



Important Changes to the Committee of Foreign Investment in the United States and US Export Controls

September 5, 2019

This presentation is accompanied by oral explanation and should not be relied upon for legal advice.

Overview

- Export Control Reform Act
 - Notice and Comment
- CFIUS Background
 - Conforming Amendments
 - Pilot Program
 - Final Regulations
- New Supply Chain Regulations
- Questions?

Export Control Reform Act



- Establishes an interagency process to identify emerging and foundational technologies
- Broadly to track “Made in China 2025” plan
- The November 2018 Advanced Notice of Proposed Rulemaking (ANPRM) solicited comments by January 10, 2019

What are Emerging and Foundational Technologies?

- Interagency Process as provided for in the Export Control Reform Act of 2018
- Generally, to capture technologies not currently listed on either the Commerce Control List (CCL) or the U.S. Munitions List (USML)
- CFIUS Chairperson may recommend technologies to be considered “emerging and foundational”

Emerging and Foundational Technologies: Made in China 2025 Industries

- Chinese policies are aimed at advancing specific industrial sectors:

New advanced information technology	New-energy vehicles and equipment
Automated machine tools & robotics	Power equipment
Aerospace and aeronautical equipment	Agricultural equipment
Maritime equipment / high-tech shipping	New materials
Modern rail transport equipment	Biopharma / advanced medical products

Emerging Technologies Under the ANPRM

- The ANPRM seeks public comment on criteria for identifying emerging technologies. BIS plans to issue a separate ANPRM regarding identification of foundational technologies.
- The ANPRM lists the following general categories of technology:

Biotechnology	Artificial intelligence (AI) and machine learning technology
Position, Navigation, and Timing (PNT) technology	Microprocessor technology
Advanced computing technology	Data analytics technology
Quantum information and sensing technology	Logistics technology such as <u>Mobile Electric Power</u>
Additive manufacturing	Robotics
Brain-computer interfaces	Hypersonics
Advanced materials	Advanced surveillance technologies

The Committee on Foreign Investment in the United States (CFIUS)

- CFIUS is a federal interagency committee authorized to review certain transactions involving foreign investment in the United States to determine the effect of such transactions on U.S. national security.



Recent CFIUS Amendments

- Expand the scope of transactions reviewable by CFIUS to address current national security concerns
 - Including a focus on investments from countries with the demonstrated or declared strategic goal of acquiring critical technology that would affect United States leadership in areas related to national security
- Create a mandatory process to review certain transactions

Specific National Security Considerations

- Supply Chain of the United States Government
- “Third Party” Concerns
- Sensitive Personal Data
- Cybersecurity Vulnerabilities
- Information Regarding Sensitive Government Matters
- Corporate Culture

CFIUS Process

- CFIUS reviews transactions and identifies national security concerns
 - Approximately 90% clear with no action by CFIUS*
- CFIUS can negotiate or impose mitigation to address national security concerns
 - Approximately 10% of notified transactions
- CFIUS can recommend that the President prohibit a transaction
 - While only five have been blocked (publicly available information), dozens have been abandoned

*Statistics are approximations because the CFIUS process is confidential unless President takes action

Overview of New FIRRMA Regulations



- Pilot Program regulations took effect November 10, 2018
- Other provisions take effect February 2020 or 30 days after Federal Register publication

Pilot Program Facts

- Context – USG concerns about predatory investment
- Temporary program to assess CFIUS’s ability to protect key U.S. industries under 27 NAICS codes
- Mandatory reporting for investments, even non-controlling, in critical technology (CT) companies in certain industries
- Civil Penalties for failure to file certain transactions
 - Strict liability
 - Up to full value of the transaction



Assessing Whether a Transaction is a Covered Foreign Investment in a Pilot Program U.S. Business

- Foreign investor?
- U.S. Pilot Program Business?
 - Critical Technology Involved?
 - NAICS-Identified Industry?
- Non-passive investment?

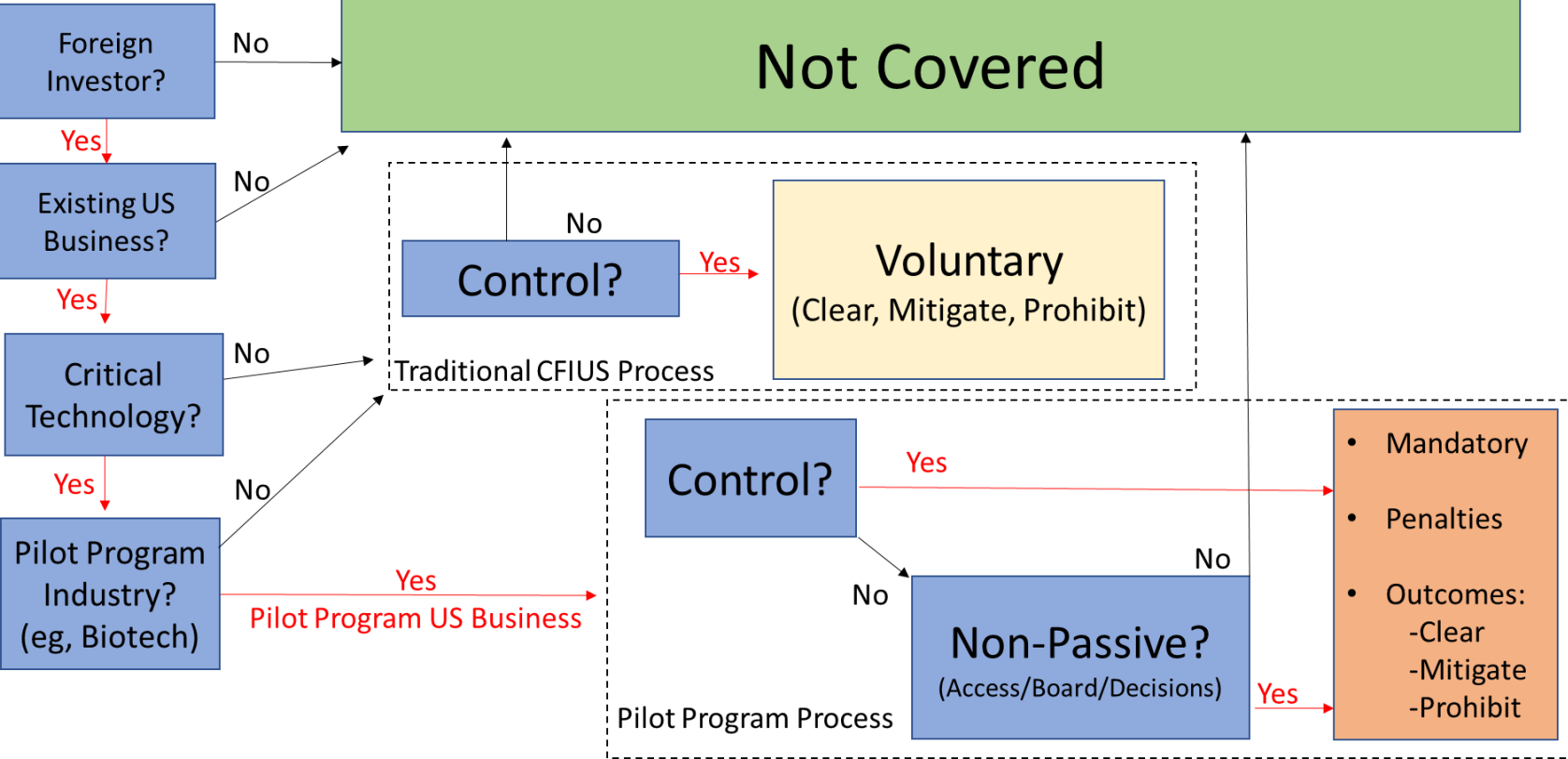
New Pilot Program Analysis (Critical Technology?)

- U.S. business produces, designs, tests, manufactures, fabricates, or develops
 - Defense articles or services covered under the International Traffic in Arms Regulations (ITAR) (22 CFR Parts 120-130)
 - Items covered under the Export Administration Regulations (EAR) (15 CFR Parts 730-774) and controlled
 - Pursuant to multilateral regimes, including for reasons relating to national security, chemical and biological weapons proliferation, nuclear nonproliferation, or missile technology; or
 - For reasons relating to regional stability or surreptitious listening.
 - Civilian nuclear facilities, equipment, material, and technology under the Atomic Energy Act (AEA) (10 CFR Parts 110 & 810)
 - Select agents and toxins covered by bioterrorism regimes (7 CFR Part 331, 9 CFR Part 121, and 42 CFR Part 73)
 - **Emerging and foundational technologies controlled pursuant to the Export Control Reform Act of 2018 (Not yet determined)**

New Pilot Program Analysis (Protected Industry?)

- Critical Technology is utilized in or designed specifically for use in:
 - Aircraft Manufacturing
 - Aircraft Engine and Engine Parts Manufacturing
 - Alumina Refining and Primary Aluminum Production
 - Ball and Roller Bearing Manufacturing
 - Computer Storage Device Manufacturing
 - Electronic Computer Manufacturing
 - Guided Missile and Space Vehicle Manufacturing
 - Guided Missile and Space Vehicle Propulsion Unit and Propulsion Unit Parts Manufacturing
 - Military Armored Vehicle, Tank, and Tank Component Manufacturing
 - Nuclear Electric Power Generation
 - Optical Instrument and Lens Manufacturing
 - Other Basic Inorganic Chemical Manufacturing
 - Other Guided Missile and Space Vehicle Parts and Auxiliary Equipment Manufacturing
 - Petrochemical Manufacturing
 - Powder Metallurgy Part Manufacturing
 - Power, Distribution, and Specialty Transformer Manufacturing
 - Primary Battery Manufacturing
 - Radio and Television Broadcasting and Wireless Communications Equipment Manufacturing
 - Research and Development in Nanotechnology
 - Research and Development in Biotechnology (except Nanobiotechnology)
 - Secondary Smelting and Alloying of Aluminum
 - Search, Detection, Navigation, Guidance, Aeronautical, and Nautical System and Instrument Manufacturing
 - Semiconductor and Related Device Manufacturing
 - Semiconductor Machinery Manufacturing
 - Storage Battery Manufacturing
 - Telephone Apparatus Manufacturing
 - Turbine and Turbine Generator Set Units Manufacturing

Full CFIUS Covered Transaction Analysis Effective November 10, 2018



Supply Chain Developments

- Effective August 13, 2019, the 2019 National Defense Authorization Act imposes new restrictions on procurements for telecommunications equipment or services based on ties to certain Chinese entities.
- Executive Order grants the Department of Commerce the authority to prohibit communications providers from using particular products (including Huawei products) in their networks.
- Huawei designated as a “Denied Entity” prohibited from receiving U.S. exports.

Key Takeaways

- Stay abreast of the development of Emerging and Foundational Technology Regulations
- Be aware that any foreign investment in a U.S. business has the potential to trigger a mandatory CFIUS review under certain circumstances
 - We have seen circumstances where even an internal corporate reorganization has triggered a CFIUS review

Your questions, please.



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