

# KIRKLAND & ELLIS

Kirkland Alert

## CFIUS in its Enforcement Era

26 April 2024

On April 11, 2024, the U.S. Department of the Treasury (“Treasury”), as Chair of the Committee on Foreign Investment in the United States (“CFIUS”), issued a [Notice of Proposed Rulemaking](#) (“the Proposed Rule”) regarding certain CFIUS procedures, penalties and enforcement authorities. If the Proposed Rule becomes final, it will greatly expand CFIUS’ ability to monitor and enforce its regulations and mitigation agreements. CFIUS has requested public comments on the Proposed Rule, which must be submitted no later than May 15, 2024. Treasury’s issuance of the Proposed Rule coincides with a GAO [report](#), published April 18, 2024, which reviewed a sample of CFIUS’ mitigation agreements and recommended that CFIUS establish committee-wide processes over monitoring and enforcing compliance with mitigation agreements, as the number of such agreements has been steadily growing.

We summarize the key aspects of the Proposed Rule and provide related takeaways below.

### ***Non-Notified Information Requests***

The Proposed Rule would expand the information that CFIUS is able to seek from parties when conducting outreach regarding transactions for which no declaration or notice was filed with CFIUS. Presently, CFIUS regulations authorize CFIUS to request information “necessary to determine whether the transaction is a covered transaction,” and require transaction parties to respond to such requests. The Proposed Rule would also allow CFIUS to request information needed to determine if the transaction (i) meets the criteria for a mandatory declaration, and/or (ii) raises national security considerations.

The Proposed Rule would expand the CFIUS regulations to require not only parties to the transaction but also “other persons” to respond to certain requests for information regarding non-notified transactions. Notably, the Proposed Rule does not define who may be an “other person.”

## ***Obligations to Provide Information to CFIUS***

The Proposed Rule would expand the information that persons receiving information requests from CFIUS are required to provide. Such persons would be required to provide CFIUS with information requested (i) to monitor compliance with and enforce the terms of a mitigation agreement, order or condition and (ii) to determine whether the parties made a material misstatement or omitted material information in a prior CFIUS filing. The Proposed Rule states that, while CFIUS often requests such information, the current regulations do not explicitly require compliance with CFIUS' requests.

The Proposed Rule would also lower the standard that CFIUS uses to determine whether a subpoena may be issued to obtain information. Currently, the regulations stipulate that CFIUS may issue a subpoena to obtain information from transaction parties and other persons if "deemed *necessary*." The Proposed Rule would lower the discretionary threshold for this decision, permitting CFIUS to issue a subpoena to obtain such information if "deemed *appropriate*."

## ***Timeline for Mitigation Terms Discussion***

The Proposed Rule would implement a required timeframe for parties to respond to mitigation terms proposed by CFIUS, similar to the timeframes set forth regarding responses to question sets. The Proposed Rule would require parties to *substantively* respond to proposed mitigation terms within three business days, unless otherwise granted an extension by CFIUS, by either accepting the terms, proposing other terms or detailing why the parties cannot comply with the terms proposed by CFIUS.

## **Increase to Maximum Civil Monetary Penalties**

The Proposed Rule would increase the *maximum* civil monetary penalty that CFIUS could impose, in an effort to "sufficiently deter [and] penalize certain violations." The Proposed Rule would authorize the maximum penalty to be:

- *For failure to file a mandatory declaration: the greater of \$5 million (increased from \$250,000) or the value of the transaction.*
- *For submission of a material misstatement or omission, or a false certification, within a CFIUS filing: \$5 million (increased from \$250,000).*
- *For violations of material provisions of mitigation agreements, orders or conditions: the greater of \$5 million (increased from \$250,000), the value of the transaction, or (as*

newly set forth in the Proposed Rule) the value of the violating party's interest in the U.S. business or covered real estate at the time of the transaction or at the time of the violation.

The Proposed Rule would also expand the circumstances in which penalties may be assessed for a material misstatement or omission to include such misstatements or omissions made outside of the formal filing process, such as in response to information requests regarding non-notified transactions, failure to file mandatory declarations and monitoring compliance with mitigation agreements. Finally, it would extend the timeframe in which parties may submit a petition regarding notice of imposition of a penalty from 15 to 20 business days.

## Key Takeaways

- **CFIUS remains keenly focused on enforcement.** The Proposed Rule highlights CFIUS' continuing focus on enforcement, as [outlined](#) previously in the [Enforcement and Penalty Guidelines](#) issued by CFIUS in October 2022. Unlike the Guidelines, which provided a "roadmap" but did not expand CFIUS' legal authority, the Proposed Rule would expand CFIUS' compliance monitoring and enforcement authorities. Dealmakers should continue to carefully consider whether a transaction may be subject to the mandatory filing requirement, ensure all information provided to CFIUS is complete and accurate – both in formal filings and in other communications with CFIUS – and take deliberate steps to ensure compliance with mitigation agreements at all times. The Proposed Rule's significant increase in the maximum penalty amount signals that future penalties are likely to be higher than those seen previously as CFIUS seeks to use its penalty power to deter future violations.
- **CFIUS is seeking to significantly expand its authority to request information regarding non-notified transactions with the addition of "other persons."** The Proposed Rule fails to specify the scope of who may be covered by the "other persons" who are required to respond to requests for information regarding non-notified transactions. This group could conceivably include bankers, vendors or customers of the U.S. business or failed bidders for the transaction, among others. The requirement for "other persons" to provide information regarding non-notified transactions, upon request, raises a number of potential issues, including regarding the confidentiality of information provided to CFIUS and the disclosure of such information to third parties.
- **CFIUS remains focused on actively identifying non-notified transactions and conducting related outreach.** As [stated](#) in CFIUS' [Annual Report for Calendar Year](#)

2022, CFIUS has sought to “*identify potential methods to enhance the identification of non-notified and nondeclared transactions.*” By expanding CFIUS’ authority to request certain information regarding non-notified transactions, the Proposed Rule signals that CFIUS will continue to conduct outreach regarding non-notified transactions. If a transaction is not subject to a mandatory filing requirement, the parties should carefully assess the profile of the transaction and consider whether CFIUS is likely to conduct outreach regarding the non-notified transaction and, if so, if a voluntary filing may be advisable.

## Authors

Mario Mancuso, P.C.

Partner / Washington, D.C. / New York

Ivan A. Schlager, P.C.

Partner / Washington, D.C.

Lucille Hague

Partner / Washington, D.C.

Daniel J. Gerkin

Partner / Washington, D.C.

Michelle A. Weinbaum

Partner / Washington, D.C.

Justin Schenck

Partner / Washington, D.C.

William G. Phalen

Associate / Boston

Chad B. Crowell

Associate / Washington, D.C.

Erika Krum

Associate / Washington, D.C.

Brandon Ricaurte

Associate / Houston

## Related Services

### Practices

- International Trade & National Security

## Suggested Reading

- 15 April 2024 Article New Proposal Signals Sharper Enforcement Focus At CFIUS
- 05 March 2024 Kirkland Alert An Unacceptable Risk: Groundbreaking Executive Order Restricts Outbound Transfers of U.S. Personal Data and Government-Related Data to Countries of Concern
- 16 February 2024 Award Chambers Global: The World's Leading Business Lawyers 2024

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