

October 22, 2018

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**CFIUS: FIRRMA Pilot Program Requires Mandatory Declarations for Certain Critical Technology Investments in Key Industries; Expands CFIUS Jurisdiction to Cover Certain Noncontrolling Investments**

**美国外国投资委员会（“CFIUS”）：《外国投资风险审查现代化法案》（“FIRRMA”）试点项目要求对重要行业的某些关键技术投资进行强制声明；美国外国投资委员会管辖权扩展至包括某些非控制性投资**

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On October 10, 2018, the Department of Treasury, which chairs the Committee on Foreign Investment in the United States (CFIUS), an inter-agency committee, issued an interim rule establishing a pilot program implementing portions of the Foreign Investment Risk Review Modernization Act of 2018 (FIRRMA), enacted on August 13, 2018. Prior to the adoption of the interim rule, CFIUS was only authorized to review transactions that could result in control of a U.S. business by a foreign person in order to determine the effect of such transactions on the national security of the United States. Under the new interim rule, CFIUS's jurisdiction is expanded to encompass the authority to review certain noncontrolling foreign investments in critical technology companies in 27 pilot program industries. Parties involved in such investments, as well as traditional controlling investments in U.S. businesses in the same 27 pilot program industries, are required to file mandatory declarations with CFIUS for review.

2018年10月10日，作为多机构参与的共同委员会“美国外国投资委员会”（“CFIUS”）的主席机构，美国财政部发布了《外国投资风险审查现代化法案》（“FIRRMA”）试点项目暂行规定。此规定设立的试点项目贯彻了2018年8月13日签署的FIRRMA中的部分法条。在此暂行规定出台之前，CFIUS仅有权以评估对美国国家安全的影响为目的审查可能导致外国人控制美国企业的交易。在新的暂行规定下，CFIUS的管辖权得到扩展，现有权对27个试点项目行业中的关键技术公

October 22, 2018

司的某些非控制性外国投资进行审查。参与此类投资的各方需向 CFIUS 提交强制声明以供审查。若对此 27 个试点项目行业内的美国企业进行控制性投资的投资各方，亦需提交强制声明。

### *Test for Covered Investments under the Pilot Program*

#### **试点项目所包含的投资**

Under the interim rule, which formally takes effect on November 10, 2018, the pilot program applies to investments by all foreign persons, including private and public entities, that meet all of the following three criteria:

根据 2018 年 11 月 10 日正式生效的暂行规定，试点项目适用于同时符合以下三项标准的所有外国实体进行的投资（包括公有和私有实体）：

#### **I. Covered Pilot Program U.S. Businesses**

##### **一、包含的“试点项目美国企业”**

The interim rule defines a “Pilot Program U.S. Business” as any U.S. business that produces, designs, tests, manufactures, fabricates, or develops a critical technology that is (1) utilized in connection with the U.S. business’s activity in one or more Pilot Program Industries (defined below); or (2) designed by the U.S. business specifically for use in one or more Pilot Program Industries.

暂行规定将“试点项目美国企业”定义为：任何生产、设计、测试、制造、组装或发展一项关键技术的美国企业，该技术（1）用于与此美国企业在一个或多个“试点项目行业”（定义见下文）相关的活动；或者（2）由此美国企业专门设计用于一个或多个“试点项目行业”。

The definition of Pilot Program U.S. Business only includes companies involved in various stages of development, design, manufacturing and production of relevant critical technologies. It does not extend to companies in Pilot Program Industries that merely use those critical technologies.

“试点项目美国企业”的定义仅包括在各个阶段参与相关关键技术研发、设计、制造和生产的美国公司，不适用于仅使用那些属于“试点项目行业”关键技术的公司。

Critical technologies, as defined by FIRRMA, means any of the following:

FIRRMA 对“关键技术”的定义包括：

- defense articles or defense services included on the United States Munitions List;  
美国军需清单内包含的国防物品或国防服务；

October 22, 2018

- items included on the Commerce Control List 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;

贸易管制清单内包含的并且属于以下情形之一的物品：

- 根据多边制度受到管制，包括出于国家安全、生化武器扩散、核不扩散或导弹技术等相关原因；
  - 出于地区稳定或监听等原因受到管制；
- specially designed and prepared nuclear equipment, parts and components, materials, software, and technology;

特别设计和准备的核设备、零件、组成部分、材料、软件和技术；

- nuclear facilities, equipment, and material;
- select agents and toxins; or
- certain emerging and foundational technologies.

核设施、设备和材料；

特定的制剂和毒素；

某些新兴和基础技术；

## II. Covered Pilot Program Industries

### 二、包含的“试点项目行业”

The pilot program covers 27 industries, including aircraft, aircraft engines, electronic computers, guided missiles, space vehicles, nuclear electric power, petrochemicals, nanotechnology, biotechnology, semiconductor, storage battery, among others. Not all industries with critical technologies are covered by the pilot program. A complete list of covered industries, including their respective North American Industry Classification System (NAICS) code, is attached as the Exhibit at the end of this article.

试点项目包含 27 个行业，包括飞机、飞机发动机、电子计算机、制导导弹、航天器、核电、石油化工、纳米技术、生物技术、半导体、蓄电池等行业。并不是所有拥有关键技术的行业都受试点项目管辖。完整清单以及各行业的北美工业分级系统代码请参见文末附件。

October 22, 2018

### III. Covered Investments

#### 三、包含的投资

The pilot program expands CFIUS's jurisdiction, consistent with FIRRMA, to allow review of certain investments by foreign persons that do not constitute an acquisition of control of a U.S. business (referred to in FIRRMA as "other investments"). For an investment to be covered under the pilot program, it would have to give the foreign investor:

在 FIRRMA 的框架下，试点项目扩大了 CFIUS 的管辖权，允许 CFIUS 审查某些外国人对美国企业的构成“控制性收购”的投资（FIRRMA 将此类投资称为“其它投资”）。如果一项投资可使外国投资者符合以下任意一种情况，CFIUS 就有权管辖：

- Access to any material nonpublic technical information in the possession of the target U.S. business;

能够获取试点项目中美国企业持有的重大非公开技术信息

- Membership or observer rights on the board of directors or equivalent governing body of the U.S. business, or the right to nominate an individual to a position on the board of directors or equivalent governing body of the U.S. business; or

能够在试点项目中的美国企业的董事会或类似机构中拥有席位或担任观察员，或拥有相关提名权；或者

- Any involvement, other than through voting of shares, in substantive decision-making of the U.S. business regarding the use, development, acquisition, or release of critical technology.

能够通过非投票的方式参与试点项目中美国企业的涉及关键技术的使用、开发、获取或公布等实质性决策。

#### *Investments Outside of the Pilot Program Coverage*

#### *试点项目范围之外的投资*

The pilot program does not cover all transactions within the jurisdiction of CFIUS as expanded by FIRRMA. Transactions not covered by the pilot program at this time include investments in critical infrastructure, real estate and businesses possessing sensitive personal data of U.S. citizens. The Department of Treasury retains the authority under FIRRMA to implement new rules to further expand the jurisdiction of CFIUS to cover more specified technologies and industries at a future time.

October 22, 2018

试点项目并不涵盖在 FIRRMA 之下扩展了管辖权的 CFIUS 有权管辖的所有交易。目前，不包含在试点项目以内的交易包括重点基础设施、房地产、以及持有美国公民敏感个人信息的企业。然而财政部有权在未来发布新的规定，进一步扩大 CFIUS 的管辖权，以涵盖更多的特定技术和行业。

The pilot program also excludes certain investments made by investment funds that have foreign investors, even if such foreign investors have rights on an advisory board or committee for those investment funds, so long as (1) a U.S. general partner (or equivalent) is the fund's exclusive manager; (2) a foreign person is not the fund's general partner (or equivalent); (3) investment decisions or decisions of the general partner related to entities in which the fund is invested cannot be approved, disapproved or otherwise controlled by the board, advisory committee or the foreign person; (4) the general partner (or equivalent) cannot be unilaterally removed by the foreign person.; and (5) the foreign person does not have access to material nonpublic technical information.

试点项目也不包括某些含有外国投资人的投资基金进行的投资。即使外国投资人在那些投资基金的董事会或者顾问委员会拥有席位，只要符合以下五个条件，投资基金的投资就不属于试点项目的范畴。这五个条件为：（1）美国的普通合伙人（或同等职称）是基金的唯一经理；（2）外国人不担任基金的经理（或同等职称）；（3）普通合伙人的投资决定不能被董事会、顾问委员会或者外国人通过、否决、或者以其他方式控制；（4）普通合伙人（或同等职称）不能单方面被外国人解雇；（5）外国人不能获取重大非公开技术信息。

### Mandatory Declarations

#### 强制声明

- **Content of Mandatory Declarations**  
**强制声明的内容**

If an investment meets all of the three criteria under the above test, the parties to the transaction are required to file mandatory declarations under the interim rule. It should be noted that if an investment constitutes a traditional control investment in a U.S. Business in one of the 27 Pilot Program Industries, the parties are also required to file mandatory declarations. The interim rule defines "mandatory declarations" as abbreviated notices that generally should not exceed five pages in length. The items required to be disclosed in mandatory declarations include:

如果一项投资符合以上测试的所有三项标准，根据暂行规定交易各方将需提交强制声明。需要注意的是，如果一项投资构成对 27 个试点项目行业内的美国企业进行传统的控制性投资，交易各方亦需提交强制声明。暂行规定中对“强制声明”的定义为一般不超过五页的简要通知。在强制声明内需要披露的项目包括：

October 22, 2018

- Information identifying the parties to a transaction, the subject of the transaction and a brief description of the nature and structure of the transaction, including what will be acquired;

交易各方身份的信息，交易的内容，以及对交易性质和结构的简短描述，包括收购标的；

- Additional information clarifying the ownership of the foreign investor and its activities;

更多的阐释外国投资人所有权及其活动的信息

- A statement explaining how the Pilot Program U.S. Business is subject to the pilot program;

一份解释试点项目美国企业为何受试点项目管辖的声明

- Information about the Pilot Program U.S. Business' previous U.S. government contracts, grants and funding;

试点项目美国企业先前的美国政府合同、拨款、以及资助信息

- A description of the parties' prior history with CFIUS;

一份交易各方与 CFIUS 先前历史的描述

- All sources of financing for the transaction; and

交易的所有资金来源；以及

- A statement as to whether the parties stipulate that the transaction is covered by CFIUS' jurisdiction, including through the pilot program.

一份关于交易各方是否认定交易受 CFIUS 管辖（包括受试点项目管辖）的声明

- **Timing and Review of Mandatory Declarations**

- **强制声明的提交时间和审查过程**

Declarations must be filed at least 45 days prior to a transaction's expected completion date. CFIUS will have 30 days to take action to (1) clear the transaction; (2) commence a unilateral review; (3) advise the parties that the declaration is insufficient for CFIUS to complete its review or (4) request a formal written notice.

October 22, 2018

声明必须至少在交易的预期完成日期前 45 天提交。CFIUS 需要在收到声明后的 30 天内采取行动以 (1) 批准交易；(2) 开始单方面审查；(3) 告知交易各方声明内容不足以让 CFIUS 完成审查；或者 (4) 要求提供正式书面通知。

If fewer than all the parties to a transaction submit a declaration, CFIUS may, at its discretion, request that the parties to the transaction file a written notice of the transaction, if CFIUS deems the information provided by the submitting party or parties in the declaration is insufficient for the Committee to assess the transaction.

如果不是参与交易的所有方都提交了声明，CFIUS 在认定提交方提供的信息不足以让其对交易完成评估的情况下，有权自行要求参与交易的各方提交书面通知。

Parties may also choose to voluntarily file a written notice under CFIUS's standard procedures rather than a declaration. The interim rule extends the review period for written notices to 45 days.

参与交易的各方也可以自愿选择在 CFIUS 的正式程序下提交书面通知，以代替声明。暂行规定将书面通知的审查时间延长至 45 天。

- **Penalty for Failing to File Mandatory Declarations**  
**不提交强制声明的罚款**

Parties that are required to file with CFIUS and do not do so can be assessed a civil monetary penalty up to the value of the transaction.

需要向 CFIUS 提交声明的各方如未提交声明，可能面临民事罚款，罚款金额最高可达到交易的总金额。

- **Transactions Not Subject to Mandatory Declarations**  
**不需要提交强制声明的交易**

- Transactions completed prior to November 10, 2018, or

在 2018 年 11 月 10 日之前完成的交易；或者

- Transactions for which, prior to October 11, 2018, (i) there is an executed binding written agreement; (ii) a party has made a public offer to shareholders to buy shares or (iii) a party has solicited proxies in connection with a board election.

October 22, 2018

在 2018 年 10 月 11 日之前，交易各方（1）已签署有约束力的书面协议的交易；（2）交易一方已向股东发出公开要约购买股票的交易；或者（3）交易一方已经就董事会选举开始征集委托投票的交易。



October 22, 2018

**Exhibit: Pilot Program Industries**

**附件：试点项目行业**

\*北美工业分级系统代码

Aircraft Manufacturing

飞机制造

NAICS Code\*: 336411

Aircraft Engine and Engine Parts Manufacturing

飞机发动机和发动机零部件制造

NAICS Code: 336412

Alumina Refining and Primary Aluminum

Production

氧化铝精炼和原铝生产

NAICS Code: 331313

Ball and Roller Bearing Manufacturing

滚珠和滚柱轴承制造

NAICS Code: 332991

Computer Storage Device Manufacturing

计算机存储设备制造

NAICS Code: 334112

Electronic Computer Manufacturing

电子计算机制造

NAICS Code: 334111

Guided Missile and Space Vehicle

Manufacturing

制导导弹与航天器制造

NAICS Code: 336414

Guided Missile and Space Vehicle Propulsion

Unit and Propulsion Unit Parts

Manufacturing

制导导弹和航天器推进装置和推进装置零件

制造

NAICS Code: 336415

Military Armored Vehicle, Tank, and Tank  
Component Manufacturing

军用装甲车、坦克和坦克部件制造

NAICS Code: 336992

Nuclear Electric Power Generation

核电力生产

NAICS Code: 221113

Optical Instrument and Lens Manufacturing

光学仪器和透镜制造

NAICS Code: 333314

Other Basic Inorganic Chemical Manufacturing

其他基础无机化学物制造

NAICS Code: 325180

Other Guided Missile and Space Vehicle Parts

and Auxiliary Equipment Manufacturing

其他制导导弹和航天器零件及辅助设备制造

NAICS Code: 336419

Petrochemical Manufacturing

石油化工制造

NAICS Code: 325110

Powder Metallurgy Part Manufacturing

粉末冶金零件制造

NAICS Code: 332117

Power, Distribution, and Specialty Transformer

Manufacturing

电力、输电和特种变压器制造

NAICS Code: 335311

Primary Battery Manufacturing

原电池制造

NAICS Code: 335912

Radio and Television Broadcasting and Wireless

Communications Equipment Manufacturing

广播电视播送和无线通信设备制造

NAICS Code: 334220

October 22, 2018

Research and Development in Nanotechnology  
纳米技术的研究与开发  
NAICS Code: 541713

Research and Development in Biotechnology  
(except Nanobiotechnology)  
生物技术研究与开发 ( 纳米生物技术除外 )  
NAICS Code: 541714

Secondary Smelting and Alloying of Aluminum  
铝的二次冶炼和合金化  
NAICS Code: 331314

Search, Detection, Navigation, Guidance,  
Aeronautical, and Nautical System and  
Instrument Manufacturing  
搜索、探测、导航、制导、航空和航海系统  
和仪器制造  
NAICS Code: 334511

Semiconductor and Related Device  
Manufacturing  
半导体及相关器件制造  
NAICS Code: 334413

Semiconductor Machinery Manufacturing  
半导体机械制造  
NAICS Code: 333242

Storage Battery Manufacturing  
蓄电池制造  
NAICS Code: 335911

Telephone Apparatus Manufacturing  
电话设备制造  
NAICS Code: 334210

Turbine and Turbine Generator Set Units  
Manufacturing  
涡轮机和涡轮发电机组制造  
NAICS Code: 333611

October 22, 2018

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如果您对这篇文章有任何问题，请联系斯蒂文·W·舒斯特律师：[sschuster@mclaughlinstern.com](mailto:sschuster@mclaughlinstern.com)

*McLaughlin & Stern, LLP, established in 1898, is one of New York's most distinguished law firms. The firm provides a diverse range of sophisticated legal services to businesses and individuals and has particular expertise in corporate, securities, mergers and acquisitions, hedge funds, corporate finance, litigation and alternative dispute resolution, employment law, trusts and estates, real estate, intellectual property, bankruptcy and reorganization, tax, family and matrimonial law, health care law, art law, environmental law, maritime law, international law, and other private client matters. Our China practice includes the representation of Chinese companies regarding their acquisitions and commercial transactions in the United States as well as the representation of underwriters and funds who invest in transactions with and raise capital for Chinese companies. We also represent Chinese companies whose securities are registered in the United States as well as numerous other public companies.*

麦克劳林与斯特恩责任有限合伙人律师事务所以下简称“麦斯律师事务所”)成立于1898年，是纽约历史最悠久的律所之一。本所向工商界和个人提供领域广泛且老道精专的专业法律服务，包括并购、公司融资、诉讼、房地产、知识产权、医疗卫生、家庭法、税务、环境法、海洋法、艺术法、信托与遗产以及其他客户的私密事务。我们的中国业务包括代表中国公司在美国的收购以及其它商业交易，亦代表承销商以及投资中国公司的基金。我们也代表在美国注册股票的中国公司和其他大量上市公司。



*Steven W. Schuster has been engaged in the practice of corporate and securities law for over 30 years and is Chair of the firm's Corporate and Securities Department and Chair of the firm's China practice. Mr. Schuster received his B.A. from Harvard University in 1976 and his J.D. from New York University in 1980.*

斯蒂文·W·舒斯特在公司与证券法方面有超过30年的执业经验，他同时是我所公司与证券法部门的主席，以及我所中国业务部的主席。舒斯特先生于1976年获哈佛大学学士学位，1980年纽约大学法学博士学