ALERT MEMORANDUM

CFIUS Introduces Pilot Program for Mandatory Declarations of Critical Technology Investments

October 16, 2018

On October 10, 2018, the Department of the Treasury issued interim regulations ("Interim Regulations") for the Committee on Foreign Investment in the United States ("CFIUS") to conduct a pilot program implementing provisions relating to critical technologies of the Foreign Investment Risk Review Modernization Act of 2018 ("FIRRMA"),[1] which recently amended the Exon-Florio amendments to the Defense Production Act of 1950 (together, "Exon-Florio").[2] The Department of the Treasury also released amendments to CFIUS's regulations effective October 11, 2018 to implement the immediately effective portions of FIRRMA.[3]

Section 1727(c) of FIRRMA authorizes CFIUS to conduct one or more pilot programs to implement any authority

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[1] Pub. L. No. 115-232, Title XVII (enacted Aug. 13, 2018) ("FIRRMA"). To learn more about FIRRMA, see our alert memorandum, Congress Passes CFIUS Reform Bill (Aug. 7, 2018).

[2] 50 U.S.C. § 4565 (2018). The primary CFIUS regulations are codified at 31 C.F.R. pt. 800. To learn more about CFIUS, see our alert memorandum, Recent Revisions to Exon-Florio "National Security" Reviews of Foreign Investment in the United States (Dec. 22, 2008).

[3] See Provisions Pertaining to Certain Investments in the United States by Foreign Persons, 83 Fed. Reg. 51,316 (Oct. 11, 2018) (amending 31 C.F.R. pt. 800). Part 800 was amended to extend the CFIUS review period from 30 days to 45 days; add changes in rights that could result in control and transactions structured to evade or circumvent CFIUS review to the definition of covered transaction; clarify that covered transactions include joint ventures; add a penalty provision; provide for tolling during lapses in appropriation; remove the requirement for a physical submission of notices and certifications; require the submission of partnership agreements, integration agreements, or other side agreements with filings; provide for stipulations (with basis) that a traction is a covered transaction or a foreign government-controlled transaction, as applicable; permit the extension of CFIUS investigations by 15 days in "extraordinary circumstances," which is defined as "circumstances for which extending an investigation is necessary and the appropriate course of action due to a force majeure event or to protect the national security of the United States"; and permits information sharing with domestic and foreign governmental entities (subject to confidentiality and classification requirements). Notably, these amendments left unchanged the definition of "U.S. business," which remains "any entity . . . engaged in interstate commerce in the United States, *but only to the extent of its activities in interstate commerce*." 31 C.F.R. § 800.226 (emphasis added). The emphasized language was not in FIRRMA's statutory definition of "U.S. business," which had led some to question whether a change was intended.

provided pursuant to any provision of, or amendment made by, FIRRMA that did not take effect immediately upon enactment. The newly issued Interim Regulations bring into effect a pilot program implementing enhanced, and in many cases mandatory, review of transactions involving "critical technologies" (generally, export-controlled technologies) used by the target in, or designed by the target for, one or more of a list of specified industries. The pilot program takes effect on November 10, 2018.

This memorandum provides a synopsis of the most significant changes contained in the Interim Regulations, which:

- expand CFIUS jurisdiction to non-controlling, non-passive investments in any U.S. business that produces, designs, tests, manufactures, fabricates, or develops a "critical technology" for use by anyone in one of 27 industries identified in the Interim Regulations (such investments, "pilot program covered investments," and such U.S. businesses, "pilot program U.S. businesses");
- require mandatory short-form filings ("declarations") for all non-passive investments by foreign persons in pilot program U.S. businesses, including a requirement to submit such declarations at least 45 days prior to a transaction's expected completion date;
- provide a limited safe harbor from CFIUS jurisdiction and mandatory declarations for passive investments through U.S. private equity funds; and
- establish civil penalties up to the transaction value for failure to make a mandatory declaration.[4]

1. Expansion of CFIUS Jurisdiction to Covered Critical Technology Investments

a. Background

Pre-FIRRMA, Exon-Florio nominally applied only to potential acquisitions of "control"[5] of a "U.S. business."[6] FIRRMA immediately modified and broadened the authorities of the President and CFIUS under Exon-Florio to include:

- purchases or leases of, or concessions regarding real estate that is—
    - located in or part of airports or sea ports; or

[4] *See* Determination and Temporary Provisions Pertaining to a Pilot Program To Review Certain Transactions Involving Foreign Persons and Critical Technologies, 83 Fed. Reg. 51,322 (Oct. 11, 2018) (to be codified at 31 C.F.R. pt. 801).

[5] Defined in part as "the power, direct or indirect . . . to determine, direct, or decide important matters affecting an entity." 31 C.F.R. § 800.204(a).

[6] The current regulatory definition of "United States business" is "any entity, irrespective of the nationality of the persons that control it, engaged in interstate commerce in the United States, but only to the extent of its activities in interstate commerce." 31 C.F.R. § 800.226. FIRRMA adds a statutory definition of "United States business" as "any person engaged in interstate commerce in the United States," which tracks the existing Exon-Florio language in the pre-FIRRMA statutory definition of "covered transaction" ("any merger, acquisition, or takeover…by or with any foreign person which could result in foreign control of any person engaged in interstate commerce in the United States"). FIRRMA § 1703; 50 U.S.C. §4565(a)(3).

  - proximate to (or otherwise permitting surveillance of) military or sensitive government facilities located in the United States;

- any change in rights of an existing investment that would result in foreign control of a U.S. business; and

- any transaction designed to evade or circumvent CFIUS review.[7]

FIRRMA also contemplated a further expansion of CFIUS jurisdiction upon the implementation of regulations to non-controlling, non-passive "other investments" in companies that:

- own, operate, manufacture, supply, or service critical infrastructure;[8]

- produce, design, test, manufacture, fabricate, or develop one or more "critical technologies" (defined as a wide range of export-controlled technologies);[9] or

- maintain or collect sensitive personal information of U.S. citizens that may be exploited in a manner that threatens national security.[10]

FIRRMA defines "other investment" as a direct or indirect investment by a foreign person that affords that person:

- access to any material nonpublic technical information;[11]

[7] FIRRMA § 1703.

[8] "Critical infrastructure" is defined, subject to regulation, as "systems and assets, whether physical or virtual, so vital to the United States that the incapacity or destruction of such systems or assets would have a debilitating impact on national security." *Id*.

[9] "Critical technologies" is defined to include:

> "(i) Defense articles or defense services included on the United States Munitions List set forth in the International Traffic in Arms Regulations under subchapter M of chapter I of title 22, Code of Federal Regulations.
> (ii) Items included on the Commerce Control List set forth in Supplement No. 1 to part 774 of the Export Administration Regulations under subchapter C of chapter VII of title 15, Code of Federal Regulations, and controlled—
> (I) pursuant to multilateral regimes, including for reasons relating to national security, chemical and biological weapons proliferation, nuclear nonproliferation, or missile technology; or
> (II) for reasons relating to regional stability or surreptitious listening.
> (iii) Specially designed and prepared nuclear equipment, parts and components, materials, software, and technology covered by part 810 of title 10, Code of Federal Regulations (relating to assistance to foreign atomic energy activities).
> (iv) Nuclear facilities, equipment, and material covered by part 110 of title 10, Code of Federal Regulations (relating to export and import of nuclear equipment and material).
> (v) Select agents and toxins covered by part 331 of title 7, Code of Federal Regulations, part 121 of title 9 of such Code, or part 73 of title 42 of such Code.
> (vi) Emerging and foundational technologies controlled pursuant to section 1758 of the Export Control Reform Act of 2018." *Id.*

[10] *Id*.

[11] "Material nonpublic technical information" is defined as information that "provides knowledge, know-how, or understanding, not available in the public domain, of the design, location, or operation of critical infrastructure; or . . . is not available in the public domain, and is necessary to design, fabricate, develop, test, produce, or manufacture critical technologies, including processes, techniques, or methods." FIRRMA § 1703. Financial information on the performance of the U.S. business is specifically excluded.

- membership or observer rights on the board of directors or equivalent of the U.S. business, or the right to nominate a director; or
- any involvement (other than through the voting of shares) in substantive decision-making related to sensitive personal data of U.S. citizens, critical technologies, or critical infrastructure.[12]

FIRRMA also expands CFIUS jurisdiction to any changes in rights of an existing investment that would result in an "other investment" of a U.S. business related to critical infrastructure, critical technologies, or sensitive personal data.[13]

b. Businesses Covered by Interim Regulations

The Interim Regulations make effective the first part of FIRRMA's expansion of CFIUS jurisdiction over "other investments" by implementing the provisions on "critical technologies" covering a wider range of non-controlling investments and requiring mandatory notifications in many instances. The first key definition in the Interim Regulations is "pilot program U.S. business," which is a layered definition capturing any "U.S. business"[14] in which:

- the U.S. business produces, designs, tests, manufactures, fabricates or develops "critical technologies" (defined to include many, but not all, technologies controlled under the Export Administration Regulations, as well as technologies controlled under the International Traffic in Arms Regulations, nuclear and chemical/biological controls, and newly controlled "emerging and foundational technologies"),[15] and
    - uses critical technologies in connection with its own activities in a "pilot program industry" (see below), or
    - specifically designs the critical technologies for use by others in a pilot program industry;[16]

[12] *Id*.
[13] *Id*.
[14] "U.S. business" is defined under existing regulations as "any entity, irrespective of the nationality of the persons that control it, engaged in interstate commerce in the United States, but only to the extent of its activities in interstate commerce." 31 C.F.R. § 226.
[15] 83 Fed. Reg. at 51,328 (to be codified at § 801.204). Specifically, "critical technologies" includes: (a) defense articles or defense services included on the United States Munitions List set forth in the International Traffic in Arms Regulations (ITAR) (22 C.F.R. parts 120-130); (b) items included on the Commerce Control List set forth in Supplement No. 1 to part 774 of the Export Administration Regulations (EAR) (15 C.F.R. parts 730-774) and controlled (1) pursuant to multilateral regimes, including for reasons relating to national security, chemical and biological weapons proliferation, nuclear nonproliferation, or missile technology; or (2) for reasons relating to regional stability or surreptitious listening; (c) specially designed and prepared nuclear equipment, parts and components, materials, software, and technology covered by 10 C.F.R. part 810 (relating to assistance to foreign atomic energy activities); (d) nuclear facilities, equipment, and material covered by 10 C.F.R. part 110 (relating to export and import of nuclear equipment and material); (e) select agents and toxins covered by 7 C.F.R. part 331, 9 C.F.R. part 121, or 42 C.F.R. part 73; and (f) emerging and foundational technologies controlled pursuant to section 1758 of the Export Control Reform Act of 2018.
[16] 83 Fed. Reg. at 51,328 (to be codified at § 801.213).

- the "pilot program industry" involved is one of the following (identified by North American Industry Classification System Code, or "NAICS Code"): [17]

Aircraft Manufacturing (NAICS Code: 336411)

Aircraft Engine and Engine Parts Manufacturing (NAICS Code: 336412)

Alumina Refining and Primary Aluminum Production (NAICS Code: 331313)

Ball and Roller Bearing Manufacturing (NAICS Code: 332991)

Computer Storage Device Manufacturing (NAICS Code: 334112)

Electronic Computer Manufacturing (NAICS Code: 334111)

Guided Missile and Space Vehicle Manufacturing (NAICS Code: 336414)

Guided Missile and Space Vehicle Propulsion Unit and Propulsion Unit Parts Manufacturing (NAICS Code: 336415)

Military Armored Vehicle, Tank, and Tank Component Manufacturing (NAICS Code: 336992)

Nuclear Electric Power Generation (NAICS Code: 221113)

Optical Instrument and Lens Manufacturing (NAICS Code: 333314)

Other Basic Inorganic Chemical Manufacturing (NAICS Code: 325180)

Other Guided Missile and Space Vehicle Parts and Auxiliary Equipment Manufacturing (NAICS Code: 336419)

Petrochemical Manufacturing (NAICS Code: 325110)

Powder Metallurgy Part Manufacturing (NAICS Code: 332117)

Power, Distribution, and Specialty Transformer Manufacturing (NAICS Code: 335311)

Primary Battery Manufacturing (NAICS Code: 335912)

Radio and Television Broadcasting and Wireless Communications Equipment Manufacturing (NAICS Code: 334220)

Research and Development in Nanotechnology (NAICS Code: 541713)

Research and Development in Biotechnology (except Nanobiotechnology) (NAICS Code: 541714)

Secondary Smelting and Alloying of Aluminum (NAICS Code: 331314)

Search, Detection, Navigation, Guidance, Aeronautical, and Nautical System and Instrument Manufacturing (NAICS Code: 334511)

Semiconductor and Related Device Manufacturing (NAICS Code: 334413)

[17] 83 Fed. Reg. at 51,328 (to be codified at 31 C.F.R. § 801.212) and 51,333-34 (to be codified at 31 C.F.R. Part 801, Annex A).

Semiconductor Machinery Manufacturing (NAICS Code: 333242)	Telephone Apparatus Manufacturing (NAICS Code: 334210)
Storage Battery Manufacturing (NAICS Code: 335911)	Turbine and Turbine Generator Set Units Manufacturing (NAICS Code: 333611)

c. Transactions Covered by Interim Regulations

The transactions covered by the Interim Regulations are "pilot program covered transactions," which are either (1) any transaction that could result in "control" over a pilot program U.S. business by a foreign person, where "control" is defined under existing regulations,[18] or (2) "pilot program covered investments," which are non-controlling "investments" (defined as equity investments or contingent equity investments, meaning instruments convertible to voting equity) that afford a foreign person "access to any material nonpublic technical information"; membership, observer, or nomination rights to the board of directors or equivalent; or any other involvement, other than through the voting of shares, regarding the use, development, acquisition, or use of critical technology.[19] "Material nonpublic technical information" is defined in turn as "information that is not available in the public domain, and is necessary to design, fabricate, develop, test, produce, or manufacture critical technologies, including processes, techniques, or methods."[20] Information on the financial performance of the business is specifically excluded.[21]

This expansion of covered transactions is, however, less broad than it may appear given CFIUS's expansive reading of "control" in other contexts. Under existing CFIUS practice, there is a substantial chance that an acquisition of, say, 15% of a target company accompanied by a board seat would be deemed "control," even if neither the ability to vote 15% of the shares nor a single vote on the board would be sufficient to cause or block any corporate decision as a formal matter. To the extent an acquiror has the *de jure* right to block any major decision, control would certainly be found. Nevertheless, it is clear that the expanded definition of "pilot program covered investment" is intended to capture all but purely passive

[18] 31 C.F.R. § 800.204(a) ("The term control means the power, direct or indirect, whether or not exercised, through the ownership of a majority or a dominant minority of the total outstanding voting interest in an entity, board representation, proxy voting, a special share, contractual arrangements, formal or informal arrangements to act in concert, or other means, to determine, direct, or decide important matters affecting an entity; in particular, but without limitation, to determine, direct, take, reach, or cause decisions regarding the following matters, or any other similarly important matters affecting an entity: (1) The sale, lease, mortgage, pledge, or other transfer of any of the tangible or intangible principal assets of the entity, whether or not in the ordinary course of business; (2) The reorganization, merger, or dissolution of the entity; (3) The closing, relocation, or substantial alteration of the production, operational, or research and development facilities of the entity; (4) Major expenditures or investments, issuances of equity or debt, or dividend payments by the entity, or approval of the operating budget of the entity; (5) The selection of new business lines or ventures that the entity will pursue; (6) The entry into, termination, or non-fulfillment by the entity of significant contracts; (7) The policies or procedures of the entity governing the treatment of non-public technical, financial, or other proprietary information of the entity; (8) The appointment or dismissal of officers or senior managers; (9) The appointment or dismissal of employees with access to sensitive technology or classified U.S. Government information; or (10) The amendment of the Articles of Incorporation, constituent agreement, or other organizational documents of the entity with respect to the matters described in paragraphs (a)(1) through (9) of this section.")

[19] 83 Fed. Reg. at 51,328 (to be codified at 31 C.F.R. § 801.209).

[20] 83 Fed. Reg. at 51,328 (to be codified at 31 C.F.R. § 801.208).

[21] *Id*.

investments. The Interim Regulations also clarify that each incremental investment that meets the definition of a pilot program covered investment is subject to CFIUS jurisdiction even if it involves the same foreign person in the same pilot program U.S. business, so long as there has been no acquisition of control.[22]

However, as anticipated by FIRRMA, the Interim Regulations provide an exception permitting a foreign investor to make indirect investments through an "investment fund" managed exclusively by a U.S. general partner, managing member, or equivalent and to retain limited consultation rights without triggering the "pilot program covered investment" rules.[23] Foreign investors may participate in an advisory committee or other body of such a fund (at fund level, not portfolio company level), so long as:

- the committee does not have the ability to approve, disapprove, or otherwise control investment decisions of the fund or of the general partner or equivalent with respect to any portfolio company, and
- the foreign investor itself cannot otherwise approve, disapprove, or otherwise control investment decisions of the fund or decisions of the general partner or equivalent with respect to any portfolio company, unilaterally decide (or, crucially, block) the appointment, removal, or compensation of the general partner or equivalent; or obtain access to material nonpublic technical information via the advisory committee.[24]

Importantly, FIRRMA's managed fund exception, read literally (as CFIUS has historically read its regulations as applied to private equity funds) applies only where a foreign person invests through a U.S. fund managed by a U.S. general partner. It does not appear to apply when the acquiring fund itself is a foreign person, even if it is managed by a U.S. person (as the foreign person fund would be investing directly and not eligible for the exception). Under CFIUS's regulations and prior practice, a U.S.-controlled fund may be a "foreign person" if (a) it is an offshore legal entity with a principal place of business outside the United States and (b) a majority of its equity (not control) is held by foreign persons.[25] Thus, U.S.-controlled offshore funds must take care to ensure that they themselves meet the complete passivity requirements set out in the definition of "pilot program covered investment" to avoid triggering CFIUS jurisdiction and potential mandatory filing requirements. This may require careful analysis of the relative rights of affiliated funds or the interposition of a U.S. acquisition vehicle such as a limited partnership that ensures that the offshore fund interest is completely passive. Similarly, direct co-

[22] 83 Fed. Reg. at 51,328-29 (to be codified at 31 C.F.R. § 801.302).
[23] FIRRMA § 1703; 83 Fed Reg. at 51,328 (to be codified at 31 C.F.R. § 801.207). "Investment fund" is defined as "any entity that is an 'investment company,' as defined in section 3(a) of the Investment Company Act of 1940 (15 U.S.C. 80a-1 et seq.), or would be an 'investment company' but for one or more of the exemptions provided in section 3(b) or 3(c) thereunder."
[24] 83 Fed Reg. at 51,329-30 (to be codified at 31 C.F.R. § 801.304). Waivers of potential conflicts of interest, allocation limitations, or the like presumptively will not typically be considered control of investment decisions, but CFIUS may deem it control in undefined "extraordinary circumstances." Note that such a determination would in principle render filing of a declaration mandatory and expose the foreign person to fines for failure to file.
[25] *See* 31 C.F.R. § 800.216 ("foreign person" includes "foreign entity"); 31 C.F.R. § 800.212 (any entity organized under the law of a foreign state is a foreign entity if either its principal place of business is outside the United States or its equity securities traded principally on one or more foreign exchanges, unless the entity can demonstrate that a majority of its equity interest is ultimately owned by U.S. nationals).

investments by investors in a fund are not automatically subject to review and declaration requirements, but to avoid that result they must be carefully analyzed to ensure they are sufficiently passive to avoid triggering the "pilot program covered investment" definition.

FIRRMA raised the possibility that the expansion of CFIUS jurisdiction to "other investments" would be limited to select categories of foreign persons to be identified by regulation; the Interim Regulations leave open that possibility for the final regulations but as an initial matter cover all foreign investors, noting CFIUS's desire to "understand and examine, in a comprehensive manner, the nature of foreign direct investment as it relates to critical technologies and the pilot program industries."[26]

2. Mandatory Declarations for Covered Critical Technology Investments

The Interim Regulations also implement FIRRMA's provisions related to mandatory declarations for pilot program covered transactions.[27] Although generally mandatory declarations will be limited to transactions in which an entity with a significant foreign government interest acquires a significant stake in a U.S. business, CFIUS was explicitly given authority to extend mandatory notification to all transactions involving U.S. critical technology.[28] After November 10, 2018, parties to pilot program covered transaction, whether an acquisition of control over a pilot program U.S. business or a non-controlling pilot program covered investment, must electronically submit either a declaration or a standard notice at least 45 day prior to the completion of the transaction.[29] As noted, every pilot program covered transaction is subject to the declaration requirement, even if the same parties have filed a declaration with respect to a previous transaction, so long as the two parties are "unaffiliated" (defined as the foreign person's not holding more than half of the voting rights or the right to appoint more than half the directors or equivalent of the pilot program U.S. business).[30] Parties may, in place of a declaration, submit a full CFIUS notice,[31] and they would be well advised to do so if they expect CFIUS to conduct a substantial review of their transaction.

Although the Interim Regulations recite that the declaration requirement is "consistent with FIRRMA's requirement that CFIUS establish declarations as ''abbreviated notices that would not generally exceed 5 pages in length,'"[32] the Interim Regulations require declarations to contain most of the information contained in the body of a full CFIUS notification and appear virtually certain to exceed five pages by a substantial multiple. Notably, the Interim Regulations require declarations to include:

[26] FIRRMA § 1703; 83 Fed. Reg. at 51,324.
[27] 83 Fed. Reg. at 51,330 (to be codified at 31 C.F.R. § 801.401, -.402).
[28] FIRRMA § 1705.
[29] 83 Fed. Reg. at 51,330 (to be codified at 31 C.F.R. § 801.401). For transactions with closing dates after December 25, 2018, declarations must be submitted at least 45 days before the completion date of the transaction; for transactions with closing dates after November 10 but prior to December 25, declarations must be submitted by November 10 or promptly thereafter. *Id.*
[30] 83 Fed. Reg. at 51,328 (to be codified at 31 C.F.R. § 801.209, -.214).
[31] 83 Fed. Reg. at 51,330 (to be codified at 31 C.F.R. § 801.401(b). A modest amount of additional information is required to be included in a CFIUS notice regarding a pilot program covered transaction. *See* 83 Fed. Reg. at 51,333 (to be codified at 31 C.F.R. § 801.503).
[32] 83 Fed. Reg. at 51,325; *see also* FIRRMA § 1706.

- a transaction description with components similar to those required in a standard notice, including a complete organizational chart that includes descriptive information about all parties, parents, and ultimate owners (for ultimate parents that are private companies) or shareholder with an interest of greater than five percent (for ultimate parents that are public companies), together with a description of any foreign government interest in the acquiror's ownership structure;
- a description of the governance rights being acquired by the foreign person;
- location data (address or precise geographic coordinates) for every facility operated by the U.S. business;
- a description of the critical technology or technologies the U.S. business and its subsidiaries produce, design, test, manufacture, fabricate, or develop, together with the associated NAICS code and a description of the relevant export control classifications;
- a statement concerning the existence of any prime contracts or subcontracts with the U.S. government over the past 3 years (or 5 years for any classified contracts or 10 years for contracts involving access to the personally identifiable information of any U.S. government personnel);
- a statement concerning grants or other funding from the Departments of Defense or Energy or participation in defense or energy programs related to critical technologies over the past 5 years;
- a statement as to whether the pilot program U.S. business participated in a Defense Production Act Title III Program[33] within the past seven years;
- a statement as to whether the pilot program U.S. business has received or placed priority rated contracts or orders under the Defense Priorities and Allocations System (DPAS) regulation[34], and the level(s) of priority of such contracts or orders (DX or DO) within the past three years;
- a statement as to whether the parties are stipulating that the transaction is covered by the pilot program that specifies all the bases for such stipulation;
- a statement as to whether the transaction could result in control by a foreign person or is a foreign-government-controlled transaction that specifies the bases for such stipulations;
- a statement as to whether any party to the transaction has been party to another transaction previously notified or submitted to CFIUS and its case number; and
- a statement as to whether the pilot program U.S. business, the foreign person, or any parent or subsidiary of the foreign person has been convicted in the last ten years of a crime in any jurisdiction.[35]

Unlike a full CFIUS filing, foreign person parties filing a declaration are not required to provide personal identifier information for their directors, officers, and shareholders or those of their parents, and U.S.

[33] 50 U.S.C. § 4501 *et seq*.
[34] 15 C.F.R. part 700.
[35] *See* 83 Fed. Reg. at 51,330-32 (to be codified at 31 C.F.R. § 801.403).

businesses are not required to provide market share information or contact information for government contracts, so the burden of a declaration is somewhat less, but the scope appears to go significantly beyond the statutory goal. The regulations also invite the parties to stipulate that a transaction is a pilot program covered investment or could result in control of a pilot program U.S. business, giving supporting reasoning;[36] this would not seem to lessen the burden of the declaration, though it is in theory possible that it could accelerate CFIUS's review.

Under the Interim Regulations, failure to comply with the mandatory declaration requirement can be punishable with a fine *up to the value of the transaction at issue*.[37] This raises substantial concerns in connection with CFIUS's traditional desire to maintain flexibility to assert jurisdiction over a transaction and avoid giving bright-line guidance. For example, CFIUS has long taken the position that it has authority to review corporate reorganizations in which ownership of a U.S. subsidiary is transferred from one subsidiary in a corporate group to another, though ordinarily such a transaction would raise no concerns. However, with the advent of the mandatory declaration, if the U.S. subsidiary is a pilot program U.S. business, failure to file a notification could result in a massive fine. Similarly, the Interim Regulations state that waiver of a potential conflict of interest or an investment limit by a foreign investor in a U.S. investment fund would only constitute a pilot program covered transaction "in extraordinary circumstances"[38]—which are undefined, leaving any party engaging in such a waiver to either file as a precautionary measure or, again, risk a massive fine. Similar issues arise with vaguely defined concepts such as "designed specifically for use in one or more pilot program industries."[39] It remains to be seen whether the CFIUS staff will be prepared to provide detailed guidance with respect to such questions—which traditionally they have not been, leaving parties and their counsel to make informed judgments on whether to make a voluntary filing—or instead parties will be faced with the choice between a purely defensive filing for transactions with minimal substantive impact and the risk of a substantial fine for failure to meet the filing requirement. .

3. Effective Date and Timing

The Interim Regulations will take effect on November 10, 2018.[40] Transactions where a binding agreement or term sheet was executed, or a public tender offer or proxy solicitation was initiated, prior to October 11, 2018 are not subject to the Interim Regulations, nor are those consummated prior to the effective date.[41] However, transactions where a binding agreement was executed on or after October 11 may become subject to the mandatory declaration requirements if they are not closed prior to November 10, and so parties must immediately consider whether pending transactions may be subject to the Interim Regulations.

[36] *See* 83 Fed. Reg. at 51,331 (to be codified at 31 C.F.R. § 801.403(c)(3)); 83 Fed. Reg. 51,325-26.
[37] 83 Fed. Reg. at 51,332-33 (to be codified at 31 C.F.R. § 801.409).
[38] 83 Fed. Reg. at 51,330 (to be codified at 31 C.F.R. § 801.304(c)).
[39] 83 Fed. Reg. at 51,332 (to be codified at 31 C.F.R. § 801.213).
[40] 83 Fed. Reg. at 51,328 (to be codified at 31 C.F.R. § 801.211).
[41] 83 Fed. Reg. at 51,327 (to be codified at 31 C.F.R. § 801.103).

Consistent with FIRRMA, the Interim Regulations require CFIUS to act upon a declaration within 30 days of receipt from the CFIUS staff chairperson, who must "promptly" review and circulate the declaration to CFIUS upon determining the declaration to be complete.[42] CFIUS must: (1) request that the parties file a notice; (2) inform the parties that CFIUS cannot complete action under section 721 on the basis of the declaration, and that they may file a full notice to seek written notification from the Committee that the Committee has completed all action under section 721 with respect to the transaction (also effectively leaving open CFIUS's ability to re-review the transaction at a later date if the parties do not file a full notice); (3) initiate a unilateral review of the transaction through an agency notice; or (4) notify the parties that CFIUS has completed all action under section 721.[43] During the course of a review, parties to a declaration have two business days to respond to request for follow-up information from the CFIUS staff chairperson (as compared to three business days in the context of a standard notice) but can request an extension, or the notice can be rejected.[44]

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[42] 83 Fed. Reg. at 51,332 (to be codified at 31 C.F.R. § 801.404).
[43] 83 Fed. Reg. at 51,332 (to be codified at 31 C.F.R. § 801.407).
[44] 83 Fed. Reg. at 51,332 (to be codified at 31 C.F.R. § 801.406).