

# THE NATIONAL LAW REVIEW

## FIRRMA Takes Form as CFIUS Enacts a New Pilot Program Targeting “Critical Technologies”

Thursday, October 11, 2018

- On October 10, 2018, the Committee on Foreign Investment in the United States put into effect the first mandatory filing requirement ever imposed by CFIUS. The Department of Treasury’s summary of the Pilot Program is available [here](#).
- Effective November 10, 2018, CFIUS will require reviews of critical technology investments – including certain non-controlling investments – from any country.
- A failure to file notice or a new short form declaration to CFIUS may result in a civil monetary penalty *up to the value of the transaction*.
- The requirements will not apply to any transaction that is completed prior to November 10, 2018 or any transaction for which the material terms were established prior to October 11, 2018.



Article By [Brian D. Weimer](#)  
[Reid Whitten](#)[Enumale M. Agada](#)  
[Douglas A. "Drew" Svor](#)  
[Sheppard, Mullin, Richter & Hampton LLP](#)  
[Global Trade Law Blog](#)[Antitrust & Trade](#)  
[Regulation](#)  
[Global](#)  
[Financial Institutions & Banking](#)  
[All Federal](#)

### Background

On August 13, 2018, President Trump signed FIRRMA into law. FIRRMA is a transformational expansion of the authority of the Committee on Foreign Investment in the United States (CFIUS) to review certain transactions that previously eluded the Committee’s jurisdiction (discussed in our blog). Congress left many critical aspects of the FIRRMA framework to be addressed through regulations promulgated by the Department of Treasury. Although we do not expect final rules to be forthcoming until late 2019 or early 2020, Congress empowered the Department of Treasury to “test-drive” parts of FIRRMA through Pilot Programs. Those programs can be implemented simply, taking effect 30 days after publication of the program requirements in the Federal Register. The adoption and implementation of the Pilot Program for critical technologies represents the Department of Treasury’s first attempt to implement substantive parts of FIRRMA prior to issuing formal regulations.

### Implementation of the Pilot Program

In strongly worded language, the Department of Treasury made clear that technological superiority is the lynchpin of U.S. national security and that implementing the Pilot Program under FIRRMA was necessary to maintain U.S. leadership in key industries falling under the umbrella of “critical technologies.”

The program covers investments in which a foreign investor acquires any of the following in a U.S. business involved in a Pilot Program industry:

1. Access to any material nonpublic technical information in the possession of the Pilot Program U.S. business;
2. Membership rights, observer rights, or the right to nominate an individual to a position on the board of directors or equivalent governing body of the Pilot Program U.S. business; or
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.

The Pilot Program will apply the investments described above in U.S. businesses that “produce, design, test,

manufacture, fabricate, or develop one or more critical technologies” either: (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 of the Pilot Program industries. The Department of Treasury defines Pilot Program industries by their classification under the following 27 North American Industry Classification System (NAICS) codes:

1. Aircraft Manufacturing: NAICS Code 336411
2. Aircraft Engine and Engine Parts Manufacturing: NAICS Code 336412
3. Alumina Refining and Primary Aluminum Production: NAICS Code 331313
4. Ball and Roller Bearing Manufacturing: NAICS Code 332991
5. Computer Storage Device Manufacturing: NAICS Code 334112
6. Electronic Computer Manufacturing: NAICS Code 334111
7. Guided Missile and Space Vehicle Manufacturing: NAICS Code 336414
8. Guided Missile and Space Vehicle Propulsion Unit and Propulsion Unit Parts Manufacturing: NAICS Code 336415
9. Military Armored Vehicle, Tank, and Tank Component Manufacturing: NAICS Code 336992
10. Nuclear Electric Power Generation: NAICS Code 221113
11. Optical Instrument and Lens Manufacturing: NAICS Code 333314
12. Other Basic Inorganic Chemical Manufacturing: NAICS Code 325180
13. Other Guided Missile and Space Vehicle Parts and Auxiliary Equipment Manufacturing: NAICS Code 336419
14. Petrochemical Manufacturing: NAICS Code 325110
15. Powder Metallurgy Part Manufacturing: NAICS Code 332117
16. Power, Distribution, and Specialty Transformer Manufacturing: NAICS Code 335311
17. Primary Battery Manufacturing: NAICS Code 335912
18. Radio and Television Broadcasting and Wireless Communications Equipment Manufacturing: NAICS Code 334220
19. Research and Development in Nanotechnology: NAICS Code 541713
20. Research and Development in Biotechnology (except Nanobiotechnology): NAICS Code 541714
21. Secondary Smelting and Alloying of Aluminum: NAICS Code 331314
22. Search, Detection, Navigation, Guidance, Aeronautical, and Nautical System and Instrument Manufacturing: NAICS Code 334511
23. Semiconductor and Related Device Manufacturing: NAICS Code 334413
24. Semiconductor Machinery Manufacturing: NAICS Code 333242
25. Storage Battery Manufacturing: NAICS Code 335911
26. Telephone Apparatus Manufacturing: NAICS Code 334210
27. Turbine and Turbine Generator Set Units Manufacturing: NAICS Code 333611

As expected, the Department of Treasury is expansively interpreting the boundaries of the term “critical technologies” and developing a framework that will give CFIUS visibility into transactions that previously would not have been subject to review by the Committee.

## **Key Takeaways from the Adoption of the Pilot Program**

We see at least three key takeaways from the Department of Treasury’s adoption and implementation of the Pilot Program:

1. CFIUS With Teeth. In less than a month, the days of CFIUS being a voluntary process with no penalties for choosing to forego CFIUS review will be gone. Simultaneous to this change, the emerging technology sector continues to see historic volumes of investment and M&A activity in a vibrant U.S. economy. Parties contemplating transactions in this space—especially parties contemplating foreign capital as a source of deal financing—should be prepared to address the new CFIUS framework in their negotiations and account for the new regulations in their transaction documents. Failure to do so could now result in substantial monetary penalties and, potentially, the unwinding of previously-consummated transactions.
2. Expansive Definition of Critical Technologies. Although some of the industries that will be treated as critical technologies under the Pilot Program have obvious national security, military, and warfighter applications, many do not. For example, battery technology, nanotechnology, biotechnology, and wireless equipment manufacturing are all included in the Pilot Program’s covered industries. Commercial entities who may not be frequent flyers in the CFIUS world, or who think their transactions do not implicate U.S. national security, should keep in mind that the Pentagon—and its representatives on CFIUS—remain keenly focused on the digital battlefields of the 21<sup>st</sup> century.
3. Technology Supremacy as the Foundation of U.S. National Security. As we predicted [here](#), CFIUS remains laser focused on maintaining U.S. technological leadership. Noting that the “threat to critical technology industries is more significant than ever,” the Pilot Program reinforces the Committee’s commitment to ensuring its processes are not used as a tool to subvert the technological capabilities of the United States, especially foundational capabilities that directly impact U.S. national security. Commercial parties should be prepared to deal with a CFIUS tasked with combating perceived threats to key U.S. industries and armed with newly robust review and enforcement powers to do so.

The adoption and implementation of FIRRMA continues to present novel and challenging issues to parties contemplating investments and strategic transactions involving U.S. businesses and assets. If you have any questions about FIRRMA, the Pilot Program, or CFIUS review in general, please do not hesitate to contact us.

Copyright © 2019, Sheppard Mullin Richter & Hampton LLP.

**Source URL:** <https://www.natlawreview.com/article/firma-takes-form-cfius-enacts-new-pilot-program-targeting-critical-technologies>