

## Treasury Proposes New CFIUS Regulations to Expand Monitoring and Enforcement Authorities: 5 Key Takeaways

***The proposal signals a continued effort to expand CFIUS's enforcement scope and update penalties.***

On April 11, 2024, the US Department of the Treasury (Treasury) issued a Notice of Proposed Rulemaking (the Proposed Rule) to further strengthen the monitoring and enforcement capabilities of the Committee on Foreign Investment in the United States (CFIUS). The Proposed Rule follows other steps CFIUS has taken relating to enforcement, such as the issuance of the Enforcement and Penalty Guidelines in October 2022, and may result in expanded information requests, higher penalty limits, and greater compliance costs on transaction parties. Treasury is accepting written comments from the public until May 15, 2024.

Here are five key takeaways from the Proposed Rule:

1. CFIUS would have the authority to require information as to whether a non-notified transaction may raise “national security considerations” or trigger a mandatory filing, as well as for monitoring and compliance.
2. The CFIUS Staff Chair would be able to issue a subpoena to obtain information if the Chair deems that doing so is “appropriate” (versus “necessary,” as under the current regulations).
3. Transaction parties would be required to respond to proposed mitigation terms within three business days, consistent with the timeframe to respond to questions from CFIUS during the review period.
4. The maximum penalty amount would increase substantially. For example, the maximum penalty for material misstatements or omissions would increase from \$250,000 to \$5 million per violation. The maximum penalty for violations of CFIUS orders, conditions, or material provisions of mitigation agreements could be up to the value of the party’s interest in the US business at the time of the violation or the time of the transaction.
5. CFIUS would have the authority to impose penalties for material misstatements and omissions made in response to non-notified inquiries and in communications with CFIUS related to monitoring or compliance.

Continue reading for a more in-depth analysis.

### **1. The categories of information for which CFIUS can seek and require information from transaction parties would expand**

The current CFIUS regulations authorize the CFIUS Staff Chair to request information from the parties to a transaction that was not notified to CFIUS (i.e., a non-notified transaction) to allow CFIUS to determine whether the transaction is a “covered transaction” or a “covered real estate transaction.” This is largely a jurisdictional determination. The Proposed Rule would give the Staff Chair authority to require information related to whether a non-notified transaction (1) may raise “national security considerations” and (2) meets the criteria for a mandatory filing. Treasury states in the Proposed Rule that it does not intend to use this new authority “as a substitute” for a formal CFIUS review, but rather to prevent unnecessary filings and increase efficiency. This expansion appears to be largely consistent with CFIUS’s existing practice in connection with non-notified inquiries. However, the “may raise national security considerations” standard could signal a much broader approach to such inquiries.

The Proposed Rule also requires parties to provide information when CFIUS seeks information (1) to monitor compliance with or enforce the terms of a mitigation agreement, order, or condition, and (2) to determine whether the transaction parties made a material misstatement or omitted material information during a previously concluded CFIUS review. CFIUS’s existing practice is to request such information, but the current CFIUS regulations do not expressly obligate a response in these circumstances.

### **2. CFIUS’s authority to issue subpoenas would expand**

The Defense Production Act, which establishes the statutory authority for CFIUS, authorizes the use of a subpoena to obtain information from any person “as may be necessary or appropriate ... to the enforcement or administration” of the Act and its implementing regulations. The Proposed Rule would assign this authority to the CFIUS Staff Chair and change the regulatory standard for issuance of a subpoena from “if deemed necessary” to “if deemed appropriate.” The Treasury [press release](#) accompanying the Proposed Rule highlights that the rule would “expand[] the instances in which CFIUS may use its subpoena authority, including when seeking 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.” Treasury explains that it expects this change would enhance “operational efficiency.”

### **3. A fixed time limit would apply for responding to proposed mitigation terms, absent an extension**

The Proposed Rule establishes a three-business-day deadline for parties to provide substantive responses to mitigation terms proposed by CFIUS. Parties would be able to request an extension of time that CFIUS would need to approve in writing.

A “substantive response” is defined as either an acceptance of the mitigation terms, a counteroffer, or a comprehensive explanation as to why the party or parties cannot adhere to the proposed terms. This explanation may also be accompanied by a counterproposal.

If parties do not respond within the specified period, CFIUS would have the authority to reject the filing. The proposed response period for mitigation terms is consistent with the existing timeframe for replying to questions from CFIUS during the review and investigation periods. Notably, the Proposed Rule does not establish a timeframe for when CFIUS must share proposed mitigation terms with the parties to a CFIUS filing, or for CFIUS to respond to the parties’ substantive responses and counterproposals to proposed mitigation terms.

#### 4. The maximum civil penalty for violations would increase substantially

The Proposed Rule increases the civil monetary penalty as a deterrent against violations of the regulations. In particular, the Proposed Rule would:

- increase the maximum penalty amount for the submission of a declaration or notice with a material misstatement or omission, or making a false certification in connection with a filing, to \$5 million per violation from \$250,000;
- increase the maximum penalty for failing to make a mandatory CFIUS filing under [31 C.F.R. § 800.401](#) from the greater of \$250,000 or the value of the transaction to the greater of \$5 million or the value of the transaction; and
- increase the maximum penalty for violating a material provision of a mitigation agreement, a material condition imposed by CFIUS, or an order issued by CFIUS from \$250,000 or the value of the transaction to the greatest, per violation, of (1) \$5 million, (2) the value of the transaction, (3) the value of the violating party's interest in the US business (or covered real estate) at the time of the transaction, or (4) the value of the violating party's interest in the US business (or covered real estate) at the time of the violation or the most proximate time to the violation for which assessing such value is practicable.

The Proposed Rule also extends the time period parties have to submit a petition for reconsideration upon receipt of a penalty notice from CFIUS, as well as for CFIUS to assess a petition and issue a final penalty determination, from 15 business days to 20 business days.

#### 5. CFIUS would be able to impose penalties for material misstatements or omissions outside the context of a CFIUS filing

The Proposed Rule authorizes CFIUS to impose a penalty for material misstatements or omissions made in response to a non-notified inquiry or other requests for information, including in connection with monitoring or enforcing compliance. The Proposed Rule clarifies that penalties would not apply to every material misstatement or omission made by a transaction party related to a mitigation agreement, condition, or order. Parties would be given written notice when a particular response may be subject to a penalty, which are anticipated to include communications related to:

- non-notified transactions;
- failure to file a mandatory declaration; and
- compliance with, or enforcement, modification, or termination of, a mitigation agreement, condition, or order imposed.

#### What's Next?

After Treasury collects and analyzes all comments, Treasury will issue a final rule. It is unclear when a final rule will go into effect.

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If you have questions about this Client Alert, please contact one of the authors listed below or the Latham lawyer with whom you normally consult:

**James H. Barker**

james.barker@lw.com  
+1.202.637.2200  
Washington, D.C.

**Les P. Carnegie**

les.carnegie@lw.com  
+1.202.637.1096  
Washington, D.C.

**Damara L. Chambers**

damara.chambers@lw.com  
+1.202.637.2300  
Washington, D.C.

**Zachary N. Eddington**

zachary.eddington@lw.com  
+1.202.637.2105  
Washington, D.C.

**Ruchi G. Gill**

ruchi.gill@lw.com  
+1.202.654.7126  
Washington, D.C.

**Catherine Hein**

catherine.hein@lw.com  
+1.202.637.2200  
Washington, D.C.

**Ragad Alfaraidy**

ragad.alfaraidy@lw.com  
+1.202.637.2138  
Washington, D.C.

**Asia Cadet**

asia.cadet@lw.com  
+1.202.637.2251  
Washington, D.C.

**Julie Choi Shin**

juliechoi.shin@lw.com  
+1.202.637.1003  
Washington, D.C.

**Matthew J. Crawford**

matthew.crawford@lw.com  
+1.617.880.4588  
Washington, D.C.

**Joelle Hageboutros**

joelle.hageboutros@lw.com  
+1.332.240.2143  
New York

**Elliot W. Hecht**

elliott.hecht@lw.com  
+1.202.654.7215  
Washington, D.C.

**Amulya Vadapalli**

amulya.vadapalli@lw.com  
+1.202.350.5375  
Washington, D.C.

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