

**International
Comparative
Legal Guides**



Foreign Direct Investment Regimes

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1 Foreign Investment Policy

1.1 What is the national policy with regard to the review of foreign investments (including transactions) on national security and public order grounds?

The United States continues to welcome and support foreign investment. In September 2022, the Biden-Harris administration reaffirmed, through Executive Order 14083, the United States's longstanding and bi-partisan open investment policy, noting that the country's commitment to open investment is a cornerstone of its economic policy and provides the United States with substantial economic benefits. The U.S. Congress has also recognised the benefits of foreign investment in the United States, including the promotion of economic growth, productivity, competitiveness and job creation.

Notwithstanding its open investment policy, the U.S. Government has long recognised that some foreign investments in the United States present a risk to U.S. national security. For this reason, the United States has for many decades maintained a foreign investment review process focused on identifying and addressing such national security risks.

This foreign investment review process is carried out by the Committee on Foreign Investment in the United States (“CFIUS”), an interagency body composed of representatives from various departments and offices across the executive branch of the U.S. Government (the “Executive Branch”). CFIUS was created in 1975 and has undergone several significant modifications since then, most recently following the enactment, in 2018, of the Foreign Investment Risk Review Modernization Act (“FIRRMA”).

Today, CFIUS is a well-resourced regulatory body that carries out robust reviews of foreign investment transactions within its jurisdiction.

1.2 Are there any particular strategic considerations that the State will apply during foreign investment reviews? Is there any law or guidance in place that explains the concept of national security and public order?

CFIUS reviews transactions within its jurisdiction to determine the effect of such transactions on the national security of

the United States, and it does not generalise the scope of such reviews to include other broader public interest issues. The relevant law and regulations do not define the term “national security”, however, other than indicating that the term includes issues relating to homeland security, including as applied to critical infrastructure. This lack of a definition is intentional, in recognition of the reality that national security is an everchanging concept, particularly in an age of rapid technological advancement.

Although the term “national security” is not defined, there is available significant guidance on how CFIUS construes the concept.

First, the statute that governs the CFIUS process, Section 721 of title VII of the Defense Production Act of 1950, as amended (codified at 50 U.S.C. § 4565) (the “DPA”), sets forth an extensive list of factors for CFIUS to consider in conducting its reviews.

Second, Executive Order 14083 enumerates additional factors for CFIUS to consider, including, among other things, matters relating to supply chain resilience and security, cybersecurity and sensitive data of U.S. citizens.

Third, the U.S. Government regularly communicates its national security priorities, including with regard to investment security. Of particular note are the National Security Strategy and the National Defense Strategy, each of which is periodically released by the Executive Branch. Other national security-related policies and strategies issued from time to time also provide guidance, such as the 2020 National Strategy for Critical and Emerging Technologies.

Finally, CFIUS itself regularly communicates with the public regarding its work – whether formally, such as through guidance or regulatory updates published in the Federal Register or statistics included in the public version of CFIUS's annual report to the U.S. Congress, or informally, such as in speeches and other public remarks by representatives of the various departments and offices involved in the CFIUS process. Much of this guidance can be found on the CFIUS portion of the U.S. Treasury Department's website.

1.3 Are there any current proposals to change the foreign investment review policy or the current laws?

As of early September 2023, there are currently no proposals from the Executive Branch to change the foreign investment review policy or the statute that governs CFIUS.

Members of the U.S. Congress, however, frequently propose changes to CFIUS's jurisdiction and operations. Recent proposals in the Congress have included, among other things, adding the Secretary of the U.S. Department of Agriculture to CFIUS in recognition that food security is a national security issue, and expanding the scope of CFIUS's jurisdiction over foreign purchases of farmland and other real estate in the United States.

Although beyond the scope of this chapter, in August 2023 President Biden issued an executive order to establish a framework for the U.S. Government to review certain investments by U.S. persons in companies engaged in the semiconductor and microelectronics, quantum information technologies and artificial intelligence sectors that are in, or have a defined nexus to, the People's Republic of China (including the Special Administrative Region of Hong Kong and the Special Administrative Region of Macau). The regulations to implement this new outbound investment regime are not expected to be issued until 2024. The U.S. Congress is also considering legislation to regulate certain outbound investments by U.S. persons.

2 Law and Scope of Application

2.1 What laws apply to the control of foreign investments (including transactions) on grounds of national security and public order? Does the law also extend to domestic-to-domestic transactions? Are there any notable developments in the last year?

CFIUS operates pursuant to the DPA, regulations promulgated thereunder (31 C.F.R. Part 800, *et seq.*) and several executive orders, including Executive Order 11858, as amended, and Executive Order 14083. These instruments pertain to the regulation of foreign investment in the United States, and do not extend to purely domestic-to-domestic transactions that do not involve a foreign person in some capacity.

There have been several notable developments relating to CFIUS in the last year.

First, in September 2022, President Biden issued Executive Order 14083, marking the first time a President formally provided direction on the risks CFIUS should consider when reviewing a transaction. Executive Order 14083 elaborated on several existing national security factors in the DPA and added several new factors. See the response to question 1.2 for additional information regarding these factors.

Second, in October 2022, CFIUS released its first-ever enforcement and penalty guidelines (the "**Enforcement Guidelines**"). The Enforcement Guidelines set forth the process that CFIUS uses in considering and imposing penalties for: (1) failure to timely submit a mandatory filing; (2) non-compliance with CFIUS mitigation agreements; and (3) making a material misstatement, omission or false certification to CFIUS. The Enforcement Guidelines also include a list of aggravating and mitigating factors that CFIUS considers in assessing penalties.

Third, in May 2023, the U.S. Treasury Department posted two new frequently asked questions ("**FAQs**") to the CFIUS portion of its website, one pertaining to the disclosure of information regarding limited partners of investment funds involved in a transaction undergoing CFIUS review, and a second pertaining to the timing requirements of mandatory CFIUS filings in multi-stage transactions. The latter clarified that, in a multi-stage transaction that triggers a mandatory CFIUS filing, the filing must be made at least 30 days before the earliest date upon which the foreign person acquires any equity interest in the target U.S. business, which is the "completion date" for such transactions under the CFIUS regulations. This represented

a significant development for foreign investors in transactions that trigger a mandatory CFIUS filing, as it clarified that such investors cannot make an initial passive investment in the relevant U.S. business prior to filing with CFIUS, and then seek CFIUS's approval to acquire board rights or other non-passive involvement in or access to the U.S. business. Prior to the release of the new FAQ, this structure was employed by certain market participants in order to accomplish a quick capital injection into the target U.S. business.

Finally, in August 2023, CFIUS expanded its jurisdiction over certain real estate transactions by adding eight new military installations to the list of sensitive facilities around which certain real estate transactions are covered under CFIUS's jurisdiction.

2.2 What kinds of foreign investments, foreign investors and transactions are caught? Is the acquisition of minority interests caught? Is internal re-organisation within a corporate group covered? Does the law extend to asset purchases?

At a high level, CFIUS has authority to review three categories of transactions: (1) "covered control transactions"; (2) "covered investments"; and (3) "covered real estate transactions". Each is described in greater detail below.

A "**covered control transaction**" is any transaction by or with any foreign person that could result in foreign control of any U.S. business, including such a transaction carried out through a joint venture. The CFIUS regulations define "control" as the power to determine, direct or decide important matters affecting an entity, and CFIUS interprets the concept of control broadly. See the response to question 2.6 for a discussion of what constitutes a "U.S. business", and the response to question 2.4 for the definition of "foreign person".

A "**covered investment**" is an investment, direct or indirect, by a foreign person other than an excepted investor (see the response to question 2.5 for a discussion of excepted investors) in an unaffiliated "TID U.S. business" (a concept described below) that is not a covered control transaction and that affords the foreign person any of three specified rights with respect to the TID U.S. business:

- (1) access to any "material nonpublic technical information" (as such term is defined in the CFIUS regulations) in the possession of the TID U.S. business;
- (2) membership or observer rights on, or the right to nominate an individual to a position on, the board of directors or equivalent governing body of the TID U.S. business; or
- (3) any involvement, other than through voting of shares, in substantive decision-making of the TID U.S. business regarding:
 - (a) the use, development, acquisition, safekeeping or release of sensitive personal data of U.S. citizens maintained or collected by the TID U.S. business;
 - (b) the use, development, acquisition or release of critical technologies; or
 - (c) the management, operation, manufacture or supply of covered investment critical infrastructure.

A "**TID U.S. business**" is any U.S. business that: (1) produces, designs, tests, manufactures, fabricates or develops one or more critical technology(ies); (2) performs certain functions enumerated in the CFIUS regulations with respect to covered investment critical infrastructure; or (3) maintains or collects, directly or indirectly, sensitive personal data of U.S. citizens. The CFIUS regulations define the terms "**critical technologies**", "**covered investment critical infrastructure**"

and “sensitive personal data” in 31 C.F.R. Part 800. Each concept is complex and, in many cases, requires specific legal or technical expertise to assess.

A “covered real estate transaction” is, with certain exceptions set forth in the CFIUS regulations, any purchase or lease by, or concession to, a foreign person of “covered real estate” that affords the foreign person at least three of the following property rights: (1) to physically access the real estate; (2) to exclude others from physically accessing the real estate; (3) to improve or develop the real estate; and (4) to attach fixed or immovable structures or objects to the real estate.

“Covered real estate” is real estate that is: (1) located within or will function as a part of, certain U.S. airports and maritime ports; or (2) located within certain specified distances of particular U.S. military installations. Additional details regarding these ports and military installations can be found in the CFIUS real estate regulations at 31 C.F.R. Part 802.

In addition to the three categories of transactions described above, CFIUS also has jurisdiction over any changes in rights that a foreign person has with respect to a U.S. business that could result in a covered control transaction or a covered investment, as well as any other transaction, transfer, agreement or arrangement, the structure of which is designed or intended to evade or circumvent the application of the CFIUS statute.

2.3 What are the sectors and activities that are particularly under scrutiny? Are there any sector-specific review mechanisms in place?

CFIUS’s jurisdiction is not limited by sector; it has the authority to review any covered control transaction, covered investment or covered real estate transaction, regardless of industry.

Nevertheless, certain sectors are more likely to raise potential national security considerations. These include both sectors that are historically associated with the U.S. defence industry (e.g., the aviation and munitions sectors, among others) and critical infrastructure (e.g., the communications, energy, financial services, food and agriculture, healthcare, information technology, nuclear, transportation and water sectors, among others), as well as sectors of the economy that deal with large amounts of personal data or with critical or emerging technologies. For example, in February 2022, the National Science and Technology Council identified the critical and emerging technology areas listed below as being of particular importance to the national security of the United States, and transactions involving U.S. businesses that deal with such technology areas have attracted attention from CFIUS:

- advanced computing;
- advanced engineering materials;
- advanced gas turbine engine technologies;
- advanced manufacturing;
- advanced and networked sensing and signature management;
- advanced nuclear energy technologies;
- artificial intelligence;
- autonomous systems and robotics;
- biotechnologies;
- communication and networking technologies;
- directed energy;
- financial technologies;
- human–machine interfaces;
- hypersonics;
- networked sensors and sensing;
- quantum information technologies;

- renewable energy generation and storage;
- semiconductors and microelectronics; and
- space technologies and systems.

See the response to question 3.13 for a discussion of sector-specific reviews and approvals.

2.4 Are terms such as ‘foreign investor’ and ‘foreign investment’ defined in the law?

The CFIUS regulations define “foreign person” as: (1) any foreign national, foreign government or foreign entity; or (2) any entity over which control is exercised or exercisable by a foreign national, foreign government or foreign entity. Any entity over which control is exercised or exercisable by a foreign person is a foreign person.

“Foreign national” is defined as any individual other than a U.S. national.

“Foreign entity” is defined as any branch, partnership, group or sub-group, association, estate, trust, corporation or division of a corporation or organisation organised under the laws of a foreign state if either its principal place of business is outside the United States or its equity securities are primarily traded on one or more foreign exchanges. Notwithstanding this definition, if an entity can demonstrate that a majority of the equity interest in the entity is ultimately owned by U.S. nationals, the entity will not be considered a foreign entity.

“Foreign government” is defined as any government or body exercising governmental functions, other than the U.S. Government or a subnational government of the United States. The term includes, but is not limited to, national and subnational governments, including their respective departments, agencies and instrumentalities.

2.5 Are there specific rules for certain foreign investors (e.g. non-EU/non-WTO), including state-owned enterprises (SOEs)?

Yes. Investors that are controlled by a foreign government are subject to a higher approval threshold at the first stage of a CFIUS review (see the response to question 4.2) and investors in which a foreign government holds a substantial interest may be subject to a mandatory filing requirement for certain transactions (see the response to question 3.3).

Certain investors from “excepted” countries – currently Australia, Canada, New Zealand and the UK – are exempt from CFIUS’s jurisdiction over non-controlling investments and covered real estate transactions, and are also exempt from CFIUS’s mandatory filing requirements for covered control transactions. These investors are referred to in the CFIUS regulations as “excepted investors” or “excepted real estate investors”. Importantly, CFIUS still has jurisdiction over transactions by such investors that could result in foreign control of a U.S. business.

The criteria for qualifying as an “excepted investor” or an “excepted real estate investor” are strict; therefore, careful assessment must be undertaken in order to determine whether an investor from one of the excepted countries qualifies for exemption. The test includes assessing, among other things: (1) the jurisdiction of the organisation and principal place of business of the investor and each of its parent entities; (2) the nationalities of the members and observers of the board of directors of the investor and each of its parent entities; (3) the nationalities of certain shareholders of the investor and each of its parent entities; and (4) whether the investor, its parent entities or its

subsidiaries have been convicted of certain crimes or committed certain violations.

2.6 Is there a local nexus requirement for an acquisition or investment? If so, what is the nature of such requirement (sales, existence of subsidiaries, assets, etc.)?

CFIUS has jurisdiction over certain transactions involving a “U.S. business” or involving certain real estate in the United States.

The term “**U.S. business**” is defined as any entity, irrespective of the nationality of the persons that control it, engaged in interstate commerce in the United States. The CFIUS regulations make clear that the term “entity” includes assets, whether or not organised as a separate legal entity, operated as a business undertaking in a particular location or for particular products or services. There is no minimum sales, personnel or asset threshold for an entity engaged in interstate commerce in the United States to be considered a “U.S. business” for CFIUS purposes, and even a very small footprint in the United States can suffice.

See the response to question 2.2 for a discussion of covered real estate transactions.

2.7 In cases where local presence is required to trigger the review, are indirect acquisitions of local subsidiaries and/or other assets also caught (e.g. where a parent company is acquired which has a local subsidiary in the jurisdiction)?

Yes. As described more fully in the response to question 2.2, CFIUS has jurisdiction over any covered control transaction. This includes, for example, a transaction in which a foreign person acquires control of a non-U.S. parent company that in turn controls a U.S. subsidiary or U.S. assets, so long as the subsidiary or assets constitute a “U.S. business” as described in the response to question 2.6.

3 Jurisdiction and Procedure

3.1 What conditions must be met for the law to apply? Are there any financial or market share-based thresholds?

There are no financial-based thresholds. See the response to question 2.2 for a discussion of the scope of CFIUS’s jurisdiction.

3.2 Do the relevant authorities have discretion to review transactions that do not meet the prescribed thresholds?

No. CFIUS only has the authority to review transactions within its jurisdiction. See the response to question 2.2 for a discussion of the scope of CFIUS’s jurisdiction.

3.3 Is there a mandatory notification requirement? Is it possible to make a notification voluntarily? Are there specific notification forms? Are there any filing fees?

Two categories of transactions – both involving TID U.S. businesses – must be filed with CFIUS at least 30 days before the completion date of the transaction. The “**completion date**” of a transaction is a concept defined in the CFIUS regulations

that frequently aligns with the closing date of the transaction, but may be a different date under certain scenarios. (See the response to question 2.1 for a discussion of the completion date in multi-stage transactions.)

The first category is certain transactions in which the target is a TID U.S. business and a foreign government holds a voting interest, direct or indirect, of 49 per cent or more in the foreign investor. Interests held by the national and subnational governments of a single foreign state will be aggregated and, for purposes of determining the percentage of interest held indirectly by one entity in another entity, any interest of 50 per cent or greater will be deemed to be a 100 per cent interest.

The second category is certain transactions in which the target is a U.S. business that produces, designs, tests, manufactures, fabricates or develops one or more critical technology(ies), and a licence or other regulatory authorisation from the U.S. Government would be required for the export, re-export, transfer (in-country) or retransfer of such critical technology to the foreign investor or certain other persons that own or control the foreign investor.

If a transaction triggers a mandatory CFIUS filing, the parties may elect to submit either a long-form notice or a short-form declaration (see the response to question 3.9 for a discussion of the filing options). Failure to timely submit a mandatory filing when required could result in civil monetary penalties of up to US\$250,000 or the value of the transaction, whichever is greater.

Excepted investors are exempt from the mandatory filing requirements. See the response to question 2.5 for a discussion of excepted investors.

Filing fees are required for notices but are not required for declarations. The filing fee for notices is based on the value of the transaction and ranges from US\$0 (for transactions valued under US\$500,000) to US\$300,000 (for transactions valued at US\$750 million or more).

3.4 Is there a ‘standstill’ provision, prohibiting implementation pending clearance by the authorities? What are the sanctions for breach of the standstill provision? Has this provision been enforced to date?

See the response to question 3.3 for a discussion of timing considerations for transactions subject to a mandatory filing requirement.

For transactions that do not trigger a mandatory filing and are voluntarily notified to CFIUS, there is no general prohibition preventing the parties from closing the transaction during CFIUS review. In practice, however, it is relatively uncommon for parties to close a transaction while the transaction is undergoing CFIUS review, and CFIUS generally prefers that parties do not close a transaction under review until CFIUS completes its work. CFIUS also has the authority to formally order the parties not to close a transaction pending CFIUS approval, although CFIUS exercises this authority relatively infrequently.

3.5 In the case of transactions, who is responsible for obtaining the necessary approval?

When transaction parties agree to submit their transaction for CFIUS review (whether the filing is mandatory or voluntary), it is typical for the foreign investor and the U.S. business to jointly prepare and submit the filing. Although it is possible for one party to unilaterally submit a CFIUS filing, this is relatively uncommon and generally occurs in specific scenarios, such as a hostile takeover. If a transaction triggers a mandatory CFIUS filing, the filing requirement applies to all parties to the transaction.

3.6 Can the parties to the transaction engage in advance consultations with the authorities and ask for formal or informal guidance (e.g. whether a mandatory notification is required, or whether the authority would object to the transaction)?

Transaction parties are encouraged to submit a draft notice and to engage with CFIUS in advance of filing a formal notice. The purpose of these pre-notice consultations is to aid CFIUS's understanding of the transaction and to provide CFIUS with an opportunity to ask questions regarding the transaction or request additional information to be included in the formal notice. CFIUS does not provide advisory opinions or informal guidance on whether a transaction is subject to CFIUS's jurisdiction, whether a transaction is subject to a mandatory filing requirement or whether a transaction may raise national security concerns.

CFIUS will not accept or review draft declarations.

3.7 What type of information do parties to a transaction have to provide as part of their notification?

See the response to question 3.9 for a discussion of the two methods of notifying a transaction to CFIUS, including the information the transaction parties must provide as part of their notification.

3.8 What are the risks of not notifying? Are there any sanctions for not notifying (fines, criminal liability, invalidity or unwinding of the transaction, etc.) and what is the current practice of the authorities?

See the response to question 3.3 for a discussion of potential penalties associated with failing to timely submit a mandatory filing. See the response to question 3.9 for a discussion of the risks of not submitting a voluntary filing.

3.9 Is there a filing deadline, and what is the timeframe of review in order to obtain approval? Is there a two-stage investigation process for clearance? On what basis will the authorities open a second-stage investigation?

There is no filing deadline for transactions that do not trigger a mandatory filing. See the response to question 3.3 for a discussion of mandatory filings.

The timeframe for CFIUS's review of a transaction depends on which of the two filing methods the parties select: (1) the short-form filing, known as a **"declaration"**; or (2) the long-form filing, known as a **"notice"**.

Declarations require basic information regarding the parties and the transaction and are generally not intended to exceed five pages in length. CFIUS must provide the parties with a response within 30 days of accepting a declaration. The response may be approval of the transaction, or it may be a response that does not provide the parties with a definitive answer, such as requesting a long-form notice with respect to the transaction or informing the parties that CFIUS is not able to approve the transaction based on the declaration, but is not requesting a long-form notice (sometimes referred to as a **"no action"** response).

Notices require a great deal of information regarding both the foreign investor and the U.S. business, including personal information of directors and officers of the foreign investor. As discussed in the response to question 3.6, parties are encouraged

to submit a draft notice to CFIUS prior to filing formally and it is customary to do so. CFIUS reviews the draft notice and generally provides the parties with comments within 10 business days. After the parties have addressed CFIUS's comments and re-submitted a final notice, CFIUS can take up to 10 business days to formally accept the notice. Once CFIUS accepts a notice, it initiates a 45-day review period. At the conclusion of this review period, CFIUS may initiate a 45-day investigation period at its discretion. Investigations can be initiated for a number of reasons, including because CFIUS has identified a national security concern arising from the transaction or because it simply needs additional time to complete its work.

At the conclusion of the investigation period, CFIUS must either approve the transaction (with or without mitigation) or refer the transaction to the President of the United States for a decision. In extraordinary circumstances, CFIUS may extend the investigation period by an additional 15 days.

At any time during a review or investigation, the parties may seek CFIUS's permission to withdraw and re-file their notice in order to extend the CFIUS process. This happens most frequently towards the end of an investigation to allow the parties additional time to negotiate a mitigation agreement.

If CFIUS approves a transaction, it will not review the transaction again in the future absent extraordinary circumstances (e.g., a party submitted false or misleading information to CFIUS in connection with the initial review). For this reason, parties are said to receive **"safe harbour"** for their transaction upon obtaining CFIUS approval.

If a transaction within CFIUS's jurisdiction does not trigger a mandatory filing and the parties elect not to submit the transaction to CFIUS voluntarily, CFIUS retains the authority to review the transaction at any time. If CFIUS reviews a transaction post-closing and identifies a national security concern arising from the transaction, it can negotiate or impose mitigation measures or recommend to the President of the United States that the President order divestiture. As a result, the benefit of obtaining safe harbour is increased certainty that CFIUS will not intervene in the future.

3.10 Can expedition of review be requested and on what basis? How often has expedition been granted?

There is no formal mechanism for parties to request expedited review. Parties can indicate to CFIUS their desired closing timeline and any transaction-specific timing considerations, but CFIUS is under no obligation to complete its work prior to the deadlines discussed in the response to question 3.9.

3.11 Can third parties be involved in the review process? If so, what are the requirements, and do they have any particular rights during the procedure?

In keeping with the confidentiality limitations described in the response to question 3.12, third parties generally are not involved in the CFIUS review process.

That said, CFIUS maintains a telephone number and an email address through which third parties can provide information to CFIUS, including information regarding a potential foreign investment that may implicate U.S. national security or information regarding a possible breach of a CFIUS mitigation agreement. Third parties providing information to CFIUS in this manner are not guaranteed a response and CFIUS assumes no obligation to take action on the basis of the information provided.

3.12 What publicity is given to the process and how is commercial information, including business secrets, protected from disclosure?

Under the DPA and the CFIUS regulations, CFIUS is generally prohibited from making public any information or documentary material filed with CFIUS. This general rule does not prohibit CFIUS from disclosing: (1) information relevant to any administrative or judicial action or proceeding; (2) information to the U.S. Congress (including duly authorised committees and subcommittees thereof); (3) in certain limited circumstances, information to other U.S. (e.g., state-level) or non-U.S. (e.g., foreign ally and partner) governmental entities; and (4) information that the parties have consented to be disclosed to third parties. Further, if the parties to a transaction make public any information or documentary material regarding the transaction, CFIUS may subsequently reflect such information or material in CFIUS's public statements.

Any unauthorised disclosure of information or documentary material filed with CFIUS is punishable as a criminal offence and, in general, the U.S. Government is careful to comply with confidentiality obligations pertaining to information filed with CFIUS.

3.13 Are there any other administrative approvals required (cross-sector or sector-specific) for foreign investments?

Depending on the sector or assets, in addition to CFIUS, a foreign investment transaction may be subject to sector-specific reviews, approvals, notifications or restrictions at the U.S. federal and/or state levels. Although a comprehensive description of such industry or sector-specific approvals is beyond the scope of this chapter, several examples are provided below for illustrative purposes.

First, foreign investments in U.S. businesses that participate in the defence industry and perform on U.S. Government contracts that require access to classified information, technology or data may require engagement with or approvals from the Defense Counterintelligence and Security Agency (“**DCSA**”), a component of the U.S. Department of Defense.

Second, foreign investments in U.S. businesses that participate in the telecommunications sector may require a licence or other authorisation from the Federal Communications Commission (the “**FCC**”), which may refer a transaction to the Committee for the Assessment of Foreign Participation in the United States Telecommunications Services Sector, commonly referred to as “**Team Telecom**”, for a national security review.

Other industries in which foreign investment in the United States may trigger separate reviews, approvals, notifications or restrictions include the shipping, aviation and nuclear industries, among others. In addition, there has been a recent trend of U.S. states considering, and in some cases enacting, laws regulating foreign acquisitions of real estate at the state level.

4 Substantive Assessment

4.1 Which authorities are responsible for conducting the review?

CFIUS is chaired by the Secretary of the U.S. Department of the Treasury, and the Committee includes the heads of the following departments and offices of the Executive Branch:

- Department of Justice;
- Department of Homeland Security;
- Department of Commerce;
- Department of Defense;
- Department of State;
- Department of Energy;
- Office of the U.S. Trade Representative;
- Office of Science & Technology Policy;
- Office of the Director of National Intelligence (non-voting, *ex officio*); and
- Department of Labor (non-voting, *ex officio*).

The following White House offices also observe and, as appropriate, participate in the CFIUS process:

- Office of Management and Budget;
- Council of Economic Advisors;
- National Security Council;
- National Economic Council; and
- Homeland Security Council.

The heads of other Executive Branch departments and offices also participate in the CFIUS process on a case-by-case basis as appropriate.

4.2 What is the applicable test and what is the burden of proof and who bears it?

In order to conclude all action under the DPA with respect to a transaction (i.e., approve the transaction), CFIUS must determine that there are no unresolved national security concerns with the transaction. Senior officials of CFIUS member agencies must certify this determination to certain specified members and committees of the U.S. Congress.

If CFIUS determines that a transaction under its review is a “**foreign government-controlled transaction**” (i.e., a covered control transaction that could result in the control of a U.S. business by a foreign government or an entity controlled by or acting on behalf of a foreign government), and CFIUS wishes to approve the transaction during the initial 45-day review period (i.e., without undertaking the subsequent 45-day investigation), CFIUS must determine that the transaction will not impair the national security of the United States. This “will not impair” standard is generally considered a higher standard than the “no unresolved national security concerns” standard.

4.3 What are the main evaluation criteria and are there any guidelines available? Do the authorities publish decisions of approval or prohibition?

CFIUS reviews transactions to determine the effect of such transactions on the national security of the United States. It does so by assessing whether a risk to U.S. national security arises from the transaction under review. Pursuant to the DPA, CFIUS assesses risk as a function of the threat, vulnerabilities and consequences to national security related to the transaction.

More specifically, under the CFIUS regulations, the “**threat**” is a function of the intent and capability of a foreign person to take action to impair the national security of the United States; the “**vulnerabilities**” are the extent to which the nature of the U.S. business presents susceptibility to impairment of national security; and the “**consequences**” to national security are the potential effects on national security that could reasonably result from the exploitation of the vulnerabilities by the threat actor.

See the response to question 4.2 for further discussion of evaluation criteria and the response to question 1.2 for a discussion of guidance.

Except for transactions prohibited by the President of the United States following the recommendation of CFIUS (which are announced publicly), the results of specific CFIUS reviews are not published. CFIUS does, however, publish an annual report that contains various anonymous statistics pertaining to the transactions it has reviewed, including countries of origin and industries. See the response to question 3.12 for a discussion of CFIUS confidentiality.

4.4 In their assessment, do the authorities also take into account activities of foreign (non-local) subsidiaries in their jurisdiction?

Yes. When assessing the effect of a transaction on the national security of the United States, CFIUS takes into account the activities of both the U.S. business and its affiliates, as well as the foreign investor and its affiliates, in each case including non-U.S. subsidiaries.

4.5 How much discretion and what powers do the authorities have to approve or reject transactions on national security and public order grounds? Can the authorities impose conditions on approval?

CFIUS itself cannot permanently suspend or prohibit a transaction. Such authority rests solely with the President of the United States, who has the authority, under the DPA, to take such action for such time as the President considers appropriate to suspend or prohibit any transaction within CFIUS's jurisdiction that threatens to impair the national security of the United States.

CFIUS does, however, have the authority to mitigate national security concerns that arise from a transaction under its review. For the most part, CFIUS addresses such concerns by negotiating and entering into contracts with transaction parties. These contracts, which are formally titled National Security Agreements and often colloquially referred to as mitigation agreements, are binding written agreements between the U.S. Government (represented by one or more CFIUS member agencies) on the one hand, and one or more of the transaction parties on the other hand. CFIUS has broad discretion as to what terms it includes in a mitigation agreement to mitigate the identified risk(s) arising from the transaction. Examples of mitigation measures include, among others:

- prohibiting or limiting the transfer or sharing of certain intellectual property, trade secrets or technical information;
- establishing guidelines and terms for handling existing or future contracts with the U.S. Government or its contractors, U.S. Government customer information and other sensitive information;
- ensuring that only authorised persons have access to certain technology, systems, facilities or sensitive information;
- ensuring that certain facilities, equipment and operations are located only in the United States;
- requiring prior notification to and non-objection by the U.S. Government regarding changes to data storage locations;
- restricting recruitment and hiring of certain personnel;
- security protocols to ensure the integrity of products or software sold to the U.S. Government;
- notifying customers or relevant U.S. Government parties when there is a change of ownership in the U.S. business;
- assurances of continuity of supply to the U.S. Government for defined periods, notification and consultation prior to taking certain business decisions and reservation of

certain rights for the U.S. Government in the event that the company decides to exit a business line;

- exclusion of certain sensitive U.S. assets from the transaction;
- ensuring that only authorised vendors supply certain products or services; and
- establishing a corporate security committee, voting trust and other mechanisms to limit foreign influence and ensure compliance, including the appointment of a U.S. Government-approved security officer and/or member of the board of directors and requirements for security policies, annual reports and independent audits.

In addition to its authority to negotiate and enter into mitigation agreements with transaction parties, CFIUS has the authority to unilaterally impose conditions on a transaction pursuant to a CFIUS order. In general, CFIUS exercises this unilateral authority less frequently than it does its authority to enter into consensual mitigation agreements.

4.6 Is it possible to address the authorities' objections to a transaction by the parties providing remedies, such as by way of a mitigation agreement, other undertakings or arrangements? Are such settlement arrangements made public?

See the response to question 4.5 for a discussion of mitigation agreements. CFIUS does not make public the mitigation agreements that it enters into.

4.7 Can a decision be challenged or appealed, including by third parties? On what basis can it be challenged? Is the relevant procedure administrative or judicial in character?

There is no appeal mechanism within the CFIUS process regarding CFIUS's ultimate assessment as to the effect of a transaction on U.S. national security. Further, actions taken by the President of the United States to suspend or prohibit a transaction that threatens to impair the U.S. national security are not subject to judicial review. Legal challenges relating to the CFIUS process are rare and, pursuant to the DPA, may be brought only in the U.S. Court of Appeals for the District of Columbia Circuit.

If CFIUS imposes penalties on a person for, among other things, failure to timely file a mandatory filing, non-compliance with a CFIUS mitigation agreement or making a material misstatement, omission or false certification to CFIUS, the penalised person may, within 15 business days of receipt of the notice of a penalty, submit to CFIUS a petition for reconsideration. Additional information regarding the penalty process can be found in the CFIUS regulations and in the Enforcement Guidelines.

4.8 Are there any other relevant considerations? What is the recent enforcement practice of the authorities and have there been any significant cases? Are there any notable trends emerging in the enforcement of the FDI screening regime?

In August 2023, CFIUS released the public version of its annual report to the U.S. Congress covering calendar year 2022. The report indicated that, as compared to 2021, CFIUS requested more long-form filings from parties that initially submitted short-form filings; more notices required a second 45-day

investigation; and more notices had to be withdrawn and re-filed prior to receiving CFIUS approval. Further, the percentage of transactions requiring mitigation increased significantly.

These statistics largely confirmed what market participants and CFIUS practitioners have experienced in recent years. Namely, although the vast majority of transactions notified to CFIUS are still being approved (most without requiring

mitigation), the CFIUS process has generally become more rigorous and more time-consuming in an era of renewed great power competition. In this environment, transaction parties are increasingly recognising the critical importance of assessing, and appropriately addressing, CFIUS risk as part of their deal planning.



Benjamin G. Joseloff, a former White House and U.S. Treasury Department official, focuses his practice on advising U.S. and international clients on the regulatory aspects of cross-border mergers, acquisitions, dispositions, investments and other business transactions. Mr. Joseloff is known in particular for his expertise on matters relating to the Committee on Foreign Investment in the United States (CFIUS). Mr. Joseloff served in the U.S. Government for five years, holding senior legal and policy roles relating to national security and foreign investment. From 2017 to 2018, Mr. Joseloff served as Director for International Trade and Investment at the National Security Council (NSC) and the National Economic Council (NEC), where he coordinated White House efforts relating to the Foreign Investment Risk Review Modernization Act of 2018 (FIRRMA), the most substantial update and expansion of CFIUS in 30 years. Most recently, Mr. Joseloff served as Senior Counsel and CFIUS Lead Counsel at the U.S. Department of the Treasury, where he led a team of attorneys that provided legal advice in connection with the Treasury Secretary's role as Chairperson of CFIUS.

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