

PUBLICATION

BIS Requests Comments on "Emerging" Technologies for CFIUS and Export Control Reforms

Authors: Alan F. Enslin, John M. Scannapieco, Julius Bodie

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The Committee on Foreign Investment in the United States (CFIUS) reform legislation, titled the Foreign Investment Risk Review Modernization Act (FIRRMA), was signed into law in August 2018 as a part of the National Defense Authorization Act for Fiscal Year 2019 (2019 NDAA). CFIUS, an interagency committee chaired by the U.S. Department of the Treasury, has traditionally reviewed national security risks of certain forms of foreign direct investment in the U.S. economy that results in control of a U.S. business by a foreign person. The new legislation casts a wider net over what type of transactions and investments are subject to potential CFIUS review, including certain passive investments that do not necessarily result in control of a company. The 2019 NDAA also included the Export Control Reform Act of 2018 (ECRA), which will have major implications for U.S. and foreign businesses and implements key changes to the U.S. statutory basis for export controls of commercial, dual use, and less sensitive defense items. In November 2018, the first steps for substantive regulatory implementation of both FIRRMA and the ECRA began to take place.

First, on November 10, 2018, the FIRRMA pilot program went into effect, implementing two key provisions of the legislation: **expanded jurisdiction** rules that target critical technologies and new mandatory filing requirements. CFIUS's jurisdiction now includes reviews of certain investments by foreign persons that do not necessarily constitute an acquisition of "control" of a U.S. business (FIRRMA refers to these as "other investments"). An investment can now fall within the purview of CFIUS review if it gives the foreign investor one of the following:

1. Access to any material nonpublic technical information in the possession of the U.S. business;
2. Membership or observer rights on the board of directors or equivalent governing body of the U.S. business, or the right to nominate an individual to a position on the board of directors or equivalent governing body of the U.S. business; or
3. Any involvement, other than through voting of shares, in substantive decision-making of the U.S. business regarding the use, development, acquisition, or release of **critical technologies**.

In addition, the pilot program covers any U.S. business that produces, designs, tests, manufactures, fabricates, or develops a critical technology that is: (1) utilized in connection with the U.S. business's activity in one or more "Pilot Program Industries," or (2) designed by the U.S. business specifically for use in one or more "Pilot Program Industries" (the program covers 27 Pilot Program Industries for which the U.S. government determined that "strategically motivated foreign investment" could pose a threat to U.S. technical superiority and national security, including the manufacturing of aircrafts, computers, wireless communications equipment, and semiconductors).

The second major change in the pilot program is that it establishes **mandatory declarations**, described by the Department of Treasury as "abbreviated notice that generally should not exceed five pages in length," for foreign transactions that constitute either a controlling investment or a FIRRMA "other investment" described above. CFIUS filings have always been voluntary prior to this reform legislation, but you can now face potentially significant penalties for failing to submit a mandatory filing. The declarations must be filed at least

45 days prior to a transaction's expected completion date, at which point CFIUS will have 30 days to take action.

The pilot program's most immediate impact will be a sharp rise in CFIUS filings due to the mandatory declarations. The Pilot Program Industries include much more than just traditional national security business sectors. U.S. commercial sectors that usually attract foreign investment like wireless communications and telephone technology, storage batteries and battery manufacturing, biochemical R&D, and optical lens manufacturing will also be subject to new mandatory CFIUS requirements. When considering such an investment moving forward, it is critical to know which industries are covered and whether your investment might trigger a filing and/or review.

The FIRRMA pilot program evidences the U.S. government's increased emphasis on protecting critical technologies, and the ECRA serves to underpin that focus in several respects. The ECRA codifies the statutory authority of the Commerce Department's Bureau of Industry and Security (BIS) to administer the U.S. Export Administration Regulations (EAR) that regulate the export of less sensitive military items and "dual use" items (items that are used for commercial/civilian purposes but can also have military applications). The statutory authority for the EAR was provided by the Export Administration Act of 1979, which lapsed in 2001 and has since been kept in effect since via executive orders and annual continuations.

The ECRA tasks the U.S. government and BIS to identify and establish "appropriate controls" for the export of "emerging and foundational technologies" via an ongoing interagency review process conducted by the Departments of Commerce, Defense, Energy and State. Once a new technology is determined to be classified as emerging and foundational, FIRRMA imposes multiple requirements on CFIUS to review proposed foreign investments in that technology, as identified "emerging and foundational" tech will be included within the FIRRMA definition of "critical technologies," and therefore subject to CFIUS review.

On November 19, BIS published an advance notice of proposed rulemaking (ANPRM) in the Federal Register seeking public comments on how the U.S. should define and identify "emerging" technologies to assist and inform the ongoing interagency process.

The notice lists 14 broad categories of technology that BIS intends to focus on:

4. Biotechnology
5. Artificial intelligence (AI)
6. Position, Navigation, and Timing (PNT) technology
7. Microprocessor technology
8. Advanced computing technology
9. Data analytics technology
10. Quantum information and sensing technology
11. Logistics technology
12. Additive manufacturing (e.g., 3D printing)
13. Robotics
14. Brain-computer interfaces
15. Hypersonics
16. Advanced materials
17. Advanced surveillance technologies

BIS also noted that it will issue a separate request for comments regarding "foundational" technologies with national security implications. **If you are conducting business in or related to one of the 14 representative technology categories in the ANPRM for emerging technologies, we encourage you to consider**

submitting comments to BIS by the December 19, 2018 deadline. This is an opportunity to provide clarification, prevent misunderstanding, and help shape regulatory policies that are likely to have significant downstream effects.

If you have any questions about the updated CFIUS rules, BIS proposal, or changes to export controls, please contact a member of Baker Donelson's [Global Business Team](#). We will continue to closely monitor CFIUS Pilot Program developments and the interagency process to identify emerging and foundational technologies.