

Voluntary CFIUS Filings May Limit Uncertain Outcomes

By **Nicholas Klein, Nathaniel Bolin and Danish Hamid** (June 24, 2021)

The risk has never been higher that the U.S. government will seek to review foreign investments in U.S. businesses and real estate for national security reasons.

The Committee on Foreign Investment in the United States, a powerful committee consisting of various U.S. government agencies, is primarily responsible for screening foreign investments to ensure that they do not impair U.S. national security interests.

CFIUS can impose conditions on a transaction or cause parties to withdraw or unwind deals that raise such concerns.

In certain cases, prescribed by the regulations, filing with CFIUS is mandatory and failure to file may be subject to significant penalties — including fines up to the value of the transaction.

In most cases, however, filing with CFIUS is voluntary and such a decision is driven by several factors, including the risk that CFIUS will later seek to review the transaction unexpectedly.

U.S. businesses that accepted foreign investment — often years ago — are receiving inquiries from CFIUS and are being subjected to CFIUS review and the uncertainty and expense that comes with it.

This article summarizes some of the key considerations that transaction parties should carefully evaluate when deciding whether to file with CFIUS voluntarily.

Why should parties file with CFIUS if it is not mandatory?

An unexpected CFIUS review — and particularly the imposition of restrictions on the completed transaction — are likely to result in increased costs and in some cases can even undermine the business rationale of the deal.

CFIUS has authority to review completed transactions subject to its jurisdiction that it has not already reviewed and approved indefinitely.

Thus, a decision not to notify CFIUS of a transaction subject to its jurisdiction results in ongoing uncertainty and risk after closing, often for both the U.S. business and the foreign investor, including the possibility that CFIUS will impose measures restricting the foreign investors' rights or forcing the foreign investor to divest their interest in the U.S. business.

Companies and investors that wish to manage the risk of intervention by CFIUS may voluntarily file a notice or a short-form declaration with CFIUS and, upon approval, receive a safe harbor that protects the transaction from future challenges by CFIUS.



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Short-form declaration filing may provide a faster route to CFIUS approval.

Following the passage of the Foreign Investment Risk Review Modernization Act, or FIRRMA, in 2018, CFIUS instituted a short-form declaration mechanism that allows transaction parties to seek CFIUS approval on a more succinct timeline. Unlike a traditional long-form notice filing that often takes four to six months, a declaration filing is subject to a limited 30-day review.

A declaration is much less resource-intensive than the voluntary notice and has made it easier to navigate the CFIUS review process for many transactions.

However, a declaration is not guaranteed to result in CFIUS approval and the safe harbor from future CFIUS review. In response to a declaration, CFIUS may either approve the transaction, request the parties submit a full voluntary notice or provide a so-called no-action letter that neither blocks the transaction nor provides approval and the corresponding safe harbor.

The use of declaration filings has been adopted quickly by industry as a favorable alternative to the traditional notice process. CFIUS recently revealed that of nearly 200 declarations filed in 2020, CFIUS either approved or took no action on over two-thirds of the transactions submitted via this format.

CFIUS is more focused than ever on identifying nonnotified transactions.

CFIUS' budget and staffing has increased considerably as a result of FIRRMA, reducing the chances that a transaction might fly under CFIUS' radar. CFIUS now has a dedicated team focused on identifying so-called nonnotified transactions for review.

They are actively reviewing news releases, securities filings, and other public and nonpublic sources to identify and investigate such transactions. U.S. businesses that have received foreign investment should not be surprised if contacted by the U.S. Department of the Treasury requesting "to discuss a confidential and time-sensitive matter involving your company." After reviewing the details of the transaction to verify it has jurisdiction, CFIUS often directs the parties to submit a notice for review.

The Treasury also has a webpage encouraging members of the public to submit tips and referrals regarding transactions that may have national security implications.

The webpage establishes a much more accessible means for third parties to informally raise concerns about a particular transaction. This could mean that corporate rivals, scorned bid competitors, former employees and other persons may be encouraged to draw CFIUS' attention to nonnotified transactions.

The notion of national security risk is expansive, touching a wide range of industries.

CFIUS is very concerned with respect to foreign investments into or acquisitions of U.S. businesses involved with critical technologies, U.S. critical infrastructure or the access to sensitive personal data regarding U.S. citizens.

CFIUS definition of critical technologies, nonpublic information and infrastructure that may pose national security risks if released to a foreign party is expansive. Accordingly, CFIUS regulators view U.S. business transactions in a surprisingly wide range of industries,

technologies and activities as potential national security risks.

Investors and the companies in which they seek to invest often wrongly assume that a transaction does not raise national security risks because the U.S. business does not engage in traditional national security sectors such as aerospace and defense and does not do business with the U.S. government.

But based on our recent experience, CFIUS has sought review of transactions in a wide range of industries, including financial services, healthcare, real estate, agriculture, commercial software and technology, environmental technology, and telecommunications, among others.

CFIUS has with increasing frequency imposed strict mitigation measures and forced the divestiture of U.S. businesses in widely reported transactions involving social media, healthcare and telecommunications.

CFIUS focus extends beyond China and Russia.

Another misconception is that CFIUS is focused exclusively on risks posed by strategic competitors such as China and Russia. While it is certainly true that CFIUS generally considers investments from China and Russia to pose greater potential national security risks, CFIUS has also continued to closely watch investment activity from other countries, including many close U.S. allies.

For example, in our experience, CFIUS has recently sought information on nonnotified transactions by investors from across Europe, Japan, Singapore and others.

Don't underestimate the many other benefits of a voluntary filing.

Voluntary filings also allow parties to an investment much greater control over the timing, the scope and the cost of navigating CFIUS risks. And these filings can act as a form of insurance against unknown CFIUS outcomes.

Dynamic National Security Landscape

Should CFIUS seek to review a transaction post-closing — even several years later — such a review would consider the national security risks presented at the time of review instead of at the time of the transaction.

In addition to changes in the U.S. business's operations — such as obtaining government contracts or further developing technology — the national security and geopolitical landscape may change in unpredictable ways.

Control Over Timing

Filing proactively gives the parties more control over timing of the CFIUS review process, allowing the parties to craft their message and submit a filing as best suited for the transaction, allocating both the cost and risks as appropriate. Filing with CFIUS during a transaction is often easier for the parties as the deal teams are fully engaged, information on the transaction is fresh, and the parties' leadership is focused and committed.

Budgeting Issues

The U.S. business and the investor can allocate budget for a CFIUS filing within the deal context, avoiding the unexpected costs should they be required to file post-closing. In addition to often significant attorney fees, a CFIUS notice for a transaction completed after May 1, 2020, is subject to filing fees up to \$300,000, based on the value of the transaction. Although there are no fees for filing a declaration, parties that are requested to file with CFIUS post-closing are most likely filing a notice.

Long-Term Strategic Benefits

In addition to the immediate and obvious benefits of a safe harbor for a specific transaction, voluntary filings with CFIUS also can come with important longer-term benefits.

For example, investors focused on a series of investments or building investment portfolios can leverage well-done initial voluntary filings with CFIUS to pave the way for an easier review process down the road on future transactions once they become familiar to CFIUS.

Repeat foreign investors also may benefit from streamlined threat assessments by CFIUS, increasing the likelihood of CFIUS approval on a declaration or in the initial review period.

Conclusion

Thorough vetting of CFIUS risks as early as possible in a planned transaction is a form of low-cost insurance against the very harmful impact that a CFIUS investigation could have on nonnotified transactions.

Given that there is no statute of limitations on CFIUS' authority to review nonnotified foreign investments subject to its jurisdiction, the dynamic nature of U.S. national security and foreign policy presents tremendous risk for nonnotified transactions.

Transaction parties should carefully assess the CFIUS risk presented by their transaction as the safe harbor of CFIUS approval presents a very strong value proposition for many transactions.

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