

CFIUS Proposes to Expand its Enforcement and Procedural Authorities

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On April 11, 2024, the U.S. Treasury Department proposed to expand the enforcement and transaction review authorities of the Committee on Foreign Investment in the United States (“CFIUS” or the “Committee”). In [a press release](#) and accompanying [Notice of Proposed Rulemaking](#), the Treasury Department proposed rules that would: (i) substantially increase the financial penalty amounts that CFIUS may impose for violations of its rules, procedures or mitigation agreement terms; (ii) expand the Committee’s subpoena authority and ability to seek information from non-transaction parties; and (iii) establish tight timelines for transaction parties to respond to proposed mitigation terms.

In public remarks regarding the proposals, Assistant Secretary of Investment Security Paul Rosen described the genesis of the proposed rules as “specific lessons learned” from recent CFIUS enforcement activities. Assistant Secretary Rosen also emphasized CFIUS’s ongoing focus on enforcement matters and clarified that CFIUS continues to add resources to its monitoring and enforcement team. Taken together, the proposals and public remarks underscore that CFIUS has adopted a more aggressive enforcement stance and continues to enhance its tools to ensure that transaction parties comply with its regulations, especially those governing mandatory filings, and related requirements. A brief summary of the proposed regulations follows below.

Increased Penalty Amounts

The proposed regulations significantly increase the penalty that CFIUS can impose from \$250,000 to more than \$5 million per violation, as follows:

- For material misstatements or omissions in materials provided to CFIUS, a *maximum* penalty of \$5 million per violation will apply.

- For parties that fail to submit a mandatory CFIUS filing, the penalty amount would be the *greater* of \$5 million or the value of the underlying transaction – meaning that a penalty amount could exceed the value of certain transactions.
- For material violations of a CFIUS mitigation agreement, the penalty would be the *greater* of \$5 million or the value of the underlying transaction (or in certain circumstances, the value of the party’s interest in the U.S. business at the time of the violation).

Although CFIUS has discretion to impose a lesser penalty, the proposed rules effectively establish a minimum penalty of \$5 million per violation. Additionally, the Treasury Department noted that criminal penalties remain available if necessary. In discussing the increased penalty amounts, Assistant Secretary Rosen noted that various factors could warrant, on the one hand, a lesser penalty (e.g., if a company voluntarily self-discloses and/or accepts responsibility for a violation), or, on the other hand, a heightened one (e.g., if a party makes material misstatements in response to multiple inquiries).

Expanded Subpoena Authority

While CFIUS already has subpoena authority “if necessary” under its authorizing statute, the Treasury Department’s proposals would considerably expand that authority by allowing CFIUS to issue subpoenas to obtain information both from transaction parties, “if deemed appropriate”, and from third parties that are not party to the transaction but may have information relevant to whether a transaction was subject to a mandatory filing requirement or “otherwise raises national security risks.” Interestingly, the proposals do not specify clear limitations on what information may be sought by CFIUS in this regard. Historically, CFIUS’s ability to ask questions was limited to non-notified transactions and jurisdictional status, but this proposed rule change would authorize the Committee to subpoena information regarding potential underlying “national security risks.” This represents a significant change and expansion from past CFIUS practice.

Rapid Feedback on Mitigation Agreements

The proposed regulations would require parties to provide comments on draft mitigation terms within three (3) business days, a significant shift from the current framework, which does not impose any such specific deadline. Although the proposals provide CFIUS with authority to extend the prescribed three (3) business day timeline upon request by the transaction parties, they do not obligate it to do so. Given the scope and complexity of undertakings that are typically included as part of mitigation terms, this new requirement could create significant challenges for transaction parties in connection with the negotiation of such terms.

Takeaways

The proposed rules, and Assistant Secretary Rosen’s accompanying remarks, demonstrate CFIUS’s enhanced focus on enforcement matters and signal clearly that CFIUS intends to take a more aggressive stance, particularly in connection with non-notified transactions, misstatements or omissions in materials provided to CFIUS, and for violations for mitigation agreements. Foreign investors should undertake a careful analysis of CFIUS risk—including potential long-term consequences—when considering transactions subject to CFIUS jurisdiction, and should consider carefully any possible mandatory filing requirements to ensure that a particular transaction does not trigger such requirements.

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