

Treasury Proposes Enhancing CFIUS Enforcement Authority



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On April 11, 2024, the U.S. Department of the Treasury announced a [notice](#) of proposed rulemaking that would expand the enforcement authority of the Committee on Foreign Investment in the United States (“CFIUS” or the “Committee”). If implemented, the proposal’s main impact will be to empower the Committee in its engagement with transaction parties before, during, and after the Committee’s review of a transaction. There are three main areas impacted by the rulemaking:

1. Expanding the Committee’s information gathering powers.
2. Increasing civil monetary penalties that the Committee can impose.
3. Enhancing the Committee’s ability to control the transaction review process.

The proposed rule is a supplement to, rather than an overhaul of, the CFIUS regulations that were extensively revised in the years after the enactment of the Foreign Investment Risk Review Modernization Act of 2018. The rulemaking nevertheless could have a significant impact on how certain transaction parties evaluate the legal and business decisions concerning when and how to engage with CFIUS.

Information Collection

While most transaction parties expect robust questioning from agencies’ staff after voluntarily disclosing a transaction for CFIUS review, the proposed rule would expand the Committee’s ability to engage parties that either have not voluntarily filed with, or have already concluded a review with, CFIUS.

- **Non-Notified Transactions.** With respect to a transaction not voluntarily filed with CFIUS, current rules authorize the Committee only to collect information regarding whether such a transaction falls within its jurisdiction. The proposed rule expands that authority to include requesting information regarding whether the non-notified transaction may raise national security considerations and whether a pre-closing filing may have been mandatory under existing rules. The proposal would therefore empower the Committee to gather information that would allow it to focus resources on those non-notified transactions that are more likely to give rise to national security risk or that should have been disclosed to CFIUS as mandatory filings.

- Information Regarding False Statements, Omissions, and Breaches. The proposed rule would expand CFIUS authority to gather information to monitor compliance with or enforce an existing mitigation agreement, order, or condition and to determine whether any party has made a material misstatement or omitted material information during the course of a previously concluded review. This clarification would ensure CFIUS can more effectively determine if there have been breaches or if its prior assessments were based on incomplete or inaccurate information.
- Subpoena Authority. The proposed rule would also facilitate issuing subpoenas, which tool CFIUS would be able to apply across its existing and new authorities. The proposed rule would allow the Committee to obtain information from parties to a transaction or other persons through subpoena “if deemed appropriate”, a lower threshold than the current “necessary” standard. The proposed rule also assigns to the Staff Chairperson the task of issuing a subpoena, a significant clarification to facilitate using this authority in practice.

These new information gathering authorities for the Committee should be viewed in combination with the Committee’s new penalty authority.

Civil Monetary Penalties

In line with CFIUS leaders’ focus on the Committee’s enforcement responsibilities in recent years ([CFIUS Enforcement and Penalty Guidelines](#)), the proposed rule increases the authority to penalize violations.

- New Penalty Authority. The proposed rule would allow CFIUS to penalize making a material misstatement or omission outside the context of a statutory review period (for example, when CFIUS is collecting information with respect to non-notified transactions). This change can be expected to incentivize more forthcoming disclosures to CFIUS inquiries from respondents.
- Increased Potential Amounts. The proposed rule would also increase the maximum civil penalty amount from \$250,000 to \$5 million per violation for material misstatements or omissions, or false certifications, in a filing made to CFIUS. The potential penalty amount would also be increased to the greater of \$5 million (from \$250,000) or the value of the transaction for failure to make a mandatory filing. Lastly, the amount per violation of mitigation measures would also increase to the greater of \$5 million per violation (from \$250,000), or the value of the transaction, or the value of the violating person’s interest in the U.S. business.

In combination, the proposed rule’s increased penalty authority and the information gathering authority described above provide the Committee with an enhanced ability to target cross border transactions not voluntarily disclosed to CFIUS and to deter and correct violations of national security risk mitigation measures.

Mitigation Negotiations

CFIUS annual reports show an increased percentage of its transaction reviews resulting in mitigation measures, most of which are negotiated rather than unilaterally imposed. Current regulations do not specify any timeframe for negotiations other than the statutory period for the transaction review. The absence of more specific milestones can mean that certain parties have little incentive for timely engagement (for example, if their transaction has already closed). The proposed rule would require transaction parties to substantively respond within three business days to mitigation measures that the Committee staff proposes, subject to extension by the Staff Chairperson.

The remedy for noncompliance with the proposed change would be the Committee's rejection of the parties' notice. This action may not be feasible in practice for the Committee in all circumstances, given that rejection in some ways limits the Committee's options to mitigate national security risk, but the proposed rule sets a clear standard that the Committee expects prompt engagement and finalization of mitigation terms.

The comment period is open until May 15, 2024. The Committee can be expected to finalize the rule later in 2024, at which time we plan to review the implications for transaction parties in more detail.