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3 Highlights from CFIUS Proposed Rule: Enhanced Penalties, Expanded Information Requests, and Mandatory Response Times

The U.S. Department of the Treasury (“Treasury”) recently issued a [Notice of Proposed Rulemaking](#) (“NPRM”) that would enhance and expand authorities of the Committee on Foreign Investment in the United States (“CFIUS” or “the Committee”). Concurrently with the NPRM, Treasury issued a [press release](#) that emphasized CFIUS’s increased focus on monitoring non-notified transactions, compliance with mitigation agreements, and enforcement following issuance of its 2022 [Enforcement and Penalty Guidelines](#).

The proposed rule includes several amendments to 31 C.F.R. Parts 800 and 802 aimed at strengthening the Committee’s “identification and resolution of national security risks as well as CFIUS actions in response to violations.”

The NPRM includes the following key provisions:

- 1) Increasing penalties for noncompliance with regulatory requirements, including a five-million-dollar maximum penalty for certain violations, and expanding the scope of circumstances in which a penalty may be imposed;

- 2) Expanding the Committee’s ability to access information necessary for its review of transactions, including increased subpoena power; and
- 3) Establishing a three-day turnaround for transaction parties to respond to risk mitigation proposals.

Interested parties have until May 15, 2024, to submit written comments on the proposed rule.

Background

CFIUS is a federal interagency committee that reviews certain foreign investments and real estate transactions (*i.e.*, “covered transactions”). Under regulations issued under the Foreign Investment Risk Review Modernization Act, CFIUS is authorized to review: (1) controlling investments by foreign persons in U.S. businesses; (2) certain non-controlling investments by foreign persons in U.S. businesses involved with critical technology, critical infrastructure, or sensitive personal data; and (3) the purchase or lease by, or concession to, certain foreign persons of certain real estate.

Three Highlights

- 1) *Increasing Penalties for Noncompliance.* In the NPRM, Treasury explains that the current penalty maximums do not sufficiently deter or penalize certain violations. Therefore, the NPRM proposes to increase penalties as follows:
 - Material misstatements / omissions:
 - The proposed rule would increase from \$250,000 to five million dollars the maximum penalty for submission of a declaration or notice containing a material misstatement or omission, or a false certification.
 - The NPRM expands the circumstances in which a civil monetary penalty can be imposed for a material misstatement or omission. Under the proposed rule, the new maximum penalties would also apply to material misstatements or omissions in the context of other communications with the Committee (*e.g.*, responses to requests for information regarding a non-notified transaction and/or enforcing compliance).
 - Failure to submit a mandatory filing:
 - The proposed rule would increase the penalty for failing to submit a mandatory filing to the greater of five million dollars or the value of the transaction. Under the current regulations, the penalty is the greater of \$250,000 or the value of the transaction. The NPRM explains that the increased penalty is appropriate to address covered transactions involving highly valued companies in which the actual transaction at issue has a low value.
 - Material violations of mitigation agreement:
 - The proposed rule would increase the penalty for a violation of a material provision of a mitigation agreement to the greatest of five million dollars, the value of the transaction, or the value of the violating party's interest in the U.S. business or real estate at the time of the transaction or the violation. Under the current regulations, the penalty is the greater of \$250,000 or the value of the transaction.
- 2) *Expanding the Committee's Access to Information.*
 - Current regulations empower the Committee to request from parties to a transaction information that would enable CFIUS to conduct a full assessment.
 - The NPRM would expand this authority by enabling CFIUS to require transaction parties (and, with regard to non-notified transactions, other persons) to furnish information to assist the Committee in reviewing:
 - whether a transaction is a covered transaction, presents national security risks, or is subject to a declaration requirement;
 - compliance with the terms of a mitigation agreement; and
 - whether the transaction parties made a material misstatement or omitted material information in the course of making a filing to CFIUS.
 - Notably, the authority to request information regarding non-notified transactions from persons other than transaction parties is new.
 - The proposed rule also broadens the Committee's subpoena authority. Under the current regulations, the committee may subpoena parties "if **necessary.**" The NPRM broadens the regulations to allow for the Committee to issue subpoenas "if deemed **appropriate.**"
- 3) *Establishing Response Times during Mitigation Negotiations.*
 - Under the current regulations, while the Committee has a specified time frame to complete an investigation (*i.e.*, 45 days), parties to a transaction are not required to respond to a Committee proposal regarding a mitigation agreement within a specified window. This, the Committee notes, "can sometimes result in a protracted process where parties may take longer than reasonable to respond to the Committee's proposed terms."

- The proposed rule imposes a three-business day deadline for “substantive party responses to proposed mitigation terms (both initial and subsequent proposals or revisions), unless the party requests a longer time frame” and the Committee grants the response in writing. A “substantive response” would consist of (i) acceptance of the mitigation terms, (ii) a counterproposal, or (iii) a statement detailing why the party or parties cannot comply with the proposed terms, which also may include a counterproposal.

Overall, the proposed rule would mark a notable expansion of CFIUS’s authorities. In addition to its core mission of reviewing foreign investments, the Committee appears to be moving towards being a civil enforcement agency with broad powers to compel production of information and impose significant monetary penalties.

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