Insights: Alerts

Proposed Rule May Soon Give CFIUS More Bite for Failing to Make Mandatory Filings

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On Thursday, April 11, 2024, the U.S. Department of the Treasury issued a Notice of Proposed Rulemaking aimed at increasing the penalty and enforcement powers of the Committee on Foreign Investment in the United States ("CFIUS"). Citing the United States' open investment environment, the Treasury claims the proposed rule would support CFIUS's national security objective.

Notably, the current maximum penalty for making a material misstatement, omission, or false certification to CFIUS—or not making a mandatory filing—is $250,000 or an amount equal to the value of the transaction. The proposed rule increases that maximum amount to a whopping $5 million or the value of the transaction, whichever amount is greater. The proposed rule also increases the number of circumstances for which civil monetary penalties could be imposed because of a party's misstatement or omission, regardless of whether such misstatement was to occur during CFIUS's monitoring compliance function or outside of a CFIUS review. The proposed rule explains that the regulations provide for penalties to be imposed in the following situations:

- Submitting a declaration or notice with a material misstatement or omission, or making a false certification;
- Failing to submit a timely declaration in the certain circumstances in which submission is mandatory; and
- Violating a material provision of a mitigation agreement, material condition imposed, or order issued.

CFIUS is an interagency committee created to review and investigate transactions that involve foreign investments and certain real estate transactions by foreign persons to assess the impact of such investments on national security. CFIUS operates pursuant to Section 721 of the Defense Production Act of 1950, as amended (Section 721).

This proposed rule would be the first substantive update to CFIUS regulations concerning the Committee's mitigation and enforcement authority since the enactment of the Foreign Investment Risk Review Modernization Act of 2018 ("FIRRMA"), which amended Section 721 of the Defense Production Act of 1950.

FIRRMA expanded CFIUS's jurisdiction by increasing the types of "covered transactions" CFIUS could review and was signed into law on August 13, 2018. Importantly, FIRRMA instituted a mandatory filing requirement for certain transactions and covered investments by foreign persons—including those related to businesses that may involve critical technologies, critical infrastructure, or the collection of sensitive data of U.S. citizens. CFIUS's jurisdiction also includes purchases or leases of real estate near "sensitive" U.S. properties such as military bases and ports, as well as transactions structured to evade CFIUS review.

In addition to potentially increasing the civil penalties that CFIUS could impose, the proposed rule would also increase CFIUS's ability to issue subpoenas to obtain information related to foreign investments, including intel from individuals who are not a party to a notified transaction. The rule would also implement an expandable timeline in

which parties could respond to proposals for risk mitigation to help CFIUS conduct reviews and investigations while staying within its required, statutory timeframe. The time in which parties could submit a petition for reconsideration of a penalty—and the number of days in which CFIUS would have to respond—would be increased by the proposed rule as well.

According to the Treasury Department, the proposed rule would also broaden the kinds of information the Committee could require parties and others to submit while communicating with them about certain transactions not filed with the Committee.

Regarding the proposed rule, Assistant Secretary for Investment Security Paul Rosen stated, "[t]hese updates reflect lessons learned in the course of our monitoring, compliance, and enforcement work and build on the 2022 CFIUS Enforcement and Penalty Guidelines."

The public has 30 days from April 15, 2024 (the date the proposed rule was published) to submit comments on the proposed rule to the Treasury Department. While the final rule could have revised maximum penalties or practices, this proposed rule is a clear indication that CFIUS is continuing to increase its focus on enforcement.

Kilpatrick's Government Contracting & Public Procurement team is available to provide assistance and address any further questions or needs.

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