
Guidelines for Violations of CFIUS Rules and Agreements

The Committee on Foreign Investment in the United States (“CFIUS”) issued Enforcement and Penalty Guidelines (“Guidelines”) on October 20, 2022 to address violations of national security review rules and mitigation terms.¹ The Guidelines describe three types of possible violations – (1) failure to file, (2) non-compliance with CFIUS mitigation, and (3) material misstatements, omissions, and false certifications. The Guidelines also provide information on CFIUS’s sources for obtaining information on violations, its penalty process, and possible aggravating and mitigating factors in assessing penalties.

CFIUS is an interagency committee authorized to review certain transactions involving foreign investment in the United States to determine the impact of such investment on national security concerns. CFIUS recommends to the President whether to block or unwind a proposed transaction and can also require mitigation agreements, conditions or orders (“mitigation”) for a transaction. Our prior memoranda on CFIUS can be found [here](#).

I. CFIUS Enforcement and Penalty Guidelines

During CFIUS review, the Committee may negotiate agreements to mitigate national security risks and impose conditions on the transactions and transaction parties.

The Guidelines mark the first time CFIUS has published guidance about how it may address violations of its review process and mitigation measures.² Specifically, they describe the categories of conduct that may constitute a violation, and CFIUS’s process for determining whether to impose a penalty and, if so, in what amount.

II. Possible Violations

According to the Guidelines, three types of acts or omissions may cause a violation:

- **Failure to File:** transaction parties failing to file a mandatory declaration or notice. Our prior memorandum on mandatory filings can be found [here](#).
- **Non-Compliance with CFIUS Mitigation Measures:** transaction parties failing to comply with CFIUS mitigation agreements, conditions, or orders.
- **Material Misstatements, Omissions, or False Certifications:** transaction parties making material misstatements or omissions, and false or materially incomplete certifications, in connection with assessments, reviews, investigations (including informal consultations), or CFIUS mitigation.

¹ CFIUS Enforcement and Penalty Guidelines, U.S. Department of the Treasury (Oct. 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 The Office of Investment Security’s Monitoring & Enforcement oversees CFIUS’s enforcement authority and collaborates with other CFIUS member agencies to determine whether the transaction parties are meeting their obligations.

III. Possible Sources of CFIUS Information

CFIUS stated that it will review a range of sources to determine if a violation has occurred, including information from other government agencies, publicly available sources, and information provided by transaction parties. This includes:

- **Requests for Information** to, or exculpatory evidence from, transaction parties, including any defense, justification, mitigating factors, or explanations concerning the alleged violations.
- **Self-Disclosures**, in timely, written notification, of potentially violative conduct and the individuals and entities involved.
- **Tips and referrals** submitted to the CFIUS tips line or the CFIUS Monitoring & Enforcement website.

IV. Aggravating and Mitigating Factors

According to the Guidelines, CFIUS weighs aggravating and mitigating factors to determine the appropriate penalty, depending on the facts and circumstances of a given situation. Some aggravating or mitigating factors may include:

- **Accountability and Future Compliance:** whether the conduct requires imposing accountability and incentivizing future compliance.
- **Harm:** effect of the conduct on U.S. national security.
- **Negligence, Awareness, and Intent:** whether the conduct resulted from simple negligence, gross negligence, intentional action, or willfulness, or there were efforts to conceal information from CFIUS.
- **Persistence and Timing:** length of time that elapsed before CFIUS became aware of the conduct, and frequency and duration of the conduct.
- **Response and Remediation:** whether there was self-disclosure, complete cooperation, prompt remediation, and internal review of the conduct by the transaction party.
- **Sophistication and Record of Compliance:** transaction party's past compliance with CFIUS mitigation, internal and external compliance resources, policies, and procedures to prevent conduct (and why such measures failed), history of compliance, compliance culture, experience with other federal, state, local, or foreign authorities, and implementation of policies or training on relevant CFIUS mitigation across the entity.

V. Conclusion

Although the Guidelines are non-binding, they provide welcome transparency about CFIUS's potential response to alleged violations of rules and mitigation terms. The publication of these Guidelines, along with President Biden's September 15, 2022 Executive Order, discussed [here](#), may foreshadow an upcoming enforcement push by CFIUS and attempt to incentivize individuals and entities to be proactive in sharing information with CFIUS. We recommend continually working with counsel during all stages of a transaction which may fall under CFIUS jurisdiction, including after CFIUS mitigation is established.

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If you have any questions about the issues addressed in this memorandum, or if you would like a copy of any of the materials mentioned in it, please do not hesitate to call or email authors Elai Katz (partner) at

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