

New CFIUS Developments Signal Heightened Attention on Enforcement: 4 Areas to Watch

The recent developments signal a renewed vigor to protect US national security.

This Client Alert highlights the following recent developments relating to national security investment reviews conducted by the Committee on Foreign Investment in the United States (CFIUS):

- CFIUS takes new enforcement actions.** In recent public remarks, Paul Rosen, the Assistant Secretary for Investment Security at the US Department of the Treasury (Treasury), indicated that CFIUS is taking a more active approach in the enforcement of its legal authorities. Assistant Secretary Rosen explained that CFIUS is closely reviewing breaches of mitigation agreements and has issued one or more final penalty determinations. While the details of the penalties are not yet public, these remarks follow the issuance of the [Executive Order on Ensuring Robust Consideration of Evolving National Security Risks by CFIUS](#) in September 2022 and the first-ever [CFIUS Enforcement and Penalty Guidelines](#), published in October 2022 (the Enforcement Guidelines).
- CFIUS clarifies that certain “springing rights” may not be used for mandatory filings.** For transactions involving springing rights that could implicate a mandatory CFIUS filing, new CFIUS [guidance](#) regarding the term “completion date” indicates that parties must submit a mandatory filing 30 days prior to the closing of the initial equity investment, rather than 30 days prior to the date when any corresponding springing rights are vested to the foreign investor.
- CFIUS may request information on all foreign persons related to a transaction, including limited partners in an investment fund.** New [guidance](#) puts parties on notice that CFIUS may request information on all foreign investors that are involved, directly or indirectly, in a transaction, regardless of arrangements between the parties that may otherwise limit disclosure.
- Rulemaking to expand the scope of CFIUS jurisdiction over real estate transactions.** CFIUS issued a new [proposed rule](#) that would amend the definition of “military installation” in [31 C.F.R. § 802.227](#) and add eight military installations to those listed in Part 2 of [Appendix A to C.F.R. Part 802](#), which implements the real estate provisions of Section 721 of the Defense Production Act of 1950, as amended.

Continue reading for a more in-depth analysis of these developments.

1. CFIUS takes new enforcement actions

Historically, CFIUS has rarely used its enforcement authority. CFIUS has publicly announced only two cases of penalties imposed against parties: in 2018, [CFIUS imposed a \\$1 million civil monetary penalty for repeated breaches of a mitigation agreement](#), and in 2019, [CFIUS assessed a \\$750,000 penalty for violations of an interim mitigation order](#).

Recent actions signal more active monitoring and enforcement by CFIUS, including (i) the Enforcement Guidelines, which outline how CFIUS assesses transaction parties' compliance obligations, and (ii) the announcement by Assistant Secretary Rosen that CFIUS has issued one or more additional final penalty determinations against non-compliant parties. The penalty amounts are expected to become public in the next CFIUS annual report to Congress, which is expected later this year. (For more information, see Latham's Client Alert [Six Takeaways From the CFIUS 2021 Annual Report](#).)

CFIUS can take enforcement actions against: (i) parties that fail to submit a mandatory filing, (ii) parties that do not comply with their obligations under a mitigation agreement or an order, and (iii) parties that submit a filing with a material misstatement or omission or make a false certification. A party that fails to submit a mandatory filing or violates a mitigation agreement or order may be liable for a civil monetary penalty up to \$250,000 per violation or the value of the transaction, whichever is greater. The liability for a material misstatement or omission or false certification can be up to \$250,000 per violation. To minimize the risk of an enforcement action, foreign investors and US businesses should conduct thorough CFIUS diligence in the early stages of a transaction and promptly implement and monitor their obligations under CFIUS mitigation agreements. (For more information on the CFIUS process, see Latham's report [Committee on Foreign Investment in the United States: Key Questions Answered](#).)

2. CFIUS clarifies that certain “springing rights” may not be used for mandatory filings

CFIUS has clarified that parties must submit a mandatory filing 30 days before closing of an initial equity investment, and not 30 days prior to the vesting of CFIUS triggering rights that may be associated with the investment, thereby limiting the use of springing rights in transactions where there is a mandatory CFIUS filing requirement.

A CFIUS filing is mandatory for certain transactions that involve a “TID US business,” that is, a US business involved in certain activities related to “critical Technologies,” “critical Infrastructure,” or “sensitive personal Data” of US citizens. If a transaction triggers a mandatory filing requirement, [31 C.F.R. § 800.401](#) requires that parties submit a filing to CFIUS no later than 30 days before the “completion date” of the transaction.

A new [FAQ](#) published on May 11, 2023, states that the “completion date” is the earliest date upon which any ownership interest is conveyed, assigned, delivered, or otherwise transferred to a foreign person, even if the associated rights that are necessary for CFIUS to assert jurisdiction over the transaction will not vest until a later date (e.g., subsequent to receipt of CFIUS approval). Thus, if the economic interest is conveyed before the foreign person receives corresponding rights, such as a board seat or observer right, the completion date for purposes of calculating the due date for a CFIUS mandatory filing is the date upon which the foreign person first acquires the economic interest. In accordance with this new guidance, it would appear that transactions that trigger a mandatory CFIUS filing will need to be filed no later than 30 days in advance of the earliest date upon which the foreign person will acquire any equity interest.

3. CFIUS may request information on all foreign persons related to a transaction, including limited partners in an investment fund

Another new [FAQ](#) published on May 11, 2023, clarifies that during a review process, CFIUS's diligence is not limited to the filing parties. The FAQ puts parties on notice that CFIUS may request information about indirect foreign investors involved in a transaction, such as limited partners in an investment fund. The scope of such a request depends on the facts and circumstances of each transaction and may include questions on identifying information for indirect investors, their jurisdictions of organization, and ultimate ownership, among other information. "CFIUS may also request information with respect to any governance rights and other contractual rights" that indirect investors have in the acquirer or the US business. CFIUS will request such information to facilitate its review regarding jurisdictional or national security risk-related considerations, regardless of separate arrangements that may otherwise limit disclosures for certain foreign investors. The FAQ also makes the point that "[s]uch information, as with all information filed with CFIUS ... is subject to the confidentiality protections" under the applicable statute and regulations.

4. Rulemaking to expand the scope of CFIUS jurisdiction over real estate transactions

CFIUS [published](#) a proposed rule on May 5, 2023, that would add the following military installations to Part 2 of [Appendix A to 31 C.F.R. Part 802](#):

- Air Force Plant 42, located in Palmdale, California
- Dyess Air Force Base, located in Abilene, Texas
- Ellsworth Air Force Base, located in Box Elder, South Dakota
- Grand Forks Air Force Base, located in Grand Forks, North Dakota
- Iowa National Guard Joint Force Headquarters, located in Des Moines, Iowa
- Lackland Air Force Base, located in San Antonio, Texas
- Laughlin Air Force Base, located in Del Rio, Texas
- Luke Air Force Base, located in Glendale, Arizona

In addition to expanding Appendix A, the proposed rule would add Arizona, California, Iowa, North Dakota, South Dakota, and Texas to the states in which a military range would constitute a "military installation" under 21 C.F.R. 802.227(m). The preamble to 31 C.F.R. Part 802 states that the Department of Defense will continue on an ongoing basis to assess US military installations for national security considerations. Thus, additional military installations may be added in the future.

This development follows recent congressional and public scrutiny of several acquisitions by foreign persons of land with proximity to sensitive military sites. Last December, for example, the [proposed acquisition](#) by Chinese company Fufeng Group Limited of real estate that was located approximately 12 miles from Grand Forks Air Force Base in North Dakota raised public and congressional concerns, while CFIUS reportedly determined that it did not have jurisdiction over the transaction.

Treasury is accepting written comments on the proposed rule until June 5, 2023. If adopted, the amendment would be the first update to Appendix A of the CFIUS real estate regulations since the regulations implementing the Foreign Investment Risk Review Modernization Act of 2018 went into effect in February 2020.

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