete guided missiles and space vehicles and/or (2) developing and making prototypes of guided missiles or space vehicles.	P295

8.	Guided Missile and Space Vehicle Propulsion Unit and Propulsion Unit Parts Manufacturing	336415	This US industry comprises establishments primarily engaged in (1) manufacturing guided missile and/or space vehicle propulsion units and propulsion unit parts and/or (2) developing and making prototypes of guided missile and space vehicle propulsion units and propulsion unit parts.	P295
9.	Military Armored Vehicle, Tank and Tank Component Manufacturing	336992	This US industry comprises establishments primarily engaged in manufacturing complete military armored vehicles, combat tanks, specialized components for combat tanks and self-propelled weapons.	P298

10.	Nuclear Electric Power Generation	221113	This US industry comprises establishments primarily engaged in operating nuclear electric power generation facilities. These facilities use nuclear power to produce electric energy. The electric energy produced in these establishments is provided to electric power transmission systems or to electric power distribution systems.	P120

11.	Optical Instrument and Lens Manufacturing	333314	This US industry comprises establishments primarily engaged in one or more of the following: (1) manufacturing optical instruments and lenses, such as binoculars, microscopes (except electron, proton), telescopes, prisms and lenses (except ophthalmic), (2) coating or polishing lenses (except ophthalmic) and (3) mounting lenses (except ophthalmic).	P253
12.	Other Basic Inorganic Chemical Manufacturing	325180	This industry comprises establishments primarily engaged in manufacturing basic inorganic chemicals (except industrial gases and synthetic dyes and pigments).	P196

13.	Other Guided Missile and Space Vehicle Parts and Auxiliary Equipment Manufacturing	336419	This US industry comprises establishments primarily engaged in (1) manufacturing guided missile and space vehicle parts and auxiliary equipment (except guided missile and space vehicle propulsion units and propulsion unit parts) and/or (2) developing and making prototypes of guided missile and space vehicle parts and auxiliary equipment.	P295

14.	Petrochemical Manufacturing	325110	This industry comprises establishments primarily engaged in (1) manufacturing acyclic (*i.e.*, aliphatic) hydrocarbons such as ethylene, propylene and butylene made from refined petroleum or liquid hydrocarbons and/or (2) manufacturing cyclic aromatic hydrocarbons such as benzene, toluene, styrene, xylene, ethyl benzene and cumene made from refined petroleum or liquid hydrocarbons.	P195

15.	Powder Metallurgy Part Manufacturing	332117	This US industry comprises establishments primarily engaged in manufacturing powder metallurgy products using any of the various powder metallurgy processing techniques, such as pressing and sintering or metal injection molding. Establishments in this industry generally make a wide range of parts on a job or order basis.	P231

16.	Power, Distribution and Specialty Transformer Manufacturing	335311	This US industry comprises establishments primarily engaged in manufacturing power, distribution and specialty transformers (except electronic components). Industrial-type and consumer-type transformers in this industry vary (*e.g.*, step up or step down) voltage but do not convert alternating to direct or direct to alternating current.	P281
17.	Primary Battery Manufacturing	335912	This US industry comprises establishments primarily engaged in manufacturing wet or dry primary batteries.	P282

18.	Radio and Television Broadcasting and Wireless Communications Equipment Manufacturing	334220	This industry comprises establishments primarily engaged in manufacturing radio and television broadcast and wireless communications equipment. Examples of products made by these establishments are transmitting and receiving antennas, cable television equipment, GPS equipment, pagers, cellular phones, mobile communications equipment, and radio and television studio and broadcasting equipment.	P269

19.	Research and Development in Nanotechnology	541713	This US industry comprises establishments primarily engaged in conducting nanotechnology research and experimental development. Nanotechnology research and experimental development involves the study of matter at the nanoscale (*i.e.*, a scale of about 1 to 100 nanometers). This research and development in nanotechnology may result in development of new nanotechnology processes or in prototypes of new or altered materials and/or products that may be reproduced, utilized or implemented by various industries.	P475
20.	Research and Development in Biotechnology (except	541714	This US industry comprises establishments primarily	P476

	Nanobiotechnology)		engaged in conducting biotechnology (except nanobiotechnology) research and experimental development. Biotechnology (except nanobiotechnology) research and experimental development involves the study of the use of microorganisms and cellular and biomolecular processes to develop or alter living or non-living materials. This research and development in biotechnology (except nanobiotechnology) may result in development of new biotechnology (except nanobiotechnology) processes or in prototypes of new or genetically altered products that may be reproduced, utilized or implemented by various	

			industries.	
21.	Secondary Smelting and Alloying of Aluminum	331314	This US industry comprises establishments primarily engaged in (1) recovering aluminum and aluminum alloys from scrap and/or dross (*i.e.*, secondary smelting) and making billet or ingot (except by rolling) and/or (2) manufacturing alloys, powder, paste or flake from purchased aluminum.	P224

22.	Search, Detection, Navigation, Guidance, Aeronautical and Nautical System and Instrument Manufacturing	334511	This US industry comprises establishments primarily engaged in manufacturing search, detection, navigation, guidance, aeronautical and nautical systems and instruments. Examples of products made by these establishments are aircraft instruments (except engine), flight recorders, navigational instruments and systems, radar systems and equipment, and sonar systems and equipment.	P273

23.	Semiconductor and Related Device Manufacturing	334413	This US industry comprises establishments primarily engaged in manufacturing semiconductors and related solid-state devices. Examples of products made by these establishments are integrated circuits, memory chips, microprocessors, diodes, transistors, solar cells and other optoelectronic devices.	P271
24.	Semiconductor Machinery Manufacturing	333242	This US industry comprises establishments primarily engaged in manufacturing wafer processing equipment, semiconductor assembly and packaging equipment and other semiconductor making machinery.	P251

25.	Storage Battery Manufacturing	335911	This US industry comprises establishments primarily engaged in manufacturing storage batteries.	P282

26.	Telephone Apparatus Manufacturing	334210	This industry comprises establishments primarily engaged in manufacturing wire telephone and data communications equipment. These products may be stand-alone or board-level components of a larger system. Examples of products made by these establishments are central office switching equipment, cordless and wire telephones (except cellular), PBX equipment, telephone answering machines, LAN modems, multi-user modems and other data communications equipment, such as bridges, routers and gateways.	P268

27.	Turbine and Turbine Generator Set Units Manufacturing	333611	This US industry comprises establishments primarily engaged in manufacturing turbines (except aircraft) and complete turbine generator set units, such as steam, hydraulic, gas and wind.	P259

Notes

1. Descriptions are quoted from the 2017 NAICS Manual.

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Key Contacts

Christopher Kimball Washington, DC	ckimball@cooley.com +1 202 842 7892
Kevin King Washington, DC	kking@cooley.com +1 202 842 7823

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