

CLIENT ALERT

CFIUS Releases First-Ever Enforcement Guidelines

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On October 20, the Department of the Treasury released the Committee on Foreign Investment in the United States (“**CFIUS**” or the “**Committee**”) [Enforcement and Penalty Guidelines](#) (the “**Guidelines**”). This is the first set of such enforcement guidelines that the Committee has published. The Guidelines are designed to provide the public with information regarding how CFIUS will assess violations of the laws governing foreign investment transactions, including breaches of CFIUS mitigation agreements. They also provide information on the circumstances in which the Committee will impose a penalty and the amount of such penalty, any other enforcement action that the Committee will take, and the factors that will be considered in making such determinations, including aggravating and mitigating factors.

Today’s release of the Guidelines is another step in the maturation of CFIUS toward providing clearer rules and guidance regarding the CFIUS process. These Guidelines will be particularly important to parties subject to a mandatory filing requirement and to companies with CFIUS mitigation agreements, sending a clear message that CFIUS intends to take enforcement action to ensure compliance.

Types of CFIUS Violations

Pursuant to Section 721 of the Defense Production Act of 1950, the Committee is authorized to impose monetary penalties and seek other remedies for violations or mitigation orders, conditions, or agreements. The Guidelines articulate three categories of conduct that may constitute a violation in the Committee’s view:

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1. Failure to timely submit a mandatory declaration or notice;
2. Non-compliance with CFIUS mitigation requirements through prohibited conduct or any other failure to comply with a mitigation agreement, condition, or order; and
3. A material misstatement, omission, or false certification regarding any information submitted to CFIUS in connection with an assessment, review, investigation, or mitigation, including information provided during informal consultations or in response to information requests.

CFIUS will exercise discretion in determining whether a violation will lead to a penalty or other remedy, based on the factors outlined below.

Penalty Process

The process CFIUS will follow in order to assess and determine penalties for any violation includes the following steps:

- CFIUS will send a notice of a penalty with a written explanation of the penalized conduct and the amount of monetary penalty imposed.
- The subject may submit a petition for reconsideration within 15 days.
- If timely received, CFIUS will review the reconsideration petition before issuing a final penalty determination.

If no reconsideration petition is received, the Committee will issue a final penalty determination.

Aggravating and Mitigating Factors

In determining whether to impose a penalty and of what size, CFIUS will consider both aggravating and mitigating factors, including:

- Holding the perpetrators of the violating conduct accountable and demonstrating the assurance of future compliance;
- The harm the conduct caused toward U.S. national security;
- Whether the violating conduct was the product of negligence, lack of awareness, or intentional, including any effort to conceal the violation and the seniority of the persons involved;
- The timing of the violation, frequency of the violation occurring, and the date of the transaction at issue;

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- How the subject responded to the conduct and any remedial actions taken, such as submitting a self-disclosure, cooperating in any investigation, and any internal reviews; and
- The sophistication of the violator in terms of familiarity with CFIUS and the associated laws and regulations, and its culture and past record of compliance.

These factors are non-exhaustive, and relevancy may vary depending on the circumstances of the violating conduct.

CFIUS's Sources of Information

In the course of determining whether a violation has occurred, CFIUS considers information from a wide variety of sources, including from other government agencies, publicly available information, tips through the Committee's [monitoring and enforcement website](#), transaction parties, and filing parties. Notably, CFIUS will often request information to support its monitoring of compliance with CFIUS mitigation requirements and conduct investigations. CFIUS encourages parties to submit self-disclosures when such parties believe conduct may constitute a violation. CFIUS considers the timeliness of any self-disclosure in determining the appropriate response to a violation. CFIUS may also use subpoena authority when necessary and appropriate.

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