■ a. In paragraph (a) remove '', after the effective date, intentionally or through gross negligence,'';
■ b. Revise paragraph (b);
■ c. Redesignate paragraph (g) as paragraph (h); and
■ d. Add a new paragraph (g).

The revision and addition read as follows:

§ 800.801 Penalties.

* * * * *

(b) Any person who, after the effective date, violates, intentionally or through gross negligence, a material provision of a mitigation agreement entered into before October 11, 2018, with, a material condition imposed before October 11, 2018 by, or an order issued before October 11, 2018 by, the United States under section 721(l) may be liable to the United States for a civil penalty not to exceed $250,000 per violation or the value of the transaction, whichever is greater. Any person who violates a material provision of a mitigation agreement entered into on or after October 11, 2018, with, a material condition imposed on or after October 11, 2018, by, or an order issued on or after October 11, 2018, by, the United States under section 721(l) may be liable to the United States for a civil penalty not to exceed $250,000 per violation or the value of the transaction, whichever is greater.'';

* * * * *

(g) Section 1001 of title 18, United States Code, shall apply to all information provided to the Committee under section 721 by any party to a covered transaction.

* * * * *

■ 25. Add § 800.802 to subpart H to read as follows:

§ 800.802 Effect of lack of compliance.

If, at any time after a mitigation agreement or condition is entered into or imposed under section 721(l), the Committee or lead agency, as the case may be, determines that a party or parties to the agreement or condition are not in compliance with the terms of the agreement or condition, the Committee or lead agency may, in addition to the authority of the Committee to impose penalties pursuant to section 721(h) and to unilaterally initiate a review of any covered transaction pursuant to section 721(b)(1)(D)(iii):

(a) Negotiate a plan of action for the party or parties to remediate the lack of compliance, with failure to abide by the plan or otherwise remediate the lack of compliance serving as the basis for the Committee to find a material breach of the agreement or condition;

(b) Require that the party or parties submit a written notice under clause (i) of section 721(b)(1)(C) with respect to a covered transaction initiated after the date of the determination of noncompliance and before the date that is five years after the date of the determination to the Committee to initiate a review of the transaction under section 721(b); or

(c) Seek injunctive relief.

Dated: October 4, 2018.

Heath Tarbert,

Assistant Secretary for International Markets.

[FR Doc. 2018–22187 Filed 10–10–18; 8:45 am]

BILLING CODE 4810–25–P

DEPARTMENT OF THE TREASURY

Office of Investment Security

31 CFR Part 801

RIN 1505–AC61

Determination and Temporary Provisions Pertaining to a Pilot Program To Review Certain Transactions Involving Foreign Persons and Critical Technologies

AGENCY: Office of Investment Security, Department of the Treasury.

ACTION: Interim rule.

SUMMARY: This interim rule sets forth the scope of, and procedures for, a pilot program of the Committee on Foreign Investment in the United States (CFIUS, or the Committee) under section 721 of the Defense Production Act of 1950, as amended by the Foreign Investment Risk Review Modernization Act of 2018 (FIRRMA). Pursuant to section 1727(c) of FIRRMA, this pilot program implements the authorities provided in two sections of FIRRMA that did not take effect upon the statute's enactment. First, the pilot program expands the scope of transactions subject to review by CFIUS to include certain investments involving foreign persons and critical technologies. Second, the pilot program makes effective FIRRMA's mandatory declarations provision for all transactions that fall within the specific scope of the pilot program. The pilot program is temporary and will end no later than March 5, 2020.

DATES: *Effective date:* These provisions are effective November 10, 2018.

Applicability date: See § 801.103.

Comment date: Written comments must be received by November 10, 2018.

ADDRESSES: Written comments on the interim rule may be submitted through one of two methods:

• *Electronic Submission of Comments:* Interested persons may submit comments electronically through the Federal government eRulemaking Portal at *https://www.regulations.gov.* Electronic submission of comments allows the commenter maximum time to prepare and submit a comment, ensures timely receipt, and enables the Department to make them available to the public. Comments submitted electronically through the *https://www.regulations.gov* website can be viewed by other commenters and interested members of the public.

• *Mail:* Send to U.S. Department of the Treasury, Attention: Thomas Feddo, Deputy Assistant Secretary for Investment Security, 1500 Pennsylvania Avenue NW, Washington, DC 20220.

In general, Treasury will post all comments to *www.regulations.gov* without change, including any business or personal information provided, such as names, addresses, email addresses, or telephone numbers. All comments received, including attachments and other supporting material, will be part of the public record and subject to public disclosure. You should only submit information that you wish to make publicly available.

FOR FURTHER INFORMATION CONTACT: For questions about this interim rule, contact: Thomas Feddo, Deputy Assistant Secretary for Investment Security; Laura Black, Director of Investment Security Policy and International Relations; Meena Sharma, Senior Policy Advisor; or Juliana Gabrovsky, Policy Advisor, at U.S. Department of the Treasury, 1500 Pennsylvania Avenue NW, Washington, DC 20220; telephone: (202) 622–3425; email: *CFIUS.pilotprogram@treasury.gov.*

SUPPLEMENTARY INFORMATION:

I. Background

The Foreign Investment Risk Review Modernization Act of 2018 (FIRRMA), Subtitle A of Title XVII of Public Law 115–232 (Aug. 13, 2018), amended section 721 of the Defense Production Act of 1950 (DPA). Prior to the enactment of FIRRMA, section 721 of the DPA (section 721) authorized the President, acting through the Committee, to review mergers, acquisitions, and takeovers by or with any foreign person which could result in foreign control of any person engaged in interstate commerce in the United States, to determine the effects of such transactions on the national security of the United States. FIRRMA modified and broadened the authorities of the President and CFIUS under section 721 in several ways including, without limitation, by expanding the scope of

foreign investments in the United States subject to national security review pursuant to section 721.

Section 1727(a) of FIRRMA made certain provisions of FIRRMA effective immediately upon enactment on August 13, 2018. Section 1727(b) of FIRRMA, however, delayed the effectiveness of any provision of FIRRMA not specified in section 1727(a) until the earlier of: (1) The date that is 18 months after the date of enactment of FIRRMA (*i.e.,* February 13, 2020); or (2) the date that is 30 days after publication in the **Federal Register** of a determination by the chairperson of CFIUS that the regulations, organizational structure, personnel, and other resources necessary to administer the new provisions are in place.

Notwithstanding section 1727(b), section 1727(c) of FIRRMA authorizes CFIUS to conduct one or more pilot programs to implement any authority provided pursuant to any provision of, or amendment made by, FIRRMA that did not take effect immediately upon enactment. Section 1727(c) states that a pilot program may not commence until the date that is 30 days after publication in the **Federal Register** of a determination by the chairperson of CFIUS of the scope of, and procedures for, the pilot program. This document and the interim rule set forth herein constitute the required determination of the scope of, and procedures for, a CFIUS pilot program relating to critical technologies pursuant to section 1727(c)(2) of FIRRMA.

II. Waiver of Public Comment Requirement for Temporary Provisions

The interim rule set forth in this document implements a pilot program, pursuant to section 721, relating to foreign investment into certain U.S. businesses that produce, design, test, manufacture, fabricate, or develop one or more critical technologies. Section 709(a) of the DPA (50 U.S.C. 4559(a)) provides that regulations issued under the DPA are not subject to the rulemaking requirements of the Administrative Procedure Act (APA). Moreover, to the extent that the rulemaking requirements of the APA were determined to apply to this interim rule, the provisions of the APA requiring notice of proposed rulemaking, opportunity for public participation, and delay in effective date (5 U.S.C. 553), as well as the provisions of Executive Order 13771, are inapplicable because this interim rule involves a foreign affairs function of the United States. By its terms, the pilot program to be implemented pursuant to this interim rule regulates the conduct of foreign persons seeking to acquire certain interests in particular U.S. businesses, precisely because the acquisition of such interests could harm the strategic national security interests of the United States vis-à-vis other nations.

Notwithstanding that the rulemaking requirements of the APA do not apply to this interim rule, Section 709(b)(1) of the DPA provides that, except as otherwise provided in section 709, any regulation issued under the DPA must be published in the **Federal Register** and opportunity for public comment must be provided for not less than 30 days, consistent with the requirements of 5 U.S.C. 553(b).

Section 709(b)(2) of the DPA (50 U.S.C. 4559(b)(2)), however, provides that the requirements of section 709(b)(1) may be waived if: (1) The officer authorized to issue the regulation finds that urgent and compelling circumstances make compliance with such requirements impracticable; (2) the regulation is issued on a temporary basis [1]; and (3) the publication of such temporary regulation is accompanied by the finding made under (1) (and a brief statement of the reasons for such finding) and an opportunity for public comment is provided for not less than 30 days before any regulation becomes final.

The regulations set forth in this document meet the three requirements of section 709(b)(2) of the DPA for the reasons below, and therefore qualify for waiver of the public comment requirement of section 709(b)(1) of the DPA.

First, as required by section 709(b)(2)(A) of the DPA, and for the reasons described in part III, below, the Secretary of the Treasury finds, and the Committee agrees, that urgent and compelling circumstances make completion of the process for public participation in rulemaking set forth in section 709 of the DPA impracticable prior to the effectiveness of this interim rule.

Second, pursuant to section 1727(c)(1) of FIRRMA, the authority for a pilot program is time limited to no more than 570 days following the date of FIRRMA's enactment, making any FIRRMA pilot program inherently temporary. Consistent with that limitation and the requirement of section 709(b)(2)(B) of the DPA, these regulations are issued on a temporary basis. Section 801.101 sets forth the duration of the pilot program regulations.

[1] Temporary regulations with no specific expiration date are ''interim rules'' for purposes of **Federal Register** classification.

Third, consistent with the requirement of section 709(b)(2)(C) of the DPA, if the Committee intends to make the provisions of this interim rule final, CFIUS will complete the process for public participation in rulemaking set forth in section 709 of the DPA in conjunction with the issuance of a final rule.

Given the pilot program's scope and objectives, considering and responding to public comments prior to the effectiveness of this interim rule would be inconsistent with U.S. foreign affairs interests because it would delay the effective date of the pilot program, which could provide threat actors with time to harm U.S. national security by quickly acquiring U.S. critical technologies, contrary to the urgent and compelling circumstances justifying this program, as discussed below.

As a result, the Committee is providing an immediate opportunity for public comment on this interim rule and will consider and address such comments in the process of promulgating any final rule, consistent with section 709(b)(3) of the DPA. This approach appropriately balances the urgency of the pilot program with the need for public participation in the formulation of any final rule.

III. Urgent and Compelling Circumstances for the Pilot Program

The passage of FIRRMA was based upon concerns that, as noted at section 1702(b)(4) of FIRRMA, ''the national security landscape has shifted in recent years, and so has the nature of the investments that pose the greatest potential risk to national security. . . .'' FIRRMA provides CFIUS time to develop the resources and regulations necessary to administer all of FIRRMA's provisions before the statute becomes fully effective. Notwithstanding this, FIRRMA also provides the authority for pilot programs and, in doing so, recognizes the need to immediately assess and address significant risks to national security posed by some foreign investments.

In order to be effective in identifying and addressing these national security risks, FIRRMA recognizes that there may be circumstances in which the Committee deems it appropriate to require mandatory declarations for specific types of transactions. This pilot program establishes mandatory declarations for certain transactions involving investments by foreign persons in certain U.S. businesses that produce, design, test, manufacture, fabricate, or develop one or more critical technologies. The purpose of the pilot program is to assess and address

ongoing risks to the national security of the United States resulting from two urgent and compelling circumstances: (1) The ability and willingness of some foreign parties to obtain equity interests in U.S. businesses in order to affect certain decisions regarding, or to obtain certain information relating to, critical technologies; and (2) the rapid pace of technological change in certain U.S. industries. The Committee has developed this pilot program without exempting any country from the mandatory declaration requirement in order 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. Further, foreign investors that may present national security concerns are becoming increasingly sophisticated in structuring investments in a manner that may obfuscate those concerns, including by utilizing entities in other jurisdictions. As a result, CFIUS is implementing this pilot program on a global basis. The pilot program will inform the full implementation of FIRRMA, including the Committee's approach with respect to the country specification provision in FIRRMA.

Technological superiority has long underpinned the United States' military strategy and national security innovation base. The Administration supports protecting our national security from emerging risks while maintaining an open investment policy. Although the vast majority of foreign direct investment in the United States provides economic benefits to our nation—including the promotion of economic growth, productivity, competitiveness, and job creation—some foreign direct investment threatens to undermine the technological superiority that is critical to U.S. national security. Specifically, the threat to critical technology industries is more significant than ever as some foreign parties seek, through various means, to acquire sensitive technologies with relevance for U.S. national security. Foreign investment in U.S. critical technologies has grown significantly in the past decade, and an enhanced framework is needed to address the potential impacts of this growth on U.S. national security.

Prior to FIRRMA, CFIUS's authorities did not sufficiently address the new and emerging risks that foreign direct investment can pose to U.S. technological superiority. For example, foreign investors do not need to acquire a controlling interest in order to affect certain decisions made by, or obtain certain information from, a U.S. business with respect to the use, development, acquisition, or release of critical technology. CFIUS's authorities, however, only applied to transactions that could result in foreign control of a U.S. business. Consequently, CFIUS had no authority to prevent a foreign entity from acquiring a non-controlling interest in a U.S. business that produces, designs, tests, manufactures, fabricates, or develops one or more critical technologies. FIRRMA provides CFIUS new authorities to address the national security concerns that may arise from these investments, but those authorities were not immediately effective upon FIRRMA's enactment.

Together, the pace of technological change in certain critical technology industries, the significant growth in foreign investment in certain industries relevant to national security, and the current inability of CFIUS to examine certain non-controlling transactions creates urgent and compelling circumstances for the pilot program that make completion of the process for public participation in rulemaking set forth in section 709 of the DPA impracticable prior to the effectiveness of this interim rule. Implementing the pilot program expeditiously is necessary both to protect critical technologies and to evaluate how best to implement certain aspects of FIRRMA in the long-term. The temporary nature of the pilot program and the short timeframe within which to gather data to help inform the full implementation of FIRRMA compel a rapid implementation of this interim rule. Delaying effectiveness of the interim rule would create an unacceptable risk of erosion of U.S. technological superiority. Without immediate action, foreign parties will be able to influence the use of, and decisions made by U.S. businesses with respect to, critical technologies through the types of investments FIRRMA is intended to address. The list of pilot program industries identified in Annex A has been carefully developed by the U.S. government to narrowly scope the pilot program to include only those industries in which the threat of erosion of technological superiority from some foreign direct investment requires immediate action. As noted above, the Committee invites comments on this interim rule, will consider any comments received, and if the Committee intends to make the provisions of this interim rule final, will include in any final rule responses to such comments.

Notwithstanding the issuance of this interim rule, the regulations at part 800 remain in effect.

IV. Discussion of the Pilot Program Interim Rule

Subpart-by-Subpart Overview of the Pilot Program Interim Rule

The interim rule builds upon existing rules governing CFIUS's review of transactions for national security considerations and adds a pilot program with two purposes. First, the pilot program expands the scope of transactions subject to review by CFIUS to include transactions subject to a portion of FIRRMA's ''other investments'' provision. Second, the pilot program makes effective FIRRMA's mandatory declarations provision for transactions that fall within the specific scope of the pilot program. The scope, procedures, and terms used in the pilot program are specific to the pilot program and subject to change in the proposed final rule implementing FIRRMA. The following discussion provides an overview of each subpart of the interim rule.

Subpart A

Subpart A sets forth the scope of the pilot program, its applicability based on the timing of certain events relating to a transaction, and the effect of the pilot program on other laws. FIRRMA authorizes the Committee to conduct one or more pilot programs to implement any authority provided pursuant to any provision of, or amendment made by, FIRRMA that did not take effect on the date of its enactment. This pilot program expands the scope of transactions subject to review by CFIUS to include certain investments by foreign persons in certain U.S. businesses that produce, design, test, manufacture, fabricate, or develop one or more critical technologies. The pilot program also requires the submission of declarations with basic information regarding certain covered transactions, unless the parties elect to file a notice instead. The purpose of implementing a pilot program addressing these areas is to confront the rapid changes in certain critical technology industries, the significant growth of certain types of foreign investment in those industries, and the current inability of CFIUS to review non-controlling transactions, which creates an unacceptable risk of undermining U.S. technological superiority in industries with national security implications. The regulations in this interim rule supplement existing regulations implementing section 721 of the DPA, which remain in effect. Consistent with section 1727(c)(1) of FIRRMA, the pilot program implemented through these regulations

will end no later than March 5, 2020, the date that is 570 days after the enactment of FIRRMA. These regulations will be amended, replaced, or removed no later than the date on which the pilot program ends.

As set forth in section 801.103(b), these regulations do not apply to transactions for which the completion date is prior to the pilot program effective date, or transactions for which the parties have executed a binding written agreement or other document establishing the material terms of the transaction prior to October 11, 2018.

Consistent with CFIUS's existing regulations under part 800, the pilot program does not affect or limit other authorities of the government.

Subpart B

Subpart B sets forth defined terms used in the remainder of the pilot program regulations. The following discussion describes several key terms from subpart B.

Section 801.203. FIRRMA defines the term ''investment'' as including the acquisition of a ''contingent equity interest,'' but does not define the term ''contingent equity interest.'' The pilot program interim rule provides a definition for the term *contingent equity interest.*

Section 801.204. The term *critical technologies* is defined consistent with the definition set forth in FIRRMA.

Section 801.206. The term *investment* is defined consistent with the definition set forth in FIRRMA.

Section 801.207. FIRRMA provides clarification that certain types of investments by foreign persons as limited partners or the equivalent on an advisory board or a committee of an investment fund will not be considered ''other investments'' for the purposes of FIRRMA, as reflected in section 801.304 of these regulations. The term *investment fund* is defined in subpart B by reference to the Investment Company Act of 1940 (15 U.S.C. 80a–1 *et seq.*).

Section 801.208. In this interim rule, the Committee is implementing the portion of the definition of the term *material nonpublic technical information* in FIRRMA that is related to critical technologies. The portion of FIRRMA's definition of the term ''material nonpublic technical information'' that relates to critical infrastructure is not part of this pilot program.

Section 801.209. The term *pilot program covered investment* implements most of the definition of ''other investment'' in FIRRMA. The pilot program, however, does not implement a portion of the third part of the ''other investment'' definition in FIRRMA regarding involvement, other than through voting of shares, in substantive decisionmaking regarding sensitive personal data of U.S. citizens or critical infrastructure.

Section 801.210. The term *pilot program covered transaction* includes the new concept of ''pilot program covered investment,'' described above. The term *pilot program covered transaction* also includes transactions that could result in foreign control of a U.S. business, consistent with the language in FIRRMA, but only to the extent that the U.S. business is a pilot program U.S. business.

Section *801.213.* The term *pilot program U.S. business* includes any U.S. business that produces, designs, tests, manufactures, fabricates, or develops a critical technology that is either utilized in connection with the U.S. business's activity in one or more pilot program industries, or designed by the U.S. business specifically for use in one or more pilot program industries. For purposes of the pilot program, this definition has been narrowly scoped to allow CFIUS to assess and address the foreign investment transactions most likely to raise concerns regarding the technological superiority of the United States in industries of national security importance.

Subpart C

Subpart C describes the coverage of the pilot program with a focus on pilot program covered investments. The analysis as to whether a transaction could result in control of a pilot program U.S. business by a foreign person generally follows the same analysis as under part 800, with the additional requirement that the U.S. business in question must be a pilot program U.S. business. The examples provided throughout subpart C are intended to illustrate the application of the definitions to the particular hypothetical situations. The examples are presented for the purpose of aiding the understanding of readers. They neither limit the definitions set forth in subpart B nor exhaust the scenarios to which such definitions could apply.

Subpart C illustrates that, where CFIUS has concluded all action under section 721 for a pilot program covered investment (regardless of whether the notification was made through a declaration or a notice), any incremental investment that meets the requirements of section 801.209, even if involving the same foreign person in the same pilot program U.S. business, will nevertheless be a pilot program covered investment and subject to this pilot program.

Subpart C also implements portions of section 1703 of FIRRMA that limit the application of CFIUS authority over certain types of investment fund investments and provides an explicit exception for investments involving air carriers.

Subpart D

Subpart D requires that the parties to a pilot program covered transaction submit to the Committee a declaration regarding the transaction, unless the parties elect to submit a written notice pursuant to subpart E instead. Generally, mandatory declarations must be made at least 45 days before the expected completion date of the transaction. As noted in section 801.401(d), the regulatory safe harbor described in section 800.204(e) is not available for pilot program covered transactions for which the Committee completes all action under section 721 on the basis of a declaration, irrespective of whether the transaction could result in foreign control of a U.S. business. Any subsequent or incremental acquisition that constitutes a pilot program covered transaction must be submitted to CFIUS through a notice or declaration. For the avoidance of doubt, transactions that could result in control of a pilot program U.S. business by a foreign person and that are filed as a written notice, and for which the Committee completes all action under section 721, would receive the benefit of the regulatory safe harbor described in section 800.204(e).

FIRRMA distinguishes declarations from notices in three primary respects: (1) The length of the submission; (2) the time for CFIUS's consideration of the submission; and (3) the Committee's options for disposition of the submission. The interim rule recognizes these distinctions in the manner described below.

First, section 801.403 sets forth the information required in a declaration, which is consistent with FIRRMA's requirement that CFIUS establish declarations as ''abbreviated notices that would not generally exceed 5 pages in length.'' As part of the declaration process, parties will have the opportunity to voluntarily stipulate that the transaction is a pilot program covered transaction and, if so, whether the transaction could result in control of a pilot program U.S. business by a foreign person and whether the transaction is a foreign-government controlled transaction. Such stipulations would streamline certain aspects of CFIUS's review of a declaration, thereby reducing the burden on CFIUS and potentially

leading to a faster resolution for the submitting parties.

Second, consistent with FIRRMA, section 801.404 requires that the Committee take action on a declaration within 30 days of the Committee's receipt of the declaration from the Staff Chairperson. The Staff Chairperson will circulate the declaration to the Committee after inspecting the declaration and determining it to be complete. This implements FIRRMA's distinction that CFIUS complete review of a notice within 45 days and take action upon a declaration within 30 days.

Finally, section 801.407 implements FIRRMA's mandate that the Committee take one of four actions with respect to a declaration: (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 notice to seek written notification from the Committee that the Committee has completed all action under section 721 with respect to the transaction; (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.

Section 801.407 also makes clear that parties may not submit more than one declaration for the same or a substantially similar transaction without approval from the Staff Chairperson. The purpose of this is to avoid situations where, due to the abbreviated information requests, a party or parties file a declaration even before the material terms of a transaction have been agreed upon, subsequently complete their negotiations, and attempt to withdraw and resubmit a new declaration for the same or a substantially similar transaction.

The distinctions between notices and declarations outlined here—that is, the complexity of the submission and the parties' desired timing—underpin the primary interrelated factors that parties should consider when determining whether a pilot program covered transaction is best notified to the Committee through a declaration or a notice.

As noted above, the scope, procedures, and certain terms used in the pilot program are specific to the pilot program and subject to change in the proposed final rule implementing FIRRMA.

Subpart E

Subpart E generally applies the existing CFIUS procedural regulations in part 800 to notices of pilot program covered transactions. This subpart recognizes that parties, at their discretion, may elect to file a notice for a pilot program covered transaction instead of a declaration. The purpose of the subpart is to clarify that, where parties elect to file a notice instead of a declaration, or file a notice for a pilot program covered transaction following the Committee's action on a declaration, the procedural elements of CFIUS's existing regulations under part 800 generally will apply to that notice. Certain additional information will be required from the parties with respect to any pilot program covered investment notified to the Committee through a notice.

For the avoidance of doubt, while the pilot program implements certain provisions of FIRRMA that allow CFIUS to review certain non-controlling transactions involving critical technology in specified industries, it does not change CFIUS's analysis with respect to a transaction that could result in foreign control of a U.S. business under the regulations at part 800.

Additionally, a party (or parties) to a pilot program covered transaction that has filed a written notice pursuant to section 800.401(a) regarding the transaction may not submit to the Committee a declaration regarding the same transaction, or a substantially similar transaction, without the approval of the Staff Chairperson. The purpose of the declaration is to allow for an assessment of certain information relating to certain transactions that may not, because of the scope and other factors, necessitate the collection of all of the information set forth in section 800.402(c). As noted above, parties should consider whether the transaction is of the type that would be appropriate for a declaration, or whether it would be more appropriate to notify the Committee of the transaction by filing a written notice.

Subpart F

Subpart F implements authorities provided pursuant to, and amendments made by, FIRRMA.

Executive Order 12866

These regulations are not subject to the general requirements of Executive Order 12866 because they relate to a foreign affairs function of the United States pursuant to section 3(d)(2) of that order.

Paperwork Reduction Act

The collection of information contained in this rule has been submitted to the Office of Management and Budget in accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3507(d)) and assigned control number 1505–0121. Under the Paperwork Reduction Act, an agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a valid control number assigned by the Office of Management and Budget.

Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA) (5 U.S.C. 601 *et seq.*) generally requires an agency to prepare a regulatory flexibility analysis, unless the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. The RFA applies when an agency is required to publish a general notice of proposed rulemaking under section 553(b) of the APA, or any other law. As set forth below, because regulations issued pursuant to the DPA are not subject to the rulemaking provisions of the APA, or other law requiring the publication of a general notice of proposed rulemaking, the RFA does not apply.

This interim rule implements section 721 of the DPA. Section 709(a) of the DPA provides that the regulations issued under it are not subject to the rulemaking requirements of the APA. Section 709(b)(1) instead provides that any regulation issued under the DPA be published in the **Federal Register** and opportunity for public comment be provided for not less than 30 days. (Notwithstanding the notice requirements of section 709(b)(1), section 709(b)(2) of the DPA waives the DPA's public comment provision for temporary provisions. As discussed in part II above, this interim rule implements a pilot program and is issued pursuant to the section 709(b)(2) waiver provision.) Section 709(b)(3) of the DPA also provides that all comments received during the public comment period be considered and the publication of the final regulation contain written responses to such comments. Consistent with the plain text of the DPA, legislative history confirms that Congress intended that regulations under the DPA be exempt from the notice and comment provisions of the APA and instead provided that the agency include a statement that interested parties were consulted in the formulation of the final regulation. See H.R. Conf. Rep. No. 102–1028, at 42 (1992) and H.R. Rep. No. 102–208 pt. 1, at 28 (1991). The limited public participation procedures described in the DPA do not require a general notice of proposed rulemaking as set forth in the RFA. Further, the mechanisms for

publication and public participation are sufficiently different to distinguish the DPA procedures from a rule that requires a general notice of proposed rulemaking. In providing the President with expanded authority to suspend or prohibit the acquisition, merger, or takeover of, or certain other investments in, a domestic firm by a foreign firm if such action would threaten to impair the national security, Congress could not have contemplated that regulations implementing such authority would be subject to RFA analysis. For these reasons, the RFA does not apply to these regulations.

List of Subjects in 31 CFR Part 801

Foreign investments in the United States, Investigations, National defense, Reporting and recordkeeping requirements.

■ Accordingly, under the authority provided by section 1727(c) of FIRRMA, for the reasons stated in the preamble, the Department of the Treasury amends 31 CFR chapter VIII by adding part 801 as follows:

PART 801—PILOT PROGRAM TO REVIEW CERTAIN TRANSACTIONS INVOLVING FOREIGN PERSONS AND CRITICAL TECHNOLOGIES

Subpart A—General

Sec.
801.101 Scope.
801.102 Effect on other law.
801.103 Applicability rule.

Subpart B—Definitions

801.201 General.
801.202 Completion date.
801.203 Contingent equity interest.
801.204 Critical technologies.
801.205 FIRRMA.
801.206 Investment.
801.207 Investment fund.
801.208 Material nonpublic technical information.
801.209 Pilot program covered investment.
801.210 Pilot program covered transaction.
801.211 Pilot program effective date.
801.212 Pilot program industry.
801.213 Pilot program U.S. business.
801.214 Unaffiliated pilot program U.S. business.

Subpart C—Pilot Program Covered Transactions

801.301 Control.
801.302 Transactions that are pilot program covered transactions.
801.303 Transactions that are not pilot program covered transactions.
801.304 Treatment of certain investment fund investments.
801.305 Exception for air carriers.
801.306 Timing rule for contingent equity interests.

Subpart D—Mandatory Declarations Under the Pilot Program

801.401 Mandatory declarations under the pilot program.
801.402 Procedures for declarations under the pilot program.
801.403 Contents of declarations under the pilot program.
801.404 Beginning of thirty-day period.
801.405 General.
801.406 Rejection, disposition, or withdrawal of declarations.
801.407 Committee actions.
801.408 Confidentiality.
801.409 Penalties.

Subpart E—Notice of Pilot Program Covered Transaction

801.501 Notice of pilot program covered transactions.
801.502 Applicability of part 800.
801.503 Additional contents of written notice.
801.504 Agency notice of pilot program covered transactions.

Subpart F—Implementation of Certain Authority Provided in FIRRMA

801.601 Implementation of certain authority regarding covered transactions.
801.602 Implementation of certain authority regarding mandatory declarations.

Annex A to Part 801—Industries

Authority: 50 U.S.C. 4565; Pub. L. 115–232.

Subpart A—General

§ 801.101 Scope.

The regulations in this part implement a pilot program in accordance with section 1727(c) of the Foreign Investment Risk Review Modernization Act of 2018. Pursuant to section 1727(c), the pilot program implements authorities provided in certain provisions of, or amendments made by, the Foreign Investment Risk Review Modernization Act of 2018 that did not take effect on the date of its enactment. This pilot program expands the scope of transactions reviewable by CFIUS to include certain investments by foreign persons in certain U.S. businesses that produce, design, test, manufacture, fabricate, or develop one or more critical technologies. The pilot program also requires that parties to a pilot program covered transaction notify CFIUS of the transaction by either submitting a declaration or filing a written notice. The regulations in this part supplement the existing regulations implementing section 721 of the Defense Production Act of 1950, as amended, under part 800 to Title 31 CFR Chapter VIII, which remain in effect. The pilot program implemented through these regulations will end no later than the date on which the full regulations implementing the Foreign Investment Risk Review Modernization Act of 2018 become effective, and in no event later than the date that is 570 days after the enactment of the Foreign Investment Risk Review Modernization Act of 2018. These regulations will be amended, replaced, or removed no later than the date on which the pilot program ends.

§ 801.102 Effect on other law.

Unless otherwise indicated, nothing in this part shall be construed as altering or affecting any other authority, process, regulation, investigation, enforcement measure, or review provided by or established under any other provision of federal law, including the International Emergency Economic Powers Act (50 U.S.C. 1701–1706), or any other authority of the President or the Congress under the Constitution of the United States.

§ 801.103 Applicability rule.

(a) Except as provided in paragraph (b) of this section and otherwise in this part, the regulations in this part apply from the pilot program effective date.

(b) The regulations in this part do not apply to any transaction for which:

(1) The completion date is prior to the pilot program effective date; or

(2) The following has occurred before October 11, 2018:

(i) The parties to the transaction have executed a binding written agreement or other document establishing the material terms of the transaction;

(ii) A party has made a public offer to shareholders to buy shares of a pilot program U.S. business; or

(iii) A shareholder has solicited proxies in connection with an election of the board of directors of a pilot program U.S. business or has requested the conversion of convertible voting securities.

Subpart B—Definitions

§ 801.201 General.

Unless otherwise indicated, terms used in the regulations in this part that are defined in §§ 800.201 through 800.228 of this chapter have the meanings set forth therein.

§ 801.202 Completion date.

The term *completion date* means, with respect to a transaction, the date upon which an ownership interest, including a contingent equity interest, is conveyed, assigned, delivered, or otherwise transferred to a person, or a change in rights occurs.

§ 801.203 Contingent equity interest.

The term *contingent equity interest* means a financial instrument that currently does not entitle its owner or holder to voting rights but is convertible into an equity interest with voting rights.

§ 801.204 Critical technologies.

The term *critical technologies* means the following:

(a) Defense articles or defense services included on the United States Munitions List set forth in the International Traffic in Arms Regulations (ITAR) (22 CFR 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 CFR 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 CFR part 810 (relating to assistance to foreign atomic energy activities).

(d) Nuclear facilities, equipment, and material covered by 10 CFR part 110 (relating to export and import of nuclear equipment and material).

(e) Select agents and toxins covered by 7 CFR part 331, 9 CFR part 121, or 42 CFR part 73.

(f) Emerging and foundational technologies controlled pursuant to section 1758 of the Export Control Reform Act of 2018.

§ 801.205 FIRRMA.

The term *FIRRMA* means the Foreign Investment Risk Review Modernization Act of 2018, Subtitle A of Title XVII of Public Law 115–232 (Aug. 13, 2018).

§ 801.206 Investment.

The term *investment* means the acquisition of equity interest, including contingent equity interest.

§ 801.207 Investment fund.

The term *investment fund* means 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.

§ 801.208 Material nonpublic technical information.

(a) The term *material nonpublic technical information* means 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.

(b) The term *material nonpublic technical information* does not include financial information regarding the performance of an entity.

§ 801.209 Pilot program covered investment.

The term *pilot program covered investment* means an investment, direct or indirect, by a foreign person in an unaffiliated pilot program U.S. business that could not result in control by a foreign person of a pilot program U.S. business and that affords the foreign person:

(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.

§ 801.210 Pilot program covered transaction.

The term *pilot program covered transaction* means:

(a) Any pilot program covered investment; or

(b) 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.

§ 801.211 Pilot program effective date.

The term *pilot program effective date* means November 10, 2018.

§ 801.212 Pilot program industry.

The term *pilot program industry* means any industry identified in Annex A to part 801 by reference to the North American Industry Classification System (NAICS).

§ 801.213 Pilot program U.S. business.

The term *pilot program U.S. business* means any U.S. business that 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.

§ 801.214 Unaffiliated pilot program U.S. business.

The term *unaffiliated pilot program U.S. business* means, with respect to a foreign person, a pilot program U.S. business in which that foreign person does not directly hold more than fifty percent of the outstanding voting interest or have the right to appoint more than half of the members of the board of directors or equivalent governing body.

Subpart C—Pilot Program Covered Transactions

§ 801.301 Control.

For the sole purpose of determining whether a transaction could result in control of a pilot program U.S. business by a foreign person, the provisions set forth in subpart C of this part (excluding § 800.302(b) of this chapter and the examples thereunder) regarding covered transactions shall apply to any pilot program covered transaction declared to the Committee pursuant to § 801.401 or notified to the Committee pursuant to § 801.501.

§ 801.302 Transactions that are pilot program covered transactions.

Transactions that are pilot program covered transactions include, without limitation:

(a) A transaction that meets the requirements of § 801.209, irrespective of the percentage of voting interest acquired.

Example 1. Corporation A, a foreign person, proposes to acquire a four percent, non-controlling equity interest in Corporation B. Corporation B is a U.S. business that manufactures a critical technology as part of its business in a pilot program industry. Corporation B is therefore a pilot program U.S. business. Pursuant to the terms of the investment, a designee of Corporation A will have the right to observe the meetings of the board of directors of Corporation B. The proposed transaction is a pilot program covered investment and therefore a pilot program covered transaction.

Example 2. Corporation A, a foreign person, proposes to acquire a four percent, non-controlling equity interest in Corporation B, a pilot program U.S. business as described above. Pursuant to the terms of the investment, Corporation A has approval rights with respect to Corporation B's licensing of a critical technology to third parties. Corporation A is therefore involved

in substantive decisionmaking with respect to Corporation B and the proposed transaction is a pilot program covered investment and a pilot program covered transaction.

(b) A transaction that meets the requirements of § 801.209, irrespective of the fact that the Committee concluded all action under section 721 for a previous pilot program covered investment by the same foreign person in the same pilot program U.S. business, where such transaction involves the acquisition of access or rights described by § 801.209 in addition to those notified to the Committee in the transaction for which the Committee previously concluded action.

Example. The Committee concludes all action under section 721 with respect to a pilot program covered investment by Corporation A, a foreign person, in which Corporation A acquires a four percent, non-controlling equity interest with board observer rights in Corporation B, a pilot program U.S. business. One year later, Corporation A proposes to acquire an additional five percent equity interest in Corporation B, resulting in Corporation A holding a nine percent, non-controlling equity interest in Corporation B. Pursuant to the terms of the additional investment, Corporation A will be provided access to material nonpublic technical information in the possession of Corporation B to which Corporation A did not previously have access. The proposed transaction is a pilot program covered investment and therefore a pilot program covered transaction because the transaction involves both an acquisition of an equity interest in a pilot program U.S. business and a new right to access material nonpublic technical information.

(c) A transaction that meets the requirements of § 801.209, irrespective of the fact that the critical technology produced, designed, tested, manufactured, fabricated, or developed by the pilot program U.S. business became controlled pursuant to section 1758 of the Export Control Reform Act of 2018 after the pilot program effective date, unless any of the criteria set forth in paragraphs (b)(2)(i) through (b)(2)(iii) of § 801.103 is satisfied with respect to the transaction prior to the critical technology becoming controlled pursuant to section 1758 of the Export Control Reform Act of 2018.

Example. Corporation A, a foreign person, has executed a written agreement establishing the material terms of a proposed non-controlling investment in Corporation B, a pilot program U.S. business. The proposed investment will afford Corporation A access to material nonpublic technical information in the possession of Corporation B. The only controlled technology produced, designed, tested, manufactured, fabricated, or developed by Corporation B became controlled pursuant to section 1758 of the Export Control Reform Act of 2018 after the pilot program effective date but prior to the date upon which the written agreement establishing the material terms of the investment was executed. The proposed transaction is a pilot program covered investment and therefore a pilot program covered transaction.

(d) A transaction by or with any foreign person that could result in foreign control of any pilot program U.S. business.

Example. Corporation A, a foreign person, acquires a 40 percent interest and the ability to determine important matters with respect to Corporation B, a U.S. pilot program business. The proposed transaction is a pilot program covered transaction.

§ 801.303 Transactions that are not pilot program covered transactions.

Transactions that are not pilot program covered transactions include, without limitation:

(a) An investment by a foreign person in a U.S. business that manufactures a technology that it utilizes in connection with its activity in one or more pilot program industries, but does not produce, design, test, manufacture, fabricate, or develop one or more critical technologies.

Example. Corporation A, a foreign person, proposes to acquire a four percent, non-controlling equity interest in Corporation B, a U.S. business that operates in a pilot program industry. Pursuant to the terms of the investment, a designee of Corporation A will have the right to observe the meetings of the board of directors of Corporation B. Corporation B does not produce, design, test, manufacture, fabricate, or develop any critical technology. Assuming no other relevant facts, the proposed transaction is not a pilot program covered transaction.

(b) An investment by a foreign person in a pilot program U.S. business that does not afford the foreign person any of the rights specified in paragraphs (a), (b), or (c) of § 801.209 or any control rights.

Example. The Committee concluded all action under section 721 with respect to a pilot program covered transaction in which Corporation A, a foreign person, acquired a four percent, non-controlling equity interest with board observer rights in Corporation B, a pilot program U.S. business. One year later, Corporation A proposes to acquire an additional five percent equity interest in Corporation B, which would result in Corporation A holding a nine percent, non-controlling equity interest in Corporation B. The proposed investment does not afford Corporation A any additional rights with respect to Corporation B, including the rights specified in § 801.209. Assuming no other relevant facts, the proposed transaction is not a pilot program covered transaction.

(c) A transaction that results or could result in control by a foreign person of a U.S. business that is not a pilot program U.S. business.

Example. Corporation A, a foreign person, proposes to purchase all of the shares of Corporation B, which is a U.S. business that operates in a pilot program industry but does not produce, design, test, manufacture, fabricate, or develop any critical technology. As the sole owner, Corporation A will have the right to elect directors and appoint other primary officers of Corporation B. Assuming no other relevant facts, the proposed transaction is not a pilot program covered transaction. It is, however, a covered transaction (see § 800.301 of this chapter).

§ 801.304 Treatment of certain investment fund investments.

(a) 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 a committee of the fund shall not be considered a pilot program covered transaction with respect to the foreign person if:

(1) The fund is managed exclusively by a general partner, a managing member, or an equivalent;

(2) The foreign person is not the general partner, managing member, or equivalent;

(3) The advisory board or committee does not have the ability to approve, disapprove, or otherwise control:

(i) Investment decisions of the investment fund; or

(ii) Decisions made by the general partner, managing member, or equivalent related to entities in which the investment fund is invested;

(4) The foreign person does not otherwise have the ability to control the investment fund, including the authority:

(i) To approve, disapprove, or otherwise control investment decisions of the investment fund;

(ii) To approve, disapprove, or otherwise control decisions made by the general partner, managing member, or equivalent related to entities in which the investment fund is invested; or

(iii) To unilaterally dismiss, prevent the dismissal of, select, or determine the compensation of the general partner, managing member, or equivalent;

(5) The foreign person does not have access to material nonpublic technical information as a result of its participation on the advisory board or committee; and

(6) The investment otherwise meets the requirements of paragraph (4)(D) of subsection (a) of section 721 made effective by part 801.

(b) For the purposes of paragraphs (a)(3) and (4), and except as provided in

paragraph (c) of this section, a waiver of a potential conflict of interest, a waiver of an allocation limitation, or a similar activity, applicable to a transaction pursuant to the terms of an agreement governing an investment fund shall not be considered to constitute control of investment decisions of the investment fund or decisions relating to entities in which the investment fund is invested.

(c) In extraordinary circumstances, the Committee may consider the waiver of a potential conflict of interest, the waiver of an allocation limitation, or a similar activity, applicable to a transaction pursuant to the terms of an agreement governing an investment fund, to constitute control of investment decisions of the investment fund or decisions relating to entities in which the investment fund is invested.

Example 1. Corporation A, a foreign person, makes an investment in an investment fund as a limited partner. The investment confers membership on an advisory board of the investment fund. The investment fund holds 100 percent of the ownership interests in a pilot program U.S. business. Corporation A will have the right to approve decisions made by the general partner with respect to the use and development of the critical technologies produced by the pilot program U.S. business. This transaction is a pilot program covered transaction.

Example 2. Corporation A, a foreign person, makes an investment in an investment fund as a limited partner. The investment confers membership on an advisory board of the investment fund. The investment fund holds 100 percent of the ownership interests in a pilot program U.S. business. Corporation A is not the general partner that wholly manages the investment fund. Corporation A lacks any ability to control the investment fund or its decisions. As a member of the advisory board, Corporation A has the right to vote on the compensation of the general partner and the right to vote on the dismissal of the general partner for cause, but does not have the power to determine either of these matters unilaterally. Assuming no other relevant facts, this transaction is not a pilot program covered transaction with respect to Corporation A.

§ 801.305 Exception for air carriers.

No investment involving an air carrier, as defined in section 40102(a)(2) of title 49, United States Code, that holds a certificate issued under section 41102 of that title shall be a pilot program covered transaction.

§ 801.306 Timing rule for contingent equity interests.

The provisions set forth in § 800.304 of this chapter regarding convertible voting instruments shall apply to contingent equity interests.

Subpart D—Mandatory Declarations Under the Pilot Program

§ 801.401 Mandatory declarations under the pilot program.

(a) Except as provided in paragraph (b) of this section, the parties to a pilot program covered transaction shall submit to the Committee a declaration with information regarding the transaction in accordance with § 801.402.

(b) Notwithstanding paragraph (a) of this section, parties to a pilot program covered transaction may elect to submit a written notice pursuant to subpart E of this part regarding the transaction instead of a declaration. Parties to a pilot program covered transaction that have filed with the Committee a written notice regarding a transaction pursuant to § 801.501 may not submit to the Committee a declaration regarding the same transaction or a substantially similar transaction without the approval of the Staff Chairperson.

(c) Parties shall submit to the Committee the declaration required pursuant to paragraph (a) of this section, or a written notice pursuant to paragraph (b) of this section, no later than:

(1) November 10, 2018, or promptly thereafter, if the completion date of the transaction is between November 10, 2018 and December 25, 2018; or

(2) 45 days before the completion date of the transaction, if the completion date of the transaction is after December 25, 2018.

(d) Section 800.204(e) of this chapter shall not apply with respect to any pilot program covered transaction for which the Committee completes all action under section 721 pursuant to § 801.407(a)(4).

§ 801.402 Procedures for declarations under the pilot program.

(a) A party or parties shall submit a declaration of a pilot program covered transaction pursuant to § 801.401 by submitting electronically the information set out in § 801.403, including the certifications required thereunder, to the Staff Chairperson in accordance with the submission instructions on the Committee's section of the Department of the Treasury website at *https://home.treasury.gov/policy-issues/international/the-committee-on-foreign-investment-in-the-united-states-cfius.*

(b) No communications other than those described in paragraph (a) of this section shall constitute the submission of a declaration for purposes of section 721.

(c) Information and other documentary material submitted to the Committee pursuant to this section shall be considered to have been filed with the President or the President's designee for purposes of section 721(c).

(d) Persons filing a declaration shall, during the time that the matter is pending before the Committee, promptly advise the Staff Chairperson of any material changes in plans, facts, or circumstances addressed in the declaration, and any material change in information required to be provided to the Committee under § 801.406(a)(3). Such changes shall become part of the declaration filed by such persons under § 801.401, and the certification required under § 801.405(c) shall apply to such changes.

§ 801.403 Contents of declarations under the pilot program.

(a) The party or parties submitting a declaration of a pilot program covered transaction pursuant to § 801.401 shall provide the information set out in this section, which must be accurate and complete with respect to all parties and to the transaction. (See also paragraphs (d) and (e) of this section.)

(b) If fewer than all the parties to a transaction submit a declaration, the Committee may, at its discretion, request that the parties to the transaction file a written notice of the transaction under § 801.501, if the Staff Chairperson determines that the information provided by the submitting party or parties in the declaration is insufficient for the Committee to assess the transaction.

(c) Subject to paragraph (e) of this section, a declaration submitted pursuant to § 801.401 shall describe or provide, as applicable:

(1) The name of the foreign person(s) and pilot program U.S. business(es) that are parties to, or, in applicable cases, the subject of the transaction, as well as the name, telephone number, and email address of the primary point of contact for each party.

(2) The following information regarding the transaction in question, including:

(i) A brief description of the nature of the transaction and its structure (*e.g.,* share purchase, merger, asset purchase);

(ii) The percentage of voting interest acquired;

(iii) The percentage of economic interest acquired;

(iv) Whether the pilot program U.S. business has multiple classes of ownership;

(v) The total transaction value in U.S. dollars;

(vi) The expected closing date; and

(vii) All sources of financing for the transaction.

(3) The following:

(i) A statement as to whether a party to the transaction is stipulating that the transaction is a pilot program covered transaction and a description of the basis for the stipulation; and

(ii) A statement as to whether a party to the transaction is stipulating that the transaction could result in control of a pilot program U.S. business by a foreign person or that the transaction is a foreign government-controlled transaction and, in each case, a description of the basis for the stipulation.

(4) A statement as to whether the foreign person will acquire any of the following in the pilot program U.S. business:

(i) Access to any material nonpublic technical information in the possession of the pilot program U.S. business, and if so, a brief explanation of the type of access and type of information;

(ii) Membership, observer rights, or nomination rights as set forth in § 801.209(b), and if so, a statement as to the composition of the board or other body both before and after the completion date of the transaction;

(iii) Any involvement, other than through voting shares, in substantive decisionmaking of the pilot program U.S. business regarding the use, development, acquisition, or release of critical technologies and if so, a statement as to the involvement in such substantive decisionmaking; or

(iv) Any rights that could result in the foreign person acquiring control of the pilot program U.S. business and, if so, a brief explanation of these rights.

(5) The following information regarding the pilot program U.S. business:

(i) Website address;

(ii) Principal place of business;

(iii) Place of incorporation or organization; and

(iv) A list of the addresses or geographic coordinates (to at least the fourth decimal) of all locations of the pilot program U.S. business, including the pilot program U.S. business's headquarters, facilities, and operating locations.

(6) With respect to the pilot program U.S. business that is the subject of the transaction and any entity of which that pilot program U.S. business is a parent, a brief summary of their respective business activities, as, for example, set forth in annual reports, and the product or service categories of each, including the applicable six-digit NAICS codes.

(7) A statement as to which critical technology or critical technologies the pilot program U.S. business and its subsidiaries produce, design, test, manufacture, fabricate, or develop, and the relevant six-digit NAICS code or codes, as applicable under §§ 801.212 and 801.213, for each critical technology listed. This statement shall include a description (which may group similar items into general product categories) of the items and a list of any relevant Export Control Classification Numbers under the EAR and United States Munitions List categories under the ITAR, and, if applicable, identify whether any are specially designed and prepared nuclear equipment, parts and components, materials, software, and technology covered by 10 CFR part 810, nuclear facilities, equipment, and materials covered by 10 CFR part 110 or select agents and toxins covered by 7 CFR part 331, 9 CFR part 121 or 42 CFR part 73.

(8) A statement as to whether the pilot program U.S. business has any contracts (including any subcontracts, if known) that are currently in effect or were in effect within the past three years with any U.S. Government agency or component, or in the past 10 years if the contract included access to personally identifiable information of U.S. Government personnel.

(9) A statement as to whether the pilot program U.S. business has any contracts (including any subcontracts, if known) that are currently in effect or were in effect within the past five years involving information, technology, or data that is classified under Executive Order 12958, as amended.

(10) A statement as to whether the pilot program U.S. business has received any grant or other funding from the Department of Defense or the Department of Energy, or participated in or collaborated on any defense or energy program or product involving one or more critical technologies or pilot program industries within the past five years.

(11) A statement as to whether the pilot program U.S. business participated in a Defense Production Act Title III Program (50 U.S.C. 4501 *et seq.*) within the past seven years.

(12) 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 (15 CFR part 700), and the level(s) of priority of such contracts or orders (DX or DO) within the past three years.

(13) The name of the ultimate parent of the foreign person.

(14) A complete organizational chart, including, without limitation, information that identifies the name, principal place of business and place of incorporation or other legal organization (for entities), and nationality (for individuals) for each of the following:

(i) The immediate parent, the ultimate parent, and each intermediate parent, if any, of each foreign person that is a party to the transaction;

(ii) Where the ultimate parent is a private company, the ultimate owner(s) of such parent; and

(iii) Where the ultimate parent is a public company, any shareholder with an interest of greater than five percent in such parent.

(15) Information regarding all foreign government ownership in the foreign person's ownership structure, including nationality and percentage of ownership, as well as any rights that a foreign government holds, directly or indirectly, with respect to the foreign person.

(16) With respect to the foreign person that is party to the transaction and any of its parents, as applicable, a brief summary of their respective business activities, as, for example, set forth in annual reports.

(17) A statement as to whether any party to the transaction has been party to another transaction previously notified or submitted to the Committee, and the case number assigned by the Committee regarding such transaction(s).

(18) A statement (including relevant jurisdiction and criminal case law number or legal citation) 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.

(d) Each party submitting a declaration shall provide a certification of the information contained in the declaration consistent with § 800.202 of this chapter. A sample certification may be found on the Committee's section of the Department of the Treasury website at *https://home.treasury.gov/policy-issues/international/the-committee-on-foreign-investment-in-the-united-states-cfius.*

(e) A party that offers a stipulation pursuant to paragraph (c)(3) of this section acknowledges that the Committee and the President are entitled to rely on such stipulation in determining whether the transaction is a pilot program covered transaction, a transaction that could result in control of a pilot program U.S. business by a foreign person, or a foreign government-controlled transaction for the purposes of section 721 and all authorities thereunder, and waives the right to challenge any such determination. 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 with respect to any pilot program covered transaction.

§ 801.404 Beginning of thirty-day period.

(a) Upon receipt of a declaration submitted pursuant to § 801.401, the Staff Chairperson shall promptly inspect the declaration and shall promptly notify in writing all parties to a transaction that have submitted a declaration that:

(1) The Staff Chairperson has accepted the declaration and circulated the declaration to the Committee, and the date on which the assessment described in paragraph (b) of this section begins; or

(2) The Staff Chairperson has determined not to accept the declaration and circulate the declaration to the Committee because the declaration is incomplete, and provide an explanation of the material respects in which the declaration is incomplete.

(b) A thirty-day period for assessment of a pilot program covered transaction that is the subject of a declaration shall commence on the date on which the declaration is received by the Committee from the Staff Chairperson. Such period shall end no later than the thirtieth day after it has commenced, or if the thirtieth day is not a business day, no later than the next business day after the thirtieth day.

§ 801.405 General.

(a) In assessing a pilot program covered transaction submitted pursuant to § 801.401, the Committee should consider the factors specified in section 721(f) and, as appropriate, require parties to provide to the Committee the information necessary to consider such factors. The Committee's assessment shall examine, as appropriate, whether:

(1) The transaction constitutes a pilot program covered transaction and whether it could result in foreign government control over a pilot program U.S. business;

(2) There is credible evidence to support a belief that any foreign person exercising control of the pilot program U.S. business or exercising rights related to a pilot program covered investment might take action that threatens to impair the national security of the United States; and

(3) Provisions of law, other than section 721 and the International Emergency Economic Powers Act, provide adequate and appropriate authority to protect the national security of the United States with respect to the risk arising from the pilot program covered transaction.

(b) During the thirty-day assessment period, the Staff Chairperson may invite the parties to a pilot program covered transaction to attend a meeting with the Committee staff to discuss and clarify issues pertaining to the transaction.

(c) If the Committee notifies the parties to a transaction that have submitted a declaration pursuant to § 801.401 that the Committee intends to complete all action under section 721 with respect to that transaction, each party that has submitted additional information subsequent to the original declaration shall file a certification as described in § 800.202 of this chapter. A sample certification may be found on the Committee's section of the Department of the Treasury website at *https://home.treasury.gov/policy-issues/international/the-committee-on-foreign-investment-in-the-united-states-cfius.*

(d) If a party fails to provide the certification required under paragraph (c) of this section, the Committee may, at its discretion, take any of the actions under § 801.407(a).

§ 801.406 Rejection, disposition, or withdrawal of declarations.

(a) The Committee, acting through the Staff Chairperson, may:

(1) Reject any declaration that does not comply with § 801.403 and so inform the parties promptly in writing;

(2) Reject any declaration at any time, and so inform the parties promptly in writing, if, after the declaration has been submitted and before the Committee has taken one of the actions specified in § 801.407(a):

(i) There is a material change in the pilot program covered transaction as to which a declaration has been submitted; or

(ii) Information comes to light that contradicts material information provided in the declaration by the party (or parties); or

(3) Reject any declaration at any time after the declaration has been submitted, and so inform the parties promptly in writing, if the party (or parties) that submitted the declaration does not provide follow-up information requested by the Staff Chairperson within two business days of the request, or within a longer time frame if the party (or parties) so request in writing and the Staff Chairperson grants that request in writing.

(b) The Staff Chairperson shall notify the parties that submitted a declaration when the Committee has found that the transaction that is the subject of a declaration is not a pilot program covered transaction.

(c) Parties to a transaction that have submitted a declaration pursuant to § 801.401(a) may request in writing, at any time prior to the Committee taking action under § 801.407(a), that such declaration be withdrawn. Such request shall be directed to the Staff Chairperson and shall state the reasons why the request is being made and state whether the transaction that is the subject of the declaration is being fully and permanently abandoned. An official of the Department of the Treasury will promptly advise the parties to the transaction in writing of the Committee's decision.

(d) The Committee may not request or recommend that a declaration be withdrawn and refiled, except to permit parties to a pilot program covered transaction to correct material errors or omissions in the declaration submitted with respect to that pilot program covered transaction.

(e) A party (or parties) may not submit more than one declaration for the same or a substantially similar transaction without approval from the Staff Chairperson.

§ 801.407 Committee actions.

(a) Upon receiving a declaration submitted pursuant to § 801.401 with respect to a pilot program covered transaction, the Committee may, at the discretion of the Committee:

(1) Request that the parties to the transaction file a written notice pursuant to subpart E;

(2) Inform the parties to the transaction that the Committee is not able to complete action under section 721 with respect to the transaction on the basis of the declaration and that the parties may file a written notice under part 800 to seek written notification from the Committee that the Committee has concluded all action under section 721 with respect to the transaction;

(3) Initiate a unilateral review of the transaction under § 801.504; or

(4) Notify the parties in writing that the Committee has concluded all action under section 721 with respect to the transaction.

(b) The Committee shall take action under paragraph (a) within the time period set forth in § 801.404(b).

§ 801.408 Confidentiality.

The provisions of § 800.702 of this chapter shall apply to information submitted to the Committee through a declaration.

§ 801.409 Penalties.

(a) Any person who fails to comply with the requirements of § 801.401 may be liable to the United States for a civil

penalty not to exceed the value of the pilot program covered transaction.

(b) The provisions of § 800.801(a), (d), (e), (f), (g), and (h) shall apply to a declaration submitted to the Committee pursuant to § 801.401.

Subpart E—Notice of Pilot Program Covered Transaction

§ 801.501 Notice of pilot program covered transactions.

Parties to a pilot program covered transaction may notify the Committee of the transaction by filing with the Committee a written notice pursuant to § 800.401(a) of this chapter and this subpart.

§ 801.502 Applicability of part 800.

(a) The provisions set forth in Subpart D—Notice; Subpart E—Committee Procedures: Review and Investigation; Subpart F—Finality of Action; Subpart G—Provision and Handling of Information; and Subpart H—Penalties of Part 800 regarding covered transactions shall apply to any pilot program covered transaction notified to the Committee.

(b) Section 800.204(e) shall not apply with respect to any pilot program covered investment for which the Committee completes all action under section 721 pursuant to § 800.504 or § 800.506(d) of this chapter.

§ 801.503 Additional contents of written notice.

(a) In addition to the information required pursuant to § 800.402(c), a written notice of a pilot program covered transaction filed pursuant to § 800.401(a) of this chapter shall include the following information:

(1) A statement as to whether a party to the transaction is stipulating that the transaction is a pilot program covered transaction and a description of the basis for the stipulation;

(2) A statement as to whether the foreign person will acquire any of the following in the pilot program U.S. business:

(i) Access to any material nonpublic technical information in the possession of the pilot program U.S. business, and if so, a brief explanation of the type of access and type of information;

(ii) Membership, observer rights, or nomination rights as set forth in § 801.209(b), and if so, a statement as to the composition of the board or other body both before and after the transaction; or

(iii) Any involvement, other than through voting shares, in substantive decisionmaking of the United States business regarding the use, development, acquisition, or release of critical technologies and if so, a statement as to the involvement in such substantive decisionmaking; and

(3) With respect to the pilot program U.S. business that is the subject of the transaction, a statement as to which critical technology or critical technologies the pilot program U.S. business and its subsidiaries produce, design, test, manufacture, fabricate, or develop, and the relevant six-digit NAICS code, as applicable under §§ 801.212 and 801.213, for each critical technology listed. This statement shall include a description (which may group similar items into general product categories) of the items and a list of any relevant Export Control Classification Numbers under the EAR and United States Munitions List categories under the ITAR, and, if applicable, identify whether any are specially designed and prepared nuclear equipment, parts and components, materials, software, and technology covered by 10 CFR part 810, nuclear facilities, equipment, and materials covered by 10 CFR part 110 or select agents and toxins covered by 7 CFR part 331, 9 CFR part 121 or 42 CFR part 73.

(b) If the party (or parties) stipulate pursuant to § 800.402(n) of this chapter that the pilot program covered transaction that is the subject of the written notice could result in a covered transaction under part 800, the party (or parties) are not required to include in the written notice the information required by this section.

(c) A party that offers a stipulation acknowledges that the Committee and the President are entitled to rely on such stipulation in determining whether the transaction is a pilot program covered transaction, a transaction that could result in control of a pilot program U.S. business by a foreign person, or a foreign government-controlled transaction for the purposes of section 721 and all authorities thereunder, and waives the right to challenge any such determination. 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 with respect to any pilot program covered transaction.

§ 801.504 Agency notice of pilot program covered transactions.

Any member of the Committee, or his designee at or above the Under Secretary or equivalent level, may file an agency notice to the Committee through the Staff Chairperson regarding a pilot program covered transaction for which no declaration has been submitted pursuant to § 801.401 and no written notice has been filed under § 801.501(a) if that member has reason to believe that the transaction is a pilot program covered transaction and may raise national security considerations. Notices filed under this paragraph are deemed accepted upon their receipt by the Staff Chairperson.

Subpart F—Implementation of Certain Authority Provided In FIRRMA

§ 801.601 Implementation of certain authority regarding covered transactions.

Paragraphs (4)(A)(ii) (solely with respect to clauses (iii)(II) and (iv)(II) (solely with respect to an investment described in section 721(a)(4)(B)(iii)(II)) of subparagraph (B)), (4)(B)(iii)(II), (4)(B)(iv)(II) (solely with respect to an investment described in section 721(a)(4)(B)(iii)(II)), (4)(D)(i)(I), 4(D)(i)(II), (4)(D)(i)(III)(bb), (4)(D)(ii)(I)(bb), (4)(D)(ii)(II), (4)(D)(iii)(I), (4)(D)(iv), and (4)(D)(v) of subsection (a) of section 721 shall take effect on the pilot program effective date solely with respect to any pilot program covered transaction. Paragraph (4)(A)(ii) (solely with respect to clauses (iv)(I) and (v) of subparagraph (B)) of subsection (a) of section 721 shall take effect on the pilot program effective date.

§ 801.602 Implementation of certain authority regarding mandatory declarations.

Paragraphs (1)(C)(v)(I), (II), (III), (IV)(aa), (IV)(cc), (IV)(dd), (IV)(ee), (IV)(ff), and (IV)(gg) of subsection (b) of section 721 shall take effect on the pilot program effective date solely with respect to any pilot program covered transaction.

Annex A to Part 801—Industries

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

Dated: October 4, 2018.

Steven T. Mnuchin,

Secretary.

[FR Doc. 2018–22182 Filed 10–10–18; 8:45 am]

BILLING CODE 4810–25–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 165

[Docket Number USCG–2018–0855]

RIN 1625–AA00

Safety Zone; Ohio River, Cincinnati, OH

AGENCY: Coast Guard, DHS.

ACTION: Temporary final rule.

SUMMARY: The Coast Guard is establishing a temporary safety zone for all navigable waters of the Ohio River, extending the entire width of the river, from mile marker (MM) 469 to MM 470.5 in Cincinnati, OH. This safety zone is necessary to provide for the safety of persons, vessels, and the marine environment during the Yeatman's Cove fireworks display. Entry into, transiting through, or anchoring within this safety zone is prohibited unless authorized by the Captain of the Port Sector Ohio Valley or a designated representative.

DATES: This rule is effective from 8 p.m. through 9 p.m. on October 11, 2018.

ADDRESSES: To view documents mentioned in this preamble as being available in the docket, go to *http://www.regulations.gov,* type USCG–2018–0855 in the ''SEARCH'' box and click ''SEARCH.'' Click on Open Docket Folder on the line associated with this rule.

FOR FURTHER INFORMATION CONTACT: If you have questions on this rule, call or email Petty Officer Matthew Roberts, Marine Safety Detachment Cincinnati, U.S. Coast Guard; telephone 513–921–9033, email *SECOHV-WWM@USCG.Mil.*

SUPPLEMENTARY INORMATION:

I. Table of Abbreviations

CFR Code of Federal Regulations
COTP Captain of the Port Sector Ohio Valley
DHS Department of Homeland Security
FR Federal Register
MM Mile marker
NPRM Notice of proposed rulemaking
§ Section
U.S.C. United States Code

II. Background Information and Regulatory History

The Coast Guard is issuing this temporary rule without prior notice and opportunity to comment pursuant to authority under section 4(a) of the Administrative Procedure Act (APA) (5 U.S.C. 553(b)). This provision authorizes an agency to issue a rule without prior notice and opportunity to comment when the agency for good cause finds that those procedures are ''impracticable, unnecessary, or contrary to the public interest.'' Under 5 U.S.C. 553(b)(3)(B), the Coast Guard finds that good cause exists for not publishing a notice of proposed rulemaking (NPRM) with respect to this rule because it is impracticable. This safety zone must be established by October 11, 2018, and we lack sufficient time to provide a reasonable comment period and then consider those comments before issuing this rule. The NPRM process would delay the establishment of the safety zone until after the scheduled date of the fireworks and compromise public safety.

Under 5 U.S.C. 553(d)(3), the Coast Guard finds that good cause exists for making this rule effective less than 30 days after publication in the **Federal Register**. Delaying this rule would be contrary to public interest because immediate action is necessary to respond to the potential safety hazards associated with the fireworks display.

III. Legal Authority and Need for Rule

The Coast Guard is issuing this rule under authority in 33 U.S.C. 1231. The Captain of the Port Sector Ohio Valley (COTP) has determined that potential hazards associated with the fireworks display will be a safety concern for all navigable waters of the Ohio River extending from mile marker (MM) 469 to MM 470.5. The purpose of this rule is to ensure safety of persons, vessels, and the marine environment before, during, and after the Yeatman's Cove fireworks.

IV. Discussion of the Rule

This rule establishes a temporary safety zone from 8 p.m. through 9 p.m. on October 11, 2018. The temporary safety zone will cover all navigable waters of the Ohio River, extending the entire width of the river, from MM 469 to MM 470.5. The duration of the temporary safety zone is intended to ensure the safety of vessels and these navigable waters before, during, and after the scheduled fireworks display.

No vessel or person will be permitted to enter the temporary safety zone without obtaining permission from the COTP or a designated representative. A designated representative is a commissioned, warrant, or petty officer of the U.S. Coast Guard assigned to units under the operational control of USCG Sector Ohio Valley. Persons or vessels may request permission to enter the safety zone from the COTP or a designated representative. They may be contacted on VHF–FM radio channel 16 or phone at 1–800–253–7465. If permission is granted, all persons and vessels must transit at their slowest safe speed and comply with all lawful directions issued by the COTP or a designated representative. The COTP or a designated representative will inform the public of the enforcement date and times for this safety zone, as well as any changes, through Broadcast Notices to Mariners (BNMs), Local Notices to Mariners (LNMs), and/or Marine Safety Information Bulletins (MSIBs) as appropriate.

V. Regulatory Analyses

We developed this rule after considering numerous statutes and Executive Orders related to rulemaking.