# THE COMMITTEE ON FOREIGN INVESTMENT IN THE UNITED STATES SHARPENS ITS ENFORCEMENT EDGE: PROPOSED REGULATORY REVISIONS EXPAND PENALTY AUTHORITY

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**US Policy and Regulatory Alert**

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On 15 April 2024, the Treasury Department's Office of Investment Security published a Proposed Rule to revise the regulations governing the Committee on Foreign Investment in the United States (CFIUS or the Committee). The Proposed Rule would introduce three key changes to the CFIUS process and mark the most significant update to CFIUS's authority since the enactment of the Foreign Investment Risk Review Modernization Act of 2018. CFIUS is an interagency body with authority to review foreign acquisitions and investments (including land acquisitions) and to take action to safeguard US national security, including by requiring parties to adopt mitigation measures or even recommending to the President to prohibit transactions.

Written comments on the Proposed Rule are being accepted for consideration and must be submitted by 15 May 2024.

## TIGHTER TIMELINE TO ANALYZE AND RESPOND TO MITIGATION TERMS

The Proposed Rule would mandate that, where CFIUS has proposed mitigation terms during an investigation, parties must respond substantively to those terms within three business days or as extended by CFIUS, similar to the existing three business day deadline to respond to supplemental questions in reviews of Joint Voluntary Notices. There is currently no regulatory deadline to respond to proposed mitigation. CFIUS justifies this change by noting that delayed responses to mitigation terms may prevent completion of investigations within the statutorily mandated 45 days, necessitating parties to withdraw and refile a notice in order to restart the statutory clock. However, mitigation agreements are often complex documents that merit careful consideration as they may require costly and extensive compliance procedures, hiring of additional staff, and may necessitate restructuring of an acquisition in order to implement—changes that could negate a transaction's underlying economic rationale.

Notably, the Proposed Rule does not have any self-imposed deadline for CFIUS to propose mitigation nor does it limit CFIUS's time to consider parties' responses. This leaves open the possibility of CFIUS proposing mitigation very late in an investigation and putting pressure on the parties to agree quickly to terms. We have encountered this scenario in filings and have seen CFIUS attempt to exert pressure on parties to accept mitigation terms by running out the clock and, in turn, trying to limit the time available to push back.

The significant risk of this change is that CFIUS would refuse an extension request, and then the parties cannot provide a substantive response to mitigation terms. The failure to respond to proposed mitigation would give CFIUS the basis to reject a notice outright. CFIUS's comments to the Proposed Rule suggest this authority may be used primarily in reviews of non-notified transactions (i.e., transactions that were not previously reviewed and have closed) where CFIUS claims that there is a national security risk that requires mitigation and prompt completion of the review is critical. Nonetheless, the increased risk of being under time pressure may incentivize parties to consider possible CFIUS mitigation demands and proactively propose terms or consider alternative measures.

## BROADER SCOPE OF INQUIRY

The Proposed Rule's second change would expand the Committee's authority to request information about non-notified transactions to determine the applicability of mandatory filings and identify national security concerns. Current regulations only grant CFIUS authority to request information to determine whether a transaction constitutes a “covered transaction” or a “covered real estate transaction.” In our experience advising clients in non-notified transaction inquiries, CFIUS already assumes authority to request information to assess application of the mandatory notice requirement (i.e., whether technologies produced by a US business target are critical technologies), so the Proposed Rule's change seems to codify existing practice. Nonetheless, transaction parties should take care to consider whether a given transaction is likely to pique CFIUS's interest and conduct additional due diligence to either preemptively mitigate potential national security concerns or accurately incorporate CFIUS risk into the transaction structure.

The Proposed Rule would further amend CFIUS regulations to require parties to provide information CFIUS requests to monitor compliance with a mitigation agreement or to determine if a party made a material misstatement or omission in a prior proceeding.

## INCREASED PENALTIES AND ENFORCEMENT AUTHORITY

The third Proposed Rule change would dramatically increase maximum civil penalties for material misstatements and omissions in declarations or notices from USD$250,000 to USD$5,000,000, a twenty-fold increase. Similarly, the maximum penalty for failure to comply with a mandatory notice requirement would increase from USD$250,000 to USD$5,000,000 (or the value of the transaction, whichever is greater). The Proposed Rule would also expand the situations in which CFIUS may impose a penalty to include material misstatements or omissions outside the context of declarations and notices, most notably in response to a request for information relating to non-notified transactions or monitoring and enforcement compliance.

## TAKEAWAY

The Proposed Rule demonstrates the Committee's intent to more closely scrutinize non-notified transactions in the United States and strongly disincentivize transaction parties from avoiding, or attempting to avoid, CFIUS review. Parties should actively assess transactions for CFIUS risks, and for transactions subject to review, parties should consider issues likely to be of greatest concern to the Committee in order to anticipate and respond effectively to mitigation demands, should those arise. We recommend that a CFIUS analysis be a standard component of any acquisition or investment involving a foreign buyer or investor where the deal involves a US business, regardless of the nature, scope, or ultimate beneficial ownership of the foreign party.

Our International Trade team is actively monitoring the development of these regulatory changes and is available to answer any questions and assist in navigating the CFIUS process.

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