

Proposed Regulations Would Alter CFIUS Mandatory Filing Requirements

I. Overview

The U.S. Department of the Treasury proposed a rule modifying the mandatory declaration requirements for national security review of transactions by the Committee on Foreign Investment in the United States (“CFIUS”).¹ The rule would shift the focus of the mandatory filing analysis from industries to export control requirements and clarify the term “substantial interest” as used to define when parties must file. This is an anticipated development in the implementation of the Foreign Investment Risk Review Modernization Act of 2018 (“FIRRMA”), discussed in our memorandum [here](#).

II. Background

Although CFIUS filings for many transactions are voluntary, FIRRMA expanded CFIUS’s power to mandate short-form declarations in two scenarios: first, for certain transactions pertaining to U.S. businesses involved in “critical technologies”; and second, for transactions where a foreign government has a substantial interest in a foreign person investing in certain U.S. businesses.

Mandatory declarations were established as part of CFIUS’s “Pilot Program” in 2018. The program required short-form filings for certain non-controlling investments and other covered transactions possibly resulting in a foreign person controlling U.S. businesses that produce, design, test, manufacture, fabricate, or develop critical technologies for use in specific industries identified using the North American Industry Classification System (“NAICS”). The program, discussed in more detail [here](#), concluded in February 2020 when the Treasury Department finalized FIRRMA regulations and indicated that more proposed rulemaking would be forthcoming.

III. The Proposed Rule

Under the proposed rule, the mandatory filing requirement would replace the use of NAICS codes with analysis using existing U.S. export authorizations. Specifically, the declaration requirement would be based on “whether certain U.S. government authorizations would be required to export, re-export, transfer (in any country), or retransfer the critical technology or technologies produced, designed, tested, manufactured, fabricated, or developed by the U.S. business to certain transaction parties and foreign persons in the ownership chain.”²

The relevant export authorizations are those required under the International Traffic in Arms Regulations (ITAR), the Export Administration Regulations (EAR), regulations issued by the Department of Energy, and licenses issued by the Nuclear Regulatory Commission for the export of controlled nuclear technology to specified countries. Whether a regulatory authorization is required would be based on the foreign person’s principal place of business, nationality or nationalities, and whether the foreign person is considered an “end user” under applicable U.S. regulations. CFIUS would still require a declaration where a transaction qualifies for an exception or exemption from export licensing requirements, except for certain EAR exceptions directly specified in the rule for national security reasons.

¹ Provisions Pertaining to Certain Investments in the United States by Foreign Persons, 85 Fed. Reg. 30893 (May 21, 2020) available at <https://www.federalregister.gov/documents/2020/05/21/2020-10034/provisions-pertaining-to-certain-investments-in-the-united-states-by-foreign-persons>.

² *Id.*

The proposed rule also clarifies the definition of “substantial interest” as used in the second circumstance in which CFIUS may mandate declarations. As noted above, parties are required to notify CFIUS of covered transactions where a foreign government has a “substantial interest in a foreign person that will acquire a substantial interest in certain types of U.S. businesses.”³ The proposed rule clarifies that a foreign state government has a substantial interest in an entity “primarily directed, controlled, or coordinated by or on behalf of a general partner, managing member, or equivalent” when that government holds 49% or more of the interest in the partner.

IV. Conclusion

The proposed rule may provide further clarity regarding mandatory filing requirements, although it will change the scope of transactions subject to these requirements. The analysis will closely mirror the inquiry used to determine whether a party is subject to export controls, and companies may readily have the information needed to make an efficient determination as to whether to make a mandatory declaration. Comments on the proposed rule will be accepted until June 22, 2020.

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If you have any questions about the issues addressed in this memorandum or if you would like a copy of any of the materials mentioned, please do not hesitate to call or email Elai Katz at 212.701.3039 or ekatz@cahill.com; or Lauren Rackow at 212.701.3725 or lrackow@cahill.com; or email publications@cahill.com.

³ *Id.*