

CFIUS - INTRODUCTION

- CFIUS is an interagency committee chaired by the Secretary of the Treasury that is authorized to review certain transactions involving foreign investment in the United States to determine the effect of such transactions on the national security of the United States.
- CFIUS can recommend that the President block or unwind a transaction for national security concerns.
- CFIUS can also impose requirements on a transaction to mitigate any national security risks (e.g., a US-citizen board, a CFIUS-approved US-citizen security officer, or the sale of sensitive assets).
- CFIUS is a confidential process, though annual reports with aggregate data are released.



CFIUS - INTRODUCTION

- CFIUS has jurisdiction over three types of investments:
 - “Covered control transactions,” - transactions “by or with any foreign person which could result in foreign control of any U.S. business” (i.e., the traditional scope of CFIUS jurisdiction);
 - 31 C.F.R. § 800.210.
 - “Covered investments,” - small, non-controlling investments by foreign persons:
 - in sensitive “TID U.S. businesses,” (which deal in Critical Technology, Covered Investment Critical Infrastructure or Sensitive Personal Data), and
 - in which a foreign person gains a board or observer seat, access to material nonpublic technical information (non-financial), or involvement in substantive decision-making other than voting its shares with respect to the U.S. business at issue; and
 - 31 C.F.R. § 800.211.
 - “Covered real estate transactions” - in which the real estate at issue is located in proximity to specified ports and specified sensitive government and military installations.
 - 31 C.F.R. § 802.212.



CFIUS – KEY DEFINITIONS

- “Critical Technologies” include:
 - Items controlled for export under
 - (i) the International Traffic in Arms Regulations (ITAR),
 - (ii) the Export Administration Regulations (EAR), pursuant to multilateral regimes, regional stability, surreptitious listening, and
 - (iii) Nuclear parts and technology, (iv) select agents and toxins, and (v) emerging and foundational technologies.
 - 31 C.F.R. § 800.215.
- “Covered Investment Critical Infrastructure” is set out in a prescribed list by CFIUS covering important infrastructure. List includes power generation, rail, port terminal, water, Department of Defense suppliers, and other assets that are similarly important to national security.
 - 31 C.F.R. § 800.212 /31 C.F.R. Part 800, Appendix A.
- Sensitive Personal Data: Identifiable data maintained or collected by a U.S. business that (A) targets U.S. national security-related staff or contractors, (B) has data in sensitive categories (e.g., health, financial, geolocation) on more than one million individuals or has a designated business objective to have such data, or (C) genetic information.
 - 31 C.F.R. § 800.241.

CFIUS – KEY DEFINITIONS

- “Control” is broadly defined to include:
 - the power to determine, direct, or decide important matters affecting an entity through any means, including:
 - ownership of a majority of the total outstanding voting interests, proxy voting, contractual arrangements, or arrangements to act in concert; and
 - minority interests that confer a significant ability to affect important matters related to the US business (could be as low as 15% by voting share plus a board seat).
 - 31 C.F.R. § 800.208.



CFIUS – MANDATORY FILINGS

- Filings are mandatory in two circumstances:
 - The acquisition of a “substantial interest” (a voting interest, direct or indirect, of 25 percent) in a TID U.S. business by a foreign person in which a foreign government has a “substantial interest” (a voting interest, direct or indirect of 49 percent); for determining indirect interests, parents (50% or more) are deemed to have 100%.
 - 31 C.F.R. § 800.401(b).
 - Covered Investments and Covered Control Transactions involving TID U.S. businesses that:
 - (1) produce, design, test, manufacture, fabricate, or develop “critical technologies”, and
 - (2) a “US regulatory authorization” would be required to export, re-export, transfer (in-country) or retransfer the technologies to certain foreign persons involved in the transaction.
 - 31 C.F.R. § 800.401(c).
- Excepted investors from Five Eyes countries



CFIUS – VOLUNTARY FILINGS

- Otherwise, CFIUS is a voluntary process - either or both parties to a prospective transaction may notify CFIUS and initiate a review.
- However, the only way to receive a legal guarantee that CFIUS will not force a divestment or mitigation terms on a transaction is to file.
- Parties receive two types of a legal “safe harbor:”
 - If CFIUS clears the transaction and effectively approves it (which could include the negotiation of a mitigation agreement); or
 - If CFIUS determines that the transaction is not subject to its jurisdiction.
- For all transactions, either a short-form “Declaration” or a long-form “Notice” may be used.
 - 31 C.F.R. Subpart D, Declarations / 31 C.F.R. Subpart E, Notices.
 - When reviewing both Declarations and Notices, CFIUS may ask questions of the parties – which must respond quickly (2 business days for Declarations, 3 for Notices).
 - 31 C.F.R. § 800.406 / 31 C.F.R. § 800.504.

CFIUS – TIMELINE FOR REVIEWS

- Declarations: Once accepted by CFIUS, CFIUS must respond within 30 days. 31 C.F.R. § 800.405. Possible responses:
 - Request a Notice from the parties (the acceptance of which would begin a 45-day review process) or unilaterally take action to review the transaction;
 - Conclude action with respect to the transaction by indicating to the parties that there are no unresolved national security concerns; or
 - Take no action with respect to the transaction, meaning that CFIUS is not able to complete action on the basis of the Declaration and that the parties may file a Notice if they wish to receive affirmative approval from CFIUS.
 - Note: this does not provide a legal safe harbor but indicates as a practical matter that CFIUS does not have concerns.
 - 31 C.F.R. § 800.407.
- Notice: Once accepted by CFIUS, 45-day review process begins. 31 C.F.R. § 800.503
 - At end of review period, CFIUS may approve the transaction or begin a 45-day investigation period. 31 C.F.R. § 800.505-506.



RECENT DEVELOPMENTS

- Executive Order 14083: Codifies recent expansions of CFIUS focus, including critical supply chains, AI, biotech, aggregate investment trends, cybersecurity risks, and sensitive personal data
- Federal and State Proposals to Scrutinize Real Estate Acquisitions:
 - Addition of 8 additional US military facilities; follows scuttled property acquisition near Grand Forks Air Force Base.
 - 85 FR 3166, Jan. 17, 2020, as amended at 88 FR 57350, Aug. 23, 2023.
- Enforcement/Penalty Guidelines
- Penalty enhancements
- Mitigation negotiation response times (new NPRM)