

## **Powers of the Modern CFIUS A Talk with Aimen Mir and Colin Costello**

- What is the Committee on Foreign Investment in the United States (CFIUS)
  - Interagency committee tasked with reviewing foreign direct investment in the U.S. to identify and address national security concerns posed by such transactions.
  - Laws and guidance<sup>1</sup>
    - Defense Production Act of 1950 § 721<sup>2</sup>
      - Revised by
        - Foreign Investment and National Security Act of 2007 (FINSA)<sup>3</sup>
        - Foreign Investment Risk Review and Modernization Act of 2018 (FIRRMA).<sup>4</sup> Among other things:
          - Expands scope and jurisdiction of CFIUS by including real estate transactions near U.S. Government facilities, non-passive investment in critical industry or technologies, transactions in which foreign government has substantial interest, transactions designed to evade CFIUS regs, and transaction that may compromise personally identifiable info of U.S. citizens
          - Refines procedures, including review and investigations timeline
          - Authorizes CFIUS to address national security risks related to mitigation agreements, including conducting periodic reviews to determine if agreements should be phased out or modified and reviewing the appropriateness of conditions if a threat no longer requires mitigation
    - Implemented by Executive Order 11858<sup>5</sup>

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<sup>1</sup> See more at U.S. Department Treasury CFIUS Laws and Guidance resource page: <https://home.treasury.gov/policy-issues/international/the-committee-on-foreign-investment-in-the-united-states-cfius/cfius-laws-and-guidance>

<sup>2</sup> 50 U.S.C. 4565, <https://www.govinfo.gov/app/details/USCODE-2015-title50/USCODE-2015-title50-chap55-subchapIII-sec4565>.

<sup>3</sup> Pub. L. No. 110-49, <https://home.treasury.gov/system/files/206/FINSA.pdf> .

<sup>4</sup> Pub. L. No. 115-232, Title XVII Sub. A., [https://home.treasury.gov/sites/default/files/2018-08/The-Foreign-Investment-Risk-Review-Modernization-Act-of-2018-FIRRMA\\_0.pdf](https://home.treasury.gov/sites/default/files/2018-08/The-Foreign-Investment-Risk-Review-Modernization-Act-of-2018-FIRRMA_0.pdf).

<sup>5</sup> <https://home.treasury.gov/system/files/206/EO-11858-Amended.pdf>.

- CFIUS regulations: 31 C.F.R. Part 800,<sup>6</sup> 801<sup>7</sup>, 802<sup>8</sup>
  - Composition of voting members
    - Chaired by the Secretary of the Treasury
    - Department of Energy
    - Department of Justice
    - Department of Homeland Security
    - Department of State
    - Department of Defense
    - Department of Commerce
    - U.S. Trade Representative
    - White House’s Office of Science and Technology Policy
    - Non-voting member: Office of the Director of National Intelligence
  - Types of transactions reviewed
    - Transactions that result in foreign person gaining control of a U.S. business
    - Non-controlling, non-passive investments in U.S. businesses involving critical technology, sensitive personal data, or critical infrastructure
    - Acquisition of real estate near sensitive U.S. Government facilities or property of national security sensitivities
  - Actions CFIUS can take
    - Review transactions and require parties to adopt measures to mitigate identified national security concerns
      - Most transactions are ultimately cleared without condition because they do not raise national security concerns or other exiting laws address any risks
    - Recommend to the President that the transaction be prohibited in cases where CFIUS determines risk cannot be adequately mitigated
      - Very few transactions are recommended for rejection. Parties often will withdraw and terminate the transaction when risks cannot be mitigated and likelihood of rejection becomes high
- CFIUS Strategy
  - Mandatory and voluntary filings
    - Mandatory filings
      - Pre-FIRRMA, CFIUS reviewed transactions where it would result in a foreign person’s “control” of a U.S. business. What constitutes “control” is not bright line. Post-FIRRMA, jurisdiction expanded to include certain non-controlling investments.
      - Filings may be mandatory if:

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<sup>6</sup> <https://home.treasury.gov/system/files/206/Part-800-Final-Rule-Jan-17-2020.pdf>.

<sup>7</sup> [https://home.treasury.gov/system/files/206/FR-2018-22182\\_1786904.pdf](https://home.treasury.gov/system/files/206/FR-2018-22182_1786904.pdf).

<sup>8</sup> <https://home.treasury.gov/system/files/206/Part-802-Final-Rule-Jan-17-2020.pdf>.

- U.S. business produces any export-controlled technologies
- Transaction involves a foreign government owned investor and U.S. business is involved in critical infrastructure or holds certain types of sensitive data
- Failure to file
  - May incur a fine up to the value of the transaction
  - CFIUS has been ramping up monitoring and enforcement that may make it more likely than before that it may notice failure to file mandatory filings
- Voluntary filings
  - Making a determination as to whether to file as a voluntary
    - If CFIUS clears transaction, parties receive a safe harbor with respect to that transaction
  - Risk tolerance analysis
    - Likelihood that a transaction will come to CFIUS's attention
    - Likelihood that concerns may be raised if the transaction does come to CFIUS's attention
      - Buyer considerations
        - Assess the commercial consideration – to what extent will reasonably possible mitigation erode deal value or otherwise create operation hurdles that devalue the business?
        - If mitigation could have negative effects, should consider filing so that buyer can seek to persuade CFIUS that transaction does not pose a risk that warrants mitigation or, if CFIUS cannot clear the transaction, to negotiate an outcome that avoid a block or mitigation that undermines deal economics
      - Seller considerations
        - Same as buyer considerations since legal obligations and potential penalties apply to both
        - Reputational impact – CFIUS decision to pursue mitigation versus prohibition may in part be based on the trust CFIUS has in the parties to honor the terms of the mitigation agreement
- Timetable
  - Declaration

- Parties submit short-form declaration to receive a potential safe-harbor.
- 30-day assessment period
- Outcomes
  - Notice of cleared transaction
  - Request for full filing
  - No action letter
- Notice filing
  - 45-day review period
  - 45-day investigation period if necessary
  - 15-day Presidential review period if necessary
  - Withdrawing the Notice and voluntarily refiling (restarts the timetable)
- Mitigation
  - If CFIUS identifies a risk, it may enter into or impose mitigation agreements
    - CFIUS will collaborate with parties to negotiate mitigation agreement, although it has authority to impose mitigation unilaterally
  - Mitigation agreement vary in scope and severity
    - May require:
      - E.g. basic supply assurance agreement
      - E.g. making the investment completely passive by requiring a proxy board
    - Mitigation is tied to a risk arising from the transaction identified by CFIUS and appropriately tailored to addressing that risk
  - CFIUS may continue to monitor compliance with the mitigation agreement and may reopen its review if it assesses a material breach of the mitigation agreement
- Under Biden administration
  - Continuity in substance
  - Some changes likely in process
    - Return to black box model
    - More discussions of mitigation