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CFIUS: Inadvertent "Foreign Person" Status

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Hundreds of American companies may have inadvertently become "foreign persons" for CFIUS purposes, at risk of being caught up in the Trump Administration's restrictions on foreign investment.

Many people know that the Committee on Foreign Investment in the United States (CFIUS) has broad jurisdiction to review for national security concerns any complete acquisition of a U.S. business by a "foreign person." Some people also know that CFIUS's jurisdiction includes *investments* where a foreign person obtains "control" of the U.S. business. The term "control" is defined more broadly than one might expect for CFIUS purposes, and the only clear "safe harbor" is for investments of less than 10 percent voting power and solely for the purpose of a passive investment.

It is less well known that by accepting foreign investments, an American company can *itself* become a "foreign person" for purposes of CFIUS. That means that future investments or acquisitions by the American company of U.S. businesses will be subject to CFIUS review, just as if the American company were a Chinese, or German or Canadian firm.

U.S. companies considering foreign investment therefore have to consider not just whether to make a voluntary filing with CFIUS in connection with the investment, but whether the investment will make the U.S. company itself an "inadvertent foreign person."

This CFIUS Briefing will cover:

- An overview of the CFIUS national security review process and its background
- What is a "covered transaction?"
- What is a "foreign person?"
- How a U.S. company can become an "inadvertent foreign person?"
- Why this presents risks to U.S. companies caught in this trap

The "Inadvertent Foreign Person" Trap

American companies today are part of the global economy, and not just in terms of their commercial activities. American companies accept investments from foreign (non-U.S.) investors, enter into partnerships and joint ventures with foreign firms, and are sometimes acquired by foreign buyers. American companies also frequently make investments in other American companies or grow by acquisition of other American companies.

When a foreign person makes an investment in an American business, the parties have to consider whether to make a voluntary filing with CFIUS. Not all transactions are covered by CFIUS. Essentially, the transaction must be an investment or acquisition, by a "foreign person," giving the foreign person some ability to influence key decisions affecting the U.S. business. As the process is technically voluntary, parties may determine a filing is not warranted or advisable where there truly are no national security implications (though this analysis in and of itself can become quite complex). Some types of transactions

are not covered, such as purely passive investments, debt that does not have indicia of control, and a few other specialized categories; these are discussed starting on **p. 6**.

If a transaction is a "covered transaction," CFIUS has jurisdiction and the parties must decide whether to make a voluntary filing with the Committee. This process is described starting on **p. 8**. If they choose not to make a voluntary filing, CFIUS retains jurisdiction indefinitely. If CFIUS reviews a transaction—before or after the transaction has closed—and cannot resolve any "national security concerns," it can request mitigation steps (see **p. 9**) and even divestiture by the foreign investor. If the parties don't comply, CFIUS can refer the case to the White House, which can take action to suspend or prohibit the transaction, essentially requiring a post-closing divestiture.

Over the years, many American companies have accepted investments from foreign venture capital or private equity funds, strategic partners, or even non-U.S. individuals, without making a voluntary CFIUS filing. In the past, foreign investment in U.S. businesses was only rarely a matter of great concern. Today, however, foreign investments in U.S. businesses—that is, any transaction where a foreign person gains some degree of influence over a U.S. business or access to technical proprietary information—are under the microscope. This is especially true for investments from China, where public information suggests the CFIUS clearance rate has fallen by 20-30 percent under the Trump Administration.

The "inadvertent foreign person" trap is this. An American company that has taken enough investment from non-U.S. sources such that a foreign person may exercise "control" over that business, *technically may have become a foreign person itself*. This is because, whether the investor is incorporated in the United States or not, CFIUS examines the investor's complete ownership chain for any "foreign person"—and the test is the same in either case.

An investor or buyer is a "foreign person" for CFIUS purposes if it is an entity over which some degree of control (how much control is not well defined) can be exercised by a "foreign national," "foreign government" or "foreign entity. Thus, although an entity organized in the U.S. is clearly not a "foreign entity," it *nevertheless could be a "foreign person"* if there is a sufficient degree of control exercised over that entity by a foreign individual, entity or government.

How much "control" is too much? Congress left the definition to the Committee; and the Committee has taken a "functional" approach that "eschews bright lines." Essentially, "control" means the ability to direct or decide "important matters" affecting an entity, as shown by ownership of voting interests, board representation, proxy voting, special shares, contractual arrangements, formal or informal arrangements to act in concert or other means. This issue is discussed in greater detail starting at **p. 5**.

To pull these threads together, let's assume two entrepreneurs start a company in Silicon Valley making a wearable fitness device. If both of them are U.S. passport holders and U.S. residents, clearly the company is not a "foreign person;" this would be true even if the company were formed in the Cayman Islands, for example. But if one of them is a foreign national or resident, it is quite possible the startup will be a "foreign person" for CFIUS purposes right from the outset. Parenthetically, if it is operating in the United States, it is also a "U.S. business," so an investment into the startup by another foreign person would be subject to CFIUS review.

The new company succeeds in attracting funding from an investor in Menlo Park. The investor gets typical "Series A" voting rights, 15 percent of the company, and a board seat. If the investor is not a foreign person, then CFIUS does not cover this investment.

The company does well and its next round of funding is from a Chinese technology investment fund or strategic investor. The Series B terms give the new investors essentially the same rights as the Series A: certain voting rights, 15 percent of the company, and a board seat. That investment is clearly by a foreign person, in a U.S. business, and is outside the safe harbor. The parties decide not to make a voluntary CFIUS filing, however, because it can be expensive, cause a delay in funding, is unclear whether the investment results in "control" and they don't believe their technology, operations or location raise any national security concerns.

Three years later the company has raised another round or two, including from other foreign investors, never making a CFIUS filing. Now the company wants to grow by making a significant strategic investment in, or perhaps even acquiring an artificial intelligence company that will enhance its product offering, or a social

media company that will allow its customers to share information about their workouts, biking routes, and other personal information.

What this thoroughly American company may not realize is that, over time, and inadvertently, even though it is still a Delaware corporation with all its operations in California, *it has become a foreign person for purposes of CFIUS* because one or more "foreign persons" (its investors) have enough "control" that the CFIUS test is met when applied to the American company.

If that test is met, then our American company's own investments or acquisitions are subject to scrutiny by CFIUS. Given the nature of the target company in this example, national security concerns might well be present, and CFIUS could require complicated mitigation steps and in the worst case, bar the transaction. Moreover, if the target is aware of this problem, it could put our company at a competitive disadvantage, compared to bidders who are not "foreign persons," in competing for the deal. If the company goes ahead with the transaction without making the voluntary filing, it and its investment will forever be subject to the possibility that CFIUS will notice the deal and require a filing.

If the American company is feeling like Damocles, sitting at a banquet with a sword hanging over him by a single thread, it would not be far wrong. This may be an unintended consequence of the current hostility toward investments from certain countries, but that does not make it less real. In fact, Congress is now in 2018 considering expanding the scope of CFIUS reviews, making even more types of transactions potentially covered.

The situation may change in the future, but for now, American companies that are inevitably players in a global financial, technological and commercial marketplace, have one more thing to worry about.

The CFIUS National Security Review Process

CFIUS is a voluntary filing regime under which the U.S. government can review any foreign acquisition based on its potential impact on national security, including critical national infrastructure and critical technologies. After review, CFIUS can require changes to the transaction. In rare cases, CFIUS will recommend to the President that a deal be blocked. If the parties do not voluntarily file, CFIUS retains the power to review, require changes, or recommend the unwinding of a transaction after closing. False statements in submissions, and violations of mitigation agreements, are punishable by fines.

As outlined below, CFIUS was established in 1975 and for many years was not a major concern for most international transactions. In recent years the concern has heightened, and under President Trump, CFIUS sometimes seems to have become a weapon in the political wars being fought in the United States. Legislation is pending in Congress that would expand the reach of CFIUS and even make filings mandatory in some transactions. These developments will be discussed in more detail below.

History of CFIUS

CFIUS is an inter-agency committee that operates under the direction of the President. It is chaired by the Secretary of the Treasury and includes the heads of Justice, Homeland Security, Commerce, Defense, State and Energy as well as the U.S. Trade Representative (USTR) and the director of the Office of Science and Technology Policy. There are other offices that are advisors to the Committee, including the National Security Council.

CFIUS was established in 1975. The original policy rationale was protection of "critical national infrastructure." However, in 1988, the addition of the Exon-Florio amendments to the Defense Production Act of 1950 (currently codified in Section 721 of the Foreign Investment and National Security Act) gave the President non-reviewable authority to block foreign acquisitions on national security grounds. This authority was delegated by the Reagan Administration to CFIUS. The Congressional Research Service has written that "CFIUS was [thereby] transformed from a purely administrative body with limited authority to review and analyze data on foreign investment to one with a broad mandate and significant authority to advise the President on foreign investment transactions and to recommend that some transactions be blocked."

The Foreign Investment and National Security Act of 2007 (FINSA) greatly increased the significance of CFIUS to companies doing international transactions. The Act was passed after the Dubai Ports World scandal and amended the CFIUS process to give Congress greater oversight; expanded the meaning of "national security" to include critical infrastructure; and required CFIUS to investigate (not merely review) all covered transactions deals where the foreign buyer is owned or controlled by a foreign power.

The FINSA regulations of 2009 reinforced the authority of CFIUS under FINSA. Some commentators have noted that although FINSA did strengthen the hand of CFIUS, it also imposed more predictability on the process and attempted to remove some of the politics. But the rise of China's economy—and the rise of economic nationalism in the United States—have reinjected politics into the process.

As a statistical matter, most cross-border transactions are never submitted to CFIUS, and there are some, but not many cases where CFIUS has exercised its power to require a review after a transaction closes. In the current climate, however, China-related transactions are in the spotlight, and parties bypass CFIUS at their risk.

Also, as a statistical matter, most—perhaps 90 percent or more—transactions submitted to CFIUS are cleared. Since the Trump inauguration, the statistics have been much less positive for China-related deals. As discussed in more detail below, China deals are still getting done, but parties must be smarter in picking their deals and in prosecuting their CFIUS applications.

What Transactions are Subject to CFIUS?

Not all foreign investments in the U.S. are covered by CFIUS. Whether a transaction is subject to the jurisdiction of CFIUS, and whether parties are well advised to voluntarily file an application with CFIUS, requires a case-by-case evaluation of the facts involved in the transaction, including the nature of the transaction, the identities of the parties, and the type of U.S. business being acquired.

"Covered Transactions"

CFIUS only applies to "covered" transactions which could present national security implications. "Covered transactions" are defined as:

- any proposed or completed merger, acquisition, or takeover,
- by or with any foreign person (foreign national, government or entity, or an entity controlled by any of the foregoing),[1]
- which does or could result in "control,"
- of a "U.S. business" by that foreign person

If a transaction is a "covered transaction," then CFIUS has the jurisdiction to examine it for purposes of determining whether it presents a risk to U.S. "national security." That term is not precisely defined and as applied, its meaning has evolved over time. Just what constitutes "national security" will be discussed later in this briefing.

"Merger, Acquisition or Takeover"

For now, CFIUS only applies to acquisitions of interests in U.S. businesses—thus, it applies to acquisitions, mergers, takeovers, investments, and other business combinations. It does not currently apply to other types of business transactions, such as strategic alliances, marketing and distribution arrangements, debt financings (unless they are coupled with sufficient indicia of control or convertible into equity ownership), licensing agreements, or other non-acquisitory transactions unless the arrangement involves contribution of a U.S. business.

CFIUS also does not apply to the purchase of raw or undeveloped land or other greenfield investments, because even if there may be an "acquisition" involved (of land, land use rights, a building, etc.), there may be no acquisition of a "U.S. business." This is discussed further below.

In an attempt to work around the constraints of CFIUS, many parties to U.S.-China transactions in recent months have explored the use of joint ventures, long-term debt financing, or licensing arrangements as a way to postpone or avoid entirely the need to consider a CFIUS filing. However, if such an arrangement amounts in substance to the acquisition of a "U.S. business," then it would be covered even if its form is not an "acquisition."

"Foreign Person"

CFIUS only applies when the acquirer is a "foreign person." This seems like a point only lawyers could love, but the question is not whether the acquirer is a "foreign entity," but rather whether it is a "foreign person."

A "foreign person" is defined in the CFIUS regulations (31 CFR 800.216) as a "foreign national," "foreign government," "foreign entity" or any entity over which control is exercised or exercisable by any of the foregoing. This leads to some interesting permutations:

- An entity organized in a foreign country and controlled by foreign nationals or a foreign government is clearly both a "foreign entity" and a "foreign person." However, a *"foreign entity" nevertheless might not be a "foreign*

person" if it is ultimately controlled by U.S. individuals or entities, and no foreign individual, entity or government has any significant ability to control it.

- At the same time, *an entity organized in the U.S.* is clearly not a "foreign entity," but it *nevertheless could be a "foreign person*" if there is a sufficient degree of control exercised over that entity by a foreign individual, entity or government. *This is how a U.S. company can become an "inadvertent foreign person."*

Thus looking only at where an entity is organized does not answer the question. It is necessary to look "under the hood" and determine who or what controls the entity in question. What constitutes sufficient indicial of control is another difficult question and is discussed below.

"Control"

The Foreign Investment and National Security Act (FINSA) does not define the term, instead requiring CFIUS to define it by regulation. In 2008, CFIUS promulgated those regulations and specifically said its definition "eschews bright lines." The Committee's commentary on its 2008 regulations said:

> The Final Rule maintains the long-standing approach of defining "control" in functional terms as the ability to exercise certain powers over important matters affecting an entity.
>
> Specifically, "control" is defined as the "power, direct or indirect, whether or not exercised, through the ownership of a majority or a dominant minority of the total outstanding voting interest in an entity, board representation, proxy voting, a special share, contractual arrangements, formal or informal arrangements to act in concert, or other means, to determine, direct, or decide important matters affecting an entity; in particular, but without limitation, to determine, direct, take, reach, or cause decisions regarding the [matters listed in §800.204(a)], or any other similarly important matters affecting an entity."

This is a broad approach, and essentially subjects every non-trivial investment to a "facts and circumstances" test. The Committee's commentary went on to emphasize that no one factor is determinative.

> Consistent with the existing regulations, control is not defined in terms of a specified percentage of shares or number of board seats. Although share holding and board seats are relevant to a control analysis, neither factor on its own is necessarily determinative. Instead, all relevant factors are considered together in light of their potential impact on a foreign person's ability to determine, direct, or decide important matters affecting an entity.

Examples of "important matters" are provided in the CFIUS regulations. Side agreements or disproportionate voting rights could cause a minority interest holder to control the business. However, the regulations specify certain minority shareholder protections that do not convey control, such as the power to prevent the sale of all or substantially all of the company's assets. "Customary minority protections" that are often given to venture capital and other investors in U.S. businesses may, or may not, amount to a sufficient degree of control to trigger CFIUS.

If the terms of an investment permit a party to gradually acquire greater control, eventually resulting in "control," it may be prudent to report the transaction at the outset – for example, a convertible debt financing, the issuance of warrants or options, etc.

Finally, loans and other credit arrangements, without more, do not amount to "control" However, if a debt transaction gives a foreign party the right to acquire control over a business in the event of default or other circumstances, this may indicate a CFIUS filing. Given the somewhat murky definition of "business," a blanket lien could, for example, amount to acquisition of control.

"U.S. business"

Surprisingly, it is not always clear whether the target of an acquisition is a "U.S. business." Again, there are several permutations.

- *U.S. target with U.S. operations*. The acquisition of 100 percent of a company is clearly the acquisition of a business. Thus acquisition of 100 percent of, or a controlling interest in, a U.S. company with operations in the U.S. clearly triggers CFIUS, regardless of whether the target is controlled by U.S. or foreign nationals (because the inquiry with regard to the target is not whether it is foreign or domestic, but whether its business includes a "U.S. business").
- *U.S. target with no U.S. operations*. This would be an unusual fact pattern, but it focuses the question on whether the target of the acquisition is a "U.S. business."

- *Foreign target with no U.S. operations*. By definition, a transaction with a target that has no "U.S. business" is not a "covered transaction."
- *Foreign target with some U.S. business*. The foreign parent of a U.S. subsidiary is not necessarily itself a U.S. business. However, a transaction with a foreign target that has some U.S. business *does* implicate CFIUS as regards that U.S. business. This was the case in the recent blocked acquisition of Aixtron. In that case, a Chinese company proposed to acquire a German semiconductor company with U.S. subsidiaries, design center and other operations. CFIUS ultimately blocked the deal with respect to the U.S. business, meaning the PRC entity was prohibited from acquiring the U.S. assets.
- *Acquisition of assets only*. The acquisition of assets (as opposed to an operating company) may, or may not, trigger CFIUS. This will require a case-by-case analysis of whether the assets are sufficient to constitute a "business." Buying a piece of equipment, or raw land, or even technology, might not constitute the acquisition of a "business." However, if the acquisition also involves the transfer of business operations, personnel, and the like, then an asset acquisition could still be the acquisition of a "business."
- *Joint ventures, licensing arrangements and other structures*. As noted above, these non-acquisition structures require the parties to consider both whether the nature of the deal is substantively equivalent to an "acquisition," regardless of its form; and whether the transaction gives a degree of control to a "foreign person" over a "U.S. business." Thus the formation by a U.S. party and a PRC party of a joint venture in China would not be a covered transaction if both parties simply inject cash; but if the U.S. party injects a "business," even this transaction could be captured by CFIUS.

Transactions Not Covered

Certain "passive investments" are not captured by CFIUS. These are transactions:

- conducted "solely for the purpose of investment," defined as those (i) in which the transaction does not involve owning more than 10 percent of the voting securities of the target; or (ii) those made directly by a bank, trust company, insurance company, investment company, pension fund, employee benefit plan, mutual fund, finance company, or brokerage company "in the ordinary course of business for its own account
- where the foreign party "has no intention of determining or directing the basic business decisions of the issuer"

Both tests must be met. In some senses the analysis is circular because an investment which provides "control" is not likely to be seen as "passive."

Pure financing transactions are not covered. Treasury Regulations provide that that the extension of a loan or a similar financing arrangement by a foreign person to a U.S. business will not be considered a covered transaction and will not be investigated, unless the loan conveys a right to the profits of the U.S. business or involves a transfer of management decisions.

Greenfield investments are generally not subject to CFIUS regulations. Examples include Tianjin Pipe's steel pipe mill in Texas, Suntech Power's solar panel assembly plan in Arizona and American Yuncheng's gravure cylinder plant in South Carolina.

Other transactions not covered include:

- stock splits or pro rata stock dividend that does not involve a change in control;
- an acquisition of any part of an entity or of assets that do not constitute a U.S. business;
- an acquisition of securities by a person acting as a securities underwriter, in the ordinary course of business and in the process of underwriting; and
- an acquisition pursuant to a condition in a contract of insurance relating to fidelity, surety, or casualty obligations if the contract was made by an insurer in the ordinary course of business."

"National Security"

In some countries, regulations are "list-based;" that is, the government publishes a list of matters, parties, or sectors that are covered by the regulations. China's Foreign Investment Catalog takes this approach, and the U.S. has similar lists in export control, environmental, and other areas.

CFIUS is not "list-based." Rather, it has a broad, and not specifically defined mandate to protect the national security of the United States. What constitutes "national

security" evolves over time and is subject to the political environment in the United States. This is by design: Congress intended to give CFIUS wide and flexible authority to review foreign investment in the U.S.

That said, Section 721 of FINSA does contain a list of factors that CFIUS is to take into account. The list is reproduced in Appendix A and is useful but so broad that it only provides general guidance in the context of a given transaction. The Treasury Department also published guidance in 2010.[2]

Based on this guidance and observations of actual cases before CFIUS, it is possible to list some of the major areas parties should analyze in light of the national security mandate of CFIUS:

- *Foreign government-controlled parties*. In these cases CFIUS must not only review, but must also "investigate" the transaction if it could "affect the national security of the U.S." and the effect is not adequately mitigated.
- *Where the transaction affects critical infrastructure*. In this area, the statues "sets a high standard, defining critical infrastructure as: "any systems and assets, whether physical or cyber-based, so vital to the United States that the degradation or destruction of such systems or assets would have a debilitating impact on national security, including national economic security and national public health or safety.
- *Where the transaction is in a sensitive sector or involves sensitive technology*. Non-government related businesses where there are national security implications, such as energy, transportation, businesses that impact the U.S. financial system, products or services subject to ITAR or U.S. export controls, or involving critical infrastructure. Recently the semiconductor sector has clearly been regarded by CFIUS as "sensitive." CFIUS has also expressed an interest in robotics, artificial intelligence, augmented reality, and drones even where the technology may currently be classified as "EAR99."
- *Where the target has government contracts or has received federal support*. U.S. businesses that provide products or services to the U.S. government, either as prime contractors or subcontractors, or as suppliers to prime contractors, where the U.S. agency has functions relevant to national security – e.g., information technology, telecommunications, energy, natural resources, and industrial products), where the target has security clearances or classifications, or deals with classified information or contracts, or where the target has received R&D or other government funding or subsidies.
- *Where the target has access to classified information*. If the target's employees or other representatives have security clearances or access to classified information, a CFIUS filing is likely to be prudent.
- *Risk of interruption in supply*. CFIUS often will inquire whether the foreign acquirer, acting independently or under instructions from its home government, can delay, deny or place conditions upon the provision of output from the target, where that output is critical to U.S. national security.
- *Risk of leakage of sensitive technology*. CFIUS is concerned about the risk of leakage of sensitive technology, and will look at how much damage would be done if the technology were deployed against U.S. assets, and how readily available the technology is and therefore whether it makes sense to block a specific deal.
- *Risk of access to personal identifier information*. CFIUS has raised concerns where a foreign acquirer could obtain access to personal identifier information, such as consumer financial information. Such risks are especially present where the U.S. business may have personal identifier information of U.S. Government employees.
- *Risk of spying*. In certain cases, CFIUS will be concerned about the risk that the acquisition would put the foreign acquirer in a position to acquire intelligence, sabotage or otherwise affect U.S. national security concerns. It is therefore important to examine the proximity of a U.S. business to sensitive locations and critical infrastructure (e.g., bridges, tunnels, power plants, etc.).
- *Track record of foreign party's home country*. CFIUS will take into account whether the foreign party's home country has a bad record regarding non-proliferation or other national security concerns.
- *Track record and reputation of the foreign party itself*. CFIUS will also consider the track record of the foreign party and its personnel themselves.
- *Blacklisted countries*. A transaction with a blacklisted country (North Korea, etc.) would be prohibited anyway and therefore would never reach CFIUS. But CFIUS may ask about the foreign investor's dealings with

countries subject to U.S. sanctions, on the notion that technology could leak; these concerns conceivably could lead to mitigation agreements or even a recommendation to suspend or prohibit a transaction.

- *Size of transaction*. The size of the transaction is not a factor considered by CFIUS.
- *Hi-tech sector*. Although national security concerns often arise in high-technology businesses, this is not a factor considered by CFIUS in and of itself—although clearly many hi-tech sectors are national-security sensitive. However, even low-technology businesses can touch on national security or other concerns, or can be located in proximity to sensitive installations. Hotels and food processing are two examples of low-tech businesses that have been subject to CFIUS review.

CFIUS Process

As described in detail below, parties must first decide if they believe the transaction is potentially covered by CFIUS. Even if a transaction is potentially covered, the parties must still decide whether the likely national security considerations justify a voluntary submission to CFIUS—keeping in mind that if there is no pre-acquisition filing, CFIUS retains jurisdiction indefinitely to request and review a post-closing filing. As a statistical matter, the majority of U.S.-China acquisitions elect not to make a CFIUS filing, in part reflecting that many such acquisitions are in relatively "safe" sectors.

The parties are encouraged to consult informally before making a decision to file or not file. If the parties file a notification, CFIUS has 30 days to review and can request additional information. In many cases, the process ends there. In a minority of cases—but almost always where the acquirer is Chinese—CFIUS will trigger a second, 45-day investigation period. In either situation, CFIUS can request negotiation of a mitigation agreement. In rare cases, CFIUS will recommend to the President that the deal be blocked. Note that due to an overwhelming number of cases and limited resources, there can be significant timing delays in this process, including the time required to provide comments on a draft notice, as well delaying the point in which CFIUS "starts the clock" on the 30-day review period. CFIUS could also request the parties withdraw and re-file the notice to allow for further review time.

Informal consultation is encouraged

Parties are strongly encouraged to consult informally with CFIUS before any filing, whenever they believe there may be national security implications. A draft notice can be filed with CFIUS to guide these discussions at any time more than five days before the filing of a formal notice. CFIUS will provide comments and questions on the draft filing to be incorporated into the formal notification.

Filing of formal notification

The notice (called a "joint voluntary notice") must include information about the parties, the transaction, the parties' market share, any involvement with the U.S. government, sensitive or military technology or facilities, the completion date and net value of the deal. The foreign investor must provide detailed information about itself and its control persons, including biographical information. Certifications must be provided as to completeness and accuracy. All information submitted is confidential.

30-day review

Once a formal notification is made to CFIUS, the Committee has 30 days to review, during which time it can request additional information from and consultations with the parties. CFIUS will notify the parties as to the starting date of the 30-day period. If there is unanimous agreement to stop at this point, the process ends. Most reviews conclude after the 30-day review.

45-day investigation

CFIUS can trigger a second, 45-day investigation.

Rejection of voluntary filing.

It is possible for CFIUS to "reject" the voluntary filing by the parties; in one case, CFIUS rejected a filing on the grounds that it had information contradicting the information on the filing, which is supposed to be "complete and accurate." CFIUS suggested the parties might wish to check their facts and resubmit.

Changes to the transaction

CFIUS and the parties can negotiate a "mitigation agreement" to address any concerns. This may involve changes to the transaction, compartmentalization of sensitive operations or technology, or the like.

Recommendation to the President
CFIUS has the authority to recommend to the President that a transaction be blocked. If so, the President has 15 days to make a decision. This is rare. The President must find there is "credible evidence" that national security would be impaired, and that other U.S. laws are not sufficient to protect the national interest.

Ongoing jurisdiction
If the parties do not file, CFIUS retains jurisdiction indefinitely to review any transaction, before or after completion.

Possible mitigation measures
Mitigation measures might include:

- Restricting access to potentially sensitive technologies, data or other information to a small group of U.S. citizens;
- Creating clear policies and procedures for the handling of any potentially sensitive information;
- Developing a process for keeping appropriate U.S. government personnel aware of any security concerns, including any business decisions that may implicate national security considerations; and
- Establishing a committee or some other apparatus within the company that is responsible for ensuring compliance with any actions taken. Any such committee should be appropriately supported by the company's board of directors.

Penalties
A person that either intentionally or through gross negligence submits a material misstatement or omission in a notice or makes a false certification to CFIUS may be subject to a civil penalty up to $250,000 per violation. A person that either intentionally or through gross negligence violates a material provision of a mitigation agreement with, or a material condition imposed by, the United States may be subject to the greater of (i) a civil penalty up to $250,000 per violation or (ii) the value of the transaction.

END NOTES

1 For purposes of this briefing paper, "foreign" will mean "non-U.S." and "domestic" will mean U.S.

2 Available online at **https://www.treasury.gov/resource-center/international/foreign-investment/Documents/GuidanceSummary_12012008.pdf** and **https://www.treasury.gov/resource-center/international/foreign-investment/Documents/CFIUSGuidance.pdf**.

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