

**Alert | Export Controls & Economic Sanctions/
International Trade**



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Treasury Department Announces Proposed Regulatory Updates to CFIUS Enforcement Mechanisms and Civil Penalties

On Apr. 11, 2024, the U.S. Department of the Treasury (Treasury) issued a notice of proposed rulemaking that would update certain Committee on Foreign Investment in the United States (CFIUS or the Committee) procedures with a particular focus on the Committee's penalty and enforcement mechanisms. These proposed updates to the CFIUS regulations come as Treasury is developing a similar outbound investment regime expected to go into a rulemaking process in 2024.

CFIUS is an interagency committee chaired by Treasury that is authorized to review certain transactions involving certain categories of foreign investments into the United States with the objective of determining the effect of such transactions on the national security of the United States. If a national security risk arises as a result of a transaction within its jurisdiction, CFIUS is authorized to impose and enforce conditions or negotiate and enter into agreements with the transaction parties to mitigate the national security risks.

Treasury's proposed rule includes multiple amendments to the Committee's process of identifying and resolving national security risks brought about from transactions, as well as the Committee's ability to take certain actions in response to alleged violations of the foreign investment review regime. The proposed rule seeks to accomplish these aims through the following key expansions of CFIUS enforcement mechanisms:

- **Authorizing CFIUS to request certain information on non-notified transactions:** The proposed rule would authorize the Committee to request additional information on non-notified transactions to determine if transactions meet the criteria for a mandatory filing and/or raise any additional national security concerns. These changes would assist and enhance the Committee's power to determine if parties to a transaction need to submit a notice for review of the transaction.
- **Allowing CFIUS to use its subpoena authority in more instances related to obtaining information regarding transactions:** The proposed rule would amend the language that authorized the Committee to use subpoenas 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. Under the proposed rule, the Committee could issue subpoenas when it deemed it "appropriate" to do so. The current rule is more limited, only allowing the exercise of this power when CFIUS determines it is "necessary."
- **Specifying the time frame for transaction parties to respond to proposed CFIUS mitigation measures:** The proposed rule would institute a timeline for transaction parties to respond to risk-mitigation proposals from the Committee during the course of its review yet still allow the Committee to conclude its reviews and close the investigations within the required statutory time frame. Under the proposed rule, parties would have three business days to provide substantive responses to proposed mitigation terms, unless the parties requested and were granted a longer time period to respond. This aligns with the Committee's procedures for responses to follow-up information requests during the transaction review period.
- **Expanding civil monetary penalties on transaction parties:** The proposed rule would expand the circumstances in which the Committee may impose civil monetary penalty on a transaction party due to the party's material misstatement and omission. Unlike the current regulations where violations are limited to statements made during the review process, the proposed rule would encompass situations when the material misstatement or omission occurred outside a review or investigation of a transaction or when it occurred in the context of the Committee's monitoring and compliance functions, such as requests for information related to non-notified transactions.
- **Increasing the maximum civil monetary penalty available for CFIUS violations:** The proposed rule would increase the maximum penalty amount per violation for a material misstatement or omission, the making of a false certification, violation of material provisions of mitigation agreements, violation of material conditions imposed by the Committee, and violations of orders issued by the Committee. Under the proposed rule, the maximum penalty would increase from \$250,000 to \$5,000,000, or the greater of \$5,000,000 or the value of the transaction, depending on the nature of the violation.
- **Extending time frame to submit a petition for reconsideration of a penalty:** The proposed rule would extend the time frame in which a party could make a submission of a petition for reconsideration of a penalty to the Committee from 15 business days of receipt of the notice of penalty, to 20 business days. The proposed rule would also amend the time frame the Committee has to assess the petition and issue a final penalty determination, similarly, extending it from 15 business days to 20 business days.

The proposed rule primarily focuses on deterring bad actors, including transaction parties that might deliberately withhold or misstate information to expedite the Committee's review or increase chances of the Committee clearing the transaction. However, these proposed measures from Treasury signal that CFIUS and the Biden administration remain committed to more aggressively reviewing foreign

investments in the United States and enforcing against potential national security risks that may result from these transactions.

If these proposed measures are ultimately adopted, transaction parties should be mindful of the increasing severity of the penalties and scrutiny of review on all transactions and statements made to CFIUS, including those relating to non-notified transactions. Transaction parties should consider how these proposed rules increase scrutiny on material misstatements or omissions to the Committee. They also have the potential to impact not only transaction parties' submissions during the course of a CFIUS review, but even earlier in the deal due diligence when assessing whether a CFIUS filing might be necessary or appropriate, as the consequences for failure to file mandatory disclosures and otherwise providing complete information to CFIUS would expand greatly if this proposed rule is adopted in its current form.

Interested parties may submit written comments in responses to the proposed rule on the [eRulemaking Portal](#). The public comment period is open until May 15, 2024.

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