

Treasury Department Releases CFIUS Enforcement and Penalty Guidelines

Key Notes:

- The Treasury Department recently released guidelines specifying conduct that may be considered a violation of CFIUS regulations.
- The guidelines provide information about how CFIUS gathers information and the formal penalty process.
- They also indicate factors that CFIUS may consider in making an enforcement determination, including aggravating and mitigating factors.

On October 20, 2022, the Department of the Treasury, as the lead agency for the Committee on Foreign Investment in the United States (CFIUS or “Committee”), released written [Enforcement and Penalty Guidelines](#) (“Guidelines”) that for the first time provide information on how the Committee assesses violations of the laws and regulations that govern foreign direct investment transactions that fall under its jurisdiction, including potential breaches of CFIUS mitigation agreements.

CFIUS is authorized to review transactions that could result in the control of U.S. businesses by foreign persons or companies, as well as non-controlling investments by foreign persons or companies in certain U.S. businesses that are involved in critical technology, critical infrastructure, the gathering of sensitive personal data, or even certain covered real estate transactions, to determine the effect of such transactions on U.S. national security. While the United States welcomes foreign investment, transactions in certain industries and technological sectors warrant a more thorough review to mitigate any potential national security risks. Most covered investments clear CFIUS review, but a limited number do require the parties to take certain

actions or enter into mitigation agreements to alleviate any concerns.

The Treasury Department acknowledges that most parties who undergo CFIUS review “abide by their legal obligations and work collaboratively with the Committee to mitigate any national security risks arising from the transaction.” The Guidelines serve as a reminder, however, that compliance with CFIUS regulations and mitigation agreements is “not optional” and, according to Assistant Secretary Paul Rosen, “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.”

Conduct that May Constitute a Violation

The Guidelines set forth three categories that CFIUS considers “acts or omissions” that may constitute violation of relevant statutes (see Section 721 of the Defense Production Act of 1950, as amended) and implementing regulations. They are:

- Failure to timely file a mandatory declaration or notice to CFIUS about a covered transaction.
- Noncompliance with, or conduct that is prohibited under, CFIUS mitigation agreements, conditions, or orders (“CFIUS Mitigation”).
- Material misstatements in or omissions from information filed with CFIUS, and false or materially incomplete certifications filed by a party in connection with informal consultations with CFIUS, assessments, reviews, investigations, or CFIUS Mitigation.

In reviewing a matter for a possible violation, the Guidelines note that CFIUS gathers information from multiple sources, including “from across the U.S. government, publicly available information, third-party service providers (e.g., auditors and monitors), tips, transaction parties, and filing parties.” Most often the Committee will simply request information from the party subject to the investigation, but CFIUS does have subpoena authority. In providing any response, the Guidelines note that parties are able “to provide any exculpatory evidence, as well as any defense, justification, mitigating factors, or explanation for the conduct at issue.”

In addition to issuing a request for information to a party, CFIUS encourages a party subject to a mitigation agreement to submit a self-disclosure if a violation may have occurred. Such self-disclosures must be timely submitted and made before CFIUS or other government agencies discover the possible violation. The Committee also obtains information about possible violations via tips, referrals, or other relevant information.

Penalty Process

The Guidelines note that CFIUS often reaches out informally to a subject party prior to initiating a formal penalty process. However, if the issue cannot be resolved, such initial communications “are purely for informational purposes and never constitute any form of waiver of any penalty, remedy, or other authorities by the government or any defense or excuse” for the party subject to the investigation.

The key steps in any formal penalty process under the Guidelines are as follows:

- CFIUS sends the party a notice of penalty that details the conduct to be penalized and any monetary penalty to be imposed. The notice must state the legal basis upon which the Committee determined any conduct constituted a violation, and it may set forth any aggravating and mitigating factors that were considered.
- The party subject to the notice may, within 15 business days of receipt of the notice, submit to CFIUS a petition for reconsideration, including any defense, justification, mitigating factors, or explanation. The Committee may extend this response period for good cause.

- If a petition for reconsideration is timely received, CFIUS must consider it before issuing a final penalty determination within 15 business days of receipt of the petition. This response time may also be extended by agreement between CFIUS and the party subject to the investigation.
- If no petition for reconsideration is timely received, CFIUS will move forward with issuing a final penalty determination.

Under current regulations, a party submitting a declaration or notice with a material misstatement or omission or making a false certification may be assessed penalties up to \$250,000 per violation. A party that fails to file a mandatory declaration may be assessed a civil penalty of up to \$250,000 or the value of the transaction, whichever is greater. Violations of a provision of a mitigation agreement are punishable by a civil penalty of up to \$250,000 or the value of the transaction, whichever is greater. Further, some mitigation agreements may contain a liquidated damages provision that specifies the amount of any liquidated damages the Committee might seek.

Aggravating and Mitigating Factors

In assessing any penalty, the Guidelines state that CFIUS undertakes “a fact-based analysis in which it weighs aggravating and mitigating factors,” and that the weight given to any factor depends on the specific facts and circumstances of any violation. The Guidelines provide a non-exhaustive list of both aggravating and mitigating factors that the Committee may consider:

- *Accountability and Future Compliance.* The impact of the enforcement action on protecting national security and ensuring accountability of the party(ies) for their conduct and to incentivize efforts to ensure compliance.
- *Harm.* The extent to which the violation impaired or threatened to impair U.S. national security.
- *Negligence, Awareness, and Intent.* The extent to which the conduct resulting in the violation was the result of simple negligence, gross negligence, intentional action, or willfulness. This factor includes considering any effort to conceal or delay the sharing of any relevant information, as well as the seniority of persons who knew or should have known about the violation.
- *Persistence and Timing.* The length of time that elapsed between learning of the conduct resulting in the

violation and before CFIUS became aware of the violation. This factor includes consideration of the frequency and duration of the conduct and, in cases where the parties did not file any notice with CFIUS regarding the transaction, the date of the transaction itself.

- *Response and Remediation.* Whether the part(ies) submitted a self-disclosure to CFIUS and whether there was complete cooperation during the investigation. CFIUS also considers appropriate remediation efforts and corrective actions to prevent any reoccurrence of a violation.

In addition, the Guidelines indicate that CFIUS will take into consideration a party's sophistication and, when applicable, past record of compliance with all legal obligations under CFIUS statutes. This factor includes any corporate policies, training, procedures, and the overall "compliance culture" that exists within the company.

Conclusion

CFIUS makes clear that these Guidelines are "non-binding and are not intended to, do not, and may not be relied upon to create any right or benefit, substantive or procedural, enforceable at law by any party in any administrative, civil, or criminal matter." However, they should offer further incentives for compliance and provide further transparency to the CFIUS regulatory process. With an enhanced budget and additional personnel and resources, the Committee is indicating that enforcement is an increasing focus of its regulatory authority.

Further, the public issuance of these Guidelines comes only weeks after President Joseph Biden issued an Executive Order elaborating on existing statutory factors and including additional national security considerations CFIUS must consider in its review process of covered transactions. For more information on the EO, please see our [October 6, 2022 International Trade Update](#).

FOR MORE INFORMATION

For more information, please contact:

Francesca M.S. Guerrero
Partner, International Trade
202.973.2774
Francesca.Guerrero@ThompsonHine.com

Samir D. Varma
Partner, International Trade
202.263.4136
Samir.Varma@ThompsonHine.com

Scott E. Diamond*
Senior Legislative & Regulatory Policy Advisor,
International Trade
202.263.4197
Scott.Diamond@ThompsonHine.com

**Not licensed to practice law*

This advisory bulletin may be reproduced, in whole or in part, with the prior permission of Thompson Hine LLP and acknowledgment of its source and copyright. This publication is intended to inform clients about legal matters of current interest. It is not intended as legal advice. Readers should not act upon the information contained in it without professional counsel.

This document may be considered attorney advertising in some jurisdictions.

© 2022 THOMPSON HINE LLP. ALL RIGHTS RESERVED.