

CFIUS Adopts Final Mandatory Declaration Rule, Refocusing on Export Control Requirements

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On October 15, 2020, the United States Department of the Treasury will implement a final rule modifying certain provisions of the regulations of the Committee on Foreign Investment in the United States (CFIUS), implemented earlier this year at 31 C.F.R. Part 800. The final rule is largely similar to a proposed rule published in May 2020, providing clarifications but few significant changes. Now final, the rule brings export control requirements related to critical technologies into the forefront of CFIUS reporting considerations, departing from a prior focus on North American Industry Classification System (NAICS) codes.

As with the proposed rule, the CFIUS filing requirement has turned away from industry-based reporting toward a focus on US government authorizations related to the export, reexport, transfer (in-country), or retransfer of controlled items. CFIUS declarations are now mandatory not for transactions involving particular industries but for those involving companies that design, development, test, manufacture, fabricate, or produce particular items that are critical technologies subject to certain US export controls.

Specifically, the mandatory declaration requirement for covered transactions is triggered by foreign investment in a US company that designs, develops, tests, manufactures, fabricates, or produces items

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that would require authorizations for export to any person that:

- Could directly control the US business as a result of the covered transaction;
- Is directly acquiring an interest that is a covered investment in the US business;
- Has a direct investment in the US business and their rights are changing in a way that could result in a covered transaction;
- Is a party to any transaction, transfer, agreement, or arrangement which is designed or intended to evade or circumvent CFIUS requirements; or
- Individually, or as part of a group of foreign persons, holds a direct or indirect voting interest of 25% or more as a result of the transaction and as further described in the rule.

The relevant export authorizations may be issued by the Department of State under the International Traffic in Arms Regulations (ITAR), Department of Commerce under the Export Administration Regulations (EAR), Department of Energy, or the Nuclear Regulatory Commission. Aside from a limited carve-out for certain EAR license exceptions, the availability of ITAR exemptions or EAR license exceptions for the export of the controlled items has no bearing on whether a declaration to CFIUS is mandatory. Transactions involving items that are eligible for export pursuant to EAR license exceptions ENC (encryption), TSU (technology and software unrestricted), or STA (strategic trade authorization) are exempted from the otherwise mandatory filing requirement, provided that all applicable requirements of the relevant license exception are met, such as submitting a classification request prior to use of license exception ENC.

Flowing from this final rule is that NAICS codes are no longer relevant to determining whether a CFIUS filing is mandatory. Rather, an export control review should be conducted to determine whether a declaration is required, even if no export activities are contemplated. Transactions involving investors from countries that are subject to strict export control requirements, such as China, should be closely scrutinized for CFIUS declaration requirements.

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