



Staying Out of the Penalty Box—A Reminder Regarding the CFIUS Pilot Program

IN SHORT

The Situation: Certain controlling and non-controlling investments by foreign persons in the United States require a mandatory notification to the Committee on Foreign Investment in the United States ("CFIUS").

The Developments: CFIUS previously established a mandatory notification pilot program pursuant to legislation that will significantly change CFIUS and the CFIUS process.

The Impact: Parties that fail to comply with the mandatory notification requirement can be subject to significant penalties.

As we previously wrote about [here](#) and [here](#), there is a relatively new program (effective November 2018) pursuant to which certain investments in the United States trigger a mandatory notification to the Committee on Foreign Investment in the United States ("CFIUS"). Under this program, which implements portions of the Foreign Investment Risk Review Modernization Act of 2018, CFIUS can impose significant penalties (up to the value of the transaction) on both the buyer/investor and the seller/target for failing to comply with the mandatory notification requirement. There are several components to this new program—including coverage of transactions falling below CFIUS's traditional "control" threshold—that require thinking about the CFIUS issue in a new way. Parties should consult with counsel early in deal planning to make sure that they are able to properly consider these issues in the planning stages.



Under a relatively new program, certain controlling and non-controlling foreign investments in companies that operate in the United States can trigger a mandatory CFIUS notification.



Failure to comply can result in significant penalties on the parties.

Here's what you need to know.

- **Critical technology companies.** The program applies to foreign investments in U.S. "critical technology" companies—a category whose contours are broad and subject to change. This includes companies that develop, manufacture, or test, among other products and technologies, sensitive export controlled and certain nuclear products and technologies. It also includes companies that develop or manufacture technologies subject to export controls as so-called "emerging" and "foundational" technologies. The U.S. government is working to define emerging and foundational technologies, but they may include, among other technologies, artificial intelligence, semiconductors, and biotechnology. Whether a U.S. company may be considered a "critical technology" company is not always obvious. It is important to ask the right questions and complete the appropriate analysis before proceeding with a transaction.

- Controlling and non-controlling rights.** Under the new program, a foreign investor no longer needs to receive control rights for the transaction to fall within CFIUS's purview. The mandatory filing requirement applies to controlling and certain types of non-controlling investments in U.S. critical technology companies. The types of non-controlling rights that trigger a mandatory notification include a foreign person obtaining: (i) access to certain technical information; (ii) a board seat or board observer rights; or (iii) involvement in substantive decision-making regarding the use, development, acquisition, or release of critical technology (which can include having access to or discussions with senior officers of a U.S. company). So, even a very small investment with board observer rights can trigger a mandatory filing, with a potential penalty up to the value of the transaction for failing to file.
- Definition of foreign person is broad.** A "foreign person," for purposes of the mandatory notification program, could be someone that you may not think of as "foreign." In particular, in addition to entities organized outside the United States, CFIUS may treat as "foreign persons" U.S. companies controlled by foreign persons (such as by having, in some circumstances, a foreign person Chief Executive Officer) or U.S. private equity funds that have foreign person general partners or significant foreign limited partners. Investments by those companies or funds could trigger a mandatory CFIUS notification. Note that U.S. private equity funds with foreign limited partners will not be considered foreign if certain conditions are met. Parties should consider these issues when forming new funds or contemplating potential investments.
- Timing.** Under the new program, parties to investments covered by the mandatory notification requirement must submit a declaration 45 days before closing. During that time, CFIUS will review the declaration and issue a determination. At the conclusion of its review, 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 seek CFIUS clearance; (iii) initiate a unilateral review; or (iv) notify the parties that it has concluded all action with respect to the transaction. Given these potential outcomes, parties need to plan ahead, including to assess what the parties will do if CFIUS informs the parties that its review cannot be completed based on the declaration and that the parties may file a full notice to seek CFIUS clearance. Note that parties can also file a full notice to meet the mandatory notification requirement if they believe that CFIUS likely will require a full notice in the declaration process.
- Declaration form.** The mandatory notification, which is called a declaration, is essentially a short form (five-six pages) CFIUS notice. The form requires information from both the foreign investor and the U.S. business.
- Penalties.** Failure to comply with the mandatory notification program can result in a penalty on each non-compliant party up to the value of the investment or transaction.

Jones Day has been advising on these issues in connection with numerous transactions since November 2018. Please do not hesitate to reach out if you have any question about whether a particular investment might trigger a mandatory notification.

THREE KEY TAKEAWAYS

- Foreign investments in U.S. critical technology companies can trigger a mandatory CFIUS notification requirement.
- The mandatory notification requirement applies to controlling and certain non-controlling investments.
- CFIUS can impose significant penalties up to the value of the transaction if parties do not comply with the mandatory notification requirement.



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