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CFIUS Proposed Rule Aims to Strengthen Penalty and Enforcement Measures

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The US Department of the Treasury (Treasury), which chairs the Committee on Foreign Investment in the United States (CFIUS or the Committee), recently released a Notice of Proposed Rulemaking (NPRM) to augment certain CFIUS mitigation, penalty, and enforcement procedures. Comments on the NPRM are due by May 15, 2024.

In its press release dated April 11, 2024, Treasury stated that this proposed rule “marks the first substantive update to the mitigation and enforcement provisions of the CFIUS regulations since the enactment and implementation of the Foreign Investment Risk Review Modernization Act of 2018, which amended CFIUS's governing statute (section 721 of the Defense Production Act of 1950).”

BACKGROUND

CFIUS reviews certain transactions involving foreign investment into businesses and real estate in the United States to identify and mitigate national security concerns. When a concern is identified, CFIUS is authorized to impose conditions on the transaction parties to address risk. This proposed rule aims to enhance CFIUS's ability to identify and resolve national security risks.

SUMMARY OF CHANGES

The proposed rule includes the following key changes:

- **Expands CFIUS information requests.** The rule would expand the types of information CFIUS can request from transaction parties pertaining to “non-notified transactions.” A “non-notified transaction” is a transaction for which no notice or declaration has been submitted to CFIUS.
- **Requires responses related to compliance monitoring and mitigation agreements.** Transaction parties would be required to provide information related to monitoring compliance with the terms of mitigation agreements, as well as information regarding material misstatements or other omitted material information related to a concluded review or investigation.
- **Expands penalties.** The rule expands the circumstances in which a civil monetary penalty can be imposed to include material misstatements or omissions outside of the submission of a declaration or notice, such as in “responses to the Committee's

requests for information related to non-notified transactions, certain responses to the Committee's requests for information related to monitoring or enforcing compliance, and other responses to the Committee's requests for information, such as for agency notices..."

- **Significantly increases civil monetary penalties.** The rule would increase the maximum civil monetary penalty from \$250,000 to \$5 million, as well as create a new method for determining the maximum possible penalty for a breach of a mitigation agreement, condition, or order imposed.
- **Expand subpoena authority.** The rule would expand the instances in which CFIUS may use its subpoena authority, including when seeking information from third persons not party to a transaction.
- **Extend petition timeframes.** The rule would extend the time frame for submission of a petition for reconsideration of a penalty determination from 15 to 20 business days.

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