

Treasury Proposes Stronger CFIUS Penalties, Broader Subpoena and Enforcement Powers

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The U.S. Department of the Treasury (Treasury), which chairs the Committee on Foreign Investment in the United States (CFIUS or the Committee), recently published a Notice of Proposed Rulemaking (NPRM) that would amend the CFIUS regulations to enhance the Committee's access to transaction information, including through its subpoena powers, and strengthen CFIUS's existing penalty and enforcement authorities. Treasury's press release describes the NPRM as the "first substantive update to the mitigation and enforcement provisions of the CFIUS regulations since the enactment and implementation of the Foreign Investment Risk Review Modernization Act of 2018." **Comments on the NPRM are due May 15, 2024.**

As background, CFIUS is an interagency committee that reviews transactions involving certain foreign investments in U.S. businesses and certain real estate transactions for potential national security risks. Section 721 of the Defense Production Act of 1950, as amended (Section 721), authorizes CFIUS to impose monetary penalties and seek other remedies for violations of Section 721, the CFIUS regulations, and any mitigation orders, conditions, or agreements imposed by CFIUS.

Parties to a proposed transaction involving foreign investment, especially those subject to a mandatory CFIUS filing requirement and those that could result in mitigation, should take note of the significantly increased penalties and expanded use of CFIUS's subpoena powers that the new rules would entail. The proposed changes also include measures to further address non-notified transactions, where parties may or may not be aware of CFIUS filing requirements or may decide not to file.

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The proposed rule includes the following changes to CFIUS's authorities:

- Expands the types of information CFIUS can require from parties regarding non-notified transactions (i.e., transactions subject to CFIUS jurisdiction for which no notice or declaration has been submitted to the Committee);
- Requires parties to provide information upon request related to monitoring compliance with or enforcing the terms of a mitigation agreement, or determining whether a transaction party made a material misstatement or omission in the course of a review or investigation;
- Institutes a three-business day time frame for parties to provide a substantive response to proposed mitigation terms in the course of a review, unless the Staff Chairperson grants an extension;
- Generally increases the maximum civil penalty amount from \$250,000 to \$5 million (or, depending on the nature of the violation, 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 obligations under Section 721 and the CFIUS regulations (e.g., material misstatements, material omissions, making a false certification, or failure to submit a mandatory CFIUS filing), as well as violations of mitigation orders, conditions, or agreements;
- Expands the list of circumstances in which CFIUS may impose a penalty to also apply to material misstatements or omissions in contexts outside of declarations and notices, including statements to the Committee related to non-notified transactions and monitoring or enforcing compliance;
- Expands the instances in which CFIUS may use its subpoena authority by permitting the Committee to issue a subpoena to obtain information when deemed *appropriate* by the Committee rather than only when deemed *necessary* by the Committee; and
- Extends the time frames for parties to submit a petition for reconsideration of a penalty notice and for CFIUS to assess the petition and issue a final penalty determination from 15 business days to 20 business days.

These changes would significantly enhance CFIUS's ability to more broadly scrutinize U.S. transactions at a time when investments in the United States are increasing as a result of Congress's and the Biden Administration's numerous domestic investment incentive programs. Assistant Secretary for Investment Security Paul Rosen noted that these updates reflect lessons learned through monitoring, compliance, and enforcement efforts and build on the 2022 CFIUS Enforcement and Penalty Guidelines, which we analyzed here.

The proposed changes follow a series of measures by the Biden Administration to strengthen CFIUS's ability to review foreign investments into the United States. In August 2023, Treasury published a final rule expanding the list of military installations subject to the jurisdiction of CFIUS with respect to certain real estate transactions. Likewise, in September 2022, the Biden Administration issued an Executive Order expanding on the existing list of statutory factors that CFIUS may consider when reviewing transactions to assess their potential impact on U.S. national security.

Wiley has unparalleled CFIUS and National Security practices and capabilities that leverage the expertise of our former senior U.S. government leaders and renowned professional experts with extensive experience representing domestic and international companies in complex transactions across a wide range of industry sectors. Please reach out to any of the authors listed on this alert should you have any questions about Treasury's proposed amendments to the CFIUS regulations governing foreign investment review.