

A Practical Overview for Dealmakers

By Daanish Hamid · November 6, 2023

1. What is CFIUS?

The Committee on Foreign Investment in the United States or **CFIUS** is a U.S. inter-governmental agency committee chaired by the Secretary of the Treasury. CFIUS is responsible for reviewing certain non-U.S. investments in, or acquisitions of, U.S. businesses to determine if such transactions impair U.S. national security. CFIUS maintains broad jurisdiction over both controlling as well as certain minority or non-controlling investments in U.S. businesses. CFIUS also has jurisdiction to review certain types of real estate transactions that grant non-U.S. persons access to locations proximate to sensitive U.S. military or other facilities. CFIUS can assert jurisdiction over corporate and real estate deals even if a non-U.S. person forms and uses a U.S. legal entity to act as the named buyer or investor in transaction documents. CFIUS has existed since 1975; however, CFIUS' jurisdiction and processes have significantly increased as a result of the Foreign Investment Risk Review Modernization Act of 2018, also known as **FIRREA**.

2. What happens if CFIUS identifies national security concerns associated with a particular transaction?

If CFIUS determines that it has jurisdiction and that a transaction raises relevant national security concerns, CFIUS can request the parties to agree to certain mitigation measures. If the parties refuse to accept mitigation measures or if CFIUS determines that its concerns cannot be mitigated, CFIUS will ask the parties to withdraw from or unwind their transaction. If the parties refuse, CFIUS will notify the President of the United States of that transaction. The President will then decide, upon advice from CFIUS, whether to exercise his legal authority to suspend, block, or unwind the transaction. There have certainly been situations in the past where the President has exercised this authority to prevent transactions from proceeding due to national security concerns.

3. What can trigger CFIUS concerns?

CFIUS concerns can impact parties in a variety of instances. The following is a limited sample list of the types of parties that typically consider CFIUS risk prior to engaging in transactions:

- U.S. technology (including AI), social media, semiconductor, defense, energy, water supply/treatment, telecommunications, agriculture, transportation, infrastructure, healthcare, biotechnology, insurance, financial services, big data, real estate, specialty metal, or other companies interested in
 - receiving non-U.S. investments,
 - being acquired by non-U.S. parties, or
 - entering into certain types of joint ventures, collaborations, concessions, or long-term leases with non-U.S. persons.
- U.S. or non-U.S. PE/VC firms, CVC's, or other investors that intend on selling their U.S. portfolio company ownership interests directly or indirectly to non-U.S. parties.
- Non-U.S. PE/VC firms, CVC's, or other investors that engage in direct or indirect U.S. investments in or acquisitions of U.S. businesses or real estate.
- Non-U.S. sovereign wealth funds that engage in U.S. investments in or acquisitions of U.S. businesses or real estate.
- U.S. general partners or U.S.-focused investment funds that have non-U.S. owners, limited partners, managers, or management companies.
- Non-U.S. investors or acquirors that invest in non-U.S. companies that have direct or indirect U.S. subsidiaries or businesses.

The above list only provides illustrative examples where parties should consider whether they trigger CFIUS jurisdiction. This is not intended to represent a comprehensive account of every instance where CFIUS can be relevant.

4. What U.S. government agencies participate in CFIUS?

CFIUS is chaired by the Secretary of the Department of the Treasury. CFIUS's other voting members are (i) the Secretaries of the Departments of Justice, Homeland Security, Commerce, Defense, State, and Energy, (ii) the U.S. Trade Representative, and (iii) the Director of the Office of Science & Technology Policy. Observing/non-voting members of CFIUS include the Director of National Intelligence, who is responsible for providing CFIUS with an independent analysis of any national security threats posed by a transaction.

5. What national security concerns are important to CFIUS?

CFIUS exercises broad discretion when conducting its reviews and accounts for a variety of actual or potential national security concerns. Recent CFIUS regulations focus on transactions involving (i) U.S.

businesses associated with critical technology,¹ certain types of critical infrastructure,² or sensitive personal data³ regarding U.S. citizens, or (ii) certain real estate proximate to sensitive military or other facilities specified in relevant CFIUS regulations. However, in CFIUS’s view, the scope of national security is not limited to just these concerns.

On September 15, 2022, President Biden issued an Executive Order (EO) reasserting CFIUS’s focus on key national security concerns. Among various matters, the EO states that CFIUS must consider (i) a transaction’s effect on military and non-military supply chains and food security; (ii) a transaction’s impact on U.S. technological leadership (including in the context of microelectronics, AI, biotechnology, biomufacturing, quantum computing, advanced clean energy (such as battery storage and hydrogen), and climate adaptation technologies); (iii) industry investment trends that suggest that the transaction can have a cumulative harmful impact on national security when viewed in the context of prior deals; (iv) cybersecurity risks; and (v) potential foreign exploitation of sensitive data pertaining to U.S. persons. This EO is supposed to guide not only CFIUS, but also assist foreign investors and U.S. businesses with deciding whether to submit a CFIUS filing early in their deal to address potential national security concerns head on instead of being caught flat-footed should CFIUS challenge their transaction upon learning of it from other sources.

6. Are investors/acquirors from certain countries more likely to trigger CFIUS reviews?

Relevant regulations *generally* allow CFIUS to evaluate investors/acquirors from **any country** subject to certain exceptions. In practice, foreign investors/acquirors from China or Russia or that have strong relationships or affiliations with or in those countries tend to attract significant CFIUS attention. However, CFIUS has also conducted reviews of numerous transactions involving investors from Korea, Japan, the UAE, and other countries. Relevant regulations contain *limited* exemptions to CFIUS scrutiny for certain *non-controlling* transactions involving qualified investors from Australia, Canada, New Zealand, and the United Kingdom. To qualify for those exemptions, investors must satisfy several detailed conditions.

¹ “**Critical technologies**” are items subject to U.S. export controls and other existing regulatory regimes, as well as emerging and foundational technologies controlled pursuant to the Export Control Reform Act of 2018. The export control classification number of a technology item helps determine whether it falls within or outside the scope of critical technology for purposes of CFIUS reviews.

² “**Critical infrastructure**” covers systems and assets, whether physical or virtual, so vital to the United States that the incapacity or destruction of such systems or assets would have a debilitating impact on U.S. national security. In certain cases, critical infrastructure could include, but is not limited to, internet/telecommunications networks, satellite systems, industrial resources, specialty metal facilities, energy sources and storage, oil pipelines, financial systems, rail lines, airports, maritime ports, and public water and treatment systems. Further information on critical infrastructure sectors is available at <https://www.cisa.gov/critical-infrastructure-sectors>

³ Subject to certain exceptions, “**sensitive personal data**” means certain types of identifiable financial, geolocation, electronic communication, and health data maintained or collected by U.S. businesses. Genetic test information is considered sensitive personal data as well. In addition, anonymized data that can be reverse engineered to identify specific individuals can still fall within the scope of sensitive personal data if certain other conditions are satisfied.

7. What makes the CFIUS process challenging?

CFIUS's jurisdiction over foreign investments/acquisitions in the United States is very broad. Both controlling and certain non-controlling or minority investments are within CFIUS's purview. When determining the national security implications of a transaction, CFIUS accounts for a variety of factors, including those that are classified and cannot be shared with the transaction parties themselves or the public at large. CFIUS is also not subject to any statute of limitations and has the ability to review and possibly challenge a non-notified transaction *at any time*, even months or years after it has closed. However, transaction parties can avoid future CFIUS challenges if they submit a CFIUS filing beforehand and receive a safe harbor letter. The scope of this safe harbor protection is discussed below.

8. How does CFIUS learn of a foreign investment/acquisition of a U.S. business?

CFIUS learns of transactions through a variety of means, including in the following cases:

- First, recent regulations require parties to submit a **mandatory filing** to CFIUS in certain defined circumstances (discussed below) prior to closing their transaction. Parties that fail to submit a mandatory filing can be subject to a civil penalty up to \$250,000 or the value of the transaction itself, whichever is greater.
- Second, CFIUS regulations contain a framework pursuant to which parties may submit a **voluntary filing** to CFIUS (also discussed below).
- Third, CFIUS has staff members who track public reports (such as press releases and SEC filings) that reveal relevant transactions that have not already undergone a CFIUS review (known as "**non-notified transactions**"). Recent legislative efforts have resulted in a substantial increase in funding and staff dedicated to monitoring non-notified transactions.
- Fourth, the Department of the Treasury, which leads the CFIUS review process, has developed a webpage encouraging members of the public to provide it with tips/referrals concerning non-notified transactions. This could mean that corporate rivals, scorned bid competitors, disgruntled former employees, and other persons may draw CFIUS's attention to non-notified transactions.

9. What can happen if CFIUS identifies a non-notified transaction?

CFIUS may self-initiate a review or direct parties to submit a filing if they did not inform CFIUS of those transactions previously. Certain deal parties that are unable to provide CFIUS with a sufficient explanation for failing to report relevant non-notified transactions on their own initiative may find themselves subject to a rigorous post-transaction CFIUS review. If a mandatory CFIUS filing was required, parties may be liable for a significant civil penalty if they did not submit that filing on their own initiative.

10. In what cases must transaction parties submit a mandatory filing to CFIUS?

Subject to certain exceptions, relevant CFIUS regulations require parties to foreign acquisitions of, or *certain* controlling or even non-controlling investments in, U.S. businesses to file a mandatory submission with CFIUS if one or both of the following conditions are satisfied:⁴

- A single foreign government has a “substantial interest”⁵ in the foreign investor and that investor will acquire a substantial interest in a U.S. business that has certain involvement (as prescribed in CFIUS regulations) with critical technologies, certain types of critical infrastructure, or sensitive personal data. CFIUS regulations refer to these types of companies as “**TID U.S. businesses**”;⁶ or
- The target of the foreign investment or acquisition is a TID U.S. business that produces, designs, tests, manufactures, fabricates, or develops one or more critical technologies for which a U.S. regulatory authorization would be required to export, reexport, transfer (in country), or retransfer to certain transaction parties or others in the ownership chain.⁷

Parties that trigger a mandatory filing must submit a short-form **declaration** or, if they prefer, a long-form **notice** to CFIUS 30 days prior to the completion date of the transaction.

11. What are the differences between a declaration and a notice?

The notice form is longer and more detailed than a declaration. CFIUS also takes a longer time to complete its review of a notice than a declaration. Parties must pay a filing fee to CFIUS when submitting a notice. The fee amount ranges according to the value of the transaction. At this time, CFIUS does not impose a filing fee with respect to declarations. CFIUS also has the ability after reviewing a declaration to request parties to submit a notice *in addition* to the declaration. This will extend the review process and increase the costs associated with it. For these reasons, some parties may consider submitting a notice instead of a declaration at the outset in certain cases that are not otherwise clear cut.

As mentioned above, parties that submit a filing may receive a safe harbor letter from CFIUS if there are no significant national security concerns and CFIUS has concluded all action under its authorizing statute. This safe harbor protection restricts CFIUS from initiating a review of a transaction except in certain limited

⁴ The above bullet points provide only a high-level description of the mandatory filing triggers. CFIUS regulations prescribe more detailed requirements that parties should review with the aid of counsel.

⁵ “**Substantial interest**” means a direct or indirect voting interest of (i) 49% or more held by a foreign government in the foreign investor and (ii) 25% or more held by that foreign investor in the U.S. business.

⁶ One must consider several factors outlined in relevant regulations prior to concluding whether a business is a TID U.S. business.

⁷ U.S. export control classifications are relevant to the CFIUS analysis even if the U.S. business does not actually engage in export or reexport activity.

instances. The safe harbor protection resulting from a notice may be broad and generally covers follow-on investments by the same foreign investor. In contrast, the safe harbor protection resulting from a declaration may be limited to just the investment addressed by that declaration itself.

12. Should parties submit a voluntary filing to CFIUS if a mandatory filing is not triggered?

There can be circumstances where foreign investors or acquirors may determine that they need to file a voluntary submission with CFIUS *even if* a mandatory filing is not triggered. Determining whether to file a voluntary submission is a business decision that investors/acquirors must make after considering a variety of factors including, *but not limited to*, whether (i) the target business maintains a direct or indirect business relationship with the U.S. government or military; (ii) the target business is involved with classified projects or sensitive industries; (iii) the transaction involves access to real estate proximate to certain sensitive facilities; (iv) the target business is involved with certain sensitive industries or supply chains; or (v) the foreign investor is affiliated with countries or governments that have traditionally raised national security concerns. Appropriate pre-transaction CFIUS due diligence will enable parties to determine whether they should file a voluntary submission with CFIUS. As with mandatory filings, voluntary submissions can take the form of either a declaration or a notice.

13. What could happen if the parties do not file a voluntary submission with CFIUS?

No *monetary* penalties will apply if the parties do not file a voluntary submission and a mandatory filing is not otherwise triggered. However, the parties will not have any safe harbor protection as described above. CFIUS will continue to have the ability to conduct a unilateral review or direct the parties to file a submission with CFIUS at any point, even months or years after the closing. CFIUS may view parties with suspicion if they did not voluntarily file a submission with respect to a transaction that triggers national security concerns.

Feel free to contact the author below if you require any support with CFIUS compliance or filings.



DAANISH HAMID is a partner with Rimón's Washington, D.C. office. He is a member of the firm's National Security, International Trade, and White Collar Practice Groups. Daanish regularly represents clients before CFIUS and has led several successful CFIUS filings. His practice also covers FCPA/anti-corruption compliance and investigations, OFAC sanctions, and anti-money laundering (AML) /anti-terrorist financing concerns. Further information is available at [Daanish Hamid » Rimón Law](#). He can be reached at daanish.hamid@rimonlaw.com.

This summary is provided for informational purposes only and contains a limited introduction to CFIUS. This summary is not intended to constitute legal advice or an opinion, nor does it create an attorney-client relationship with Rimón. You should seek professional legal counsel before taking any action.