

FAQs on FIRRMA Critical Technology Pilot Program

1. What is the purpose and duration of the pilot program?

FIRRMA authorizes CFIUS to conduct one or more pilot programs to implement any provisions of the legislation that were not immediately effective upon enactment. CFIUS determined that the new and evolving threats to U.S. national security arising from certain foreign investments in U.S. businesses in particular industries require immediate attention. The pilot program allows CFIUS to address these risks to U.S. national security, and in the process, gain insights that will inform the development of final regulations to fully implement FIRRMA.

In accordance with FIRRMA, the pilot program will commence 30 days following publication of the regulations in the Federal Register—that is, on November 10, 2018. The pilot program is temporary and will end no later than the date on which the full regulations implementing FIRRMA become effective, and in no event later than the date that is 570 days after the enactment of FIRRMA (*i.e.*, March 5, 2020).

2. Where can I find more information about NAICS codes?

Information on NAICS codes can be found on this Web site:

<https://www.census.gov/eos/www/naics/>

3. Is there a “white list” or a “black list” in the pilot program?

No, this pilot program applies to all foreign persons. Like prior CFIUS legislation and FIRRMA itself, the pilot program does not single out any specific country. The Committee’s experience under the pilot program will inform the full implementation of FIRRMA, including the Committee’s approach with respect to the country specification provision in FIRRMA.

4. Do these new regulations change the definition of “control?”

The pilot program regulations do not change the definition of “control” set forth in 31 CFR 800.204. Rather, the pilot program regulations expand CFIUS’s jurisdiction to include certain non-controlling investments by foreign persons in certain U.S. businesses that produce, design, test, manufacture, fabricate, or develop a critical technology.

5. Do the pilot program regulations change the process for written notices?

The pilot program regulations do not change the process for written notices filed pursuant to part 800, other than requiring additional information for certain pilot program covered transactions.

In particular, a notice of a pilot program covered transaction filed with CFIUS must include the information set forth in 31 CFR 800.402(c). In addition to these information requirements, notices of pilot program covered transactions must include the information set forth in 31 CFR 801.503, with one exception: if a party stipulates, pursuant to 31 CFR 800.402(n), that the pilot

program covered transaction could result in control by a foreign person over the pilot program U.S. business, the party is not required to include the information set forth in 31 CFR 801.503 and need only provide the information requirements at 31 CFR 800.402(c). A party making a stipulation must provide a description of the basis for the stipulation as set forth in 31 CFR 800.402(n).

The pilot program regulations do not change in any way the process for notices covering transactions that fall outside the scope of the pilot program regulations.

6. What is the value of stipulations?

A stipulation could expedite review and action by CFIUS because it may streamline certain aspects of CFIUS's review. In addition, stipulating control will reduce certain information requirements (see Question 5).

Parties submitting a stipulation should be aware, however, that the Committee and the President are entitled to rely on such stipulation in determining whether the transaction is a pilot program covered transaction and/or a foreign government-controlled transaction, and parties making a stipulation waive the right to challenge any such determination. Additionally, neither the Committee nor the President is bound by any such stipulation, nor does any such stipulation limit the ability of the Committee or the President to act on any authority provided under section 721 of the Defense Production Act of 1950 (DPA), as amended, with respect to any covered transaction.

7. Can parties voluntarily file declarations for non-pilot program transactions?

At this time, the declaration process is only available for transactions that fall within the specific scope of the pilot program. The Committee's experience conducting the pilot program will inform how CFIUS develops the final regulations to fully implement FIRRMA, including use of the declaration process for a broader range of transactions.

8. If a transaction falls within the scope of the pilot program, how should parties determine whether to submit a declaration versus a written notice?

The pilot program regulations require that parties to a pilot program covered transaction submit a declaration to CFIUS. Parties may, however, elect to submit a full written notice instead of a declaration. Parties will need to consider at the outset whether to submit a declaration or a full written notice based on the complexity of the transaction, timing considerations, and other relevant factors. A full written notice may be more appropriate than a declaration when the parties believe the Committee may require more extensive information to analyze potential national security risks. With respect to timing, parties should consider the likelihood that CFIUS will be able to conclude action under section 721 of the DPA in the 30 days allotted for assessing a declaration. Because CFIUS has the option of responding to a declaration by requesting that the parties file a written notice, there may be instances in which parties would save time overall by filing a written notice at the outset.

9. How do I file a declaration?

Parties submitting a declaration must use the form and follow the instructions available at <https://home.treasury.gov/policy-issues/international/the-committee-on-foreign-investment-in-the-united-states-cfius>.

10. Can I simultaneously file both a declaration and a written notice for the same transaction?

CFIUS will not simultaneously review both a written notice and a declaration for the same transaction or substantially similar transactions.

Pursuant to 31 CFR 801.401(b), parties that have filed a written notice may not submit a declaration regarding the same transaction or a substantially similar transaction without the approval of the Staff Chairperson. In the case where a declaration is pending with the Committee regarding a transaction—*i.e.*, the Committee has not yet taken action pursuant to 31 CFR 801.407 with respect to the declaration—and the parties file a written notice regarding the same transaction or a substantially similar transaction, the parties should expect CFIUS to stop its assessment of the declaration and, instead, to begin reviewing the written notice.

11. Under the pilot program, which transactions benefit from the regulatory “safe harbor” for subsequent acquisitions of additional interest as described in 31 CFR 800.204(e)?

Pursuant to the safe harbor set forth at 31 CFR 800.204(e), referred to as the incremental acquisitions rule, “[a]ny transaction in which a foreign person acquires an additional interest in a U.S. business that was previously the subject of a covered transaction for which the Committee concluded all action under section 721 shall not be deemed to be a transaction that could result in foreign control over that U.S. business (*i.e.*, it is not a covered transaction).” This provision was introduced when the scope of CFIUS’s review included only transactions that could result in foreign control of a U.S. business and when the only means to file was by submitting a written notice.

When a written notice is filed for, and CFIUS concludes all action with respect to, a pilot program covered transaction that falls within 31 CFR 801.210(b) (*i.e.*, any transaction by or with any foreign person that could result in foreign control of any pilot program U.S. business, including such a transaction carried out through a joint venture), the incremental acquisitions rule will apply.

With respect to transactions that are within the scope of the pilot program, the incremental acquisitions rule does not apply when the Committee concludes all action under section 721 with respect to: (1) any pilot program covered transaction submitted to the Committee through a declaration (as opposed to a full written notice); or (2) any pilot program covered *investment* (*i.e.*, the acquisition of equity interest, including contingent equity interest, that could not result in control by a foreign person of a pilot program U.S. business and that affords the foreign person any of the access, rights or involvement detailed in 31 CFR 801.209) filed with the

Committee through a full written notice. In these situations, the conclusion of all action by the Committee provides a safe harbor only with respect to the particular investment that is the subject of the filing.

12. If CFIUS requests that I file a notice in response to my declaration, am I required to file a notice? How long do I have to file the notice?

In response to a declaration, the Committee may request, pursuant to 31 CFR 801.407(a)(1), that the parties file a written notice in accordance with subpart E of part 801. This indicates that the Committee believes it is necessary for CFIUS to review, and potentially investigate, the transaction under the procedures set forth in 31 CFR part 800. If the parties do not file a notice upon request, the Committee may utilize other authorities available to it, including, without limitation, the ability to initiate a unilateral review of the transaction.

The Staff Chairperson may specify a timeframe within which the Committee requests the parties to file a written notice. Even if the Staff Chairperson does not specify a timeframe, parties are encouraged to file a written notice as promptly as possible after receiving the Committee's request. The written notice would be subject to the standard timeframe for a CFIUS review and, if necessary, investigation. In the written notice, parties should reference the declaration case number.

13. If I file a declaration and CFIUS requests a notice or informs me that it is not able to complete action under section 721 of the DPA with respect to the transaction on the basis of the declaration, how do I file a notice?

Parties submitting a notice after the Committee has taken action pursuant to 31 CFR 801.407(a)(1) or (2) should prepare the notice in accordance with subpart E of part 801. The information requirements for a written notice of a pilot program covered transaction overlap to some degree with the requirements for declarations, but are more extensive in other respects. As a result, parties filing a written notice will be able to draw on the information submitted in the declaration, but will need to prepare responses to all of the information requirements in accordance with subpart E.

14. What do I do if I have a transaction where closing is expected to occur less than 45 days after CFIUS starts accepting declarations on November 10, 2018?

For pilot program covered transactions with a completion date less than 45 days after November 10, 2018 (*i.e.*, transactions with a completion date between November 10 and December 25, 2018), the pilot program regulations specifically provide that such transactions are to be submitted to CFIUS on November 10, 2018, or promptly thereafter. The requirement that pilot program covered transactions be filed with CFIUS 45 days before the completion date applies only to transactions for which the completion date is after December 25, 2018.

Although the 45-day requirement is not applicable to transactions with a completion date between November 10 and December 25, 2018, when a transaction is completed while it is

pending with CFIUS, measures—potentially including divestment—are available to address risks to national security identified by CFIUS. Thus, parties assume some risk by completing a transaction while it is pending with CFIUS.

15. A “pilot program covered investment” includes an investment that affords the foreign person “[a]ny 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.” What does this mean?

The pilot program regulations define a “pilot program covered investment” in 31 CFR 801.209 to include any non-controlling investment, direct or indirect, by a foreign person in an unaffiliated pilot program U.S. business that affords the foreign person 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.

The term “substantive decisionmaking” as it relates to the use, development, acquisition, or release of a critical technology may include, for example, decisions regarding the following:

- licensing;
- pricing, sales, and specific contracts;
- supply arrangements;
- corporate strategy and business development;
- research and product development, including budget allocation;
- manufacturing locations;
- access to such technology;
- the storage or protection of such technology;
- appointment or removal of personnel or management with operational oversight; or
- strategic partnerships.

As a general matter, substantive decisionmaking for purposes of 31 CFR 801.209(c) does not include strictly administrative decisions.

The term “any involvement” does not mean that the foreign person must have final decisionmaking authority. It also captures situations in which the investment gives the foreign person, among other things, any of the following with respect to decisionmaking regarding the use, development, acquisition, or release of critical technology:

- the right to consult with or provide advice to a decisionmaker;
- special approval or veto rights;
- the right or ability to participate on a committee with decisionmaking authority;
- the right to have direct access to directors, officers, managers, and other employees engaged in or with the ability to make decisions; or
- the right to appoint officers or employees who have involvement of the type listed above.

16. How do I determine whether a company is a pilot program U.S. business?

Pursuant to 31 CFR 801.213, a U.S. business meets the definition of a “pilot program U.S. business” if it 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.

The first step is to determine, if not already known, whether the U.S. business produces, designs, tests, manufactures, fabricates, or develops a critical technology. This will involve considering everything that the U.S. business produces, designs, tests, manufactures, fabricates, and develops, and determining whether anything falls within the definition of a “critical technology” pursuant to 31 CFR 801.204.

If a U.S. business produces, designs, tests, manufactures, fabricates, or develops one or more critical technologies, the next step is to determine whether the U.S. business utilizes any of those critical technologies in connection with its activities in one or more pilot program industries (*i.e.*, the industries identified in Annex A to 31 CFR part 801). If so, the U.S. business is a pilot program U.S. business.

If not, the final step is to determine whether one or more of the critical technologies produced, designed, tested, manufactured, fabricated, or developed by the U.S. business is designed by the U.S. business specifically for use in one or more pilot program industries, irrespective of whether such use is by the U.S. business itself or by another person. If so, the U.S. business is a pilot program U.S. business.

17. Prior to the effectiveness of the pilot program, a foreign person (Corporation A) made a non-controlling investment in a U.S. business (Corporation B) that would have been a pilot program U.S. business had the pilot program been in effect at the time. The investment afforded Corporation A one or more of the rights specified in paragraphs (a), (b), or (c) of 31 CFR 801.209. CFIUS did not review this investment because the pilot program was not yet in effect and hence the investment was not a pilot program covered transaction. If, while the pilot program is in effect, Corporation A makes an additional investment in Corporation B to prevent the dilution of Corporation A’s *pro rata* interest in Corporation B, is such additional investment a pilot program covered transaction?

Not necessarily. Assuming no other relevant facts, an additional investment to prevent dilution of a foreign person’s *pro rata* interest in a pilot program U.S. business, with respect to which the foreign person already had rights specified in paragraphs (a), (b), or (c) of 31 CFR 801.209 prior to the effectiveness of the pilot program, does not alone constitute a pilot program covered transaction if the additional investment does not afford the foreign person any of the rights specified in paragraphs (a), (b), or (c) of 31 CFR 801.209.

Example: In December 2017, Corporation A, a foreign person, acquired a four percent non-controlling equity interest with board observer rights in Corporation B, a U.S. business that

would have been a pilot program U.S. business after the pilot program effective date. The Committee did not review such investment. One year later, while the pilot program was in effect, Corporation A proposes to make an additional investment in Corporation B to prevent dilution and maintain Corporation A's four percent non-controlling equity interest in Corporation B. The proposed additional investment would not afford Corporation A any of the rights specified in paragraphs (a), (b), or (c) of 31 CFR 801.209. Assuming no other relevant facts, the additional investment is not a pilot program covered transaction.

18. How do I know if my company's technology constitutes "emerging or foundational technology"?

Consistent with FIRRMA, the regulations implementing the pilot program define "critical technologies" to include, among other things, emerging and foundational technologies controlled pursuant to section 1758 of the Export Control Reform Act of 2018 ("ECRA," Pub. Law 115-232, Title XVII, Subtitle B). In keeping with the ECRA, emerging and foundational technologies will be determined by an interagency process that will consider both public and classified information as well as information from the Emerging Technology Technical Advisory Committee (formerly known as the Emerging Technology and Research Advisory Committee) and CFIUS. This interagency process is anticipated to result in proposed rules for new Export Control Classification Numbers on the Commerce Control List, which is maintained by the Department of Commerce. As emerging and foundational technologies are identified and become controlled under the ECRA, they will be covered under the definition of "critical technologies" in the CFIUS regulations. CFIUS is not creating a separate definition of emerging and foundational technologies outside the interagency process outlined by the ECRA.

On November 19, 2018, the Department of Commerce's Bureau of Industry and Security ("BIS") published an [advance notice of proposed rulemaking \("ANPRM"\)](#) in the Federal Register seeking public comment on implementation of section 1758 of the ECRA and in particular, the criteria for identifying emerging technologies that are essential to U.S. national security. *See* 83 Fed. Reg. 58201 (Nov. 19, 2018) and 83 Fed. Reg. 64299 (Dec. 14, 2018) (extending the public comment period until Jan. 10, 2019). Comments submitted on this ANPRM will help inform the interagency process to identify and describe such emerging technologies. BIS is expected to issue a separate ANPRM regarding criteria for identifying foundational technologies that may be important to U.S. national security.

19. Does the pilot program apply to investments by or through investment funds?

Yes, the pilot program applies to all transactions that constitute pilot program covered transactions, which may include investments by or through investment funds. Consistent with FIRRMA, the pilot program regulations include a clarification at 31 CFR 801.304 in the context of indirect investments by limited partners through investment funds in light of the role sometimes played by limited partners within the fund, i.e., that of a member on the fund's advisory board or committee. In particular, the clarification applies in the context of an indirect investment by a foreign person in a pilot program U.S. business through an investment fund that affords the foreign person (or a designee of the foreign person) membership as a limited partner or equivalent on an advisory board or committee of the fund. This clarification is intended to

make clear that, where all of the criteria in 31 CFR 801.304 are satisfied, a limited partner's advisory board or committee membership does not in and of itself render the foreign person's indirect investment in a pilot program U.S. business a "pilot program covered transaction" if it would not otherwise be.

20. If a foreign limited partner does not meet all of the criteria in 31 CFR 801.304(a), is it subject to the pilot program?

Not necessarily. If a foreign limited partner is a member of the advisory board or committee of a fund, but all of the criteria set forth in 31 CFR 801.304(a) are not met, an analysis of the particular facts and circumstances will be required to determine if the indirect investment by the foreign person in a pilot program U.S. business through an investment fund is a pilot program covered transaction. The analysis would consider whether the investment could result in foreign control of a pilot program U.S. business or affords the foreign person any of the following:

- (a) access to any material nonpublic technical information in the possession of the pilot program U.S. business;
- (b) 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
- (c) 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.

21. The pilot program requires the submission of mandatory declarations, but FIRRMA includes an exception to the mandatory declaration requirement for investments by investment funds meeting certain criteria. Does FIRRMA's exception to the mandatory declaration requirement apply in the context of the pilot program?

Yes. FIRRMA includes an exception to the mandatory declaration requirement for investments by an investment fund if—

- (a) the fund is managed exclusively by a general partner, a managing member, or an equivalent;
- (b) the general partner, managing member, or equivalent is not a foreign person; and
- (c) the investment fund satisfies, with respect to any foreign person with membership as a limited partner on an advisory board or a committee of the fund, the criteria specified in FIRRMA's general clarification for investment funds (sections 721(a)(4)(D)(iv)(cc) and (dd) of the DPA).

31 CFR 801.602 makes effective certain provisions of section 721 as set out in FIRRMA, including the mandatory declaration exception for certain investments by investment funds, with respect to any pilot program covered transaction (i.e., paragraph (1)(C)(v)(IV)(dd) of subsection (b) of section 721).

Notwithstanding this exception to mandatory filings, parties should nevertheless consider whether to file a voluntary notice if the transaction is a pilot program covered transaction.

22. How does the pilot program treat transactions where the same foreign person is making both an indirect investment in a pilot program U.S. business through an investment fund, as well as a direct investment in the pilot program U.S. business?

Consistent with its current practice, CFIUS will consider the totality of the particular facts and circumstances of the transaction in determining whether a transaction is subject to its jurisdiction. Even if an indirect investment through an investment fund, standing alone, does not constitute a pilot program covered investment, the direct investment by the foreign person may nevertheless be covered under 31 CFR 801.209.