

Practice Update

Treasury Proposes Enhancements to CFIUS Procedures, Penalties, and Enforcement Authority

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On April 11, 2024, the U.S. Department of the Treasury issued a Notice of Proposed Rulemaking (NPRM) proposing a new rule updating the mitigation and enforcement provisions of the regulations administered by the Committee on Foreign Investment in the United States (CFIUS).

Background

CFIUS is an interagency committee that reviews foreign person acquisitions of and investments in U.S. businesses and domestic real estate that implicate national security concerns. CFIUS has the power to investigate transactions subject to its jurisdiction; seek mitigation of national security concerns presented by transactions through agreements, conditions, and orders (collectively, “mitigation measures”); and recommend that the president issue an order to block or unwind a transaction.

The proposed rule seeks to modify the penalties for violations; negotiations of mitigation agreements; requests for information by CFIUS; and other procedures. This client alert provides an overview of the proposed rule.

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Expansion of Authority and Enforcement Mechanisms Regarding Information Requests in Non-Notified Transactions

Currently, CFIUS may request parties to a non-notified transaction to submit information to determine whether a transaction is covered as defined by the regulations or poses national security concerns. The proposed rule expands the types of information CFIUS can require of transaction parties and other persons, and amends the obligations of parties responding to CFIUS' requests for non-notified transactions.

Additionally, under the proposed rule, parties may be obligated to provide: (1) information to monitor compliance with or enforce the terms of a mitigation agreement, order, or condition and (2) information to determine whether the transaction parties have made a material misstatement or omitted material information during the course of a previously concluded review or investigation (including those that ended with rejection notices). Failure to respond to such requests, even by third parties who were not involved in the transaction, could be compelled through the issuance of a subpoena as may be deemed *appropriate* (as opposed to necessary) by CFIUS.

Establishing Response Deadlines to Risk Mitigation Proposals

Parties to covered transactions may submit, and in certain circumstances are required to submit, detailed information on transactions subject to CFIUS jurisdiction through a declaration or notice to CFIUS. As defined by statute, the CFIUS has 45 days to complete an investigation of noticed transactions. Current regulations require parties to respond to follow-up information requests within two or three business days.

In the case where CFIUS determines that a covered transaction presents a national security risk, CFIUS

will propose mitigation terms. Because there is currently no requirement for the parties to respond within an allotted amount of time to the mitigation proposals, causing delays that extend past the 45 day review period, the proposed rule requires parties to submit substantive responses to proposed mitigation terms within a three business day period.^[1] Failure to respond within the allotted time frame, or obtain extensions, may result in rejection of a CFIUS notice.

Strengthening CFIUS' Authority to Enforce Civil Monetary Penalties

CFIUS currently has the authority to impose monetary penalties and seek other remedies for violations of CFIUS regulations or mitigation orders, conditions, or agreements. Penalties are assessed on a per violation basis, and CFIUS may seek penalties and other remedies without prejudice to civil or criminal penalties that may be applicable under other authorities. CFIUS also may refer conduct to other government enforcement authorities where appropriate.

The civil penalty amount for the submission of a declaration or notice with a material misstatement or omission or the making of a false certification is currently set at a maximum of \$250,000 per violation.^[2] The penalty for failure to comply with the requirements of a mandatory declaration is set at a maximum of \$250,000 or the value of the transaction, whichever is greater, per transaction.^[3] Lastly, the current penalty for violations of material provisions of mitigation agreements, material conditions imposed by the CFIUS, or orders issued by the CFIUS is a maximum of \$250,000 or the value of the transaction, whichever is greater, per violation.^[4]

This proposed rule increases the maximum penalty amount to \$5 million per violation for material misstatements, omissions, or false certifications; the greater of \$5 million or the value of the transaction per violation for failure to comply with mandatory

declarations; and the greater of \$5 million, the value of the transaction, or the value of the party's interest in the U.S. business at the time of the violation (or time of the transaction) per violation of material mitigation agreements, conditions, or orders. These changes would not be retroactive and would apply to violations that occur on or after the effective date of the amended final rule and to mitigation agreements, conditions, and orders issued on or after the effective date of final rule.

The proposed rule seeks to expand the list of circumstances in which a civil monetary penalty may be imposed to include material misstatements or omissions that occur in communications outside a review or investigation of a transaction. CFIUS anticipates that some of the communications that may be subject to penalty will include those relevant to requests for information related to non-notified transactions; failure to file a mandatory declaration; and compliance with or enforcement, modification, or termination of a mitigation agreement, condition, or order imposed.

Lastly, the new rule would extend the time frame from 15 days to 20 days, each, for both the submission of a petition for reconsideration of a penalty to CFIUS and CFIUS response with a final penalty determination.

Conclusion: Opportunity to Comment on Proposed Rule

The proposed rule expands the authority of CFIUS to request information of parties whether they are party to a transaction or not and imposes stricter deadlines and steeper penalties for an expanded set of violations. Parties subject to mitigation measures or involved in CFIUS-covered transactions, as well as foreign investors of U.S. businesses, should therefore take notice of the proposed changes. You have an opportunity to comment by May 15 on the proposed rule. If you are interested in submitting comments or learning how these proposed changes

impact you, please reach out to your Akerman lawyer.

[1] Substantive responses include: acceptance of terms, a counterproposal, or a detailed statement of reasons that the party or parties cannot comply with the proposed terms, which may also include a counterproposal.

[2] Section 800.901(a) and 802.901(a)

[3] Section 800.401; there is no mandatory declaration provision in part 802 regarding to real estate transactions.

[4] Section 800.901(c) and 802.901(c)

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