

CFIUS Flowchart

Regardless of where the buyer or investor is incorporated, it is a **“foreign person”** if it is a **“foreign national,”** a **“foreign government,”** a **“foreign entity”** (other than one where a majority equity interest is owned by US nationals) or any entity, foreign or domestic over which control is exercised or exercisable by the foregoing. Even a US company, if controlled by foreign parties, can be a **“foreign person”** for CFIUS purposes.

“US business” focuses on where business operations are being conducted, not where the company is incorporated. Even a Cayman company can have a **“US business.”** And a US subsidiary of a foreign parent is a **“US business.”**

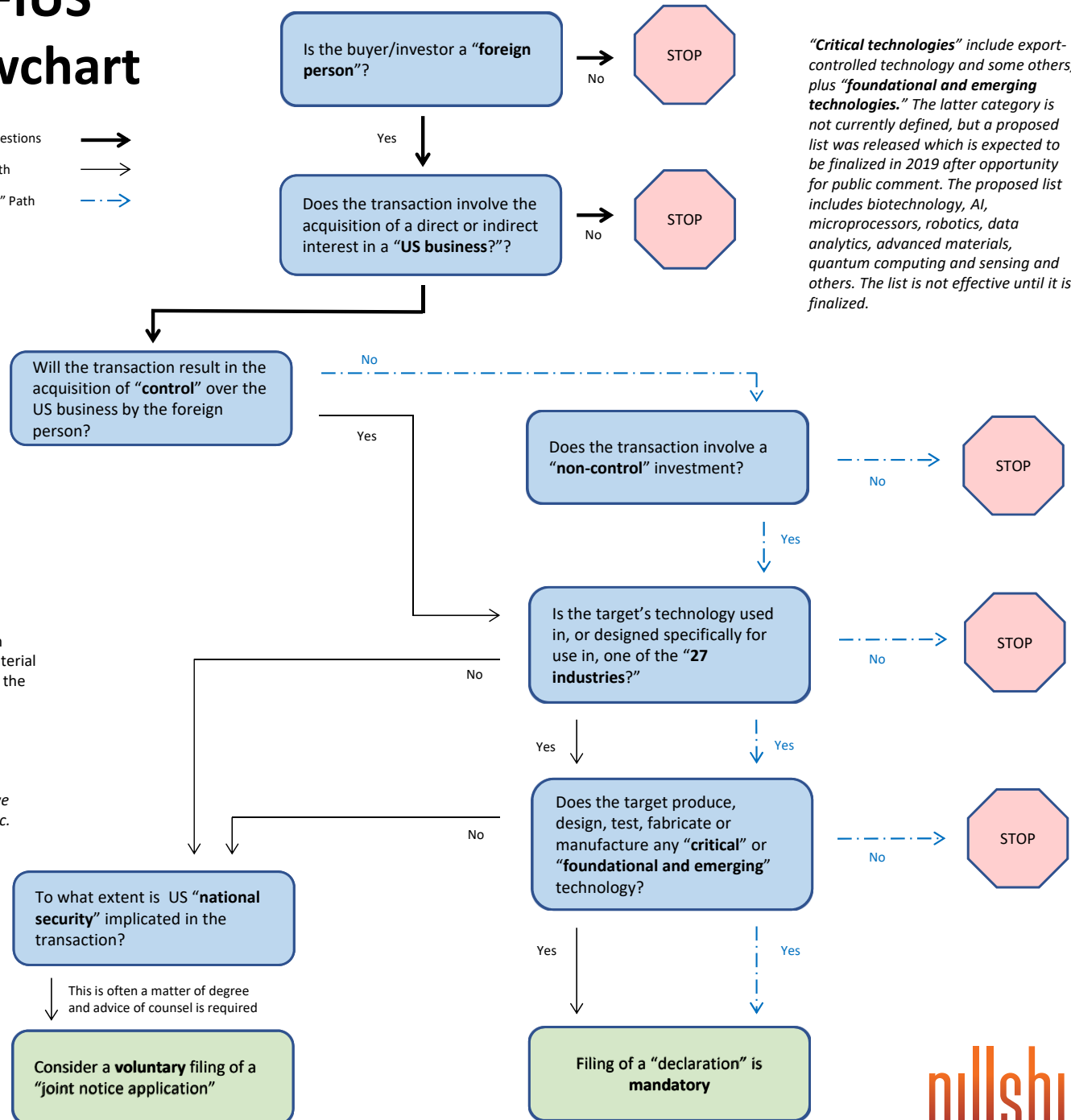
“Control” is a defined term and means **“the ability to direct or decide important matters affecting an entity, as shown by ownership of voting interests, board representation, proxy voting, special shares, contractual arrangements, formal or informal arrangements to act in concert or other means.”** A 10%+ voting interest or board rights generally are sufficient to constitute **“control”**.

“Non-control” investments are those which result in a foreign person obtaining board rights (a board seat or observer rights), access to material non-public technical information regarding **“critical technologies,”** or the ability to affect substantive decision-making regarding **“critical technologies.”**

“National security” is not defined and can include many types of technology, key suppliers to the US Government, proximity to sensitive infrastructure or facilities, access to citizens’ personal information, etc.

The **“27 industries”** are listed by NAICS Code and include semiconductors, aircraft, batteries, broadcasting, nanotechnology, petrochemicals, aluminum, computers, and others.

Threshold Questions →
 “Control” Path →
 “Non-Control” Path - - ->



“Critical technologies” include export-controlled technology and some others, plus **“foundational and emerging technologies.”** The latter category is not currently defined, but a proposed list was released which is expected to be finalized in 2019 after opportunity for public comment. The proposed list includes biotechnology, AI, microprocessors, robotics, data analytics, advanced materials, quantum computing and sensing and others. The list is not effective until it is finalized.

“27 Industries”

- Aircraft manufacturing (NAICS Code: 336411)
- Aircraft Engine and Engine Parts (NAICS Code: 336412)
- Alumina Refining and Primary Aluminum Production (NAICS Code: 331313)
- Ball and Roller Bearing Manufacturing (NAICS Code: 332931)
- Computer Storage Device Manufacturing (NAICS Code: 334112)
- Electronic Computer Manufacturing (NAICS Code: 334111)
- Guided Missile and Space Vehicle Manufacturing (NAICS Code: 336414)
- Military Armored Vehicle, Tank, and Tank Component Manufacturing (NAICS Code: 336992)
- Nuclear Electric Power Generation (NAICS Code: 221113)
- Optical Instrument and Lens Manufacturing (NAICS Code: 333314)
- Other Basic Inorganic Chemical Manufacturing (NAICS Code: 325180)
- Other Guided Missile and Space Vehicle Parts and Auxiliary Equipment Manufacturing (NAICS Code: 336419)
- Petrochemical Manufacturing (NAICS Code: 325110)
- Powder Metallurgy Part Manufacturing (NAICS Code: 332117)
- Power, Distribution and Specialty Transformer Manufacturing (NAICS Code: 335311)
- Primary Battery Manufacturing (NAICS Code: 335912)
- Radio and Television Broadcasting and Wireless Communications Equipment Manufacturing (NAICS Code: 334220)
- Research and Development in Nanotechnology (NAICS Code: 541713)
- Research and Development in Biotechnology (other than Nanotechnology) (NAICS Code: 541714)
- Secondary Smelting and Alloying of Aluminum (NAICS Code: 331314)
- Search, Detection, Navigation, Guidance, Aeronautical, and Nautical System and Instrument Manufacturing (NAICS Code: 334511)
- Semiconductor and Related Device Manufacturing (NAICS Code: 334413)
- Semiconductor Machinery Manufacturing (NAICS Code: 333242)
- Storage Battery Manufacturing (NAICS Code: 335911)
- Telephone Apparatus Manufacturing (NAICS Code: 334210)
- Turbine and Turbine Generator Set Units Manufacturing (NAICS Code: 333611)

“Critical Technology”

- Defense articles or defense services included on the US Munitions List set forth in ITAR
- Items on the Commerce Control List and controlled pursuant to multilateral regimes (including for reasons relating to national security, chemical and biological weapons proliferation, nuclear nonproliferation, or missile technology; or for reasons relating to regional stability or surreptitious listening.
- Specially designed and prepared nuclear equipment, parts and components, materials, software and technology covered by 10 CFR part 810 (relating to assistance to foreign atomic energy activities)
- Nuclear facilities, equipment and material covered by 10 CFR part 100 (relating to export and import of nuclear equipment and material)
- Selected agents and toxins covered by certain regulations
- Any **emerging and foundational technologies** controlled pursuant to section 12758 of the Export Control Reform Act of 2018

“Emerging and Foundational Technologies”

Proposed list of “emerging and foundational technologies” to be made subject to export controls:

- Biotechnology, such as nanotechnology, genomic and genetic engineering, and neurotech
- Artificial intelligence and machine learning, such as neural networks, computer vision, brain modeling,, time series prediction, evolution and genetic computation, reinforcement learning, expert systems, speech and audio processing (e.g., speech recognition and production), natural language processing (e.g., machine translation), planning (e.g., scheduling, game playing), audio and video manipulation technologies (e.g., voice cloning, deep fakes), AI cloud technologies and AI chipsets
- Position, navigation and timing technology
- Microprocessor technology, such as systems-on-a-chip and stacked memory
- Advanced computing, such as memory-centric logic
- Data analytics technology, such as visualization, automated analysis algorithms and context-aware computing
- Quantum computing and sensing technology, such as quantum computing, quantum encryption and quantum sensing
- Logistics technology, such as mobile electric power, modeling and simulation, total asset visibility or distribution-based logistics systems
- Additive manufacturing (i.e., 3D printing)
- Robotics, such micro-drones and micro-robotic systems, swarming technology, self-assembling robots, molecular robots or robot compilers, and “smart dust”
- Brain-computer interfaces, such as neural-controlled interfaces, mind-machine interfaces, direct neural interfaces or brain-machine interfaces
- Hypersonics, such as flight control algorithms, propulsion technologies, thermal protection systems, or specialized materials
- Advanced materials, such as adaptive camouflage, functional textiles, and biomaterials
- Advanced surveillance techniques, such as faceprint and voiceprint technologies

Investments Covered

“Control” investments:

- Acquisitions, mergers, takeovers and other business combinations
- Minority equity investments resulting in >10% by voting power
- Any investment that carries rights to board representation or observer rights
- Indirect acquisitions (such as by acquiring rights in a foreign parent with a US subsidiary or other business)
- Joint ventures and other commercial arrangements if they carry significant control over a US business
- **But not** debt (secured or unsecured), convertible debt or other contingent rights that do not carry any voting or control rights prior to conversion or exercise
- **And not** most overseas joint ventures and other commercial arrangements that do not carry voting or control rights over the target’s US business

Plus, certain “non-control” and other investments:

- *Any investment resulting in a foreign person gaining rights to material, non-public technical information relating to “critical technology” (not including financial information)*
- *Any investment giving a foreign person involvement (other than through voting of shares) in substantive decision-making with regard to the target’s use, development, acquisition or release of critical technology*
- *Any contingent rights to equity (convertible debt, warrants, options, etc.), with some exceptions*
- *Any acquisition of control through a joint venture*

Safe Harbors:

- Purely passive investments of <10% by voting power, with no board or observer rights; or, in the case of the mandatory program, access rights to material nonpublic technical information, or involvement in substantive decision-making, regarding critical technology
- Certain indirect investments by foreign persons through an investment fund managed exclusively by non-foreign persons in which the foreign LPs have no committee or advisory board rights, or rights to control or influence the GP’s decision-making