Simpson Thacher

To read the Treasury press release, please click here.

To read the final rule, please click here.

Report from Washington

Treasury Finalizes CFIUS Rules on Enforcement and Mitigation

November 18, 2024

Introduction

On November 18, 2024, the U.S. Department of the Treasury ("Treasury") issued a final rule governing the Committee on Foreign Investment in the United States ("CFIUS" or the "Committee") that serves as the first substantive update to the monitoring and enforcement provisions of the CFIUS regulations since the enactment and implementation of the Foreign Investment Risk Review Modernization Act of 2018 ("FIRRMA"). The final rule is largely consistent with the earlier proposed rule issued in April of this year. Notably, the new rules, as finalized, (i) allow compression of the timeline for parties to negotiate mitigation agreements; (ii) expand the Committee's ability to investigate compliance and demand a broader scope of information from parties to the transaction and third parties not directly involved in a transaction; and (iii) increase the range of penalties for certain violations.

These changes and the overall tone of the new rules exhibit a continued focus and priority by the Committee on investigation, enforcement, and mitigation

As may be relevant for dealmakers, asset managers, and other institutional investors, the new rules do not modify or expand the Committee's jurisdiction or the types of transactions that are notifiable. Nevertheless, these changes and the overall tone of the new rules exhibit a continued focus and priority by the Committee on investigation, enforcement, and mitigation. We expect the new rules to broaden existing administrative practices around investigations concerning non-notified transactions, increase the scope and distribution of information demands from the Committee, and accelerate the Committee's ability to impose mitigation on parties in a variety of contexts. CFIUS compliance has long been a focus for the global investment community, and the new rules underscore the institutional importance of staying within the good graces of the Committee.

The final rule will become effective thirty days after publication.

(I) Compressed Timeline to Negotiate Mitigation

The new rules will enable the Committee to impose a time frame as short as three business days for transaction parties to respond to any mitigation proposal presented by the

Committee. The proposal is intended to expedite the mitigation negotiation process so that CFIUS may conclude its review within the statutorily required timeframe.

Under the current procedures, there is no specific timeframe by which parties must respond to a mitigation proposal. As CFIUS will often propose conditions relatively late in its investigation period, parties sometimes seek permission to "pull and refile" their CFIUS Notice, which restarts the statutory clock for a new review cycle, to provide additional time to evaluate and negotiate proposed mitigation terms.

The rule change highlights the need for transaction parties to consider with CFIUS counsel what potential mitigation the Committee may request early in the deal process so that they may assess the feasibility of standard conditions and be ready to negotiate if non-standard terms are requested by the Committee

The final rule change could make it harder for clients to respond. Based on our experience, clients may find it difficult to negotiate these agreements with the Committee on an expedited basis, particularly where conditions require technical or business-level input on the practical feasibility of the proposed terms. Compressing the timeline by which a party must review, evaluate, and revert may prove challenging in certain circumstances. While the rules afford the Committee with flexibility regarding whether and to what degree to introduce timing requirements and parties can still seek permission to pull and refile their CFIUS Notice, the practical implications of a hurried approach may result in agreements that carry unexpected burdens or challenges to the underlying business upon completion. The rule change highlights the need for transaction parties to consider with CFIUS counsel what potential mitigation the Committee may request early in the deal process so that they may assess the feasibility of standard conditions and be ready to negotiate if non-standard terms are requested by the Committee.

(II) Expanded Ability to Investigate and Inquire

The new rules will allow the Committee to require from parties a broader range of information when investigating non-notified transactions. Currently, the Committee may demand certain information from transaction parties to evaluate whether CFIUS would have jurisdiction over a particular investment. While in practice CFIUS has often asked parties during non-notified inquiries to provide additional details on the underlying nature of the U.S. business, the new rules will stipulate that parties must also respond to questions to determine if a mandatory filing was required, as well as questions concerning the national security sensitivities of the business that may suggest that a filing was otherwise warranted. The stated purpose of these changes to the rules is that these requirements will afford the Committee with greater flexibility to determine as a threshold matter whether a formal filing to evaluate the non-notified transaction is necessary. While these changes largely codify some of the existing practices that have developed at the Committee with respect to non-notified investigations, we see this as another example that demonstrates an ever-growing focus by the Committee on non-notified inquiries. As we have discussed in prior

publications, the Committee's 2023 annual report documented an increase in the number of non-notified transactions for which the Committee sought a post-closing filing in 2022, notwithstanding a downturn in overall M&A activity that year.

The new rules would permit the Committee to require relevant information, including through subpoena, from any "other person"—even if not a party to a transaction

Separately, the new rules afford the Committee with the ability to solicit information from transaction parties for other reasons, such as compliance with existing mitigation agreements, conditions, or orders. In addition, the new rules would permit the Committee to require relevant information, including through subpoena, from any "other person"—even if not a party to a transaction. It remains to be determined how CFIUS will utilize this broad expansion of their investigative abilities in practice, but the consequence of this change is that unrelated third-parties may be the recipient of information demand letters from CFIUS.

(III) Increased Penalties

While it is unlikely that the increase in penalty authorization will have a material impact on the broader investment community, it does reflect the Committee's focus on ensuring they have the tools they believe necessary to handle non-compliance

CFIUS leadership continues to place an increased focus on enforcement and penalties with respect to the CFIUS process. The new rules will increase the maximum penalty per violation in certain instances from the greater of $250,000 or the value of the transaction, to $5 million or the value of the transaction. While it is unlikely that this increase in penalty authorization will have a material impact on the broader investment community, it does reflect the Committee's focus on ensuring they have the tools they believe necessary to handle non-compliance.

Conclusion

The new rules represent another confirmatory step in the Committee's continued prioritization and messaging around mitigation and enforcement, including as reflected in CFIUS's promulgation of Enforcement and Penalty Guidelines (the "Guidelines") discussed in our October 20, 2022 client alert. The Guidelines laid out the Committee's enforcement framework aimed at incentivizing compliance with the CFIUS regulations, and the new rules issued today build on those principles. In further demonstration of this trend, CFIUS issued three times more penalties from January 1, 2023 through August 14, 2024 than it had in the previous nearly 50-years since its establishment.

Although the final rule has been issued at the tail end of the Biden Administration, investment security is an area of bipartisan attention and support. Notably, the Trump Administration supported and implemented FIRRMA, representing the most significant expansion of CFIUS and its jurisdictional remit to date. This focus on mitigation and enforcement is also expected to become increasingly pertinent globally, given the prioritization of CFIUS and other U.S. national security policymakers on engagement with their foreign counterparts responsible for implementing and enforcing the analogous foreign

direct investment ("FDI") regimes of other countries. The new rules and associated trends should be an area of priority attention for the global investment community accordingly, with national security-focused investment requirements and enforcement requiring increased attention and education early in the investment cycle.

Simpson Thacher & Bartlett LLP is experienced in navigating the complexities of the CFIUS review process and analogous FDI regimes worldwide, and continues to monitor relevant regulatory developments. We are available to discuss further questions on request.

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