

Committee on Foreign Investment in the United States

Key Questions Answered



What is CFIUS?

CFIUS stands for the Committee on Foreign Investment in the United States. It is a US federal interagency group with authority to review foreign investments in US businesses and certain real estate transactions. CFIUS has broad authority to evaluate whether such investments could impair US national security. If a transaction could pose a risk to national security, CFIUS can recommend to the President of the United States to block or unwind the investment.

Which Agencies Make Up This Committee and How Do They Work Together?

CFIUS is chaired by the Secretary of the Treasury. The following US government parties also participate in the process: the Departments of Justice, Homeland Security, Commerce, Defense, State, and Energy; the Office of the US Trade Representative; and the Office of Science and Technology Policy. The Director of National Intelligence and the Secretary of Labor are non-voting members of CFIUS. Representatives from other federal agencies, including several White House offices, also observe and, as appropriate, participate in CFIUS's activities.



Composition of CFIUS

The day-to-day functions of CFIUS are carried out by the Department of the Treasury. Treasury staff handle almost all communications with parties to the CFIUS process.

CFIUS operates under a committee structure, which has important process implications:

- The consensus-driven interagency group is often not able to reach a decision as quickly as agencies that operate under a more unified structure.
- Receiving an advance and informal read on whether CFIUS will view a given transaction as challenging can be difficult. Because CFIUS is a collection of constituent agencies, the opinion of one such agency about a given transaction does not necessarily provide insight into the likely determination of the other agencies or CFIUS as a whole.
- In an effort to manage the committee structure, Treasury staff serve as gatekeepers.

What is the legal basis for CFIUS?

CFIUS was established by the President of the United States through executive power in 1975 to “review [foreign] investments in the United States which, in the judgment of the Committee, might have major implications for United States national interests.” In 1988, the Exon-Florio Amendment to the Defense Production Act of 1950 (i.e., Section 721 of the Act) authorized the President (through CFIUS) to review any merger, acquisition, or takeover by, or with, any foreign person that could result in foreign control of any person engaged in interstate commerce in the United States. In 2007, the Foreign Investment and National Security Act codified the then-existing CFIUS practice.

In 2018, the Foreign Investment Risk Review Modernization Act (FIRRMA) expanded CFIUS’s authority by authorizing CFIUS to review certain non-passive, non-controlling investments by foreign parties in US businesses and certain real estate transactions. FIRRMA also mandated filings for certain transactions, as discussed below. In addition, FIRRMA introduced procedural changes to the CFIUS review process. CFIUS issued regulations fully implementing these changes in 2020.

Which transactions can CFIUS review?

CFIUS may review certain transactions between a *US business and a foreign person*. CFIUS has authority to review covered (1) control transactions, (2) investments, and (3) real estate transactions.

Covered Control Transaction

A covered control transaction is a transaction that could result in “control” over a “US business” by a “foreign person.” It is important to understand these terms to appreciate the broad reach of CFIUS. A “foreign person” is (a) a foreign national, government, or entity; or (b) any entity over which control can be exercised by a foreign national, government, or entity. For example, a US branch of a non-US parent is a foreign person. “Control” is broadly defined and does not necessarily require the acquisition by the foreign person of a majority interest in the US business. CFIUS regulations specify that minority interests that confer a significant ability to influence “important matters” related to the US business may confer control. A “US business” is any entity engaged in interstate commerce in the US.

Understanding the Definition of “Principal Place of Business”

A *foreign entity* generally is defined as an entity organized under the laws of a foreign state if its “principal place of business” is outside the US. Under new regulations issued in 2020, if an entity has represented to the US government, a state government, or a foreign government that its principal place of business is outside the US (for tax or other purposes), that location is presumed to be the entity’s principal place of business.

Covered Investment

CFIUS has authority to review certain non-controlling investments in US businesses. A covered investment is one in which (1) a foreign person invests in a US business that is involved in critical **T**echnology, critical **I**nfrastructure, or sensitive personal **D**ata (collectively, TID US business), and (2) the foreign person acquires at least one of the following rights: access to material nonpublic technical information, board membership or observer rights, or any involvement in substantive decision making of the TID US business regarding critical technology, critical infrastructure, or sensitive personal data.

What Are the Components of a TID US Business?

- **Critical Technology:** Produces, designs, tests, manufactures, fabricates, or develops one or more critical **T**echnologies (e.g., certain export-controlled “dual-use” items with both civilian and military applications, defense articles, nuclear technologies, select agents and toxins, and emerging and foundational technologies);
- **Critical Infrastructure:** Owns, operates, manufactures, supplies, or services critical **I**nfrastructure; or
- **Sensitive Personal Data:** Maintains or collects sensitive personal **D**ata of US citizens.

Covered Real Estate Transaction

A covered real estate transaction is one in which a foreign person purchases or leases real estate located within (or functioning as a part of) certain airports or maritime ports, or within a certain distance of military installations or other government facilities that are sensitive for national security reasons.

Scope of CFIUS’s Jurisdiction

The scope of CFIUS’s jurisdiction is often ambiguous. The ambiguity in CFIUS’s regulations, coupled with the fact that CFIUS determines the scope of its own jurisdiction in the first instance — and is afforded significant deference by the courts — means that close questions normally should be resolved in favor of jurisdiction.

Notably, CFIUS’s jurisdiction extends to (a) foreign-to-foreign deals in which the target has one or more US subsidiaries, or US assets or operations (e.g., a French company’s acquisition of a business in Germany that has an operating subsidiary in the US); (b) the formation of a joint venture to which one party contributes to an existing US business (with “US business” defined broadly); and (c) deals involving long-term leases of US assets that operate as de facto transfers of US businesses.

Are certain transactions beyond the reach of CFIUS?

Yes. Certain types of transactions generally are beyond the reach of CFIUS, including:

- **Passive investments with <10% interest:** CFIUS does not have jurisdiction to review a transaction if it (1) is “solely for the purposes of passive investment” and (2) results in a foreign person holding 10% or less of the outstanding voting interest in a US business. An investment is “solely for the purposes of passive investment” if the investor does not intend to exercise control and is not afforded any access to nonpublic technical information or governance rights other than the ability to vote its shares.

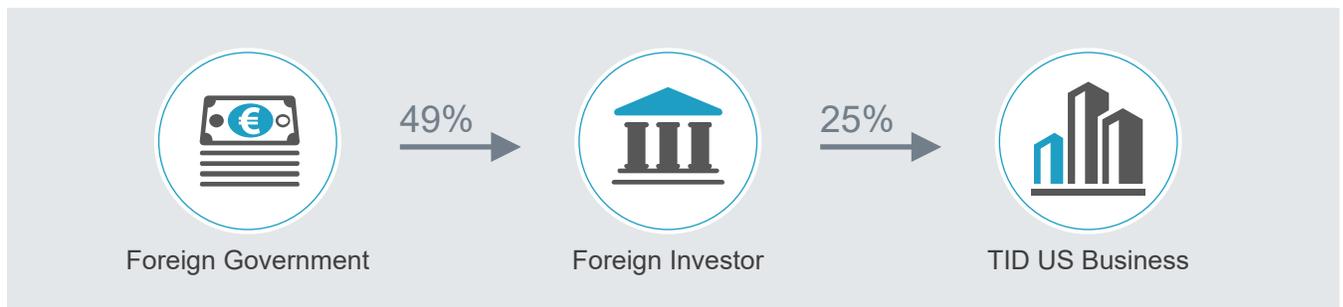
- **Incremental acquisitions:** Generally, if a foreign investor previously acquired direct control of a US business and CFIUS cleared the transaction, then CFIUS may not review subsequent investments in the same US business by the same investor.
- **Securities underwriter transactions:** CFIUS does not have jurisdiction to review an acquisition of securities by a securities underwriter in the ordinary course of business.
- **Acquisitions pursuant to a condition in an insurance contract:** Generally, CFIUS does not have jurisdiction to review acquisitions pursuant to a condition in an insurance contract relating to fidelity, surety, or casualty obligations.
- **Lending transactions:** Lending transactions generally are not within CFIUS’s jurisdiction, unless the foreign person acquires financial or governance rights characteristic of an equity investment, or an imminent default could give a foreign person actual control of collateral that constitutes a US business.
- **“Greenfield” investments:** Generally, greenfield investments — involving US businesses that did not exist prior to investment by a foreign person — are beyond the reach of CFIUS. In practice, however, greenfield status is often unclear and should be interpreted narrowly, because CFIUS may view a collection of assets assembled by investors in anticipation of the formation of a business (e.g., contracts and intellectual property) as constituting a US business.

Which transactions are required to be filed with CFIUS?

Parties to covered transactions involving a TID US business must submit a mandatory filing at least 30 days prior to the completion date of the transaction in either of the following circumstances:

Substantial Interest

A filing is required if (1) a covered transaction involves a TID US business, (2) a foreign person obtains a 25% or more voting interest in the TID US business, and (3) a foreign government (other than the governments of Australia, Canada, and the United Kingdom, which receive special treatment under the rules) holds a 49% or more voting interest in the foreign person.



Critical Technology

A filing is required if a covered transaction involves (1) a TID US business that produces, designs, tests, manufactures, fabricates, or develops a “critical technology,” and (2) a US regulatory authorization would be required to export, re-export, transfer (in-country), or retransfer such critical technology to the foreign investor or a person that holds a voting interest of 25% or more in the foreign investor.

Narrow exceptions to this filing rule exist. A filing is not required if the only critical technology at issue is eligible for License Exception ENC (related to encryption), TSU (related to certain unrestricted technology and software), or STA (related to certain strategic trade authorization). Further, if the foreign investor meets the “excepted investor” criteria, as explained below, no filing is required.

Is there a penalty for failing to submit a mandatory filing?

Yes. If a mandatory filing is not submitted, the parties to the transaction could be subject to a civil penalty not to exceed \$250,000¹ or the value of the transaction, whichever is greater.

If a filing is not mandatory, should a foreign investor still make a voluntary filing?

Outside of the mandatory filing rules, parties are not affirmatively required to submit a transaction for review by CFIUS in the first instance. Parties can file voluntarily, however, and the reason they sometimes do so is to obtain clearance of the transaction before closing. Once CFIUS has cleared a transaction, it remains cleared forever (with some limited exceptions), and CFIUS-related risk is largely eliminated. In contrast, CFIUS can review at any time a transaction that it did not clear before closing — with uncertain and potentially impactful results. In the extreme case, the CFIUS process could result in the foreign party being forced to divest its interest in the US business. Following the passage of FIRRMA, CFIUS has greatly increased its efforts to identify transactions of interest for which no filing was made, so not notifying CFIUS of a transaction can be a risky decision.

Parties normally file voluntarily when they perceive that the transaction could impact national security. CFIUS assesses this risk based on a combination of the “threat” posed by the buyer and the “vulnerability” to exploitation associated with the target. Many factors inform the evaluation of the nature and extent of such risk, including but not limited to:

- The foreign investor’s nationality and the extent of its ownership by foreign governments (e.g., Chinese and Russian investors are generally perceived as higher risk)
- The likely impact of the proposed transaction on the availability of products and services needed for national defense
- The export control status of the target’s products, software, and technology
- The target’s contractual relationships with the US government and the role of the target’s products in the supply chain relating to products eventually used by the government
- The target’s involvement in and ties to critical infrastructure in the United States (such as ports, airports, pipelines, rail systems, the power grid, and telecommunication systems)
- The target’s storage of and access to detailed personal/customer information (such as credit card information, Social Security numbers, and personal health information)
- The proximity of the target’s assets to sensitive US government locations, such as military installations (which may be known or unknown to the target)
- Close business relationships between the foreign investor and third parties that pose a risk to national security

¹All values are in US\$.

When evaluating CFIUS-related risk, parties should bear in mind that CFIUS may view the risk differently than private entities for a number of reasons. For example:

- CFIUS has access to classified information not available to the parties.
- CFIUS's principal concern is safeguarding national security —not advancing the parties' economic objectives — and so CFIUS may place emphasis on perceived risks that are objectively remote.
- National security concerns may relate to business activities that are small from a revenue perspective but material to US government interests (i.e., there is no dollar threshold or economic materiality test for CFIUS concerns).
- CFIUS generally is not transparent and normally does not give parties the opportunity to debate or appeal its conclusions.

Which party generally bears CFIUS-related risk?

As a general matter, the foreign investor has more incentive to engage with CFIUS and its review process because — in the absence of CFIUS clearance — the President could require divestiture or impose other adverse conditions after closing. At that point, the previous owners of the US business often are out of the picture (or hold reduced ownership stakes). Moreover, if the remedy involves imposing adverse conditions, those conditions typically impact the foreign investor disproportionately (e.g., by limiting the foreign investor's access to information or facilities, or limiting the foreign investor's ability to influence certain matters). That said, US targets and sellers may also have an incentive to engage with the US government through the CFIUS process if, for example, the US parties will hold equity interests in the post-transaction company or believe that such engagement will benefit other aspects of their businesses.

What is “Excepted Investor” status?

CFIUS rules provide some exemptions for “excepted investors” with sufficiently close ties to “excepted foreign states” (currently, Australia, Canada, and the United Kingdom). Excepted investors are not subject to mandatory filing rules or CFIUS's jurisdiction over non-controlling investments and real estate transactions; however, CFIUS still has jurisdiction to review control transactions involving excepted investors.

To qualify as an excepted investor, a foreign investor must meet several requirements. For example, at least 75% of the entity's board members and observers and all of its 10% or greater shareholders must be from an excepted foreign state or the US. Even if a foreign investor satisfies the other prerequisites for excepted investor status, it will not be eligible for that status if it has been found to have violated certain US laws and regulations.

CFIUS has indicated that the list of excepted foreign states, which forms the basis for excepted investor status, may be expanded in the future.

Who prepares the CFIUS filing?

The foreign investor and the target company typically prepare the CFIUS filing jointly. Preparing a filing is a substantial undertaking that requires the disclosure of a significant amount of information, primarily about the parties and the transaction. The US business and the foreign investor should have separate CFIUS counsel who work collaboratively to prepare and file the joint notice.

How do parties submit a CFIUS filing?

Parties have the option to file a short-form “declaration” or a long-form “notice.” Either way, the submission should include answers from both the US business and the foreign investor to a number of questions listed in the regulations.

A declaration may be the better option for straightforward, less sensitive transactions, as it requires less information than a notice, and CFIUS reviews declarations in 30 calendar days (whereas the long-form notice process can take three to six months). However, filing a declaration can be disadvantageous in more challenging or complicated cases because CFIUS can conclude its review of a declaration by requiring the parties to file a notice if it has concerns or additional questions about the transaction. If this occurs, filing a declaration effectively extends the CFIUS process, compared with filing a notice in the first instance.

Although all information filed with CFIUS is accorded strict confidential treatment by law, parties may find the process of producing this information to be intrusive and burdensome. If the parties file a notice instead of a declaration, the foreign investor must provide detailed “personal identifier information” (including name, address, national identity number, passport and visa information, and information about foreign government and military service) for all senior officers and directors of, and individual shareholders with a 5% or greater ownership interest in, the investment vehicle and any parent entity in the control chain.

Is there a fee for CFIUS filings?

Yes. There are fees for long-form “notice” filings but not for short-form “declaration” filings. (See above for a discussion of the two types of filings.)

The fees for notices are based on the value of the notified transaction:

Value of the transaction	Filing fee
Less than \$500,000	No fee
Equal to or greater than \$500,000 but less than \$5 million	\$750
Equal to or greater than \$5 million but less than \$50 million	\$7,500
Equal to or greater than \$50 million but less than \$250 million	\$75,000
Equal to or greater than \$250 million but less than \$750 million	\$150,000
Equal to or greater than \$750 million	\$300,000

How long does CFIUS take to review a transaction?

A filing triggers statutory deadlines within which CFIUS must act. In some cases, parties would be prudent to engage in informal consultations with CFIUS (or its constituent agencies) prior to submitting the CFIUS filing (e.g., if a transaction involves complex issues or is likely to raise national security concerns). These consultations could range from as little as a phone call with counsel to detailed presentations to CFIUS.

The process after any informal consultation varies depending on whether the parties file a declaration or a notice.

Declaration Process

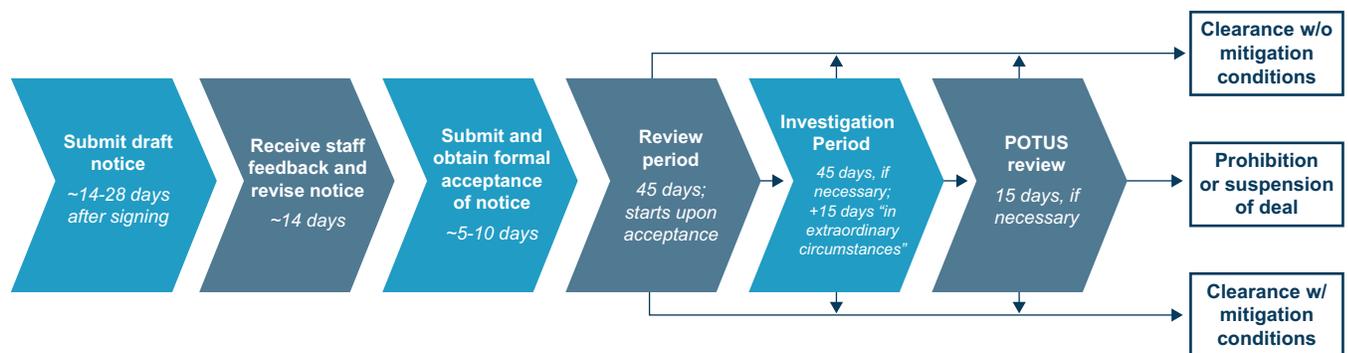
When the parties file a declaration, CFIUS has 30 days to review the submission and typically asks a number of questions of one or both parties during that period. At the end of its review, CFIUS may clear the transaction, conclude its review without formally clearing the transaction, or require the parties to file a notice.

Concluding the review without formal clearance typically is considered a good outcome. In this scenario, the parties do not receive a formal safe harbor against post-closing action by CFIUS unless they file a notice, but they are not required to continue with the CFIUS process—and as a practical matter, they know that CFIUS did not have significant concerns about the transaction (because it did not require the filing of a notice).

Notice Process

Before filing a notice, the parties are effectively required to submit a draft to CFIUS. This allows CFIUS to review the filing and identify any additional information that it would like included in the formal filing. CFIUS generally is required to provide comments on draft notices within 10 business days.

Once the parties revise the notice to address any feedback, they file a formal version of the notice. The statutory timeline for review does not commence until CFIUS officially accepts the notice by issuing a letter to that effect. In 2019, that acceptance took place on average 7.8 business days after CFIUS received the formal notice.



After accepting the notice, CFIUS has 45 days to review the transaction and decide whether to clear it or commence an investigation (essentially, an extension of the initial review). That investigation generally lasts an additional 45 days, although the process can be terminated at any point during the 45-day investigation period. A 15-day extension of the investigation is allowed in “extraordinary circumstances.”

During the review and investigation periods, any of the agencies that make up CFIUS can submit written questions to the parties through the Treasury Department case officer. When a party receives questions from CFIUS, the party has three business days to respond absent an extension.

If CFIUS cannot resolve national security concerns by the end of the investigation period, it must make a formal recommendation to the President as to the action the President should take with respect to the transaction. The President then has up to 15 additional days to decide whether to clear, suspend, prohibit, or impose conditions on the deal. In practice, to extend the statutory review period, CFIUS can also suggest that the parties voluntarily withdraw and then immediately refile their notice, thereby extending the statutory timeline for CFIUS review.

Can the CFIUS process result in conditions being imposed on a transaction?

Yes. A CFIUS determination that a transaction could threaten or impair national security does not necessarily mean that the transaction will be blocked. In many cases, CFIUS can clear a transaction subject to conditions to mitigate the perceived risks the transaction otherwise would pose. If necessary, CFIUS will engage with the parties to negotiate such conditions. If CFIUS foresees national security concerns early in the process, it may open such negotiations even in the pre-filing phase, before the parties submit their formal notice.

Mitigation instruments can range from assurance letters between CFIUS and the parties (whereby the parties undertake minimal corporate steps to address security concerns) to complex agreements that can impose burdensome operational restrictions or even require restructuring aspects of the transaction itself. In all events, the purpose of the conditions is to constrain foreign control of the target US business that otherwise would result from the transaction. Such conditions may aim to:

- Prohibit or limit the transfer of certain intellectual property, trade secrets, or know-how
- Establish terms for handling existing or future contracts with the US government
- Ensure that only authorized persons have access to certain technology; that only authorized persons have access to US government, company, or customer information; and that the foreign investor does not have access to systems that hold such information
- Ensure that only US citizens handle certain products and services
- Establish a Corporate Security Committee and other mechanisms to ensure compliance with all required actions, including the appointment of a US government-approved security officer
- Notify customers of the change of ownership
- Exclude certain sensitive assets from the transaction
- Ensure that only authorized vendors supply certain products or services

What can happen if the parties fail to comply with a mitigation instrument?

Cases concluded with mitigation instruments can be reopened at any time in the event of material breach. In addition, a person who violates a material provision of a mitigation agreement can be liable for a civil penalty of up to \$250,000 or the value of the transaction, whichever is greater, per violation.

CFIUS's Office of Investment Security Monitoring & Enforcement oversees mitigation measures. The Office designates at least one CFIUS member agency to negotiate, monitor, and enforce each active mitigation agreement. The Office also coordinates compliance activities with respect to mitigation measures, including but not limited to on-site compliance reviews, investigations, and remedial actions. In certain recent cases,

CFIUS has required the parties to hire a third-party compliance monitor to audit compliance with the mitigation instrument and report its findings to CFIUS. The costs of complying with the conditions imposed by a mitigation instrument can be significant.

Do other US agencies separately review the impact of foreign investment on national security?

Yes. The regulatory processes implicated by a given transaction generally turn on the nature of the target's operations. For example, a company with a facility security clearance must notify the Defense Counterintelligence and Security Agency, a component of the Department of Defense, when entering into negotiations that could result in certain types of foreign investment. Similarly, if a transaction involves the transfer to a foreign person of ownership or control of an entity registered with the Department of State's Directorate of Defense Trade Controls (DDTC) under the International Traffic in Arms Regulations, or a subsidiary of the registrant, the registrant must notify DDTC at least 60 days before closing. A foreign investor in a US telecommunications business generally must obtain advance approval from the Federal Communications Commission (FCC), and the FCC will not make a decision until a group of government agencies known as Team Telecom reviews the transaction for foreign policy, national security, or law enforcement risks. This is not an exhaustive list, and the regulatory processes implicated by a foreign investment in a US business must be analyzed on a case-by-case basis.

Are there CFIUS-type reviews in other countries?

Yes. Multinational transactions may need to undergo separate national security reviews in more than one country. Several other countries, including Australia, Canada, China, France, Germany, and Russia, conduct reviews of foreign investments in businesses with operations in their jurisdictions. Moreover, in November 2020, the UK government published the draft of its long-awaited National Security and Investment Bill, which is intended to set up a process that has many similarities to CFIUS regime and is designed to allow the UK government to intervene in investments considered to pose a risk to national security. Additional information about foreign investment regimes in other countries, including CFIUS in the United States, is available in the Latham-developed FDI app, which is available as a free download in the Apple App Store and Google Play that can be used on iPhone, iPad, and Android devices.

Notably, FIRRMA calls on the President to "conduct a more robust international outreach effort" to help allies and other partners establish procedures similar to those employed by CFIUS. To that end, FIRRMA instructs the CFIUS chair to establish a formal process for information sharing with allies and other US partners. With stronger foreign review processes and greater information sharing, CFIUS will have the ability to participate in coordinated, multilateral national security reviews of cross-border investments.

The Team

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Litigation & Trial

LATHAM & WATKINS RELEASES APP ON FOREIGN DIRECT INVESTMENT AS REGULATIONS PILE UP

The app is a free, interactive tool summarizing important aspects of the Committee on Foreign Investment in the United States, or CFIUS, and similar regimes in other countries across the globe.

BY MP MCQUEEN

As the regulatory environment continues to heat up worldwide for cross-border direct investment, global law powerhouse **Latham & Watkins** is introducing a new mobile application designed to make navigating the complexities a bit easier.

The firm on Thursday announced the launch of its Foreign Direct Investments Regimes application for **iPhone and iPad at the Apple App Store** and **Android devices at Google Play**. The app is a free, interactive tool summarizing important aspects of the Committee on Foreign Investment in the United States, or CFIUS, and similar regimes in other countries across the globe.

Latham contends the new tool is the first of its kind, although the firm has developed other tools in-house, and other firms have created other tools. For instance, **White & Case** introduced a **CFIUS Pilot Program Covered Transaction Analysis Tool** in November.

Les Carnegie, a partner in Latham's Washington, D.C., office and co-leader of the firm's CFIUS and U.S. national security practice, said in an interview that "just about anyone in cross-border deals would find value in the app, the financial community, the business community, business targets wondering what hurdles foreign investors might have to clear."

The new app is organized by country and includes Australia, China,

France, Germany, Italy, Spain, Russia, Saudi Arabia, Singapore, United Arab Emirates and the United Kingdom as well as the United States. After choosing a country, users can click through to read summaries of information about that jurisdiction, including which authority is responsible for foreign investment reviews, mandatory and voluntary filings, timelines, filing fees and penalties, and definitions of keywords and phrases.

Carnegie said tech experts and lawyers in-house started working on the tool in February. "We have an incredibly talented group of people in the house who develop apps and other interactive features. They constructed the platform for us and we, the lawyers, created the content that we populated into the structure," he said.

Teams from the firm's offices around the world contributed, he said. It is among several in a suite of interactive apps and other resources the firm offers, including a **"Book of Jargon"** series. The foreign direct investment tool will be updated



periodically with new information, Carnegie said.

The tool was unveiled just as the **public comment period** for proposed new **CFIUS regulations** under the Foreign Investment Risk Review Modernization Act of 2018 drew to a close Oct. 17.

"Evaluating and preparing for reviews by CFIUS and other foreign direct investment regimes has become a critical component to cross-border dealmaking in today's geopolitical environment," said Luke Bergstrom, global vice chair of Latham's mergers and acquisitions practice, in a statement.

MP McQueen is editor-at-large, and can be reached at mpmcqueen@alm.com

FOREIGN DIRECT INVESTMENT REGIMES APP



Apple App Store

Ratings and Reviews

5.0

out of 5

7 Ratings



KBourgal, 10/17/2019

Surprisingly helpful

Found this looking for CFIUS information. Very informative and easy to understand.



WinoGuy, 10/14/2019

Highly recommend!

Very handy to have with great information.



The FDI app is an interactive tool designed to provide an overview of foreign direct investment reviews in the United States (by the Committee on Foreign Investment in the US or CFIUS) and other select countries around the globe.

This first-of-its-kind app is particularly useful for parties involved in cross-border investments as it summarizes information and procedures that have become increasingly fundamental to successfully executing these transactions.

The FDI app is available as a free download in the Apple App Store and Google Play that can be used on iPhone, iPad, and Android devices.



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