

# Anything to Declare? CFIUS to Mandate Declarations from "Critical Technology" Businesses Soon

## IN SHORT

**The Situation:** On October 10, 2018, the U.S. Department of the Treasury ("Treasury") published an interim rule establishing a pilot program for the Committee on Foreign Investment in the United States ("CFIUS") that mandates filing declarations with CFIUS in connection with certain foreign investments in particular U.S. businesses.

**The Result:** Beginning November 10, 2018, parties to proposed transactions involving a foreign investment in certain U.S. "critical technology" businesses will be required to file a mandatory declaration with CFIUS.

**Looking Ahead:** U.S. businesses should evaluate whether they are covered by the pilot program, and parties to proposed transactions should evaluate whether their transactions are subject to a mandatory CFIUS declaration, which must be submitted 45 days before completion of a covered transaction.

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On October 10, 2018, Treasury announced an interim rule establishing a "pilot program" for CFIUS that defines "critical technologies" and implements the Foreign Investment Risk Review Modernization Act's ("FIRRMA") mandatory declaration provision, effective November 10, 2018. To assess whether a proposed foreign investment in a U.S. business triggers a mandatory declaration under the new pilot program, parties to the proposed transaction must determine whether: (i) the U.S. business is a "pilot program U.S. business" and (ii) the transaction is a "pilot program covered transaction."

### Step One: Is the U.S. Business a "Pilot Program" U.S. Business?

A U.S. business is a pilot program U.S. business if it "produces, designs, tests, manufactures, fabricates, or develops a critical technology," which the interim rule defines as items subject to various control regimes "utilized in connection with" or "designed ... specifically for use in" one or more of 27 pilot program industries.

### Step Two: Is the Proposed Transaction a "Pilot Program Covered Investment" or a "Pilot Program Covered Transaction"?

If the U.S. business into which a foreign investment is made is a pilot program U.S. business, then the parties must evaluate the structure of the deal to determine whether it is a pilot program covered transaction. This is defined as any transaction that could result in a foreign person obtaining "control" of a pilot program U.S. business or a "pilot program covered investment." A pilot program covered investment is a passive investment in a pilot program U.S. business through which a foreign person obtains access to material nonpublic technical information, membership, observer rights, or nomination rights on the board of directors or equivalent governing body, or involvement in substantive decision-making regarding critical technology.

To learn more about the pilot program, whether your business may be affected, and the procedures for filing a mandatory declaration, please read the full version of this [Commentary](#).

## THREE KEY TAKEAWAYS

1. The interim rule establishes a CFIUS pilot program requiring parties to pilot program covered transactions to file mandatory declarations 45 days in advance of completion date of their transaction or face a substantial civil penalty.
2. The interim rule targets transactions involving a foreign person's investment in a pilot program U.S. business, which is a U.S. business with controlled technologies that are either used in or designed for one or more of 27 pilot program industries.
3. Pilot program covered transactions are those in which a foreign person obtains either control over a pilot program U.S. business or gains access to material nonpublic technical information; membership, observer rights, or nomination rights on the board of directors or

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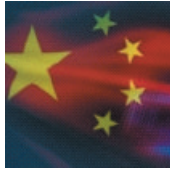
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equivalent governing body; or any involvement in substantive decision-making regarding critical technology in a pilot program U.S. business.

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