

Newly Released CFIUS Enforcement and Penalty Guidelines

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The Department of the Treasury, as chair of the Committee on Foreign Investment in the United States (CFIUS), recently issued CFIUS Enforcement and Penalty Guidelines. While CFIUS — the committee that reviews potential national security risks associated with foreign investments and real estate in the United States under Section 721 of the Defense Production Act of 1950, as amended (50 U.S.C. § 4565) (Section 721) — has never intimated that cooperation with CFIUS was optional, these guidelines (while nonbinding) make certain that persons and entities must comply with CFIUS' regulations, *i.e.*, file a timely declaration or notice; cooperate with CFIUS mitigation; and provide CFIUS with complete and accurate information. Further, the guidelines underscore the administration's commitment to protecting national security.

The guidelines: (1) provide three categories of conduct that may constitute a violation; (2) highlight the key steps of the process CFIUS generally follows in imposing penalties; and (3) identify factors CFIUS considers in determining whether a penalty is warranted and the scope of any such penalty.

Three Types of Violations

The guidelines identify three categories of acts or omissions that may constitute a violation of Section 721:

- 1. Failure to File.** Parties' failure to timely submit a mandatory declaration or notice, as applicable, constitutes a violation.
- 2. Noncompliance With CFIUS Mitigation.** CFIUS may enter into agreements with parties, impose conditions on proposed deals, or enter orders to mitigate any national security risk that results from a covered transaction or covered real estate transaction. Conduct that is prohibited by or otherwise fails to comply with such CFIUS mitigation agreements, conditions, or orders constitutes a violation.
- 3. Material Misstatement, Omission, or False Certification.** Providing material misstatements to CFIUS, filing information with omissions to CFIUS, and filing false or materially incomplete certifications in connection with assessments, reviews, investigations, or CFIUS mitigation, including information provided during informal consultations or in response to requests for information, constitutes a violation.

Penalty Process

The process for determining penalties remains as described in 31 C.F.R. §§ 800.901 and 802.901, or for certain older transactions in earlier regulations, as applicable. The guidelines simply highlight the following key steps in the process:

- 1. *Notice of Penalty.*** CFIUS will send the notice of penalty, including a written explanation of the conduct to be penalized, the amount of any monetary penalty to be imposed, the legal basis for the penalty, and factors considered.
- 2. *Petition for Reconsideration.*** Next, within 15 business days of receipt of a notice of penalty, the subject person may submit a petition for reconsideration to the CFIUS staff chairperson, including any defense, justification, mitigating factors, or explanation. Upon a showing of good cause, this period may be extended by written agreement between the staff chairperson and the subject person.
- 3. *CFIUS Determination.*** Then, if a petition for reconsideration is timely received, CFIUS will consider it before issuing a final penalty determination within 15 business days of receipt of the petition. This deadline may be extended by written agreement between the staff chairperson and the subject person. If no petition for reconsideration is timely received, CFIUS typically issues a final penalty determination via a notice to the subject person.

Factors in Determining Penalties

CFIUS weighs “aggravating and mitigating factors” in determining the penalty for a violation. However, the guidelines note that CFIUS considers the particular facts and circumstances surrounding the conduct giving rise to the violation and that the following non-exhaustive list includes factors not relevant to all violations.

Such factors include a subject person’s accountability; response to the penalty; remediation of the conduct, history, and familiarity with CFIUS; and if applicable, past compliance with CFIUS mitigation. CFIUS also considers the affect the penalty will have on future compliance with Section 721 (such as through self-disclosures when applicable) and the extent to which the conduct impaired or threatened to impair U.S. national security.

Conclusion

It is important to consult with your legal counsel if CFIUS contacts you, and in any transactions involving foreign investment or action that may present a national security risk. This helps to ensure that you comply with CFIUS’ regulations and newly released guidelines, and to avoid any penalties.

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