

CFIUS—What Is It & What Effect Does It Have on Foreign Investors?

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WHAT IS CFIUS? The Committee on Foreign Investment in the United States (CFIUS) is a U.S. inter-agency committee that reviews “covered transactions” - foreign acquisitions of and investments in U.S. companies - for national security concerns. Upon review, CFIUS can block or unwind a transaction or require the parties to alter the transaction to mitigate any national security concerns. Thus, foreign companies seeking to acquire or invest in U.S. businesses need to be aware of the potential for a CFIUS review of their transactions and to plan for future CFIUS friendly structuring.

Historically, CFIUS maintained jurisdiction over transactions in which a foreign investor acquired a controlling interest in a U.S. business. Parties to such transactions could submit a “voluntary” notice for CFIUS review to obtain a “safe harbor” from future CFIUS intervention in the transaction if the Committee agreed that no national security concerns existed. While these notices have always been technically voluntary, not filing one leaves parties vulnerable to a CFIUS review at any time, even after a transaction has closed. This process still exists for investors to minimize risk and to obtain a “safe harbor.”

However, in February 2020, CFIUS jurisdiction expanded to require that investors file mandatory declarations (a shorter form filing than a notice) for certain covered transactions involving critical technologies or infrastructure or large amounts of sensitive personal data. In addition, CFIUS jurisdiction expanded to include certain non-controlling investments, as well as real estate investments in close proximity to U.S. military installations, ports, and other locations sensitive for national security purposes.

WHAT HAPPENS IF THE PARTIES DO NOT MAKE THE CFIUS FILING? The consequences of not filing with CFIUS can be severe. CFIUS could require the parties to unwind a completed transaction or negotiate mitigation of the foreign national security concern.

ARE THERE PENALTIES? CFIUS may impose financial penalties ranging between \$250,000 and the value of the transaction for material misstatements or omissions, negligence, or failure to comply with the requirements. The new requirements are still being finalized, but may go into effect shortly.

WHAT IS THE NEW MANDATORY DECLARATION? Investors generally must file a mandatory declaration when:

- a foreign government will acquire a substantial direct or indirect investment in a U.S. business that produces, designs, tests, manufactures, fabricates, or develops critical **technology**, performs functions with respect to certain critical **infrastructure**, or maintains and collects significant amounts of sensitive personal **data** (known as a “TID business”).
- a private foreign investor makes an investment in a TID business that produces, designs, tests, manufactures, fabricates, or develops one or more Critical Technologies for use in certain industries and the foreign investor also has access to:
 - any non-public material technical information;
 - membership, observer rights, or the right to nominate individuals to the board of directors; or involvement in substantive decision-making related

to critical technologies, critical infrastructure, or sensitive personal data (in a TID business).

IS THERE A NEW EXCEPTION FOR FOREIGN INVESTORS? Maybe. CFIUS regulations include exceptions to the mandatory declaration requirements related to investments in TID businesses for investors from excepted countries (Australia, Canada, and the U.K.). To qualify as an excepted investor, the investor must be:

- a foreign national of an excepted state;
- a foreign government of an excepted state; or
- an entity (organized under the laws of an excepted foreign state or the U.S.) with a principal place of business in either when:
 - Any foreign person with 10% or more voting interest is a national of an excepted state or organized under its laws with a principal place of business in an excepted state or the U.S.
 - 75% or more of both the board members and observers are either U.S. nationals or nationals of one or more excepted foreign states.

WHAT IF WE ARE GOING TO BE LIMITED PARTNERS? Foreign limited partners investing in a TID business through an investment fund may be exempt from a mandatory declaration if:

- the General Partner will not be a foreign person;
- the firm's advisory board will have no control of investment decisions;
- the foreign person(s) will have no ability to control the fund; and
- the foreign person(s) will have no access to material, nonpublic technical information

Note that this is a narrow definition, and control is a very broad definition. If the foreign limited partners have negative rights, these rights may also be deemed as control.

WHAT SHOULD I LEARN ABOUT THE TARGET COMPANY THAT MIGHT SIGNAL IF AN INVESTMENT COULD TRIGGER A CFIUS REVIEW?

As early as possible, learn the following information about the U.S. target company:

- Is it involved in critical technology, critical infrastructure, or collect or maintain sensitive personal data (as defined in the CFIUS regulations)?
- What are the export classifications for its products and technology?
- Do any of its physical locations have geographic proximity to a U.S. Government facility, military base, airport, restricted airspace, or seaport?
- Does it have any direct or indirect business with U.S. government agencies, including the military? Has there been any government funding or investment, or does it provide any products or services under or connected to a government contract? Are any of its research and development activities of special interest to any government or military?

FINALLY, WHAT DO I NEED TO KNOW ABOUT MY COMPANY? To address a CFIUS concern, you will not only need to know the details of your ownership structure and the nationalities of your investors, but also your individual beneficial owners. In completing this analysis, you must pierce all corporate veils and identify if you have any government ownership.

Please let us know if we can answer any specific questions.

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- Megan works on trade topics, including CFIUS diligence, customs classifications, statutory and regulatory updates, international trade statistics and trends, and government enforcement actions.
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