

Trade Alert: Treasury Releases First-Ever CFIUS Enforcement and Penalty Guidelines

On October 20, 2022, the U.S. Department of the Treasury, acting as Chair of the interagency Committee on Foreign Investment in the United States (“CFIUS” or “the Committee”), released the first-ever [CFIUS Enforcement and Penalty Guidelines](#) (“the Guidelines”). The Committee, sometimes called a “black box” for its notoriously opaque internal processes, is authorized to review certain transactions involving foreign investment in the United States and certain real estate transactions by foreign persons to determine the effect of such transactions on U.S. national security. CFIUS is tasked with identifying and mitigating certain national security risks, often by entering into agreements or imposing conditions on transaction parties. The Guidelines provide insight into how CFIUS determines whether and in what amount to impose a penalty or take some other enforcement action against a party that fails to comply with CFIUS mitigation agreements or other legal obligations.

The Guidelines address three categories of acts or omissions that may constitute a “Violation.” Under the Guidelines, a “Violation” refers to any violation of Section 721 of the Defense Production Act of 1950, as amended, the regulations promulgated thereunder, or mitigation orders, conditions, or agreements pursuant thereto (“CFIUS Mitigation”).¹ The three types of conduct that may constitute a Violation include:

- (1) *Failure to File*. Failure to timely file a mandatory declaration or notice, as applicable.
- (2) *Non-Compliance with CFIUS Mitigation*. Conduct that is prohibited by or otherwise fails to comply with CFIUS Mitigation.
- (3) *Material Misstatement, Omission, or False Certification*. Material misstatements in or omissions from information filed with the Committee, and false or materially incomplete certifications filed in connection with assessments, reviews, investigations, or CFIUS Mitigation, including information provided to the Committee during informal consultations or in response to requests for information.

Not every Violation necessarily leads to a penalty or other remedy under Section 721; CFIUS exercises its discretion in determining whether a penalty is appropriate. In making its determination, the Committee engages in a fact-based analysis considering information from a variety of sources, including across the U.S. government, publicly available information, tips, transaction parties, filing parties, and other sources. The Committee then weighs aggravating and mitigating factors, including, but not limited to, the following, which are described in more detail in the Guidelines:

¹ Section 721 of the Defense Production Act of 1950, as amended (“Section 721”), is codified at 50 U.S.C. § 4565. Section 721 authorizes the Committee to impose monetary penalties and seek other remedies (e.g., directed notices, action plans) for violations of Section 721, the regulations promulgated thereunder, or mitigation orders, conditions, or agreements pursuant thereto. The regulations that address the imposition of such penalties and other remedies under Section 721 are codified at 31 C.F.R. §§ 800.901, 800.902, 801.409, 802.901, and 802.902 (“CFIUS Regulations”).

- (a) Accountability and Future Compliance,
- (b) Harm,
- (c) Negligence, Awareness, and Intent,
- (d) Persistence and Timing,
- (e) Response and Remediation, and
- (f) Sophistication and Record of Compliance.

CFIUS's process for considering and imposing penalties is set forth in the CFIUS Regulations.² The key steps in the penalty process are summarized below:

- (i) *Notice of Penalty.* The Committee sends a notice of penalty, including a written explanation of the conduct to be penalized and the amount of any monetary penalty to be imposed. The notice of penalty states the legal basis for concluding that the conduct constitutes a Violation and may set forth any aggravating and mitigating factors the Committee has considered in making its determination.
- (ii) *Petition for reconsideration.* Within 15 business days of receipt of a notice of penalty, the penalized party may submit a petition for reconsideration to the CFIUS Staff Chairperson, including any defense, justification, mitigating factors, or explanation. This period may be extended, upon a showing of good cause, by written agreement between the Staff Chairperson and the subject.
- (iii) *Upon timely receipt of a petition.* If a petition for reconsideration is timely received, the Committee will consider it before issuing a final penalty determination within 15 business days of receipt of the petition.
- (iv) *Upon no timely receipt of a petition.* If no petition for reconsideration is timely received, the Committee will ordinarily issue a final penalty determination.

In a [press release](#) announcing the Guidelines, Assistant Secretary of the Treasury for Investment Security Paul Rosen said the new Guidelines send a clear message that “[c]ompliance with CFIUS mitigation agreements is not optional, and the Committee will not hesitate to use all of its tools and take enforcement action to ensure prompt compliance and remediation, including through the use of civil monetary penalties and other remedies.”³ The new Guidelines demonstrate the U.S.’s commitment to building a robust investment screening mechanism designed to detect evolving national security risks.⁴

* * *

More from Torres Trade Law on CFIUS:

² The CFIUS Regulations, primarily 31 C.F.R. §§ 800.901 and 802.901, set forth CFIUS penalty process. For certain older transactions, earlier regulations may apply.

³ See Treasury Releases CFIUS Enforcement and Penalty Guidelines, Press Release (Oct. 20, 2022), available at <https://home.treasury.gov/news/press-releases/jy1037>.

⁴ See generally E.O. 14083 of Sept. 15, 2022, Ensuring Robust Consideration of Evolving National Security Risks by the Committee on Foreign Investment in the United States, 87 Fed. Reg. 57,369 (Sept. 20, 2022), available at <https://www.federalregister.gov/documents/2022/09/20/2022-20450/ensuring-robust-consideration-of-evolving-national-security-risks-by-the-committee-on-foreign>.

[Subscribe to the Torres Trade Law Newsletter.](#)

- On August 2, 2022, CFIUS released its Annual Report to Congress for calendar year 2021, detailing the Committee’s work concerning oversight of foreign investment transactions in areas deemed critical to U.S. national security. See [Key Takeaways from the CFIUS Annual Report for 2021](#) (published Aug. 5, 2022).
- Recently proposed legislation contemplates the creation of separate Committee on National Critical Capabilities, which has been nicknamed the “Outbound CFIUS,” to review outbound investment transactions for national security purposes. See [Congress Contemplates Committee to Review Outbound Investment](#) (published Apr. 23, 2022).
- Certain companies must comply, not only with the national security-related requirements of CFIUS Mitigation, but also with Foreign Ownership, Control, or Influence (“FOCI”) requirements overseen by the Department of Defense’s Defense Counterintelligence and Security Agency (“DCSA”). See [When CFIUS Mitigation Agreements and FOCI Reviews Overlap: A Critical Balancing Act](#) (published Jan. 18, 2022).

[Listen to the Torres Talks Trade Podcast.](#)

- In Episode 7 of the Torres Talks Trade Podcast, host Olga Torres is joined by Albert Schultz to discuss CFIUS Mitigation and how to ensure international mergers and acquisitions in critical areas proceed smoothly while minimizing risk to national security. See [Torres Talks Trade Episode 7 – The Committee on Foreign Investment in the United States](#) (published July 21, 2022).