

CFIUS Issues Final Rule Amending Mandatory Declaration Standards

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The Committee on Foreign Investment in the United States (“**CFIUS**”) recently promulgated final regulations that modify the scope of the mandatory declaration rules for transactions involving U.S. businesses involved in certain activities related to critical technologies (“[Final Mandatory Declaration Regulations](#)”).

As discussed in our memo available [here](#), CFIUS has reset the applicable trigger for mandatory declarations by effectively replacing the legacy “Pilot Program” with a new rule that is focused on whether export licenses would be required to export, re-export, transfer, or re-transfer critical technology to the incoming foreign investor. The Final Mandatory Declaration Regulations build upon the final regulations implementing the Foreign Investment Risk Review Modernization Act of 2018 (“**FIRMA**”), and leverage the existing national security export control regimes, which require licensing or authorization based on an analysis of the national security implications of a particular item or technology, end user, and the particular foreign country for export, re-export, transfer, or retransfer.

The Final Mandatory Declaration Regulations largely track the proposed regulations and include a limited set of clarifying revisions. The most notable revision clarifies that for purposes of the CFIUS exception to the mandatory declaration provisions found at § 800.401(e)(6), “eligibility” for an Export Administration Regulations (“**EAR**”) license exception refers to having satisfied any requirements imposed by the EAR that must be satisfied prior to export (even if no export is to occur). For example, if a U.S. business’s only critical technologies are items self-classified pursuant to 15 CFR 740.17(b)(2), a CFIUS declaration under paragraph (c) of § 800.401 would not be required so long as the U.S. business submits to the Commerce Department’s Bureau of Industry and Security a classification request that meets the requirements of the EAR, including the 30-day waiting period.

The Final Mandatory Declaration Regulations will enter into force on October 15, 2020. Note, the critical technology mandatory declaration provision based on NAICS codes and published as part of 31 CFR 800.401 will apply to transactions for which the following actions occurred on or after February 13, 2020 and prior to October 15, 2020:

1. the completion date;
2. the parties to the transaction have executed a binding written agreement, or other binding document, establishing the material terms of the transaction;
3. a party has made a public offer to shareholders to buy shares of a U.S. business; or
4. a shareholder has solicited proxies in connection with an election of the board of directors of a U.S. business or an owner or holder of a contingent equity interest has requested the conversion of the contingent equity interest.

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If you have any questions regarding the matters covered in this publication, please reach out to any of the lawyers listed below or your usual Davis Polk contact.

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