

CLIENT ALERT

New CFIUS Proposed Rulemaking Sharpens Enforcement Authorities and Review Procedures

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On Thursday, April 11, 2024, the U.S. Department of the Treasury, Office of Investment Security, issued a Notice of Proposed Rulemaking (the “Proposed Rule”) to enhance the regulations governing the Committee on Foreign Investment in the United States (the “Committee” or “CFIUS”).¹ If finalized, the Proposed Rules would sharpen CFIUS’s abilities to gather information and quickly address national security risks in connection with CFIUS reviews. The Proposed Rule would also increase potential civil penalties up to 20 times for material statements, omissions, and failure to comply with national security agreements. It would not, however, expand the scope of transactions that are subject to CFIUS review.

Below we provide a summary of the key aspects of the Proposed Rule. Treasury encourages the public to submit written comments in response to the Proposed Rule by May 15, 2024.

¹ *Amendments to Penalty Provisions, Provision of Information, Negotiation of Mitigation Agreements, and Other Procedures Pertaining to Certain Investments in the United States by Foreign Persons and Certain Transactions by Foreign Persons Involving Real Estate in the United States*, 89 FR 26107, Investment Security Office (April 15, 2024), <https://www.federalregister.gov/documents/2024/04/15/2024-07693/amendments-to-penalty-provisions-provision-of-information-negotiation-of-mitigation-agreements-and> [hereinafter the “Proposed Rule”].

New CFIUS Proposed Rulemaking Sharpens Enforcement Authorities and Review Procedures

A. Greater Authority to Gather Information

The Proposed Rule takes several steps to increase the Committee's ability to gain information related to transactions that have not been submitted to CFIUS for review ("non-notified transactions"). Currently, CFIUS may subpoena parties to a transaction to determine whether the transaction is "covered."² A covered transaction is one that CFIUS has jurisdiction to review.³

The Proposed Rule expands the scope of permissible requests by CFIUS to non-notified transaction parties to include (1) whether a transaction was subject to mandatory filing requirements and (2) information that would enable the Committee to determine whether a transaction may raise national security considerations.⁴ The Proposed Rule also authorizes the Committee to request information from non-parties related to whether a transaction is covered, subject to mandatory filing requirements, or may raise national security considerations. Committee officials have stated that the ability to gather information from third parties is being proposed to obtain corroborating information and supporting documentation.

The Committee's stated goal in expanding its powers to request information and subpoena is preventing "unnecessary filings and increasing efficiency in connection with filings for transactions that may present an extant risk." Because the Committee's regulations only authorize it to request information relating to its jurisdiction, it can only gain information about the national security implications of a transaction after reviewing its jurisdiction and requesting that the transaction parties submit a filing to the Committee. Many transactions subject to the Committee's jurisdiction do not raise national security considerations, so expanding the Committee's ability to gather information will enable CFIUS to ask questions related to national security considerations without establishing whether a transaction is subject to the Committee's jurisdiction. However, as currently drafted, the Proposed Rule imposes virtually no limitations on the type of information and level of detail that CFIUS could request, meaning that CFIUS may request essentially the same information from parties (and even non-parties) who are not submitting a CFIUS filing as it would from parties that do file – even if CFIUS has not established jurisdiction over the transaction.

B. Accelerated Timeline for Parties to Respond to Mitigation Terms

The Proposed Rule would amend the Committee's regulations to specify a three business day period for substantive party responses to proposed mitigation terms (both initial and subsequent proposals or revisions), unless the parties request a longer time frame and the Staff Chairperson grants that request in writing.⁵ This mirrors the current three business day

² 31 CFR 800.501(b).

³ 31 CFR 800.213.

⁴ *Proposed Rule* at Section II.A.

⁵ *Proposed Rule* at Section II.B. The Committee defines a substantive response to be either: (1) acceptance of the terms, (2) a counterproposal, or (3) a detailed statement of reasons that the party or parties cannot comply with the proposed terms, which may also include a counterproposal.

New CFIUS Proposed Rulemaking Sharpens Enforcement Authorities and Review Procedures

period that transaction parties have to respond to written questions from CFIUS while a Notice is being reviewed.⁶ If the parties fail to respond in three business days, CFIUS may then reject the notice or declaration.

Although this accelerated timeline would undoubtedly increase the pressure on transaction parties, CFIUS officials have characterized the timeline as “extendable, but accountable.” It is therefore likely CFIUS will be open to extending this timeline where appropriate.

C. Increased Civil Monetary Penalties

The Proposed Rule would increase the maximum penalty amount for various civil violations of the Committee’s regulations from \$250,000 to \$5 million (and in certain cases may go beyond \$5 million). The Proposed Rule would also expand when a material misstatement or omission may form the basis for a civil penalty. CFIUS officials have stated that the current penalties pose an insufficient deterrent and have proposed this increase to remedy the issue.

Civil penalties for material statements or omissions can form the basis for a civil penalty when included as part of a declaration or notice, or as part of a certification to the Committee.⁷ The Proposed Rule expands this to include information submitted in response to questions from the Committee.⁸ This may either be in response to questions related to a non-notified transaction or related to monitoring or enforcement compliance. The penalties for each of these material statements or omissions would be expanded by the Proposed Rule from a maximum of \$250,000 to a maximum of \$5 million. The Proposed Rule would expand CFIUS’s civil penalty authority, for the first time, to statements made in the context of non-notified transactions, significantly broadening the Committee’s powers to investigate transactions.

The Proposed Rule also expands the penalty for failure to file a mandatory transaction from \$250,000 or the value of the transaction (whichever is greater) to \$5 million or the value of the transaction (whichever is greater). This is likely to have an effect where a feature of the transaction causes its value to be low; however, the median transaction size from 2013 to 2022 for joint voluntary notices was \$170 million.⁹

Finally, the Proposed Rule increases penalties for violations of national security agreement conditions to the greatest, per violation, of (i) \$5 million, (ii) the value of the violating party’s interest in the U.S. business (or covered real estate) at the time of the transaction, (iii) the value of the violating party’s interest in the U.S. business (or covered real estate) at the time of the violation or the most proximate time to the violation for which assessing such value is practicable, or (iv) the value of

⁶ 31 CFR 800.504(a)(4). A Declaration is subject to a two business day period. 31 CFR 800.406(a)(3).

⁷ 31 CFR 800.901(a); 31 CFR 802.901(a).

⁸ *Proposed Rule* at Section II.C.

⁹ *Id.*

New CFIUS Proposed Rulemaking Sharpens Enforcement Authorities and Review Procedures

the transaction. This change would offer the Committee greater flexibility when calculating a penalty, as the current regulations are limited to \$250,000 or the value of the transaction.¹⁰

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The Proposed Rule underscores the Committee's continued focus on compliance and enforcement. By expanding its abilities to seek out non-notified transactions and other information, hold parties to account through civil penalties, and establish a timeline for national security mitigation, CFIUS would be able to be more active in investigating transactions and exercising its enforcement authorities than ever before.

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¹⁰ 31 CFR 800.901(c); 31 CFR 802.901(b)