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FAQs on the Committee on Foreign Investment in the United States (CFIUS) Process and Procedures

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What is a CFIUS filing, when should it be made, and what happens if a party fails to file?

In passing the Foreign Investment and Risk Review Modernization Act in 2018, Congress provided CFIUS with increased resources to review transactions occurring in the global marketplace to determine whether they are subject to CFIUS's jurisdiction and raise national security issues. This review results in what we call the "non-notified" practice of CFIUS. Essentially, if the CFIUS analysts see reporting of a transaction that they believe raises national security concerns, they will call the transaction parties (mainly on the buy-side) to ask questions about the transaction to determine whether CFIUS would have jurisdiction to review the transaction and whether there is reason for concern. In some cases, this non-notified practice results in CFIUS requesting that the parties to the transaction file a full CFIUS notice to allow for review of the transaction. These cases may result in clearance of the transaction, mitigation measures to cure national security concerns, or even a required divestment.

CFIUS has clearly been thinking about ways to improve its non-notified practice. In a Notice of Proposed Rulemaking (NPRM) published in the Federal Register on April 11, 2024, CFIUS has proposed to expand the types of information it can require from not only transaction parties but also other parties when engaging with CFIUS. Also, CFIUS proposes to expand the instances in which CFIUS may use its subpoena authority, including when seeking to obtain information from third persons not party to a transaction notified to CFIUS and in connection with assessing national security risk associated with non-notified transactions.

Are there penalties?

There can be penalties assessed by CFIUS in several ways. First, FIRREA created a category of mandatory CFIUS filings for certain transactions involving critical technology or foreign entities in which the government has a voting interest of 49 percent or more. Failure to file in the face of a mandatory requirement can result in penalties for both the buyer and the seller up to the value of the transaction. While no penalties for failure to make a mandatory filing have been assessed to date, transaction parties now routinely require representations around the issues that could trigger a mandatory filing.

The recent NPRM proposes to raise the stakes for a different category of potential CFIUS penalties. The NPRM proposes expanding the circumstances in which a civil monetary penalty may be imposed due to a party's material misstatement or omission, including when the material misstatement or omission occurs outside a review or investigation of a transaction and when it occurs in the context of the Committee's monitoring and compliance functions.

CFIUS also proposes substantially increasing the maximum civil monetary penalty (from \$250,000 to \$5 million) for violations of obligations under the CFIUS statute and regulations, as well as agreements, orders, and conditions authorized by the statute and regulations; and introducing a new method for determining the maximum possible penalty for a breach of a mitigation agreement, condition, or order imposed.

What is the mandatory declaration?

FIRRMA created mandatory filing requirements in certain circumstances, as described above. These requirements can be met by filing a declaration. Congress created the new construct of a CFIUS declaration in passing FIRRMA. Declarations require less information than a full notice and do not require the payment of a filing fee (which is based on the value of the transaction). A declaration can be filed in the case of a mandatory filing and also in the case of a voluntary filing. For a mandatory filing, the declaration must be filed at least 30 days prior to the “completion date” of the transaction, which is the earliest date upon which any ownership interest, including a contingent equity interest, is conveyed, assigned, delivered, or otherwise transferred to a person; or a change in rights that could result in a covered control transaction or covered investment occurs.

Is there an exception for certain countries?

Australia, Canada, New Zealand, and the United Kingdom are excepted foreign states, meaning qualifying investors who can demonstrate strong ties to these countries as defined in specific regulations are exempt from CFIUS’s expanded jurisdiction over noncontrolling minority investments and mandatory filing requirements under FIRRMA.

What if we are going to be limited partners?

CFIUS has provided guidelines for private equity funds and other corporate structures that can be followed to ensure that a foreign limited partner does not cause an entity to become a foreign person. The foreign limited partner cannot cause the fund to be an entity over which control is exercised or exercisable by a foreign national, foreign government, or foreign entity. This analysis often requires a review of the underlying fund documents and related agreements, including the limited partnership agreement and side letters (as applicable), as well as an understanding of the fund’s underlying limited partner base and associated voting rights, to confirm whether any foreign person in the fund could be considered to have the ability to exercise control over the fund.

What should I learn about the target company that might signal if an investment could trigger a CFIUS review?

The U.S. government takes an increasingly broader view of what potentially might raise a national security issue. Certainly, this includes the traditional topics of the export control status of any products or technology made by or used in the U.S. business that is the subject of the transaction. Are there government contracts or classified facilities or personnel that are part of the U.S. business? Lately, however, the U.S. government also focuses on critical infrastructure and sensitive personal data of U.S. citizens.

Please contact any of the listed authors or your usual Lowenstein Sandler contact if you have any questions.