

CFIUS OVERVIEW



Committee on Foreign Investment in the United States (CFIUS)

■ What is CFIUS?

- An inter-agency committee authorized to review transactions that could result in control of a US business by a foreign person (i.e., a covered transaction) in order to determine the effect of such transactions on the national security of the United States.
- CFIUS operates pursuant to section 721 of the Defense Production Act of 1950, as amended by the Foreign Investment and National Security Act of 2007 (FINSA) (section 721) and as implemented by Executive Order 11858, as amended, and regulations at 31 C.F.R. Part 800.

■ Organization

■ Voting Members

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| 1. Department of the Treasury (chair) | 6. Department of State |
| 2. Department of Justice | 7. Department of Energy |
| 3. Department of Homeland Security | 8. Office of the US Trade Representative |
| 4. Department of Commerce | 9. Office of Science & Technology Policy |
| 5. Department of Defense | |

■ Observing Members

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| 1. Office of Management & Budget | 4. National Economic Council |
| 2. Council of Economic Advisors | 5. Homeland Security Council |
| 3. National Security Council | |

■ Non-Voting, Ex-Officio Members

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| 1. Director of National Intelligence | 2. Secretary of Labor |
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CFIUS Timeline to Review and Investigate Covered Transactions

1. Draft Prefiling

- CFIUS recommends submitting a draft “at least five business days before the filing of a voluntary notice.”

2. National Security Reviews (30 days)

- Initiated by parties of a covered transaction through a voluntary notification filed with CFIUS
- Initiated unilaterally by CFIUS

3. National Security Investigations (45 days)*

- Investigations immediately follow the 30-day review. Investigations can occur under the following conditions:
 - The transaction threatens to impair national security of the US and the threat has not been mitigated by assurances approved by CFIUS
 - With foreign government-controlled transactions
 - Where transactions could result in control of any critical infrastructure of or within the US, or
 - If CFIUS extends the process into an investigation, upon lead agency recommendation, for any purpose

4. Presidential Review (15 days)

- Immediately follows 45-day investigation, at which point:
 - CFIUS makes recommendations to President to suspend or prohibit, in some way, the transaction, or
 - Where members of CFIUS are unable to reach a decision whether to recommend that the President suspend or prohibit transaction, asks President to make a determination

* An investigation is not required if CFIUS determines during its review that the transaction will not impair the national security of the US.

Voluntary Filing CFIUS Notification: “Safe Harbor”

- As explained under the CFIUS Guidance (73 Fed. Reg. 74567, 69 (Dec. 8, 2008)):
 - “A covered transaction that has been notified to CFIUS, and on which CFIUS has concluded action under section 721 after determining that there were no unresolved national security concerns, qualifies for a “**safe harbor**,” Thus, subject to the terms of the safe harbor and any mitigation agreement or conditions imposed by CFIUS, the transaction can proceed without the possibility of subsequent suspension or prohibition under section 721.” (emphasis added)
 - “A covered transaction that CFIUS has not reviewed and cleared without objection does not qualify for the safe harbor, and CFIUS has the authority to initiate review of the transaction on its own, even after the transaction has been concluded, which CFIUS may choose to do if it believes the transaction presents national security considerations.”

“In making their decision about whether to submit a voluntary notice of a transaction to CFIUS, parties to a transaction may wish to consider whether their transaction could present national security considerations, since CFIUS focuses solely on national security.” (CFIUS Guidance, 73 Fed. Reg. 74567, 69 (Dec. 8, 2008))

CFIUS has stated it considers “all relevant national security considerations,” but has highlighted the following factors from Section 721(f) of the Defense Production Act of 1950:

1. Domestic production needed for projected national defense requirements
2. Capability and capacity of domestic industries to meet national defense requirements, including the availability of human resources, products, technology, materials, and other supplies and services
3. Control of domestic industries and commercial activity by foreign citizens as it affects the capability and capacity of the US to meet the requirements of national security
4. Potential effects of the proposed or pending transaction on sales of military goods, equipment or technology to any country
5. Potential effects of the proposed or pending transaction on United States international technological leadership in areas affecting US national security
6. Potential national security-related effects on US critical infrastructure, including major energy assets
7. Potential national security-related effects on US critical technologies
8. Whether the covered transaction is a foreign government-controlled transaction
9. Long-term projection of US requirements for sources of energy and other critical resources and material
10. Any other factors as the President or the Committee may determine to be appropriate, generally or in connection with a specific review or investigation

Contents of a Voluntary Notice

- Information about the transaction, including:
 - Summary of transaction and copy of the transaction documents (e.g., stock purchase agreement)
- Information about the US business that is the subject of the transaction, including:
 - US government contracts, licenses and authorizations
 - Products it supplies to the US government
 - Products it manufactures or sells that are controlled by the EAR, ITAR, Department of Energy or NERC
- Information about the foreign party making the acquisition, including:
 - Identification of individuals or entities with greater than a 5% interest in the company and other information regarding the non-US or non-US government control of the acquiring party
 - Personal identifier information and curricula vitae of officers and directors of the foreign entity making the acquisition and its immediate, intermediate and ultimate parents
- Pre- and post-transaction organizational charts of the parties
- Annual reports and financial statements of the parties
- Certifications
 - Accompanying Voluntary Notice
 - Final Certification