



COMMENTARY

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Key Takeaways from the First Two Months of Mandatory CFIUS Declarations

IN SHORT

The Situation: The Pilot Program, recently announced by the Committee on Foreign Investment in the United States ("CFIUS"), mandates filing declarations with CFIUS in connection with certain foreign investments in U.S. businesses that possess "critical technology."

The Development: After two months, a number of useful observations can be shared regarding CFIUS' implementation of the Pilot Program.

Looking Ahead: Additional clarity relating to certain elements of the Pilot Program is expected from CFIUS.

The Committee on Foreign Investment in the United States has now responded to companies that submitted the first mandatory declarations under the recently announced Pilot Program for foreign investments in U.S. critical technology companies, which Jones Day first reported on [here](#).

Although CFIUS generally does not publish specific details about the transactions it reviews, provided below are some observations relating to implementation of the Pilot Program, based on our recent experience and public reporting.

CFIUS Is Using its Toolbox

At the conclusion of its review of a mandatory declaration under the Pilot Program, CFIUS may: (i) request a full written notice; (ii) inform the parties that its review cannot be completed based on the declaration and that the parties may file a full notice to seeking CFIUS clearance; (iii) initiate a unilateral review; or (iv) notify the parties that it has concluded all action with respect to the transaction.

To date, under the Pilot Program, we understand that CFIUS has used options (i), (ii), and (iv). While the sample size of declarations is reportedly small, CFIUS' willingness to clear transactions based only on a declaration is a positive sign. When a mandatory declaration is required for a particular transaction, and the parties elect to go the declaration route, the parties should carefully consider in the early stages what they will do if CFIUS does not clear the transaction at the end of the declaration review period.



Under the Pilot Program, the foreign investor is required to provide an organizational chart. CFIUS may also request an organizational chart for the U.S. business, including its subsidiaries. As such, parties should consider providing detailed organizational charts upfront for both parties.



Companies Should Consider the Decision to File a Full Notice in Lieu of a Declaration

Declarations undergo a 30-day assessment period, while full notices undergo an initial 45-day

review period, which could be followed by an additional 45-day investigation period. Although a mandatory declaration may be required for a given transaction, in certain circumstances, filing a full notice instead of a declaration (which is allowed under the Pilot Program) may be preferable. This may be the case in connection with transactions involving foreign government-controlled investors or transactions that involve the acquisition of a U.S. business with significant government contracts.

On the other hand, foreign investors with recent positive experiences before the Committee may, depending on the sensitivity of the U.S. business, be able to receive clearance at the end of the declaration review period. Timing issues driven by business considerations may also play a role in the declaration versus full filing decision.

Be Prepared to Answer Additional Questions about Government Contracts

The mandatory declaration form requires that the U.S. business indicate whether it has had any contracts within the past three years with the U.S. government or any contracts within the past 10 years that included access to personally identifiable information of U.S. government personnel. An affirmative response may elicit further questions from CFIUS. Specifically, CFIUS may request a list of all U.S. government customers and the start dates and end dates of the contracts. Under the Pilot Program, parties only have two business days to respond to requests for additional information, although extensions may be granted. Gathering this type of information can be time consuming and, therefore, U.S. businesses should begin to collect this information prior to submitting a declaration.

Provide Detailed Organizational Charts Upfront

Under the Pilot Program, the foreign investor is required to provide an organizational chart. Experience suggests that CFIUS may also request an organizational chart for the U.S. business, including its subsidiaries. As such, parties should consider providing detailed organizational charts upfront for both parties.

CFIUS Is Efficient, but Questions Remain

During the first month of the Pilot Program, we understand that CFIUS began its formal review of most, if not all, declarations received within one to two weeks after they were submitted. It remains to be seen whether CFIUS will continue to have sufficient resources to keep up with this pace if declaration submissions increase.

CFIUS has indicated that it will continue to provide additional clarity related to key terms of the Pilot Program. To date, CFIUS has only provided additional clarifying FAQs twice. Given that CFIUS does not provide advisory opinions with regard to declarations or notices, we expect that additional FAQs will seek to clarify, among other things, transactions that fall within the scope of the Pilot Program.

In connection with the partial government shutdown, currently all deadlines for declarations and transactions under CFIUS' review or investigation are "tolled." Declarations and notices submitted during the shutdown will not be commented on or accepted for review.

FOUR KEY TAKEAWAYS

1. CFIUS' willingness to clear transactions based only on a declaration is a positive sign.
2. In some circumstances filing a full notice instead of a declaration may be preferable.
3. CFIUS has indicated that it will continue to provide additional clarity related to key terms of the Pilot Program.
4. Declarations and notices submitted during the shutdown will not be commented on or accepted for review.



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