

Alert

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CFIUS Finalizes New Mandatory Filing Rule for Critical Technologies

On September 15, 2020, the U.S. Department of the Treasury published a final rule, effective October 15, 2020, that alters and expands the scope of foreign investments involving critical technologies that are subject to mandatory review by the Committee of Foreign Investment in the United States (CFIUS). The final rule modifies certain CFIUS provisions that implement section 721 of the Defense Production Act of 1950, as amended by the Foreign Investment Risk Review Modernization Act of 2018. The rule expands the scope of CFIUS's review to include a broader range of foreign investors and categories of investment and aligns the required review of foreign investments by CFIUS with international standards created by other export control regimes.

Scope of Mandatory Filings

Existing regulations required parties to a transaction to submit a declaration to CFIUS if a foreign entity sought to acquire a U.S. business that: (1) produces, designs, tests, manufactures, fabricates, or develops one or more critical technologies, and (2) that U.S. business also participates in one of 27 designated sensitive industries as classified under the North American Industry Classification System (NAICS). "Critical technologies" generally include defense articles, nuclear equipment and components, items related to weapons and weapons proliferation, and other controlled materials. The new rule eliminates the requirement that the critical technology be used in or designed for use in one of the 27 sensitive industries identified by CFIUS. Now parties must submit a mandatory declaration to CFIUS if the U.S. business must obtain a "U.S. regulatory authorization" to export, re-export, transfer (in country), or re-transfer the U.S. business's relevant critical technology to the foreign parties to the transaction.

Voting Interest Considerations

The new regulations also introduce a provision titled "Voting Interest for Purposes of Critical Technology Mandatory Declarations" that provides criteria for identifying which investors in the foreign buyer's ownership chain are relevant for determining whether a mandatory declaration is required. Additionally, if a foreign investor holds a 25 percent voting interest, directly or indirectly, in the foreign buyer, parties must consider the license and authorization requirements for that foreign investor's country separately if it is different from the foreign buyer's country.

Role of Due Diligence

The new regulations define the requirements of a "U.S. regulatory authorization" under four distinct export regimes:

1. A license or approval issued by the Department of State under the International Traffic in Arms Regulations (ITAR);
2. A license from the Department of Commerce under the Export Administration Regulations (EAR);
3. A specific or general authorization from the Department of Energy; and
4. A specific license from the Nuclear Regulatory Commission.

The changes mark a shift away from an industry-based focus (i.e., reviewing NAICS codes of the



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U.S. business) to particular export controls applicable to the critical technologies. The modifications are likely to streamline the mandatory declaration analysis for many businesses. At the same time, the new rule increases mandatory declarations for transactions involving critical technologies and for foreign investors in countries imposing more significant export controls.

Consideration of New Exceptions

The new regulations provide three exceptions that excuse mandatory filings where the foreign person and critical technologies would qualify for certain license exceptions under the Export Administration Regulations. These available license exceptions are:

- Technology and Software Unrestricted (TSU) (15 C.F.R. § 740.13), which relates to the transfer of broadly available technology;
- Encryption Commodities, Software, and Technology (ENC), paragraph (b) (15 C.F.R. § 740.17(b)), which applies to certain encryption items; and
- Strategic Trade Authorization (STA), paragraph (c)(1) (15 C.F.R. § 740.20(c)(1)), which applies to certain controlled items and technology for transfer to certain allies of the United States.

Where (1) a license is required to send the technology to the foreign investor and (2) an export of the critical technology between the parties does not qualify for an exception, a mandatory filing is required. However, existing exemptions for foreign persons qualifying for “excepted foreign investor” status or that are subject to a foreign ownership, control, or influence (FOCI) agreement and operate under a valid facility security will continue to apply.

CFIUS Filing Process

The new rule does not change CFIUS’s mandatory declaration process, which remains as follows:

- Parties must file at least 30 days prior to a transaction’s expected completion date.
- CFIUS will have 30 days to take action on a declaration.
- Parties to a transaction required to be filed with CFIUS may instead choose to file a notice under CFIUS’s standard procedures.
- A civil monetary penalty can be assessed up to the value of the transaction where parties fail to file a mandatory declaration.

Conclusion

The new regulations bring CFIUS’s mandatory review of foreign investments in critical U.S. technologies in alignment with export control regimes. As a result, a broader set of transactions are likely to be subject to mandatory review by CFIUS. Parties should promptly determine, ideally early in due diligence, whether a contemplated transaction involves “critical technologies” and requires a mandatory notification to CFIUS.
