

CLIENT ALERT

CFIUS Mandatory Declarations – Bye, Bye NAICS Codes; Hello "Regulatory Authorizations"

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Today, less than 4 months after publication of a proposed rule, the Committee on Foreign Investment in the U.S. has published a final rule, effective October 15, 2020, that eliminates the connection to certain industries, as defined by specified North American Industry Classification System (NAICS) codes, for determining whether a foreign investment in a so-called "U.S. TID business" that produces, designs, tests, manufactures, fabricates or develops "critical technologies" is subject to *mandatory* review by CFIUS. To implement this change, the new rule broadly identifies certain foreign persons whose covered investments or covered control transactions will now be subject to mandatory CFIUS review where a "regulatory authorization" would be required if the U.S. TID business' critical technology were to be exported, reexported, transferred (in-country) or retransferred to that foreign person, a determination that is generally made without regard to whether any exemptions or exceptions under the applicable export control regulations would be available. There are a few EAR exceptions (*e.g.*, certain items qualifying for the TSU, ENC and STA exceptions) that may relieve the burden somewhat for foreign investment in certain U.S. TID businesses.

The new test may be easier to apply because assessing whether the U.S. business is producing, designing, testing, manufacturing, fabricating or developing "critical technology" was (and is) already a first step in making the mandatory declaration determination, while some found the NAICS approach difficult to apply. Nonetheless, because "critical technology" covers most export controlled items and technology, eliminating the prior requirement of a connection to certain specified industries will likely increase the number of foreign investment transactions that will be subject to mandatory CFIUS review.

For more information, please contact the professional(s) listed below, or your regular Crowell & Moring contact.

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