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DEPARTMENT OF THE TREASURY

Office of Investment Security

31 CFR Part 800

RIN 1505-AC68

Provisions Pertaining to Certain Investments in the United States by Foreign Persons

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

ACTION: Proposed rule.

SUMMARY: This proposed rule would modify certain provisions in the regulations of the Committee on Foreign Investment in the United States that implement section 721 of the Defense Production Act of 1950, as amended by the Foreign Investment Risk Review Modernization Act of 2018. Specifically, this proposed rule would modify the mandatory declaration provision for certain foreign investment transactions involving a U.S. business that produces, designs, tests, manufactures, fabricates, or develops one or more critical technologies. It also makes clarifying amendments to the definition for the term “substantial interest.”

DATES: Written comments must be received by [INSERT DATE 30 DAYS AFTER PUBLICATION IN THE FEDERAL REGISTER].

ADDRESSES: Written comments on this proposed rule may be submitted through one of two methods:

- *Electronic Submission:* Comments may be submitted 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 of the Treasury (Treasury Department) to make the

comments available to the public. Please note that comments submitted through <https://www.regulations.gov> will be public, and can be viewed by members of the public.

• *Mail:* Send to U.S. Department of the Treasury, Attention: Meena R. Sharma, Deputy Director of Investment Security Policy and International Relations, 1500 Pennsylvania Avenue, NW, Washington, DC 20220.

Please submit comments only and include your name and company name (if any), and cite “*Provisions Pertaining to Certain Investments in the United States by Foreign Persons*” in all correspondence. In general, the Treasury Department will post all comments to <https://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 rule, contact: Laura Black, Director of Investment Security Policy and International Relations; Meena R. Sharma, Deputy Director of Investment Security Policy and International Relations; or Alexander Sevald, Senior Policy Advisor, at U.S. Department of the Treasury, 1500 Pennsylvania Avenue, NW, Washington, DC 20220; telephone: (202) 622-3425; email: CFIUS.FIRRMA@treasury.gov.

SUPPLEMENTARY INFORMATION:

I. Background

A. The Statute

On August 13, 2018, the Foreign Investment Risk Review Modernization Act of 2018 (FIRRMA), Subtitle A of Title XVII of Public Law 115-232, 132 Stat. 2173, was enacted.

FIRRMA amends section 721 (section 721) of the Defense Production Act of 1950, as amended (DPA), which delineates the authorities and jurisdiction of the Committee on Foreign Investment in the United States (CFIUS or the Committee). Executive Order 13456, 73 FR 4677 (Jan. 23, 2008), directs the Secretary of the Treasury to issue regulations implementing section 721. This proposed rule is being issued pursuant to that authority.

FIRRMA maintains the Committee's jurisdiction over any transaction which could result in foreign control of any U.S. business, and broadens the authorities of the President and CFIUS under section 721 to review and take action to address national security concerns arising from certain non-controlling investments and real estate transactions involving foreign persons. FIRRMA also modernizes CFIUS's processes to better enable timely and effective reviews of transactions falling under its jurisdiction, including by introducing the concept of a declaration—an abbreviated notification on which the Committee must take action under a 30-day assessment period—as an alternative to a voluntary notice, which had been the traditional means of filing a transaction with CFIUS.

FIRRMA also continues the largely voluntary nature of the CFIUS process with respect to most transactions. However, notifying CFIUS of a transaction is mandatory in some circumstances. Specifically, FIRRMA authorizes CFIUS to mandate through regulations the submission of a declaration for covered transactions involving certain U.S. businesses that produce, design, test, manufacture, fabricate, or develop one or more critical technologies. Implementation of that authority is the primary subject of this proposed rule. FIRRMA also requires declarations for certain 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. This proposed rule makes clarifying amendments with respect to the definition

of substantial interest. In both cases of mandatory declarations, parties have the option of filing a notice rather than submitting a declaration if they so choose.

B. Existing Declaration Requirement for Certain Transactions Involving U.S. Businesses with Critical Technologies

As background, on October 11, 2018, the Treasury Department published an interim rule that implemented—on a temporary basis as a pilot program—a declaration requirement for certain foreign investment transactions involving U.S. businesses with certain activities involving one or more critical technologies (Pilot Program Interim Rule). 83 FR 51322. Specifically, the Pilot Program Interim Rule made effective and implemented on November 10, 2018, a part of the Committee’s jurisdiction over certain non-controlling investments, and established mandatory declarations for certain non-controlling investments in, and certain transactions that could result in control by a foreign person of, U.S. businesses that produce, design, test, manufacture, fabricate, or develop one or more critical technologies in connection with any of 27 industries identified by reference to the North American Industry Classification System (NAICS). The Pilot Program Interim Rule provided for a public comment period, and a number of comments were received. Additional comments on the scope of this mandatory declaration pilot program were received in connection with the notice of proposed rulemaking published on September 24, 2019, proposing amendments to 31 CFR part 800 to implement provisions of FIRRMA more broadly. 84 FR 50174. On January 17, 2020, the Treasury Department published a final rule at 85 FR 3112 (Part 800 Rule) amending 31 CFR part 800 to implement provisions of FIRRMA, and the final rule took effect on February 13, 2020. With respect to the mandatory declarations for critical technology transactions, the Part 800 Rule largely incorporates the scope of the Pilot Program Interim Rule, which is based on whether a

transaction involves certain U.S. businesses with specified activities involving critical technologies and a nexus to industries identified by NAICS codes. In response to public comments, and as described in more detail in the preamble to the Part 800 Rule, certain modifications were made in the Part 800 Rule. In particular, the Part 800 Rule exempts from the critical technology transaction declaration requirement (but not CFIUS jurisdiction) certain transactions involving excepted investors (as defined in the Part 800 Rule); entities subject to an agreement to mitigate foreign ownership, control, or influence pursuant to the National Industrial Security Program regulations; certain encryption technologies; and certain investment funds managed exclusively by, and ultimately controlled by, U.S. nationals. The Pilot Program Interim Rule continues to apply only to transactions falling within the scope of that rule and for which specified actions were taken on or after its effective date and prior to the effective date of the Part 800 Rule (*i.e.*, from November 10, 2018, through February 12, 2020, as described in 31 CFR § 801.103). The scope of mandatory declarations for critical technology transactions in the Part 800 Rule will continue to apply until this rulemaking is finalized.

C. Proposed Rule Requiring Declarations for Certain Transactions Involving U.S. Businesses with Critical Technologies

In further consideration of public comments submitted on the prior rulemakings discussed above, and as informed by the Committee's experience assessing mandatory declarations for certain transactions involving critical technologies for over a year, as well as other national security considerations, this proposed rule modifies the scope of the mandatory declaration provision for certain transactions involving critical technologies. Consistent with CFIUS processes generally, the proposed rule reflects extensive consultation with CFIUS member agencies and the conclusion that a provision continuing the implementation of

mandatory declarations for transactions involving critical technologies furthers the protection of national security.

The proposed rule revises the declaration requirement for certain critical technology transactions so that it is based on whether certain U.S. government authorizations would be required to export, re-export, transfer (in 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. The proposed rule removes the NAICS code criteria and the list of NAICS codes at appendix B to the Part 800 Rule. In focusing on export control requirements for the critical technologies, the proposed rule leverages the national security foundations of the established export control regimes, which require licensing or authorization in certain cases based on an analysis of the particular item and end user, and the particular foreign country for export, re-export, transfer (in country), or retransfer. To accomplish this, the proposed rule amends § 800.104 (applicability rule) and § 800.401 (mandatory declarations) and introduces two new definitions: “U.S. regulatory authorization” and “voting interest for purposes of critical technology mandatory declarations.”

The proposed rule does not modify the definition of “critical technologies,” which is defined by FIRRMA, and implemented at § 800.215 of the Part 800 Rule. This proposed rule instead prescribes the types of transactions subject to mandatory declarations based on whether certain types of regulatory licenses or authorizations would be required for export and related activities involving the specific critical technology of the U.S. business. More broadly, consistent with FIRRMA and the Export Control Reform Act of 2018 (ECRA), CFIUS will continue its role in the process to identify emerging and foundational technologies as set forth in section 1758(a) of ECRA.

D. *Clarifying Amendment to Definition of “Substantial Interest” at § 800.244(b) and (c)*

The proposed rule also makes clarifying amendments to paragraphs (b) and (c) of the definition of substantial interest at § 800.244 of the Part 800 Rule, which establishes how to determine the percentage interest held indirectly by one entity in another for purposes of that term. In particular, the proposed rule clarifies that paragraph (b) applies only where a general partner, managing member, or equivalent primarily directs, controls, or coordinates the activities of the entity. It also removes the word “voting” before “interest” wherever it appears in paragraph (c) so that the calculation rule clearly applies to the calculation of “voting interests” as described in paragraph (a) and “interests” as described in paragraph (b) of that section.

II. Discussion of Proposed Rule

A. *Subpart A – General Provisions*

Section 800.104 – Applicability Rule

The proposed rule retains paragraph (c) to this section regarding the applicability period for transactions subject to the Pilot Program Interim Rule. The proposed rule adds paragraph (d) to clarify the applicability period of the provisions in the Part 800 Rule in light of the changes proposed in this rule. In particular, paragraph (d) limits the mandatory declaration provision in the Part 800 Rule to certain transactions involving critical technologies and for which specified actions (*e.g.*, execution of a binding written agreement) took place between the Part 800 Rule’s effectiveness (February 13, 2020) and the effective date of the rule finalizing this proposed rule. Additionally, the proposed rule adds paragraph (e) setting forth the effective date for the proposed amendments and the new defined terms discussed in this rule, which date will be determined by the time the final rule is published.

For the avoidance of doubt, the result of the applicability rule with the proposed modification will be as follows. The Pilot Program Interim Rule will continue to apply to transactions for which specified actions occurred on or after November 10, 2018, and prior to February 13, 2020, as specified in the regulations at 31 CFR § 801.103. The existing critical technology mandatory declaration provision based on NAICS codes and published in the Part 800 Rule will apply to transactions for which specified actions occurred from February 13, 2020, until the effective date of the rule finalizing this proposed rule, as specified in the proposed rule at § 800.104(d). The modifications to the critical technology mandatory declaration provision discussed in this proposed rule would apply—once finalized—starting on the effective date of the final rule, except for certain transactions for which specified actions occurred prior to the effective date of the final rule.

B. Subpart B – Definitions

The proposed rule makes clarifying amendments to § 800.244(b) and (c) and sets forth two new defined terms to be added to subpart B of part 800 as discussed below.

Section 800.244 – Substantial Interest

With respect to the definition of substantial interest, the proposed rule adds language to § 800.244(b) to clarify that it applies only where the general partner, managing member, or equivalent primarily directs, controls, or coordinates the activities of the entity. It also removes three instances of the word “voting” from § 800.244(c) in order to clarify that paragraph (c) applies not only to § 800.244(a) but also to § 800.244(b).

Section 800.254 – U.S. Regulatory Authorization

The proposed rule introduces the term and a definition of “U.S. regulatory authorization” to specify the types of regulatory licenses or authorizations that are required under the four main

U.S. export control regimes, which if applicable in the context of a particular transaction described under the proposed rule, would trigger a mandatory declaration. With respect to the International Traffic in Arms Regulations (ITAR) administered by the Department of State, this includes licenses and other approvals (*e.g.*, approved technical assistance agreements or manufacturing license agreements) required by the Directorate of Defense Trade Controls for defense articles or defense services on the United States Munitions List. With respect to the Export Administration Regulations (EAR) administered by the Department of Commerce, this includes licenses required for certain items on the Commerce Control List as identified in the Part 800 Rule at § 800.215(b). With respect to the regulations administered by the Department of Energy at 10 CFR part 810, this includes specific or general authorizations required under such regulations, except the general authorization at 10 CFR § 810.6(a) for the export of certain controlled nuclear technology to specified countries or entities. Finally, with respect to the regulations administered by the Nuclear Regulatory Commission at 10 CFR part 110, this includes any specific license required under such regulations.

Section 800.256 – Voting Interest for Purposes of Critical Technology Mandatory Declarations

The proposed rule introduces the term and provides a definition of “voting interest for purposes of critical technology mandatory declarations.” This term is used in the proposed language at § 800.401(c)(1)(v) to specify which persons in the ownership chain of foreign persons described in paragraphs (c)(1)(i) to (iv) of that section should be analyzed for export licenses and authorization purposes in determining whether a particular transaction could trigger a mandatory declaration. In seeking to set clear criteria with respect to the foreign persons that need to be analyzed under this provision, the definition establishes a threshold of a 25 percent

voting interest, direct or indirect. For entities whose activities are primarily directed, controlled, or coordinated by or on behalf of a general partner, managing member, or equivalent, the applicable threshold is a 25 percent interest in an entity's general partner, managing member, or equivalent. For purposes of determining the percentage of interest held indirectly by one person in another, the rule establishes that any interest of a parent entity in a subsidiary entity will be deemed to be a 100 percent interest. This approach to determining the percentage of interest is consistent with the proposed amendments to the definition of substantial interest at § 800.244(c), discussed above. Finally, the proposed rule specifies when the ownership interests of separate foreign persons will be aggregated for the purposes of § 800.256.

C. Subpart D – Declarations

The proposed rule modifies § 800.401(c), (e)(6) and (j), and also removes appendix B to the Part 800 Rule, to re-scope the mandatory declarations for transactions involving U.S. businesses with critical technologies. Thus, transaction parties would no longer need to consider whether the U.S. business produces, designs, tests, manufactures, fabricates, or develops a critical technology utilized in connection with the U.S. business' activity in, or designed by the U.S. business for use in, one or more industries identified by reference to NAICS codes. Instead, mandatory declarations apply only to the extent that the critical technologies that the U.S. business produces, designs, tests, manufactures, fabricates, or develops would require a U.S. regulatory authorization to export, re-export, transfer (in-country), or retransfer to the foreign persons involved in the transaction or certain foreign persons in the ownership chain as specified in § 800.401(c)(1)(i)-(v).

The proposed language at § 800.401(c)(2) further clarifies the analysis required under § 800.401(c)(1). In particular, it makes clear that, except for certain EAR license exceptions

specified at § 800.401(e)(6), which are discussed below, a U.S. regulatory authorization is considered to be required even though a license exception or exemption may be available under the EAR or ITAR, respectively. It also specifies how to analyze a foreign investor's nationality for purposes of this provision. Finally, in cases where the applicable U.S. regulatory authorization is tied to the "end user" status of the person receiving the critical technology, the proposed language at § 800.401(c)(2)(iii) specifies that for purposes of this analysis, the foreign person(s) specified in § 800.401(c)(1)(i)-(v) should be considered the end user(s).

The proposed rule retains the exceptions in the Part 800 Rule at § 800.401(e)(1) to (5) and revises the exception at paragraph (e)(6). In particular, the proposed rule modifies the description of the EAR license exception for encryption commodities, software, and technology (ENC) to specify that only subpart (b) of EAR license exception ENC is relevant for purposes of the paragraph (e)(6) exception to mandatory declarations for critical technology transactions. The scope of that exception is narrowed in the proposed rule in order to provide clarity regarding the applicability of certain subparts of that exception in the context of mandatory declarations. It also adds two more license exceptions under the EAR to paragraph (e)(6): technology and software-unrestricted (TSU) and certain elements of strategic trade authorization (STA). Note, however, that for any of the aforementioned license exceptions to relieve the declaration requirement with respect to a foreign person, such foreign person must in fact be eligible to utilize the license exception (including based on end user status, if relevant). These EAR license exceptions were selected for inclusion at paragraph (e)(6) based on national security considerations. CFIUS also notes that the restrictions on the use of all license exceptions found in 15 CFR § 740.2 would apply and must also be considered.

The proposed rule also updates the examples at § 800.401(j) to reflect the aforementioned revisions to § 800.401(c). No changes were made to § 800.403 regarding procedures for declarations or to § 800.404 regarding contents of declarations. Finally, for the avoidance of doubt, pursuant to FIRRMA, the mandatory declaration provision at § 800.401(c) applies only to critical technology businesses under § 800.248(a), not to businesses that are TID U.S. businesses solely under § 800.248(b) or (c).

III. Rulemaking Requirements

Executive Order 12866

These regulations are not subject to the general requirements of Executive Order 12866, which covers review of regulations by the Office of Information and Regulatory Affairs in the Office of Management and Budget (OMB), because they relate to a foreign affairs function of the United States, pursuant to section 3(d)(2) of that order. In addition, these regulations are not subject to review under section 6(b) of Executive Order 12866 pursuant to section 7(c) of the April 11, 2018, Memorandum of Agreement between the Treasury Department and OMB, which states that CFIUS regulations are not subject to OMB's standard centralized review process under Executive Order 12866.

Paperwork Reduction Act

The collection of information contained in this notice of proposed rulemaking has previously been submitted to OMB for review in accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3507(d), PRA), and approved under OMB Control Number 1505-0121. Under the PRA, 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 OMB control number.

Regulatory Flexibility Act

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

The proposed 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. 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 U.S. business by a foreign person if such a transaction would threaten to impair the national security of the United States, 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.

Regardless of whether the RFA applies, available data does not suggest that the proposed rule, if implemented, will have a significant economic impact on a substantial number of small entities. For purposes of the RFA, a “small entity” is (1) a proprietary firm meeting the size standards of the Small Business Administration (SBA); (2) a nonprofit organization that is not dominant in its field; or (3) a small government jurisdiction with a population of less than 50,000. 5 U.S.C. 601(3)–(6). This proposed rule would affect certain U.S. businesses that have particular activities involving critical technologies and that receive foreign investment (direct or indirect) of the type described in the proposed rule. These U.S. businesses could be found across a range of industries. Accordingly, because SBA size standards are designated by industry, and not all U.S. businesses that constitute small entities within a particular industry will be affected, it is difficult to apply the SBA size standards to determine how many small entities will be affected by this proposed rule. Additionally, some of these U.S. businesses are already subject to a declaration requirement when they receive foreign investment (direct or indirect) under the existing Part 800 Rule.

The Treasury Department considered the data on new foreign direct investment in the United States that is collected annually by the Bureau of Economic Analysis (BEA) within the Department of Commerce through its Survey of New Foreign Direct Investment in the United States (Form BE- 13). While these data are self-reported, and include only direct investments in

U.S. businesses in which the foreign person acquires at least 10 percent of the voting shares (and consequently, do not capture investments below 10 percent, which may nevertheless be covered transactions), they nonetheless provide relevant information on a category of U.S. businesses that receive foreign investment, some of which may be covered by the proposed rule.

According to the BEA, in 2018, the most current year for which data is available, foreign persons obtained at least a 10 percent voting share in 832 U.S. businesses. See U.S. Bureau of Economic Analysis, “Number of Investments Initiated in 2018, Distribution of Planned Total Expenditures, Size by Type of Investment,” available at <https://apps.bea.gov/international/xls/Table15-14-15-16-17-18.xls> (last visited May 6, 2020). The BEA reports only the general size of the investment transaction, not the type of the U.S. business involved, nor whether the U.S. business is considered a “small business” by the SBA. The smallest foreign investment transactions that the BEA reports are those with a dollar value below \$50,000,000. While not all U.S. businesses receiving a foreign investment of less than \$50,000,000 are considered “small” for the purposes of the RFA, many might be, and the number of U.S. businesses receiving foreign investments of less than \$50,000,000 is the best available information to estimate the number of transactions involving small U.S. businesses that might be subject to CFIUS’s jurisdiction and affected by the proposed rule.

Of the above mentioned 832 U.S. businesses receiving foreign investment in 2018, 576 were involved in transactions valued at less than \$50,000,000. Although this figure is under inclusive because it does not capture all transactions that could be subject to a filing requirement pursuant to the proposed rule, it also is over inclusive because it is not limited to any particular type of U.S. business. The Treasury Department believes the figure of 576 is the best estimate

based on the available data of the number of small U.S. businesses that may be impacted by this proposed rule, although the Treasury Department recognizes the limitations of this estimate.

Even if a substantial number of small entities were affected, the economic impact of the proposed rule on small U.S. businesses will not be significant. First, a portion of the U.S. businesses affected by the proposed rule are already subject to the existing declaration requirement under the Part 800 Rule. Second, the proposed rule replaces the analysis and nexus to NAICS codes with an analysis of export control authorization requirements. U.S. businesses with critical technologies are already aware, or should be aware, of the application of export controls to their items and regularly analyze export authorization requirements particularly when considering a foreign investment. The process of completing the declaration form under the proposed rule is no different from the existing Part 800 Rule. Accordingly, the proposed revisions to the Part 800 rule are not expected to change the general burden hour estimate for analyzing a transaction and preparing a declaration.

For the reasons stated above, the Secretary of the Treasury certifies that the proposed rule, if implemented, will not have a “significant economic impact on a substantial number of small entities.” 5 U.S.C. 605(b). Nevertheless, the Treasury Department is interested in any comments on how the proposed rule would affect small entities.

List of Subjects in 31 CFR Part 800

Foreign investments in the United States, Investigations, Investments, Investment companies, National defense, Reporting and Recordkeeping requirements.

For the reasons set forth in the preamble, the Treasury Department proposes to amend part 800 of title 31 of the Code of Federal Regulations, to read as follows:

PART 800 - REGULATIONS PERTAINING TO CERTAIN INVESTMENTS IN THE UNITED STATES BY FOREIGN PERSONS

1. The authority citation for part 800 continues to read:

Authority: 50 U.S.C. 4565; E.O. 11858, as amended, 73 FR 4677.

Subpart A – General Provisions

2. Amend § 800.104 by revising paragraph (a) and adding paragraphs (d) and (e) to read as follows:

§ 800.104 Applicability Rule.

(a) Except as provided in paragraphs (b) through (e) of this section and otherwise in this part, the regulations in this part apply from February 13, 2020.

* * * * *

(d) Subject to paragraphs (b) and (c) of this section, for any transaction for which the following has occurred on or after February 13, 2020, and before [EFFECTIVE DATE OF FINAL RULE], the corresponding provisions of the regulations in this part that were in effect during that time will apply:

(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.

(e) Except as provided in paragraphs (b) through (d) of this section, the amendments to this part published in the **Federal Register** on [DATE OF PUBLICATION OF FINAL RULE] apply from [EFFECTIVE DATE OF FINAL RULE].

Subpart B – Definitions

3. Amend § 800.244 by revising paragraphs (b) and (c) to read as follows:

§ 800.244 Substantial interest.

* * * * *

(b) In the case of an entity whose activities are primarily directed, controlled, or coordinated by or on behalf of a general partner, managing member, or equivalent, the national or subnational governments of a single foreign state will be considered to have a *substantial interest* in such entity only if they hold 49 percent or more of the interest in the general partner, managing member, or equivalent of the entity.

(c) For purposes of determining the percentage of interest held indirectly by one entity in another entity under this section, any interest of a parent will be deemed to be a 100 percent interest in any entity of which it is a parent.

* * * * *

4. Redesignate § 800.254 as § 800.255 and add a new § 800.254 to read as follows:

§ 800.254 U.S. regulatory authorization.

The term *U.S. regulatory authorization* means:

- (a) A license or other approval issued by the Department of State under the ITAR;
- (b) A license from the Department of Commerce under the EAR;

(c) A specific or general authorization from the Department of Energy under the regulations governing assistance to foreign atomic energy activities at 10 CFR part 810 other than the general authorization described in 10 CFR 810.6(a); or

(d) A specific license from the Nuclear Regulatory Commission under the regulations governing the export or import of nuclear equipment and material at 10 CFR part 110.

5. Add § 800.256 to read as follows:

§ 800.256 Voting interest for purposes of critical technology mandatory declarations.

(a) The term *voting interest for purposes of critical technology mandatory declarations* means, in the context of an interest in a foreign person for the purposes of § 800.401(c)(1)(v), a voting interest, direct or indirect, of 25 percent or more, subject to paragraphs (b) and (c) of this section.

(b) In the case of a foreign person that is an entity whose activities are primarily directed, controlled, or coordinated by or on behalf of a general partner, managing member, or equivalent, a foreign person will be considered to have a *voting interest for purposes of critical technology mandatory declarations* in such entity only if it holds 25 percent or more of the interest in the general partner, managing member, or equivalent of the entity.

(c) For purposes of determining the percentage of *voting interest for purposes of critical technology mandatory declarations* held indirectly by one person in another, any interest of a parent will be deemed to be a 100 percent interest in any entity of which it is a parent.

(d) For purposes of § 800.401(c)(1)(v), foreign persons who are related, have formal or informal arrangements to act in concert, or are agencies or instrumentalities of, or controlled by, the national or subnational governments of a single foreign state are considered part of a group of foreign persons and their individual holdings are aggregated.

Subpart D – Declarations

7. Amend § 800.401 by revising paragraphs (c), (e)(6), and (j) to read as follows:

§ 800.401 Mandatory declarations.

* * * * *

(c)(1) A covered transaction involving a TID U.S. business that produces, designs, tests, manufactures, fabricates, or develops one or more critical technologies for which a U.S. regulatory authorization would be required for the export, re-export, transfer (in-country), or retransfer of such critical technology to a foreign person that is a party to the covered transaction and such foreign person:

(i) Could directly control such TID U.S. business as a result of the covered transaction;

(ii) Is directly acquiring an interest that is a covered investment in such TID U.S.

business;

(iii) Has a direct investment in such TID U.S. business, the rights of such foreign person with respect to such TID U.S. business are changing, and such change in rights could result in a covered control transaction or a covered investment;

(iv) Is a party to any transaction, transfer, agreement, or arrangement described in § 800.213(d) with respect to such TID U.S. business; or

(v) Individually holds, or is part of a group of foreign persons that, in the aggregate, holds, a voting interest for purposes of critical technology mandatory declarations in a foreign person described in paragraphs (c)(1)(i) through (iv) of this section.

(2) For purposes of paragraph (c)(1) of this section, whether a U.S. regulatory authorization would be required for the export, re-export, transfer (in-country), or retransfer of a

critical technology to a foreign person described in paragraphs (c)(1)(i) through (v) of this section shall be determined:

(i) Without giving effect to any license exemption available under the ITAR or license exception available under the EAR except as described paragraph in (e)(6) of this section;

(ii) Based on such foreign person’s principal place of business (for entities) as defined in § 800.239, or such foreign person’s nationality or nationalities (for individuals) under the relevant U.S. regulatory authorization, as applicable; and

(iii) As if such foreign person is an “end user” under the applicable U.S. regulatory authorization, as applicable.

* * * * *

(e) * * *

(6) A covered transaction that requires one or more U.S. regulatory authorizations and each of which is satisfied by the foreign person’s eligibility for a license exception under the EAR at 15 CFR 740.13, 740.17(b), or 740.20(c)(1), as applicable.

* * * * *

(j) Examples:

(1) *Example 1.* Corporation A, an entity located in Country F with 75 percent of its voting interest owned by nationals of Country F, acquires 100 percent of the interests of Corporation Y, a U.S. business that manufactures a critical technology controlled under the EAR. A national of Country G owns 25 percent of the voting shares of Corporation A. Under the EAR, a license is required to export the critical technology to Country G but not Country F. Assuming no other relevant facts, the acquisition of Corporation Y is subject to a mandatory declaration.

(2) *Example 2.* Corporation B, an entity with its principal place of business in Country G and wholly owned by nationals of Country G, makes a covered investment in Corporation Z, a U.S. business that designs a critical technology controlled under the EAR. Under the EAR, a license is required to export the critical technology to Country G. The license exception at 15 CFR 740.4 authorizes Corporation B to export the critical technology to Country G without a license. Assuming no other relevant facts, the covered investment is subject to a mandatory declaration.

(3) *Example 3.* Same facts as the example in paragraph (j)(2) of this section, except that the license exception at 15 CFR 740.20(c)(1) authorizes Corporation B to export the critical technology to Country G without a license. Assuming no other relevant facts, the covered investment is not subject to a mandatory declaration.

(4) *Example 4.* Corporation D, a foreign entity with its principal place of business in Country M with 30 percent of its voting shares owned by nationals of Country M, acquires 100 percent of Corporation R, a U.S. business that designs multiple types of critical technology controlled under the EAR and the ITAR. Corporation R manufactures one critical technology that is described on the U.S. Munitions List and requires a license for export to Country M. The remainder of Corporation R's critical technology is controlled under the EAR and does not require a license for export to Country M. Assuming no other relevant facts, Corporation D's acquisition of Corporation R is subject to a mandatory declaration.

(5) *Example 5.* Corporation A, an entity with its principal place of business in Country F with 35 percent of its voting shares owned by nationals of Country F, acquires 100 percent of Corporation Y, a U.S. business that manufactures an item controlled under the ITAR. An ITAR authorization is required to export the item to Corporation A in Country F, but under the ITAR,

Corporation Y is authorized under an exemption to export the controlled article to Corporation A in Country F. Assuming no other relevant facts, Corporation A's acquisition of Corporation Y is subject to a mandatory declaration.

Appendix B to part 800 [Removed]

8. Remove appendix B to part 800.

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Thomas Feddo,

Assistant Secretary for Investment Security.

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