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NAVIGATING THE NEW LANDSCAPE FOR FOREIGN INVESTMENT IN THE U.S.

New rules that became final on February 13, 2020 dramatically expand the jurisdiction of the Committee on Foreign Investment in the United States (CFIUS). Where CFIUS was once concerned only with transactions that would result in foreign control of a U.S. business, the Committee's authority now extends to non-controlling investments in a broad range of U.S. businesses, as well as investments in certain real estate.¹

The new rules will significantly affect foreign investment in hi-tech, biotech, health care, finance, and insurance, among other sectors. Importantly, because the rules apply to both direct and indirect foreign investment, parties need to be alert to possible CFIUS issues not only when contemplating **direct foreign investment**, but also with respect to **investments via funds with foreign limited partners, or via U.S. companies that are controlled by foreign persons, or into a foreign company that has a U.S. subsidiary.**

Parties who fail to seek CFIUS approval where applicable do so at their peril: the Committee can not only recommend blocking of proposed transactions, but also unwinding of completed investments/acquisitions. More commonly, the Committee will propose mitigation conditions restricting foreign investor/acquiror rights, such as rights to participate in substantive decision-making or to access the target's intellectual property. While prior notification to CFIUS is at the parties' discretion in many cases (subject to the risk of unwinding/forced mitigation if notification is not made), the new rules make prior notification to CFIUS mandatory for investments in a broad range of businesses that deal with export-controlled and other sensitive technology, as well as for certain transactions involving a significant foreign government interest. Where filing is mandatory, failure to comply can lead not only to unwinding or imposition of mitigation conditions, but also penalties of the value of the transaction or \$250,000, whichever is greater.

At a high level, CFIUS jurisdiction turns on two pivots: (i) the rights the foreign investor will receive; and (ii) the kind of business or real estate into which the investment is being made, as further illustrated in the chart on the next page.

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¹ A portion of the rules involving non-controlling investments in certain U.S. businesses that deal in critical technology was implemented as a pilot program beginning in October 2018. But the new rules go much further.

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Two terms are key to understanding why the new rules are so significant for the hi-tech, biotech, health care, finance, and insurance sectors: (1) “critical technology” and (2) “sensitive personal data of U.S. citizens.”

- The term “critical technology” applies to businesses that design, develop, produce, fabricate, manufacture, or test many kinds of technology that are subject to U.S. export controls. Those controls go well beyond what many investors may think of as sensitive technology: for example, “critical technology” includes software that uses encryption for data protection purposes, and lentiviral packaging plasmids commonly used in biomedical research that contain the G gene from the Vesicular Stomatitis Virus.
- The term “sensitive personal data of U.S. citizens” applies to any business that, directly or indirectly,

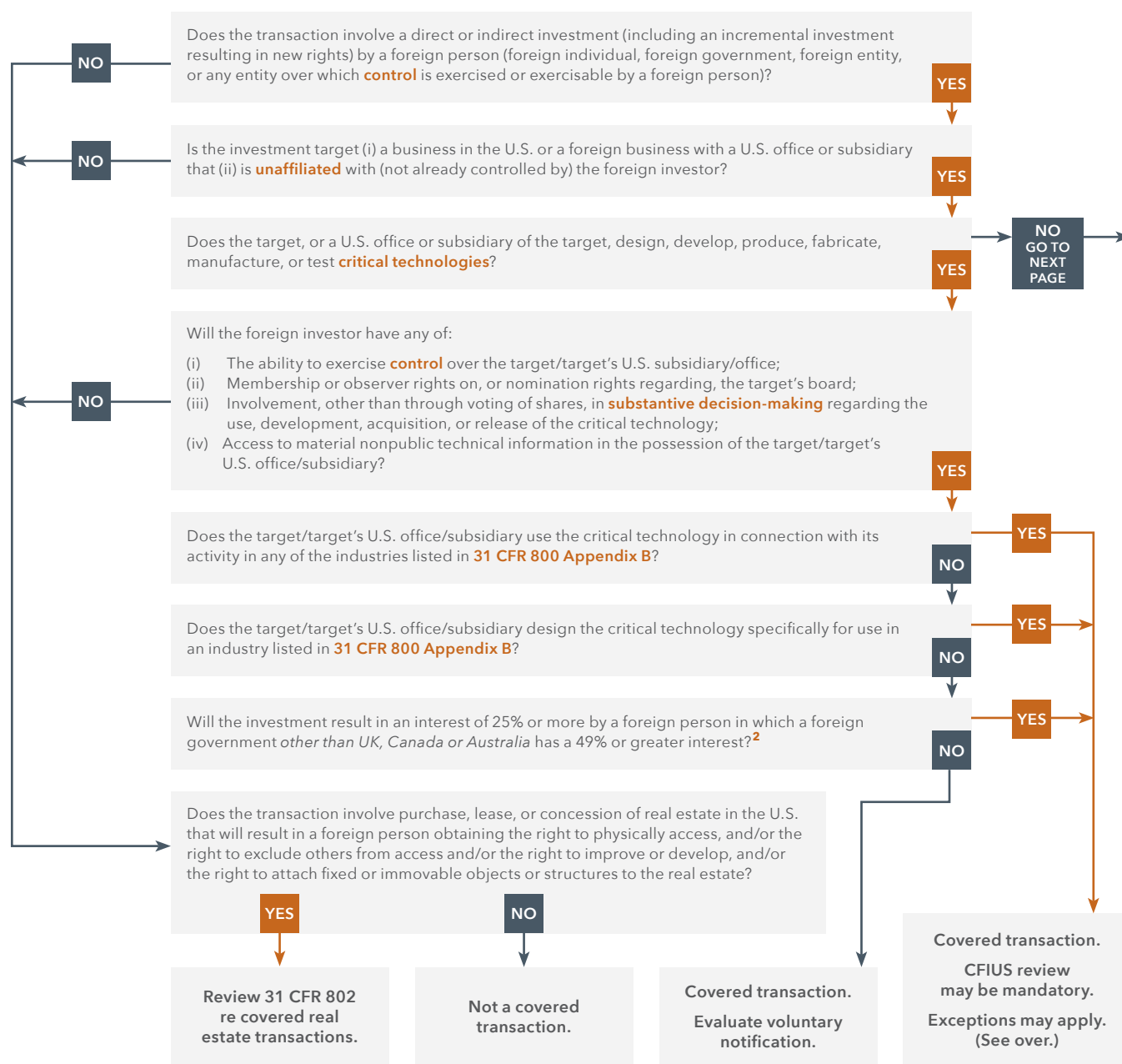
collects or maintains genetic test results of U.S. citizens, as well as U.S. businesses that collect or maintain a high volume of records containing other categories of sensitive personal data, including: geolocation data; information on an individual’s mental or physical health, biometric data, insurance application data, detailed financial data, government security clearance-related information; and non-public electronic communications (texts, chats, email, etc.) (but only between users of the business’ products and only if a primary purpose of such products is to facilitate third-party communications). Importantly, there are carve outs for data that is a matter of public record, and data concerning employees (except employees of U.S. government contractors who hold U.S. government personnel security clearances).

TYPE OF RIGHTS	TYPE OF BUSINESS/REAL ESTATE
<ul style="list-style-type: none"> ■ Control 	<ul style="list-style-type: none"> ■ Any business with respect to which CFIUS could perceive a threat to national security, broadly defined
<ul style="list-style-type: none"> ■ Membership or observer rights on, or nomination rights regarding, the target’s board; or ■ Involvement, other than through voting of shares, in substantive decision-making; or ■ Access to material nonpublic technical information in the possession of the target/target’s U.S. office/subsidiary 	<ul style="list-style-type: none"> ■ Business that designs, develops, produces, fabricates, manufactures, or tests “critical technology”; or ■ Business that owns, operates, or provides certain services to, “critical infrastructure”; or ■ Business that (directly or indirectly) collects or maintains “sensitive personal data of U.S. citizens”
<ul style="list-style-type: none"> ■ Any purchase, lease, or concession that affords one or more of the following property rights: right to physically access; right to exclude others from access; right to improve or develop; right to attach fixed or immovable objects or structures 	<ul style="list-style-type: none"> ■ Located within, or functioning as a part of, a “covered port,” as defined in 31 CFR 802.210 ■ Located within one (1) mile of the boundary of a U.S. government facility identified in 31 CFR 802, App. A, Pt. 1 or 2 ■ Located within 100 miles of a U.S. government facility identified in 31 CFR 802, App. A, Pt. 2 ■ Located within certain townships/ranges identified in 31 CFR 802, App. A, Pt. 3 ■ Located within certain offshore areas identified in 31 CFR 802, App. A, Pt. 4

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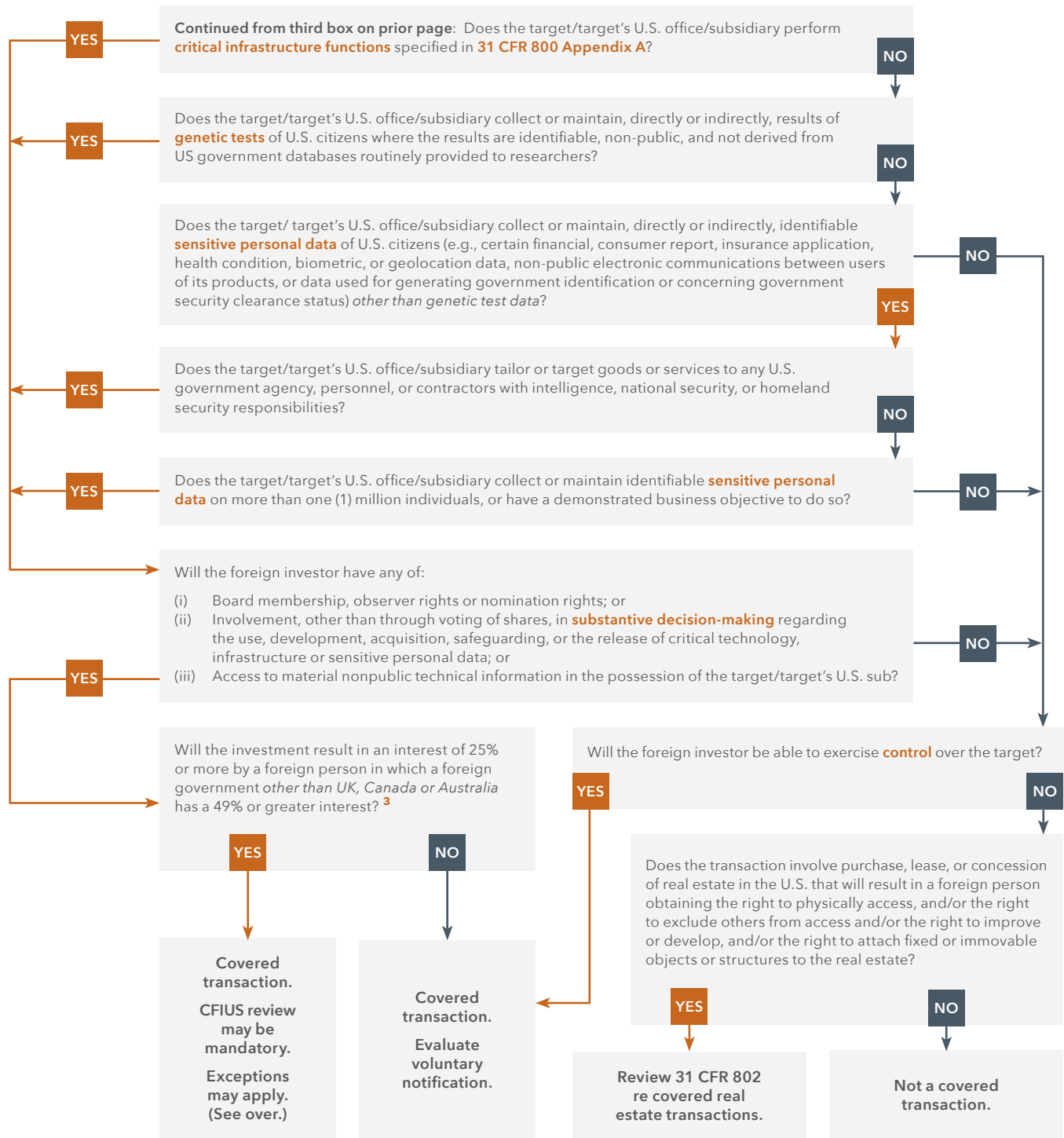
The new rules are complex (occupying over 200 pages in the Federal Register) and impossible to summarize in just a couple of pages. The full text of the rules can be found [here](#) and (for real estate transactions) [here](#). But to assist in orienting investors and their counsel to the new landscape, we offer the **flow chart** below.

For more information on the new CFIUS rules and advice on whether and how to seek CFIUS approval for a covered transaction, please contact Tahlia Townsend or David Hall of Wiggin and Dana's International Trade Compliance practice.



² The UK, Canada, and Australia have excepted foreign state status until February 13, 2022, at which point CFIUS must decide whether these countries' own foreign investment rules are sufficiently robust to justify continuation of the status. Other foreign states may also be added in future.

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EXCEPTIONS TO THE MANDATORY FILING REQUIREMENTS.

The new rules provide several exceptions to the mandatory filing requirements, as follows:

REQUIRED FEATURES OF TRANSACTION	EXEMPTION
<p>Investment by a fund that affords a foreign person (or designee) membership as a limited partner or equivalent on an advisory board or committee of the fund, provided that:</p> <ul style="list-style-type: none"> (i) the fund is managed exclusively by a general partner (or equivalent); (ii) the GP (or equivalent) is not a foreign person; (iii) the advisory board or committee on which the foreign person sits does not have the ability to approve, disapprove, or otherwise control: investment decisions of the fund, or GP decisions related to entities in which the fund is invested; and (iv) the foreign person cannot otherwise control the investment fund, including via the authority to approve/disapprove/otherwise control investment decisions or decisions of the GP related to entities in which the fund is invested, or to unilaterally dismiss, prevent the dismissal of, select, or determine the compensation of the GP. 	<p>Exempt from mandatory filing for both critical technology transactions and transactions with a substantial foreign government interest.</p> <p>(For critical technology transactions, the exemption is slightly broader, applying even if the GP is a foreign person as long as the GP is “ultimately controlled exclusively by U.S. nationals.”)</p>
Control transaction involving an air carrier that holds a certificate from the Secretary of Transportation under 49 USC 41102	Exempt from mandatory filing for both critical technology transactions and transactions with a substantial foreign government interest
Transaction by an excepted investor	Exempt from mandatory filing for non-controlling investments in critical technology businesses
Indirect foreign investment via a FOCI-mitigated entity operating under a valid security clearance	
An investment by a foreign person who satisfied the criteria for “excepted investor” status at the time of the transaction, but no longer meets all the criteria in 31 CFR 800.219(a)(1), (a)(2), (a)(3)(i), (a)(3)(ii), (a)(3)(iii), (c)(1)(i), (c)(1)(ii), and (c)(1)(iii).	
An investment that is subject to CFIUS jurisdiction solely because the target/target’s U.S. office/subsidiary produces, designs, tests, manufactures, fabricates, or develops one or more critical technologies that is eligible for export, reexport, or transfer (in country) pursuant to License Exception ENC of the Export Administration Regulations (15 CFR 740.17) – e.g., certain kinds of software with encryption capabilities.	

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KEY TERMS

(FOR ADDITIONAL DEFINITIONS, SEE 800 CFR 800.201 - 800.254)

Control

Broadly defined as the power, direct or indirect, whether or not exercised, through the ownership of a majority or a dominant minority of the total outstanding voting interest or otherwise (e.g., board representation, proxy voting, contractual arrangements) to determine, direct, or decide "important matters affecting an entity," such as: disposition of assets; reorganization/merger/dissolution; closing/relocation/alteration of facilities; major expenditures/investments; issuance of debt/equity; approval of operating budget; selection of new ventures; entry into/termination of significant contracts; appointment/dismissal of officers/senior managers/general partner; appointment/dismissal of employees with access to sensitive technology; policies/procedures from handling non-public technical, financial or other proprietary data; amendment of organizational documents with respect to the foregoing matters. **Excludes** the following minority shareholder protections: (1) the power to prevent the sale or pledge of all or substantially all of the assets of an entity or a voluntary filing for bankruptcy or liquidation; (2) The power to prevent an entity from entering into contracts with majority investors or their affiliates; (3) The power to prevent an entity from guaranteeing the obligations of majority investors or their affiliates; (4) The right to purchase an additional interest in an entity to prevent the dilution of an investor's pro rata interest in that entity in the event that the entity issues additional instruments conveying interests in the entity; (5) The power to prevent the change of existing legal rights or preferences of the particular class of stock held by minority investors, as provided in the relevant corporate documents governing such shares; and (6) The power to prevent the amendment of the Articles of Incorporation, constituent agreement, or other organizational documents of an entity with respect to the matters described in paragraphs (c)(1) through (5) of this section.

Critical technologies

Items on the United States Munitions List (USML); items on the Commerce Control List (CCL) pursuant to multilateral regimes or based on unilateral controls for regional stability, surreptitious listening, or emerging and foundational technology controls; nuclear-related items covered by 10 CFR 110 or 810; select agents and toxins covered by 7 CFR 331, 9 CFR 121, or 42 CFR 73.

Critical infrastructure functions

Owning, operating, or providing certain services related to critical infrastructure. The types of business and services to which the rules apply are detailed in the matrix at 31 CFR 800, Appendix A.

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Excepted investor

- *A foreign person who is a national of Australia, Canada, or the UK, not also a national of any other foreign state.
- *The governments of Australia, Canada, and the UK.
- A foreign entity that, with respect to itself **and** each of its parent entities, meets **all** the following criteria:
 - (i) *is organized under the laws of the U.S., Australia, Canada, or the U.K.;
 - (ii) *has its principal place of business in the U.S., Australia, Canada, or the U.K.;
 - (iii) *at least 75% of the members and observers of the board (or equivalent) are U.S. nationals or nationals of Australia, Canada, or the U.K. and not also nationals of any other foreign state;
 - (iv) each foreign person who individually or together with other foreign persons holds an interest of 10% or more is a national of Australia, Canada, or the U.K. and not also a national of any other foreign state, or is a government entity of Australia, Canada, or the U.K., or is an entity that is organized in and has its principal place of business in the U.S., Canada, Australia, or the U.K.;
 - (v) the "minimum excepted ownership" is held by persons who are not foreign persons, or who are nationals of Australia, Canada, or the U.K. and not also a national of any other foreign state, or government entities of Australia, Canada, or the U.K., or are entities organized in and having their principal places of business in the U.S., Canada, Australia, or the U.K. For an entity whose equity securities are primarily traded on an exchange in The U.S., Canada, Australia, or the U.K., "minimum excepted ownership" means a majority of voting interest, the right to a majority of profits, and the right in the event of dissolution to a majority of assets. In other cases, it means 80 percent or more of voting interest, the right to 80 percent or more of profits, and the right in the event of dissolution to 80 percent or more of assets.
 - (vi) neither the foreign person nor any of its parents nor any entity of which it is a parent is listed on the BIS Entity List or Unverified List;
 - (vii) in the five years prior to the completion date of the transaction, neither the foreign person nor any of its parents nor any entity of which it is a parent has:
 - *received notice from CFIUS that it made a material misstatement, omission, or false certification in a filing or violated a mitigation agreement/material condition/order;
 - *been subject to action by the President under section 721(d) of the Defense Production Act of 1950 (suspending or prohibiting transactions); or
 - entered into a settlement agreement with or received a finding of violation or penalty notice from OFAC regarding violations of economic sanctions; received notice of debarment from DDTC regarding violations of the International Traffic in Arms Regulations; been party to a final order by BIS regarding violations of export control laws; received a civil penalty from the National Nuclear Security Administration; or been convicted of or entered into a DOJ DPA or non-pros for a felony in any U.S. jurisdiction;
 - (viii) continues to satisfy certain of the criteria for excepted investor status for three years following completion. If the investor ceases to satisfy the relevant conditions, its excepted investor status will be retroactively lost and the transaction deemed to have involved a foreign person who was not an excepted investor. *The relevant criteria are marked with an asterisk above.*

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(FOR ADDITIONAL DEFINITIONS, SEE 800 CFR 800.201 - 800.254)

Genetic tests

Defined by reference to 42 U.S.C. 300gg-91(d)(17), which provides that “‘genetic test’ means an analysis of human DNA, RNA, chromosomes, proteins, or metabolites, that detects genotypes, mutations, or chromosomal changes,” but “does not mean – (i) an analysis of proteins or metabolites that does not detect genotypes, mutations, or chromosomal changes; or (ii) an analysis of proteins or metabolites that is directly related to a manifested disease, disorder, or pathological condition that could reasonably be detected by a health care professional with appropriate training and expertise in the field of medicine involved.”

Sensitive personal data

Eleven categories, focused on information that could be used for blackmail.

- (i) financial data that could be used to analyze or determine an individual’s financial distress or hardship;
- (ii) the set of data in a consumer report, as defined under 15 U.S.C. 1681a (with limited exceptions);
- (iii) the set of data in an application for health, long-term care, professional liability insurance, mortgage, or life insurance;
- (iv) data relating to an individual’s physical, mental, or psychological health condition of an individual;
- (v) non-public electronic communications, including email, messaging, or chat communications, between or among users of a U.S. business’s products or services if a primary purpose of such product or service is to facilitate third-party user communications;
- (vi) geolocation data collected using positioning systems, cell phone towers, or WiFi access points such as via a mobile application, vehicle GPS, other onboard mapping tool, or wearable electronic device;
- (vii) biometric enrollment data including facial, voice, retina/iris, and palm/fingerprint templates;
- (viii) data stored and processed for generating a state or federal government identification card;
- (ix) data concerning U.S. Government personnel security clearance status;
- (x) the set of data in an application for a U.S. Government personnel security clearance or an application for employment in a position of public trust;
- (xi) the results of an individual’s genetic tests.

Excludes: (i) data maintained or collected by a U.S. business concerning the employees of that U.S. business, unless the data pertains to employees of U.S. Government contractors who hold U.S. government personnel security clearances; and (ii) data that is a matter of public record, such as court records or other government records that are generally available to the public.

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(FOR ADDITIONAL DEFINITIONS, SEE 800 CFR 800.201 - 800.254)

Substantive decision-making

Defined as “the process through which decisions regarding significant matters affecting an entity are undertaken, including, as applicable: (1) Pricing, sales, and specific contracts, including the license, sale, or transfer of sensitive personal data to any third party, including pursuant to a customer, vendor, or joint venture agreement; (2) Supply arrangements; (3) Corporate strategy and business development; (4) Research and development, including location and budget allocation; (5) Manufacturing locations; (6) Access to critical technologies, covered investment critical infrastructure, material nonpublic technical information, or sensitive personal data, including pursuant to a customer, vendor, or joint venture agreement; (7) Physical and cyber security protocols, including the storage and protection of critical technologies, covered investment critical infrastructure, or sensitive personal data; (8) Practices, policies, and procedures governing the collection, use, or storage of sensitive personal data, including: (i) The establishment or maintenance of, or changes to, the architecture of information technology systems and networks used in collecting or maintaining sensitive personal data; or (ii) Privacy policies and agreements for individuals from whom sensitive personal data is collected setting forth parameters regarding whether and how sensitive personal data may be collected, maintained, accessed, or disseminated; or (9) Strategic partnerships.” **Excludes** “strictly administrative decisions.”

Unaffiliated

A business in which the foreign person “does not directly hold more than 50 percent of the outstanding voting interest or have the right to appoint more than half of the members of the board of directors or equivalent governing body.”

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 APPENDIX B TO PART 800
 INDUSTRY TRIGGERS FOR CRITICAL TECHNOLOGY
 FOR MANDATORY FILING REQUIREMENT

This publication is a summary of legal principles. Nothing in this article constitutes legal advice, which can only be obtained as a result of a personal consultation with an attorney. The information published here is believed accurate at the time of publication, but is subject to change and does not purport to be a complete statement of all relevant issues.

INDUSTRY	NCIS CODE
Aircraft Manufacturing	336411
Aircraft Engine and Engine Parts Manufacturing	336412
Alumina Refining and Primary Aluminum Production	331313
Ball and Roller Bearing Manufacturing	332991
Computer Storage Device Manufacturing	334112
Electronic Computer Manufacturing	334111
Guided Missile and Space Vehicle Manufacturing	336414
Guided Missile and Space Vehicle Propulsion Unit and Propulsion Unit Parts Manufacturing	336415
Military Armored Vehicle, Tank, and Tank Component Manufacturing	336992
Nuclear Electric Power Generation	221113
Optical Instrument and Lens Manufacturing	333314
Other Basic Inorganic Chemical Manufacturing	325180
Other Guided Missile and Space Vehicle Parts and Auxiliary Equipment Manufacturing	336419
Petrochemical Manufacturing	325110
Powder Metallurgy Part Manufacturing	332117
Power, Distribution, and Specialty Transformer Manufacturing	335311
Radio and Television Broadcasting and Wireless Communications Equipment Manufacturing	334220
Research and Development in Nanotechnology	541713
Research and Development in Biotechnology (except Nanobiotechnology)	541714
Secondary Smelting and Alloying of Aluminum	331314
Search, Detection, Navigation, Guidance, Aeronautical, and Nautical System and Instrument Manufacturing	334511
Semiconductor and Related Device Manufacturing	334413
Semiconductor Machinery Manufacturing	333242
Storage Battery Manufacturing	335911
Telephone Apparatus Manufacturing	334210
Turbine and Turbine Generator Set Units Manufacturing	333611