

October 26, 2022

CFIUS Enforcement and Penalty Guidelines Issued

Guidelines Further Illustrate Increased Emphasis on Enforcement

SUMMARY

On October 20, 2022, the United States Department of the Treasury (“Treasury”), in its role as Chair of the Committee on Foreign Investment in the United States (“CFIUS” or the “Committee”), issued guidelines (the “Enforcement Guidelines”)¹ that offer insights into how the Committee will assess and penalize violations of the legal authorities authorizing the national security review of cross-border investment transactions.² CFIUS may impose monetary penalties and may seek conduct remedies for violations of the statute and regulations it administers,³ as well as violations of any mitigation orders or agreements that may be entered into as part of the transactional review process.

The Enforcement Guidelines represent the first guidance CFIUS has issued regarding its approach to penalizing violations and reflect the Committee’s increased focus on monitoring and enforcement since the passage of the Foreign Investment Risk Review Modernization Act of 2018 (“FIRRMA”), following which CFIUS increased its staffing to support monitoring and enforcement activities. Although the Guidelines are non-binding in nature, the Enforcement Guidelines provide important insight into how CFIUS will assess and penalize violations of the authorities CFIUS administers and signal the Committee’s expectations of parties in the penalty assessment process.

THREE TYPES OF VIOLATIONS

The Enforcement Guidelines address three categories of potentially unlawful conduct:

1. **Failure to File.** The failure of a transaction party to timely submit a *mandatory* CFIUS declaration or notice.

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2. **Non-Compliance with CFIUS Mitigation.** Conduct prohibited by or that otherwise fails to comply with CFIUS mitigation agreements, conditions, or orders.
3. **Material Misstatement, Omission, or False Certification.** Material misstatements in or omissions from information filed with CFIUS, including during informal consultations or in response to the Committee's request for information, and false or materially incomplete certifications provided to CFIUS.

SOURCES OF INFORMATION

The Enforcement Guidelines note that CFIUS considers information from a wide variety of sources to determine whether a violation has occurred but focus in particular on three sources:

1. **Tips.** CFIUS encourages anyone with information regarding a potential violation to submit that information to the Office of Investment Security Monitoring & Enforcement via the email address available on the CFIUS website.⁴
2. **Self-Disclosure.** CFIUS "strongly encourages" parties that may have committed a violation to submit a timely, written self-disclosure, even if not expressly required. As noted below, CFIUS may consider the timeliness, nature, and scope of the information provided in a self-disclosure as an aggravating or mitigating factor in any enforcement determination.
3. **Requests for Information.** CFIUS frequently requests information from transaction parties and parties to mitigation agreements, and a party's cooperation is taken into account when determining whether and what enforcement action, if any, is appropriate. If necessary, CFIUS may use its subpoena authority to gather information.⁵

PENALTY PROCESS

The Enforcement Guidelines provide that a violation will not necessarily lead to a penalty or other remedy but outline the two key steps in the penalty process:

1. **Notice.** CFIUS will provide to a party alleged to have committed a violation a notice of penalty that includes a written explanation of the conduct to be penalized, the amount of the monetary penalty to be imposed, the legal basis for concluding that a violation has occurred, and, if applicable, the aggravating or mitigating factors that the Committee has considered.
2. **Contest and Assessment.** The party alleged to have committed a violation may submit a petition for reconsideration (which may include any defense, justification, mitigating factors, or explanation) to the CFIUS Staff Chairperson within 15 business days following receipt of a notice of penalty, and CFIUS will issue a final penalty determination within 15 business days following the timely receipt of the petition or, if no petition is submitted, at any time after the 15-day petition period has elapsed.⁶

AGGRAVATING AND MITIGATING FACTORS

When determining the appropriate response to a violation, the Enforcement Guidelines emphasize that CFIUS engages in a "fact-based analysis" in which it weighs aggravating and mitigating factors. The Enforcement Guidelines detail six non-exhaustive factors that the Committee may consider:

1. **Accountability and Future Compliance.** The degree to which the enforcement action will hold the violating party accountable for its actions and incentivize future compliance and cooperation.

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2. **Harm.** The extent to which a violation impaired or threatened to impair U.S. national security.
3. **Negligence, Awareness, and Intent.** The extent to which a violation was the result of simple negligence, gross negligence, intentional action, or willfulness.
4. **Persistence and Timing.** The length of time that a violating party had been aware, or had reason to be aware, of the violation prior to CFIUS becoming aware of the violation and the frequency and duration of the conduct underlying the violation.
5. **Response and Remediation.** Whether the violating party self-disclosed its violation, including the timeliness, nature, and scope of the information provided in that self-disclosure, the violating party's cooperation in the Committee's investigation, and whether the violating party conducted an internal review of the nature, extent, origins, and consequences of the violation to prevent its reoccurrence.
6. **Sophistication and Record of Compliance.** The violating party's history and familiarity with CFIUS; its past compliance with CFIUS mitigation measures; its internal and external resources dedicated to compliance; its policies, training, and procedures designed to prevent violations and the reasons for the failures of these measures; and the experience of other federal, state, local, or foreign authorities in the assessment of its quality and sufficiency of compliance.

CONCLUSION

The Enforcement Guidelines are non-binding and state that they are not intended to, do not, and may not be relied upon to create any right or benefit, substantive or procedural, enforceable at law by any party in any administrative, civil, or criminal matter, can and will be updated as circumstances require, and emphasize that CFIUS retains broad discretion with respect to its enforcement and penalty decisions.

CFIUS has increased its focus on compliance since FIRRMA, and although Treasury emphasized in its press release that “[t]he vast majority” of transaction parties abide by their legal obligations, Treasury also underscored that it will hold accountable parties who commit violations, “including through the use of civil monetary penalties and other remedies.”⁷ The Enforcement Guidelines confirm practitioners' understanding of the CFIUS process, including the importance of identifying the need for mandatory filings and timely making such filings, and respect for all of the terms of mitigation agreements. More importantly, however, they highlight certain items on which CFIUS appears to be newly focused, such as tips and self-reporting. Investors must be cautious in their filing/non-filing decisions and be especially careful to ensure the completeness and accuracy of information presented to CFIUS during the review process, and parties to national security agreements should make certain they are able to demonstrate a rigorous compliance program with respect to the terms of their agreements.

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ENDNOTES

- ¹ *CFIUS Enforcement and Penalty Guidelines*, U.S. DEPT. OF THE TREASURY (October 20, 2022), available at <https://home.treasury.gov/policy-issues/international/the-committee-on-foreign-investment-in-the-united-states-cfius/cfius-enforcement-and-penalty-guidelines>.
- ² Section 721 of the Defense Production Act of 1950, as amended (50 U.S.C. § 4565) provides the statutory authority pursuant to which CFIUS operates, as well as the regulations promulgated thereunder.
- ³ *Id.*
- ⁴ *CFIUS Monitoring and Enforcement*, U.S. DEPT. OF THE TREASURY, available at <https://home.treasury.gov/policy-issues/international/the-committee-on-foreign-investment-in-the-united-states-cfius/cfius-monitoring-and-enforcement>.
- ⁵ See 50 U.S.C. § 4555(a).
- ⁶ These 15-day periods may be extended by written agreement between the Staff Chairperson and the subject party.
- ⁷ *Treasury Releases CFIUS Enforcement and Penalty Guidelines*, U.S. DEPT. OF THE TREASURY (October 20, 2022), available at <https://home.treasury.gov/news/press-releases/jy1037>.

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