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CFIUS Implements New Pilot Program Requiring Submission of Declarations for Certain Transactions

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Recently, the regulations for the Committee on Foreign Investment in the United States ("CFIUS") Pilot Program became effective. For the first time in CFIUS' history, non-controlling investments by foreign persons — regardless of country of origin —in certain U.S. "critical technology" companies are now subject to *mandatory* notification requirements that obligate, under penalty of law, transaction parties to submit a short-form notice of the transaction to CFIUS in advance of closing. The Pilot Program radically reshapes the strategic and tactical CFIUS calculus for buyers and sellers alike.

The View from Washington

The Pilot Program reflects CFIUS' first substantive implementation of certain provisions of the *Foreign Investment Risk Review Modernization Act* ("FIRRMA"), which was signed into law in August 2018 after passing both chambers of Congress with overwhelming bipartisan support. While certain provisions of FIRRMA had immediate effect, most were delayed pending the drafting and implementation of regulations. Notably, FIRRMA specifically authorized CFIUS to undertake one or more pilot programs to implement CFIUS' expanded authority.

In introducing the Pilot Program, the U.S. Department of the Treasury ("Treasury")[1] stated that *"urgent and compelling circumstances"* relating to foreign investors' attempts to acquire U.S. critical technologies justified rapid implementation of the Pilot Program in furtherance of U.S. national security interests. This view is widely shared among members of Congress, the White House, and national security

policymakers.

Certain Noteworthy Aspects of the Pilot Program

Here are 7 things for companies and private equity investors to keep in mind about the Pilot Program.

1. The Pilot Program's requirements apply only to certain transactions.

A transaction must be notified to CFIUS under the Pilot Program if:

- ***The U.S. business is a "pilot program U.S. business"***: The U.S. business must (a) have a nexus to one or more of 27 identified industry sectors (e.g., research and development in biotechnology; petrochemical manufacturing; semiconductor and related device manufacturing); and (b) produce, design, test, manufacture, fabricate or develop one or more "critical technologies" (defined to include, *inter alia*, defense articles; a broad range of dual-use items subject to export controls; and "*emerging and foundational*" technologies that will be controlled for export under forthcoming regulations); and
- ***The transaction involves a "non-passive" foreign person***: The transaction involves a foreign person that, post-closing, will either (a) control the U.S. business, or (b) have certain "non-passive" rights (e.g., through a board observer seat, special information rights or participation in certain decision-making) with respect to the U.S. business.

2. Many rights historically enjoyed by foreign limited partners and co-investors may bring a transaction within the Pilot Program's jurisdiction.

An investment is subject to the Pilot Program if it affords a foreign person, including a foreign limited partner or co-investor, "***any involvement****… in* ***substantive decisionmaking*** *of the pilot program U.S. business regarding the use, development, acquisition, or release of critical technology*." (Emphasis added.) New Frequently Asked Questions ("FAQs") released on November 9, 2018, indicate that CFIUS will interpret "any involvement" and "substantive decisionmaking" very broadly. The term "any involvement" includes special approval/veto rights and the right to consult or have access to decisionmakers (for example, a portfolio company's management team), while the term "substantive

decisionmaking" covers a broad range of activity related to critical technology, such as decisions regarding licensing, pricing and manufacturing locations.

3. Even if a transaction may be noti ed to CFIUS under the Pilot Program, it may still be advisable for transaction parties to submit a full joint voluntary notice.

CFIUS explained in its FAQs that notwithstanding the Pilot Program's notification requirement, transaction parties may find it prudent to submit a full joint voluntary notice to CFIUS, especially if they believe that CFIUS may require information beyond what is disclosed in a declaration to assess potential national security risks. The FAQ guidance provides that parties should evaluate whether CFIUS would likely be able to conclude action on a declaration in 30 calendar days, or if, alternatively, the parties "*would save time overall by filing a written notice at the outset*."

4. CFIUS expects transaction parties to conduct due diligence on the U.S. business that is the subject of the investment.

CFIUS indicated that the first step in assessing whether a U.S. business would constitute a "pilot program U.S. business" is to "consider[] **everything** that the U.S. business produces, designs, tests, manufactures, fabricates, and develops, and determine[] whether anything falls within the definition of a 'critical technology.'" (emphasis added). Transaction parties must ensure that they have a comprehensive understanding of the U.S. business' "critical technology" profile well in advance of closing, particularly if an otherwise "non-foreign" buyer contemplates syndication in the interim period and may raise capital from foreign investors. Notably, this requires an understanding of the export control classification of the U.S. business' products (both hardware and software) and technology, even if the U.S. business does not have any non-U.S. customers or export any products or technology outside of the United States.

5. Penalties may attach to failure to submit a declaration.

Each party to a transaction within the Pilot Program's jurisdictional ambit that fails to submit a required declaration may be subject to a monetary penalty up to the value of the transaction.[2] CFIUS has not yet provided guidance regarding how CFIUS would expect to calculate penalties (e.g., the extent to which CFIUS would consider transaction parties' good-faith, documented due diligence and

conclusions about whether a transaction was subject to the Pilot Program to be a mitigating factor).

6. Each incremental pilot program covered investment by a foreign person in the same pilot program U.S. business must be noti ed to CFIUS.

Prior to FIRRMA, the CFIUS regulations provided a "safe harbor" for incremental investments in a U.S. business by a foreign person when such foreign person's prior investment in the same business had been previously reviewed and cleared by CFIUS. The Pilot Program does not provide such a safe harbor for declarations. A foreign buyer that anticipates follow-on investments in the same pilot program U.S. business, including through participation in multiple fundraises, should consider whether it may be more efficient to file a full joint voluntary notice of the first transaction rather than multiple rounds of declarations.

7. FIRRMA's nal regulations will likely change the scope of "critical technology"-related transactions that are subject to mandatory declaration requirements.

While FIRRMA mandates that certain transactions involving foreign government investors (e.g., sovereign wealth funds, public pension funds) will be subject to mandatory declaration requirements, it gives CFIUS broad discretion to determine which critical technology investments must be notified. CFIUS made clear that the Pilot Program serves an intelligence-gathering function for such investments, and that CFIUS will use the information from the Pilot Program to shape the scope and substance of FIRRMA's implementing regulations.

Key Takeaways

- Transaction parties must ensure that sufficient due diligence is conducted both on the U.S. business that is the subject of the transaction as well as the prospective acquirer to determine whether a transaction would be subject to the Pilot Program. This should include a careful evaluation of the U.S. business' "critical technology" profile with assistance from qualified counsel.
- Buyers and sellers should ensure that transaction documents which contemplate submission of a declaration to CFIUS account for the possibility that CFIUS may request that the parties file a full joint voluntary notice (e.g., with respect to outside dates and termination provisions).

- The CFIUS landscape is changing rapidly, and CFIUS has stated that it intends to release additional guidance and new regulations in advance of FIRRMA's full implementation. Each transaction warrants a bespoke assessment based on the regulatory DNA of the buyer, the potential sensitivities of the U.S. business and relevant U.S. national security policy considerations.

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1. The Department of the Treasury is chair of CFIUS. For more background on the history of CFIUS, see Mario Mancuso, *A Dealmaker's Guide to CFIUS*.↩

2. 31 C.F.R. § 801.409.↩

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Suggested Reading

- 26 December 2018 Press Release Kirkland Represents H.I.G. Capital in Sale of Enerwise Global Technologies
- 11 December 2018 Article CFIUS Pilot Program—Seven Key Takeaways for Dealmakers
- 28 November 2018 Press Release Kirkland Represents Mycom Group Limited in Sale to Inflexion Private Equity