



This document is scheduled to be published in the Federal Register on 09/15/2020 and available online at [federalregister.gov/d/2020-18454](https://www.federalregister.gov/d/2020-18454), and on [govinfo.gov](https://www.govinfo.gov)

**Billing Code 4810-25-P**

**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:** Final rule.

**SUMMARY:** This final rule modifies 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, the rule modifies 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 amendments to the definition of the term “substantial interest” and a related provision, and makes one technical revision.

**DATES:** *Effective date:* The final rule is effective on [INSERT DATE 30 DAYS AFTER PUBLICATION IN THE FEDERAL REGISTER]

*Applicability date:* See § 800.104.

**FOR FURTHER INFORMATION CONTACT:** For questions about this rule, contact: Meena R. Sharma, Deputy Director of Investment Security Policy and International Relations; or David Shogren, 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](mailto:CFIUS.FIRRMA@treasury.gov).

## **SUPPLEMENTARY INFORMATION:**

### **I. Background**

On May 21, 2020, the Department of the Treasury (Treasury Department) published a notice of proposed rulemaking amending certain provisions in 31 CFR part 800 (Part 800). 85 FR 30893. (The Office of the Federal Register made the proposed rule available for public inspection on May 20, 2020.) Public comments on the proposed rule were due by June 22, 2020, and are discussed below.

The proposed rule made revisions to the requirement to submit declarations to the Committee on Foreign Investment in the United States (CFIUS or the Committee) for certain critical technology transactions. This declaration requirement in Part 800 implements section 1706 of the Foreign Investment Risk Review Modernization Act of 2018 (FIRRMA), which amends section 721 of the Defense Production Act of 1950 (DPA) to authorize 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.

The proposed rule made modifications to the scope of the mandatory declaration provision in Part 800—primarily reorienting it from one based on a nexus to certain industries to one based on whether certain U.S. government authorizations would be required to export, reexport, 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. To accomplish this, the proposed rule amended § 800.104 (applicability rule) and § 800.401 (mandatory declarations); introduced two new definitions: “U.S. regulatory authorization” and “voting interest for purposes of critical technology mandatory declarations;” and removed the North American Industry Classification

System (NAICS) codes at appendix B to Part 800. The proposed rule also made amendments to the definition of “substantial interest” at § 800.244 of Part 800.

Further explanation of FIRRMA and the proposed rule can be found at 85 FR 30893; changes to the proposed rule are explained in further detail below.

## **II. Overview of Comments on the Proposed Rule**

During the public comment period, the Treasury Department received written submissions on the proposed rule. All comments received by the end of the comment period are available on the public rulemaking docket at <https://www.regulations.gov>.

The Treasury Department considered each comment submitted on the proposed rule and made certain revisions in this rule in response to comments. The Treasury Department recognizes the vital importance of foreign investment to the U.S. economy, including for businesses that are involved in critical technologies. The Treasury Department drafted the proposed rule, and made revisions in issuing this rule, taking into consideration various factors including national security considerations, the effect on foreign investment, and the effect on small business concerns.

Overall, the commenters were generally supportive of the proposed rule. Some of the commenters suggested revisions or clarification, and the section-by-section analysis below includes responses to these comments. Further edits were made to the rule for consistency and clarity, and one technical revision was made.

## **III. Summary of Comments and Changes from the Proposed Rule**

### *A. Subpart A – General Provisions*

#### *Section 800.104 – Applicability Rule*

While no comments were made specifically on the applicability rule, for the avoidance of doubt, the operation of the applicability rule will be the same as detailed in the proposed rule. That is, the interim rule at 83 FR 51322 (Oct. 11, 2018) implementing a pilot program requiring declarations for certain critical technology transactions 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 critical technology mandatory declaration provision based on NAICS codes and published as part of the final rule for Part 800 at 85 FR 3112 (Jan. 17, 2020) will apply to transactions for which specified actions occurred on or after February 13, 2020, and prior to [INSERT DATE 30 DAYS AFTER PUBLICATION IN THE FEDERAL REGISTER], as specified at § 800.104(d) of this rule. Finally, the modifications to the critical technology mandatory declaration provision discussed in this rule apply starting on [INSERT DATE 30 DAYS AFTER PUBLICATION IN THE FEDERAL REGISTER], except for certain transactions for which specified actions occurred prior to that date.

#### *B. Subpart B – Definitions*

##### *Section 800.213 – Covered Transaction*

The rule makes a technical revision to example 2 in paragraph (e).

##### *Section 800.244 – Substantial Interest*

Section 800.244 in Part 800 sets forth how to determine the percentage interest held indirectly by one entity in another for purposes of whether a foreign person obtains a “substantial interest” in a U.S. business where a foreign government in turn holds a “substantial interest” in the foreign person. This definition forms the basis for the declaration requirement 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. The proposed rule clarified that § 800.244(b) applies only where the general partner, managing member, or equivalent primarily directs, controls, or coordinates the activities of the entity. The proposed rule also removed three instances of the word “voting” from § 800.244(c) in order to clarify that the calculation rule applies to the calculation of “voting interests” as described in paragraph (a) and “interests” as described in paragraph (b) of that section.

One commenter suggested that the current definition at § 800.244(b) be retained and not be revised to include the language, “primarily directed, controlled, or coordinated by or on behalf of a general partner, managing member, or equivalent,” from the proposed rule. The commenter explained that there are situations where it is not clear whether a fund would be deemed to be “primarily directed” by the general partner. The commenter also expressed concern about the inclusion of the same phrase in § 800.256(b). Another commenter requested clarification of the application of § 800.244(b) where a third party controls and coordinates the activities of an entity on behalf of the general partner.

No changes were made in response to these comments. The substantial interest analysis as revised in the proposed rule at § 800.244(b) is appropriately focused on the interest held in the general partner, managing member, or equivalent when such general partner, managing member, or equivalent primarily directs, controls, or coordinates the activities of the entity rather than in all cases where an entity simply has a general partner, managing member, or equivalent. The Treasury Department expects that when analyzing the specific relationship between a general partner and an entity, it will generally be clear to the parties whether the general partner primarily directs, controls, or coordinates the activities of the entity. In a situation where a third party controls and coordinates the activities of an entity on behalf of the general partner, the

general partner does not cease to primarily direct, control, or coordinate the activities of the entity simply by contracting a third party to perform such services.

*Section 800.254 – U.S. Regulatory Authorization*

Consistent with the proposed rule, the new defined term at § 800.254 specifies 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 rule, trigger a mandatory declaration.

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

The proposed rule introduced a new defined term at § 800.256 that specified which persons in the ownership chain of the persons described in § 800.401(c)(1)(i)-(iv) should be analyzed for export licenses and authorization purposes in determining whether a particular transaction could trigger a mandatory declaration.

One commenter suggested raising the applicable voting interest threshold from 25 percent to 50 percent. No change was made in response to this comment. A threshold of 50 percent could exclude interest holders that could wield significant influence over the U.S. business, including with respect to its critical technologies. The Treasury Department concluded that a threshold of 25 percent is appropriate and sets a clear criterion with respect to the persons that need to be analyzed under this provision.

The rule makes clarifying edits, including omitting the extraneous language “foreign” before “person” in several instances, to maintain the intended meaning of the text.

*C. Subpart D – Declarations*

The proposed rule revised the mandatory declaration provision for transactions involving U.S. businesses with critical technologies so that it applies only to the extent that a U.S. regulatory authorization would be required to export, reexport, transfer (in-country), or retransfer the U.S. business's critical technologies to the foreign persons involved in the transaction or certain foreign persons in the ownership chain.

Several commenters noted the language referencing a "party to the transaction" in the proposed rule at § 800.401(c)(1) and questioned whether the intent was to include persons acquiring an indirect ownership interest in the U.S. business. In order to clarify the operation of this provision, the rule revises § 800.401(c)(1) to refer to "a person" that meets the criteria of 800.401(c)(1)(i)-(v), which includes direct and indirect ownership interests. The rule also omits the extraneous language "foreign" before "person" in several instances in paragraph (c) to maintain the intended meaning of the text. The Treasury Department notes that the term "foreign person" is defined at § 800.224 and the main U.S. export control regimes also define foreign person within their respective regulations. For avoidance of doubt, for purposes of evaluating whether certain U.S. government authorizations would be required to export, reexport, transfer (in-country), or retransfer a critical technology to a relevant "person" in an ownership chain, parties should consider whether such (hypothetical) export activity would require a U.S. regulatory authorization under the relevant U.S. export control regime.

One commenter discussed the reference to a "group of foreign persons" in § 800.401(c)(1)(v) and whether it was limited to the description in § 800.256(d). The Treasury Department notes that the proposed rule included a cross-reference to § 800.401(c)(1)(v) within § 800.256(d). Nevertheless, in the interest of clarity, the rule adds a cross-reference to § 800.256(d) in § 800.401(c)(1)(v) as well.

One commenter suggested that the mandatory declaration requirement be assessed as of the time the parties reach a binding agreement, rather than upon the closing of the transaction, given the potential for immediately effective changes to the export control regulations. The Treasury Department expects that in most circumstances, parties can reasonably anticipate if a transaction will meet the criteria of § 800.401(c) based on whether there is one or more critical technologies upon closing. Nevertheless, in response to the comment and acknowledging circumstances that may be reasonably outside the control of parties, the rule includes a new subparagraph (3) providing that for purposes of whether a declaration is mandatory under § 800.401(c), what constitutes a “critical technology” shall be assessed as of the earliest date of any of the conditions set forth in § 800.104(b)(1)-(4). An example of the application of § 800.401(c)(3) was added at § 800.401(j)(6). The rule similarly modifies paragraph (b) of § 800.401, creating a new subparagraph (b)(1) and adding new subparagraph (b)(2) providing that, for purposes of whether a substantial interest transaction involves a TID U.S. business under § 800.248(a), the determination of what constitutes a critical technology shall be assessed as of the earliest date of any of the conditions set forth in § 800.104(b)(1)-(4).

One commenter suggested clarifying that the persons referred to in § 800.401(c)(1)(i)-(v) must be the same persons that are eligible for the Export Administration Regulations (EAR) license exceptions described in § 800.401(e)(6). Clarifying revisions have been made to the rule to address this comment.

Several commenters requested clarification on what it means to be “eligible” for the EAR license exceptions specified in § 800.401(e)(6). In particular, commenters questioned whether parties were required to satisfy the procedural requirements set forth in 15 CFR § 740.17(b) in order to be considered “eligible” for the EAR license exception for encryption commodities,



software, and technology (ENC) and thus exempt from the mandatory declaration provision under § 800.401(e)(6). The rule includes revisions and an explanatory note indicating that for purposes of the CFIUS exception to the mandatory declaration provision at paragraph (e)(6), “eligibility” for an 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, under EAR license exception ENC at 15 CFR 740.17(b)(1), a person may self-classify certain encryption items, and that self-classification is sufficient for an item to be eligible for that license exception. As a result, if the U.S. business’s only critical technologies are items self-classified pursuant to 15 CFR 740.17(b)(1), a CFIUS declaration under paragraph (c) of § 800.401 would not be required (assuming other requirements of the license exception are met with respect to the person to which the hypothetical export would be made). Note that under license exception ENC at 15 CFR 740.17(b)(2) and (b)(3), a party must submit a classification request to the Commerce Department’s Bureau of Industry and Security in order to be eligible for the EAR license exception; therefore, the CFIUS exception to the mandatory filing requirement would not apply unless a classification request is submitted in accordance with the procedures set out in 15 CFR 740.17(b)(2) and (b)(3), including that 30 days have elapsed since the submission of the classification request to BIS. By contrast, the reporting requirements at 15 CFR 740.17(e) are not a condition of eligibility—that is, parties availing themselves of the mandatory declaration exception in the CFIUS rule based on eligibility for EAR license exception ENC do not need to submit semiannual reporting to BIS for purposes of this aspect of the CFIUS regulations. (Though if there is a qualifying export under the EAR, parties would need to satisfy all applicable conditions of the license exception in order to comply with the EAR.) The same is true with respect to the recordkeeping requirements under the EAR license exception for

technology and software-unrestricted (TSU) at 15 CFR 740.13(h) and the requirement to furnish certain commodity classifications to third parties under the EAR license exception for strategic trade authorization (STA) at 740.20(d)—satisfying these aspects of the license exceptions are not a condition of eligibility for purposes of the CFIUS regulations. The Treasury Department has determined that this clarity with respect to eligibility for a license exception under the CFIUS regulations will help parties evaluate whether to submit a mandatory declaration to CFIUS or comply with the eligibility requirements under the relevant EAR license exception and hence be exempted from the CFIUS declaration requirement.

Additionally, the Treasury Department notes that certain end users, such as entities listed in Supplement No. 4 to Part 744 of the EAR, are subject to license requirements, limitations on availability of license exceptions, and license application review policies that are in addition to those set forth elsewhere in the EAR.

This rule also makes clarifying edits to the examples in paragraph (j).

Finally, for the avoidance of doubt, in accordance with FIRRMA, the mandatory declaration provision at § 800.401(c) applies only to U.S. critical technology businesses under § 800.248(a), not to businesses that are TID U.S. businesses solely under § 800.248(b) or (c).

#### **IV. Rulemaking Requirements**

##### *Executive Order 12866*

This rule is not subject to the general requirements of Executive Order 12866, which covers review of regulations by the Office of Information and Regulatory Affairs (OIRA) in the Office of Management and Budget (OMB), because it relates to a foreign affairs function of the United States, pursuant to section 3(d)(2) of that order. In addition, this rule is 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 rule has previously been submitted to OMB for review in accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3507(d)), and approved under OMB Control Number 1505-0121. 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 in the preamble to the proposed rule at Section III, because rules issued pursuant to the DPA, such as this rule, are not subject to the APA or another law requiring the publication of a general notice of proposed rulemaking, the RFA does not apply.

Regardless of whether the RFA applies, available data does not suggest that the rule 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 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 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 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 CFIUS regulations.

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 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 August 18, 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 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 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 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 rule on small U.S. businesses will not be significant. First, a portion of the U.S. businesses affected by the rule are already subject to the existing declaration requirement under the existing CFIUS regulations. Second, the 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 rule is no different from the existing CFIUS regulations. Accordingly, the revisions in this 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 rule will not have a significant economic impact on a substantial number of small entities.

The Treasury Department invited public comment on how the proposed rule would affect small entities, but received none.

### *Congressional Review Act*

This rule has been submitted to OIRA, which has determined that the rule is not a “major” rule under the Congressional Review Act.

### **List of Subjects in 31 CFR Part 800**

Foreign investments in the U.S., Investigations, Investments, Investment companies, National defense, Reporting and recordkeeping requirements.

For the reasons set forth in the preamble, the Treasury Department amends part 800 of title 31 of the Code of Federal Regulations 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 [INSERT DATE 30 DAYS AFTER PUBLICATION IN THE FEDERAL REGISTER], 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 [INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER] apply from [INSERT DATE 30 DAYS AFTER THE DATE OF PUBLICATION IN THE FEDERAL REGISTER ].

## **Subpart B – Definitions**

### **§ 800.213 [Amended]**

3. Amend § 800.213 in paragraph (e)(2) in the next to last sentence after the word “provides” by removing “Corporation X” and adding in its place “Corporation A”.

4. 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.

\* \* \* \* \*

**§ 800.254 [Redesignated as § 800.255]**

5. 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.

6. 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, 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 an entity whose activities are primarily directed, controlled, or coordinated by or on behalf of a general partner, managing member, or equivalent, a 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 (b), (c), and (e)(6) and adding paragraphs (j)(4) through (6) to read as follows:

#### **§ 800.401 Mandatory declarations.**

\* \* \* \* \*

(b)(1) Subject to paragraph (b)(2) of this section, a covered transaction that results in the acquisition of a substantial interest in a TID U.S. business by a foreign person in which the

national or subnational governments of a single foreign state (other than an excepted foreign state) have a substantial interest.

(2) For purposes of paragraph (b)(1) of this section, the assessment of what constitutes a critical technology, as relevant to § 800.248(a), shall be as of the first date on which one of the conditions set forth in § 800.104(b)(1) through (4) is met with respect to a covered transaction.

(c)(1) Subject to paragraph (c)(3) of this section, 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, reexport, transfer (in-country), or retransfer of such critical technology to a person that:

(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 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 as described in § 800.256(d) 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 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, reexport, transfer (in-country), or retransfer of a

critical technology to a 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 person's principal place of business (for entities) as defined in § 800.239, or such person's nationality or nationalities (for individuals) under the relevant U.S. regulatory authorization, as applicable; and

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

(3) For purposes of paragraph (c)(1) of this section, the assessment of what constitutes a critical technology shall be as of the first date on which one of the conditions set forth in § 800.104(b)(1) through (4) is met with respect to a covered transaction. (See the example in paragraph (j)(6) of this section.)

\* \* \* \* \*

(e) \* \* \*

(6) A covered transaction described in paragraph (c)(1) of this section involving critical technology for which the export, reexport, transfer (in-country), or retransfer to any of the persons described in paragraphs (c)(1)(i) through (v) of this section would require one or more U.S. regulatory authorizations and each such critical technology and person, considered as if in the context of an export, reexport, or transfer, is eligible for at least one of the following license exceptions under the EAR, as applicable:

(i) 15 CFR 740.13;

(ii) 15 CFR 740.17(b); or

(iii) 15 CFR 740.20(c)(1).

NOTE 1 to § 800.401(e)(6): To be “eligible” for a license exception refers to any requirements imposed by the EAR that must be satisfied prior to export even if no export is to occur.

\* \* \* \* \*

(j) \* \* \*

(4) *Example 4.* Corporation A, a foreign entity with its principal place of business in 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 foreign 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.

(5) *Example 5.* Corporation B, a foreign entity with its principal place of business in 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 Z 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.

(6) *Example 6.* Corporation A, a foreign person, and Corporation B, a U.S. business, execute a binding written agreement pursuant to which Corporation A will acquire a 10 percent equity interest in Corporation B and will be afforded the right to appoint two members of Corporation B’s board of directors. As of the date of the agreement, none of the items that Corporation B manufactures constitutes a critical technology. After the agreement is executed, but prior to the completion of the transaction, a product manufactured by Corporation B is included as a defense article on the USML. Assuming no other relevant facts, under paragraph

(c)(3) of this section, the transaction is not subject to a requirement to submit a declaration to the Committee. However for purposes of § 800.211, the transaction may be a covered investment.

**Appendix B to Part 800 [Removed]**

8. Remove appendix B to part 800.

Dated: August 18, 2020.

**Thomas Feddo,**

*Assistant Secretary for Investment Security.*

[FR Doc. 2020-18454 Filed: 9/11/2020 4:15 pm; Publication Date: 9/15/2020]