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CFIUS Developments Counsel Caution for In-bound U.S. Investment

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With an eye towards preserving and expanding the gatekeeper role in national security, the Committee on Foreign Investment in the United States (CFIUS) has issued proposed rules to strengthen enforcement.

On April 11, 2024, the U.S. Department of the Treasury, as Chair of CFIUS, announced proposed rules and accepted comment until May 15, 2024, 30 days following publication in the Federal Register on April 15, 2024. The proposed rules strengthen CFIUS regulations and enforcement tools in the following ways.

First, the proposed rules would expand the information that CFIUS may request from parties to non-notified transactions—transactions that the parties did not voluntarily report to CFIUS. Under the proposed rules, CFIUS may request information related to "national security considerations" and "the criteria for a mandatory declaration." This expands beyond current regulation, which only contemplates requests to parties to non-notified transactions for information necessary to determine whether the transaction is a "covered transaction," or a "covered real estate transaction"—potentially setting up new mechanisms for CFIUS to identify failures to comply with mandatory filing requirements. The proposed regulations also provide CFIUS the power to issue a subpoena to compel responses when CFIUS is monitoring compliance with a mitigation agreement, order, or condition, and when CFIUS investigates a potential "material misstatement or omitted material information" by the parties in a concluded review. Currently, such information requests are voluntary, and not compelled by subpoena.

Second, the proposed rules would expand CFIUS's authority to issue subpoenas "if deemed *appropriate* by the Committee", versus the existing "deemed necessary" criteria—effectively lowering the standard for subpoena issuance.

Third, the proposed rules would provide for an extendable time frame of 3 business days for responses to proposed mitigation terms. Current regulations did not impose a deadline. And, while CFIUS contemplates discretionary extensions would be issued for certain complex mitigation proposals, they would be granted only on a case-by-case basis—potentially imposing substantial additional burdens on parties where discretionary extensions are not granted.

Fourth, the proposed rules increase the set maximum penalty amount from $250,000 per violation to $5,000,000 per violation. As in the current regulations, the penalty maximum may be the greater of the set amount or the value of the transaction, per violation for failure to timely file or for violating a mitigation agreement, order or condition. According to CFIUS, the current $250,000 maximum penalty amount may not provide sufficient compliance incentives given the $170 million median value of notified transactions — and that existing rules could result in a purported zero dollars transaction valuations in certain cases. The proposed rules further expand the maximum $5,000,000 penalty per violation, to include “material misstatements or omissions in contexts outside of declarations and notices,” particularly with respect to non-notified transactions.

The proposed rules accompany notable recent enforcement by the White House, through CFIUS. On May 13, 2024, the White House issued an order to MineOne Partners Ltd. to divest real estate located within 1 mile of Francis E. Warren Air Force Base in Cheyenne Wyoming. According to the order, MineOne is partially owned by Chinese nationals and acquired the property in June 2022. The company thereafter improved the property to allow for specialized cryptocurrency mining. Notably, CFIUS’s non-notified transaction team first investigated the transaction based on a public tip—the transaction parties did not file with CFIUS until after the investigation. The order mandates divestment of the property within 120 days, and removal of all equipment and improvements to the property within 90 days of the order, subject to extensions granted by CFIUS.

In a statement, Treasury Secretary Janet Yellen said the MineOne divestment order “highlights the critical gatekeeper role that CFIUS serves to ensure that foreign investment does not undermine our national security, particularly as it relates to transactions that present risk to sensitive U.S. military installations as well as those involving specialized equipment and technologies.”

Beyond the White House, Congress has exercised growing interest over national security and CFIUS. While CFIUS is chaired by the Treasury Secretary, CFIUS's voting members also include the heads of the Departments of Justice, Homeland Security, Commerce, Defense, State, and Energy, and the heads of the Office of the U.S. Trade Representative and the Office of Science & Technology Policy. Certain other agencies observe or are non-voting members.

Congress recently added the Secretary of Agriculture as a CFIUS member on a case-by-case basis with respect to covered transactions "involving agricultural land, agriculture biotechnology, or the agriculture industry." Congressional action tracks growing attention to foreign investments in U.S. agriculture lands.

CFIUS's focus in the current enforcement posture stretches far beyond military installations, to farmlands and wide swaths of the economy, and the enhanced subpoena powers, increased penalties, and expanded enforcement over non-notified transactions will notch up an already difficult environment for non-U.S. investors. Comment has ended on the proposed rules. A notice of final rulemaking is expected to follow in the coming months.

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