



U.S. Department of the Treasury **Office of Public Affairs**

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Contact: Treasury Public Affairs, (202) 622-2960

Q&A: Interim Regulations for FIRRMA Pilot Program

General

1. What is FIRRMA?

On August 13, 2018, the President signed into law the Foreign Investment Risk Review Modernization Act of 2018, or FIRRMA. FIRRMA strengthens and modernizes the Committee on Foreign Investment in the United States, or CFIUS, a multi-agency government body chaired by the Secretary of the Treasury that reviews foreign investment for national security considerations.

2. What is a pilot program?

Certain provisions of FIRRMA took effect immediately upon enactment on August 13, 2018, while others will take effect at a later date. During this interim period, FIRRMA authorizes CFIUS to conduct one or more pilot programs to implement any provisions of the legislation that were not immediately effective upon enactment.

3. Why is this pilot program necessary?

The passage of FIRRMA was based upon concerns that the national security landscape has shifted in recent years, and so has the nature of the investments that pose the greatest potential risk to national security. The pilot program is necessary to protect the nation's critical technologies from foreign investments that raise national security concerns during the time CFIUS works to fully implement FIRRMA. The pilot also will provide CFIUS valuable insight that will help shape the final regulations implementing FIRRMA.

4. Is the pilot program meant to address national security concerns or concerns about the future economic prosperity of the United States?

CFIUS remains focused exclusively on national security. CFIUS examines the effects of a transaction and assesses the impact of those effects on the national security of the United States.

The pilot program will help CFIUS protect our national security from both existing and emerging risks.

5. To whom does the pilot program apply? Is it country-specific?

Like prior CFIUS legislation and FIRRMA itself, the pilot program does not single out any specific country. Under the pilot program, CFIUS's authorities may be applied to address the national security risks posed by foreign investment in the United States, regardless of from where the investment originates.

6. Is the United States still open to foreign investment?

The United States welcomes foreign investment and continues to be one of the most open countries in the world to foreign investors. The United States is also the best place to invest worldwide, having adopted strong economic growth policies—including a new, low corporate tax rate and in the elimination of many ineffective regulations—and maintained a strong innovation ecosystem and highly developed market. We expect that the CFIUS process, as modernized and strengthened by FIRRMA, will enhance confidence in the nation's longstanding open investment policy by continuing to restrict only those foreign investments that pose national security concerns.

7. Can foreign investors still make investments in the United States in the technology industry?

The United States welcomes foreign investment in the technology industry, and maintains a strong commitment to the rule of law and the protection of intellectual property. The United States provides unique opportunities for advanced research and innovation, and offers a skilled, energized, and optimistic workforce. Neither FIRRMA nor the pilot program changes this investment environment. CFIUS will continue to assess, on a case-by-case basis through its current process and the pilot program, whether the facts and circumstances of a particular transaction (regardless of industry) pose a risk to U.S. national security.

8. Is CFIUS working with like-minded U.S. allies and partners to strengthen processes to review foreign investments for national security risks?

Yes. Treasury, in consultation with other members of CFIUS, has been, and plans to continue, working with like-minded U.S. allies and partners to strengthen investment review processes.

9. What are the amendments to CFIUS's existing regulations that are being published at the same time?

A number of the immediately effective provisions of FIRRMA required revisions to CFIUS's existing regulations. The amendments to CFIUS's existing regulations that will also be published on October 11, 2018, make such revisions and make several other updates, consistent with FIRRMA. The amendments are largely technical in nature.

Timing

10. When does the pilot program go into effect?

The interim rule implementing the pilot program will be published in the Federal Register on October 11, 2018, and the pilot program will go into effect 30 days later on November 10, 2018.

11. How long will the pilot program last?

The pilot program will end no later than the date on which the regulations fully implementing FIRRMA become effective, and in no event later than March 5, 2020, the date that is 570 days after the enactment of FIRRMA.

12. Does the pilot program apply to transactions that have already been consummated?

The pilot program regulations will not apply to transactions consummated prior to November 11, 2018. The pilot program regulations also will not apply to certain other transactions for which the parties have signed, before October 11, 2018, a binding agreement or other binding document establishing the material terms.

Pilot Program Coverage

13. Does the pilot program change CFIUS's current jurisdiction?

The pilot program will expand CFIUS's jurisdiction, consistent with FIRRMA, such that CFIUS will now be able to review certain non-controlling investments by foreign persons in some U.S. businesses. CFIUS will continue to have the same authority to review transactions that could result in control of a U.S. business by a foreign person.

14. What kind of investment is covered?

CFIUS retains the same authority to review transactions by a foreign person that could result in control of a U.S. business. The pilot program will expand CFIUS's jurisdiction, consistent with FIRRMA, to include certain non-controlling investments by foreign persons in some U.S. businesses. The types of non-controlling investments by foreign persons that are covered by the pilot program are those that would give the foreign investor:

- access to any material nonpublic technical information in the possession of the pilot program U.S. business;
- membership or observer rights on the board of directors or equivalent governing body of the pilot program U.S. business 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
- any involvement, other than through voting of shares, in substantive decisionmaking of the pilot program U.S. business regarding the use, development, acquisition, or release of critical technology.

15. What U.S. businesses will be impacted by the pilot program?

The pilot program covers any U.S. business that produces, designs, tests, manufactures, fabricates, or develops a critical technology that is: (a) utilized in connection with the U.S. business's activity in one or more pilot program industries; or (b) designed by the U.S. business specifically for use in one or more pilot program industries. Pilot program industries are identified in the Annex to the regulations.

16. What are critical technologies?

Under FIRRMA, "critical technology" is defined with reference to existing export control regimes, among others. Consistent with FIRRMA, the definition of "critical technology" in CFIUS's regulations has been updated to add a new category for the emerging and foundational

technologies controlled pursuant to section 1758 of the Export Control Reform Act of 2018 (which was enacted at the same time as FIRRMA as part of the John S. McCain National Defense Authorization Act for Fiscal Year 2019). As technology becomes controlled under these export control regimes, it is captured under the definition of “critical technology” in the CFIUS regulations.

17. How did CFIUS select the 27 covered industries?

The U.S. Government carefully developed the list of pilot program industries for which certain strategically motivated foreign investment could pose a threat to U.S. technological superiority and national security.

Mandatory Declarations

18. CFIUS has always been, by and large, a voluntary process. Why are mandatory filings necessary?

The Committee has determined that it is appropriate to implement a mandatory declaration requirement in this pilot program in order to understand and examine, in a comprehensive manner, the nature of foreign direct investment as it relates to critical technologies and the select pilot program industries. This is driven by the ongoing risks to U.S. national security arising from the rapid pace of technological change in certain U.S. industries and the nature of some foreign investments aimed at affecting certain decisions regarding, or to obtain certain information relating to, critical technologies.

19. To whom does the mandatory filing requirement apply? Is it country-specific?

The pilot program covers all foreign persons and is not country specific. The mandatory filing requirement applies to all foreign investments that fall within the scope of the pilot program. The pilot program will inform CFIUS’s approach with respect to the application of certain provisions of FIRRMA to certain categories of foreign persons.

20. What is a declaration? What is the difference between a notice and a declaration?

A declaration is an abbreviated way of informing CFIUS of a transaction that generally should not exceed five pages in length. Traditional CFIUS notices are frequently much longer and require parties to provide specific additional information that will not be required in a declaration. Also, CFIUS has 30 days to consider a declaration, as opposed to the 45 days allotted for CFIUS to conduct a review of a notice (prior to an investigation, if necessary). Finally, FIRRMA gives CFIUS the following options to resolve declarations: (1) request that the parties file a notice; (2) inform the parties that CFIUS cannot complete action on the basis of the declaration and that they may file a notice regarding the transaction; (3) initiate a unilateral review of the transaction through an agency notice; or (4) notify the parties that CFIUS has completed all action.

As part of the pilot program, CFIUS is developing a Web template for parties to use for filing a declaration. The template will be available on the CFIUS Web page in the coming days and will guide parties in providing information and facilitate filings.

Public Comment Period

21. When does the public comment period begin and end?

The Committee is providing an immediate opportunity for public comment on the interim rule. The comment period opens on October 11, 2018, and will conclude 30 days later on November 10, 2018.

22. Who may submit comments during the public comment period?

Any interested member of the public may comment. Comments will be posted publicly.

23. How can comments be submitted?

Interested persons may submit comments electronically through the Federal government eRulemaking Portal at <https://www.regulations.gov> or by mailing to U.S. Department of the Treasury, Attention: Thomas Feddo, Deputy Assistant Secretary for Investment Security, 1500 Pennsylvania Avenue, NW, Washington, DC 20220.

Next Steps

24. How long is it going to take to fully implement FIRRMA?

Several provisions of FIRRMA took effect immediately upon enactment on August 13, 2018, while others may take up to 18 months to take effect. In the meantime, CFIUS has the authority to implement pilot programs, such as the pilot program announced today, and may also issue interim regulations and guidance.

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