

Impact of FIRREA on Private Equity Funds: Expanded CFIUS Review of Foreign Investments, Filing Requirements

Structuring Investments to Minimize CFIUS Risk

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I. Overview of CFIUS and Recent Trends

What is CFIUS?

The Committee on Foreign Ivestment in the United States

- CFIUS is an inter-agency panel authorized to conduct national security reviews of foreign investments in U.S. businesses.
- CFIUS was established by E.O. 11858 (1975) and has been expanded by three major statutes: the Exon-Florio Amendment (1988), the Foreign Investment and National Security Act (FINSA) (2007), and the Foreign Investment Risk Review Modernization Act (FIRRMA) (2018).
- CFIUS is governed by implementing regulations and executive orders (including recent FIRRMA final regulations).



CFIUS Composition

The Committee consists of:

- 9 Executive Branch departments/offices
- 5 observing members
- Others can be added for specific reviews (e.g., the U.S. Department of Agriculture (“USDA”), the U.S. Department of Health and Human Services (“HHS”), the U.S. Department of Transportation (“DOT”))



Permanent Members			Observers/Ad hoc	
Dep’t of Treasury (chair)	Dep’t of Defense	Dep’t of Homeland Security	Office of Management & Budget	National Economic Council
Dep’t of Justice	Dep’t of State	Dep’t of Energy	Council of Economic Advisors	Homeland Security Council
Dep’t of Commerce	Office of the U.S. Trade Representative	Office of Science and Technology Policy	National Security Council	

National Security Assessment

The foreign person presents a **threat**.

- The buyer is from a country of concern
- The buyer has close commercial ties to a country of concern
- The buyer is controlled by or has connections to a foreign government
- The buyer has a history of noncompliance with U.S. laws and regulations

The U.S. business exposes a **vulnerability**.

- The U.S. business serves government customers, directly or indirectly
- The U.S. business deals in export-controlled goods or technologies
- The U.S. business may constitute “critical infrastructure” or serve “critical infrastructure” customers
- The U.S. business collects personal information of U.S. citizens
- U.S. real estate in sensitive locations.

CFIUS assesses the potential national security consequences of the interaction of the identified threat and vulnerability.

CFIUS Authority/Review Outcomes

- CFIUS has authority to **initiate reviews** of transactions and can **impose penalties for failure to make a mandatory filing**.
- Through the review process, CFIUS can **clear a transaction, clear it with conditions/mitigation, or recommend to the President that it be blocked** (or state that there is no consensus to clear the transaction) or that a **divestiture order** be issued for completed transactions.
 - Decisions to clear a transaction must be unanimous among the members
 - Transactions that are not cleared are typically withdrawn; recommendations to block/divest are rare and the President has never overruled one
 - CFIUS can also issue interim orders suspending a transaction pending review
 - Conditions, or “mitigation agreements,” are increasingly common (and CFIUS can impose penalties for violations)
- CFIUS provides limited information as to the reasoning behind its decision and does not publish its rationale.
- By statute, there is no judicial review of the determination of whether a covered transaction presents a national security threat.
 - However, CFIUS is open to a jurisdictional challenge.

CFIUS Mitigation

- Mitigation measures are intended to protect against national security concerns identified by CFIUS in connection with its review.
- Measures must, from CFIUS's perspective, be effective, enforceable, and monitorable.
- Measures can vary in scope based on underlying national security concerns.
- Examples:
 - Prohibiting or limiting the transfer or sharing of IP, trade secrets, or know-how
 - Establishing guidelines and terms for handing existing or future U.S. government contracts and associated information
 - Ensuring that only authorized persons have access to certain technology or sensitive information
 - Assurances regarding continuity of supply for certain periods with notification requirements for any changes
 - Establishing a Corporate Security Committee and other mechanisms to ensure compliance with all required actions, including the appointment of an approved security officer and/or director and requirements for security policies, annual reports, and independent audits
 - Excluding certain sensitive assets from a transaction or operating the acquired business under a "proxy company" reporting to a board composed entirely of independent directors
- Parties often only have a few days or a week to negotiate mitigation. Key issue is understanding the underlying concerns (to the extent CFIUS will share that information).

CFIUS Penalties

- CFIUS has the authority to impose civil monetary penalties on any party that:
 - fails to comply with any mandatory notification provision (penalty up to \$250,000 or the value of the transaction, whichever is greater)
 - violates a material mitigation agreement provision entered into after October 2018 or intentionally (or through gross negligence) violates a material mitigation agreement provision entered into before October 2018 (penalty up to \$250,000 or the value of the transaction, whichever is greater, based on the nature of the violation)
 - submits a declaration or full notice with a material misstatement or omission or makes a false certification (penalty up to \$250,000 per violation)
- CFIUS can also include provisions for liquidated or actual damages in mitigation agreements
- Failure to comply with mitigation agreements can also re-open CFIUS review or lead to imposition of additional conditions
- CFIUS has used these penalty provisions
 - In 2018, CFIUS imposed the first civil monetary penalty of \$1 million for breach of a mitigation agreement which was executed in 2016
 - In 2019, CFIUS imposed a civil monetary penalty of \$750,000 for violations of a 2018 CFIUS interim order “including failure to restrict and adequately monitor access to protected data”
 - Other penalties may have occurred but are not yet public

Recent CFIUS Trends

Steadily increasing workload

- 2019: 231 reviews + 94 short form declarations
- 2018: 229 reviews
- 2017: 237 reviews
- 2016: 172 reviews

Attention to “non-notified” transactions

- Following FIRRMA, CFIUS has established an office and allocated resources to identify and bring in transactions that have not been submitted for review.

More approvals following the first 45 day review period

- Number of transactions subjected to the additional 45-day investigation period has decreased, in part due to increased staffing and resources

Fewer “withdrawals and re-filings”

- This restarts the statutory clock, providing CFIUS with additional time to review the transaction
- CFIUS may choose to start the new filing period in the “investigation” phase

China remains a focus, but numbers of Chinese transactions are falling rapidly

- China was the most-reviewed country from 2013-2018, usually by some distance, but dropped to second behind Japan in 2019 and Chinese transactions are by no means the only focus
- The next five most-reviewed countries in recent years were Canada, France, Germany, Japan, and the United Kingdom

Notable CFIUS Reviews: TikTok

TikTok (Nov. 2019): In Nov. 2017, ByteDance (China), parent of TikTok (a social video app), acquired Musical.ly, including its U.S. operations, which it then merged with TikTok.

- In Nov. 2019, CFIUS opened an investigation due to TikTok's collection of U.S. user data, including location data and browsing and search histories, which China could use to track the locations of Federal employees / contractors, build dossiers of personal information for blackmail, and conduct corporate espionage.
- CFIUS eventually recommended divestiture. In Aug. 2020, President Trump ordered ByteDance to divest itself of the U.S. business of Musical.ly by Nov. 12, 2020.
- ByteDance filed a petition in DC Circuit challenging CFIUS jurisdiction and on due process etc.
- Extensions have expired and deadline has passed but no deal appears to have been reached.



Notable CFIUS Reviews: Non-U.S. JVs

Ekso Bionics (May 2020): CFIUS ordered Ekso Bionics, Inc., a U.S. manufacturer of robotic exoskeletons for medical and industrial use, to terminate its role in a 2019 joint venture with two Chinese partners (the China JV). As part of its contribution to the China JV, Ekso licensed certain patented technologies and non-patented manufacturing technologies to the China JV and agreed to enter into short-term contracts with the China JV to provide technical and support services to assist the China JV in becoming proficient in use of the licensed intellectual property to manufacture the exoskeleton product.

- This case is significant because it demonstrates CFIUS's willingness to assert jurisdiction over a transaction involving an overseas joint venture.
- U.S. companies engaged in manufacturing and R&D joint ventures outside the United States should consider what it is contributing to the joint venture and be aware that CFIUS may assert jurisdiction over that transaction even if the joint venture is limited to operations outside the United States and limited/no tangible assets within the United States are transferred.



Notable CFIUS Reviews: Data Concerns

- **Cofense** (*Mar. 2018*): In Feb. 2018, Pamplona Capital Management LLP, a privately owned investment fund, purchased a stake in Cofense, a cybersecurity firm serving major U.S. corporations. CFIUS initiated a review after reports published that Pamplona's funds were partly backed by a Russian billionaire. Pamplona eventually sold its stake to Blackrock, which CFIUS approved in Aug. 2019.
- **Grindr** (*Mar. 2019*): In 2016, Beijing Kunlun Tech Co Ltd (China) acquired Grindr LLC (U.S.), a dating app. CFIUS intervened in the deal after the acquisition was completed. Kunlun eventually sold Grindr to San Vicente Acquisition LLC, an investment group, which CFIUS approved in May 2020.
- **Patientslikeme** (*Apr. 2019*): CFIUS requires iCarbonX (China) to divest PatientslikeMe (U.S.), an online service that helps patients find people with similar health conditions. CFIUS intervened after the initial investment was completed in 2017.
- **StayNTouch** (*Mar. 2020*): President Trump orders Beijing Shiji Information Technology (China) to divest its acquisition of StayNTouch, a U.S. cloud-based hotel management software, reportedly over data collection concerns.



II. CFIUS Jurisdiction, Filings, and Review Process

Covered Transactions: Control

CFIUS has jurisdiction over “covered transactions.” Most transactions CFIUS reviews are “**Covered Control Transactions**,” which include any “transaction” by or with any “foreign person” which could result in “control” of a “U.S. business” by a foreign person.

FOREIGN PERSON

- Any foreign national, entity, or government, or any entity over which a foreign national, entity, or government has “control”
- Generally, any entity organized under foreign laws is a foreign person if its principal place of business is outside of the United States or its equity securities are primarily traded on a foreign exchange

CONTROL

- The power to determine, direct, or decide important matters affecting an entity, including the power to block a decision
 - More like “significant influence” than formal control (e.g., 15% plus a director)
 - Ownership percentage, contractual rights, and commercial ties are all considered
 - CFIUS interprets “control” broadly

U.S. BUSINESS

- Any entity engaged in interstate commerce in the United States
- Includes asset sales if assets in the United States can be operated as a business
- Does not include licenses or sales into the United States without a physical presence

Covered Transactions: TID U.S. Businesses and Real Estate

CFIUS has somewhat expanded jurisdiction over “TID U.S. Businesses” (which may result in “**covered investments**” even when the acquiror has no or few governance rights) and “**covered real estate**” transactions, though these are exceptions rather than the rule.

TID U.S. BUSINESS

These are Technology, Infrastructure, or Data U.S. businesses that:

- produce, design, test, manufacture, fabricate, or develop a **critical technology** (essentially, most export-controlled technologies)
- engage in one of a detailed list of specified activities relating to U.S. **critical infrastructure**
- maintain or collect **sensitive personal** data of specific types and volumes on U.S. citizens

CFIUS has **expanded jurisdiction** over investments in TID U.S. businesses

- Even if the investor does not have sufficient formal governance rights to trigger the very loose definition of “control,” contractual or de facto rights to information, board observer rights, or consultation on business decisions may trigger jurisdiction.

May also trigger **mandatory notification**

COVERED REAL ESTATE

CFIUS has jurisdiction over acquisitions of real estate, including leased real estate, that is within a **specified radius of named sensitive facilities**, with a complex series of exceptions for property in built-up urban areas and certain office leases in multitenant buildings.

Many transactions will technically trigger these rules, but few will actually be reviewed.

SIGNIFICANCE

Aside from the jurisdictional and mandatory notification rules, these categories indicate areas of **particular CFIUS interest**.

They are **not exclusive**; CFIUS routinely reviews and imposes mitigation on businesses that do not fall into these categories.

Critical Technology

Critical Technologies are items that are:

Included on the United States Munitions List (USML) set forth in the International Traffic in Arms Regulations (ITAR);

Identified on the Commerce Control List (CCL) set forth in the Export Administration Regulations (EAR) and controlled pursuant to multilateral regimes or for reasons relating to regional stability or surreptitious listening;

Subject to certain nuclear controls;

Select agents and toxins;

Emerging and foundational technologies controlled under the Export Control Reform Act.

Critical Infrastructure

- **Critical Infrastructure** means systems and assets, whether physical or virtual, so vital to the United States that the incapacity or destruction of such systems or assets would have a debilitating effect on national security.
- Appendix A to Part 800 identifies the **specific types of infrastructure** and the **specific functions** that a company would need to perform in connection with that infrastructure to be relevant for non-controlling investment transactions.

Own or operate certain internet protocol networks and exchange points	Own or operate satellites and satellite systems providing services directly to the Department of Defense (“DOD”)	Own or operate any facility that provides electric power generation, transmission, distribution, or storage directly to or located on any military installation	Own or operate technology service providers in the Significant Service Provider Program of the Federal Financial Institutions Examination Council that provide core processing services
Own or operate certain telecommunication and information services and fiber optic cable	Manufacture certain industrial resources for (i) use or operation for a Major Defense Acquisition Program, (ii) DX rated under the Defense Priorities and Allocations System regulation, or (iii) funded by certain DOD programs	Own or operate certain oil and gas systems, including refineries that meet certain size thresholds, certain liquefied natural gas (“LNG”) import or export terminals, and certain natural gas underground storage facilities or LNG peak-shaving facilities	Own or operate rail lines and associated connector lines designated as part of the Department of Defense’s Strategic Rail Corridor Network
Own or operate certain submarine cable systems and associated infrastructure	Manufacture or service certain industrial control systems	Own or operate certain interstate oil and gas pipelines and industrial control systems utilized by such pipelines	Own or operate certain public water systems and industrial control systems utilized by such water systems
Manufacture or service certain industrial control systems	Own or operate certain electric generating and/or storage facilities	Own or operate certain financial market utilities and exchanges	Own or operate certain airports and maritime ports

Sensitive Personal Data

Sensitive personal data means identifiable data (i.e., that can be used to distinguish or trace an individual's identity) (i) maintained by a U.S. business that targets or tailors products/services to certain U.S. government personnel or contractors or that maintains or collects such data on greater than one million individuals, and (ii) that fits into one of the following categories:

Financial data that could be used to analyze or determine an individual's financial distress or hardship	The set of data used by consumer reporting agencies to provide credit reports on individuals	The set of data used in an application for health insurance, long-term care insurance, professional liability insurance, mortgage insurance, or life insurance	Data relating to the physical, mental, or psychological health condition of an individual
Non-public electronic communications, including email, messaging, or chat communications, between or among users of a U.S. business's products or services if a primary purpose of such product or service is to facilitate third-party user communications	Geolocation data collected using positioning systems, cell phone towers, or WiFi access points such as via a mobile application, vehicle GPS, other onboard mapping tool, or wearable electronic device	Biometric enrollment data including without limitation facial, voice, retina/iris, and palm/fingerprint templates	Data stored and processed for generating a state or federal government identification card
Data concerning U.S. Government personnel security clearance status	The set of data in an application for a U.S. Government personnel security clearance or an application for employment in a position of public trust	Data pertaining to an individual's genetic test results	

Real Estate Transactions

CFIUS jurisdiction extends to “**greenfield**” projects involving the acquisition of interests in real property

- “Covered Real Estate” includes real estate that is:
 - Within an airport or maritime port, or
 - Located within:
 - “close proximity” (i.e., one mile) of specific military installations;
 - the “extended range” (i.e., 99 miles) of a more-sensitive subset of those military installations;
 - or certain specified areas, including counties surrounding highly sensitive Air Force bases that have intercontinental ballistic missile operations or offshore military ranges or operating locations;
 - Each of these military installations and categories are identified specifically in an appendix to Part 802
- CFIUS will have jurisdiction, i.e., a “Covered Real Estate Transaction” if the transaction involves real estate that falls into one of the above categories and affords foreign person at least three of the four following specific “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;
 4. to attach fixed or immovable structures or objects to the real estate.

CFIUS Review: Voluntary Notifications

- **Deciding whether to notify voluntarily is still the main question for most transactions**
 - Notification is still voluntary for most transactions
 - CFIUS notification does not suspend the transaction
 - Parties may close before a CFIUS review is complete (but typically do not, as it shifts risk to the investor)
- **CFIUS can also compel a review**
 - Any CFIUS member agency may initiate a review, and CFIUS actively monitors non-notified transactions
 - CFIUS has subpoena authority
 - Other regulatory agencies (FCC, DCSA (f.k.a. DSS), DDTC, etc.) may effectively require a CFIUS review
- **CFIUS may initiate a review post-closing**
 - If the parties do not file a notice and receive CFIUS clearance before closing, CFIUS retains the right to review the transaction in the future
 - CFIUS can order divestment or mitigation through post-closing review
 - CFIUS has devoted increased resources to finding covered transactions that were not reviewed and cleared
 - Recent examples show CFIUS is willing to reexamine transactions that closed years before
 - Although there is a presumption in the regulations that CFIUS will not review transactions more than three years after closing, the Secretary of the Treasury can waive the limitation
 - CFIUS has begun examining transactions potentially subject to mandatory filing requirements of which it was not notified and may begin enforcing the related penalties

CFIUS Review: Mandatory Notifications

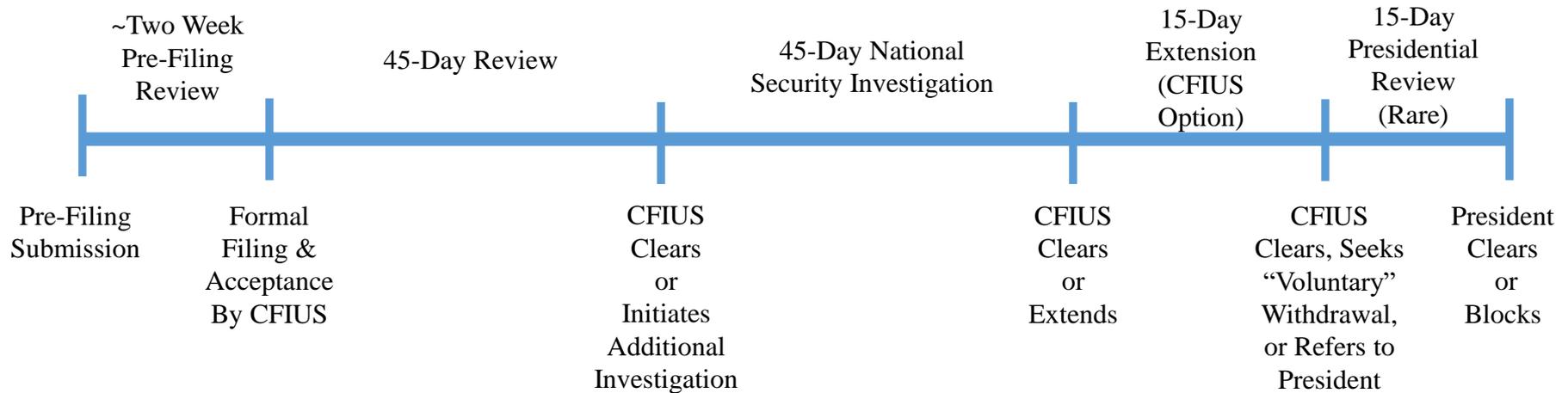
- Two categories of transactions trigger mandatory notification requirements
 - **Critical technologies**
 - Where the U.S. business **produces, designs, tests, manufactures, fabricates, or develops** one or more **critical technologies** (generally any item subject to U.S. export controls other than minimal controls) **and**
 - The critical technology would **require a license** if exported to the jurisdiction of the foreign investor or any of its direct or indirect 25% owners
 - **Irrelevant** whether the technology will actually be exported to the investor or, for that matter, to anyone (*e.g.*, proprietary manufacturing technologies that the business does not sell to third parties).
 - **Foreign government acquisitions of a substantial interest in a TID U.S. Business**
 - “**Substantial interest**” means an entity at least **49% owned by a foreign government** acquires at least **25% of a TID U.S. Business** (without analyzing export licensing for critical technology companies).
 - The interests of all state-owned entities from the same country are **aggregated**.
- Notification must be filed at least **30 days before closing** (but no requirement to await clearance).
- Two important exceptions:
 - **U.S.-controlled funds** are not considered foreign persons, regardless of investor ownership, if the investors are fully passive.
 - **Excepted investors** from “white-listed” jurisdictions (currently Australia, Canada, and the UK) are exempt from mandatory notification (but not CFIUS review generally), subject to stringent conditions limiting directors, shareholders, etc. from other jurisdictions.

CFIUS Review: Filing Fees

- CFIUS assesses tiered filing fees for notifications based on the value of the transaction
 - All full notification submissions trigger fees (voluntary, mandatory, or after CFIUS request)
 - No fees are required for short-form declarations
- Fees are due on filing and CFIUS will not accept a notice until paid
- Transaction value is generally the sum of all consideration of any kind paid by or on behalf of the foreign investor
 - For mergers and contributions of U.S. businesses to a joint venture, value is limited to the value of the U.S. business rather than the total transaction value
 - CFIUS has provided guidance on valuing non-cash consideration

Transaction Value	Filing Fee
Less than \$500,000	\$0
Between \$500,000 and \$5,000,000	\$750
Between \$5,000,000 and \$50,000,000	\$7,500
Between \$50,000,000 and \$250,000,000	\$75,000
Between \$250,000,000 and \$750,000,000	\$150,000
Greater than \$750,000,000	\$300,000

CFIUS Timeline: Full Notifications



- Official CFIUS review of a full notice starts when CFIUS “accepts” the filing, which CFIUS views as discretionary
- Timeline may be extended by requests for “voluntary” withdrawal and refiling, which restart the timetable at the beginning of the 45-day review period (can request to move directly into additional 45-day investigation period)
- CFIUS may issue interim orders or refer for a Presidential decision at any time
- Timeline may be restarted if there is a material change to the transaction or if any information request is not answered within three business days by the parties (unless an extension is granted)
- Realistic timeframe for a transaction with substantive issues is four to eight months, including drafting

Short-Form Declarations

- Parties can submit a short-form declaration instead of a full notification
 - Declarations are intended to be short-form submissions providing CFIUS with basic information regarding the nature of the transaction and the parties
 - In practice, declarations require submission of much of the same information as a full notice
- Declarations are subject to a 30-day assessment period
 - CFIUS is directed to “promptly” notify the parties if a declaration is accepted or rejected as incomplete
 - Rejected declarations restart the 30-day assessment period upon resubmission
- CFIUS may take any of the following actions after the 30-day assessment:
 - request a full written notice
 - inform the parties that its review cannot be completed based on the declaration alone and that the parties may file a full notification to seek clearance
 - initiate a unilateral review
 - notify the parties that it has concluded all action with respect to the transaction
- While potentially quicker, the declaration process is less likely to result in clearance
- Parties can consider using the declaration process to gauge CFIUS interest but risk an inconclusive result and potential loss of a month if clearance is desired

Advantages and Disadvantages of Voluntary Notification

• ADVANTAGES OF VOLUNTARY NOTIFICATION

- May reduce vulnerability to political criticism
- Eliminates the risk that the target, a rival bidder, or another interested party will seek to encourage CFIUS review at a late stage to delay the transaction
- Eliminates the risk of a post-closing review and imposition of remedial measures or divestiture

• DISADVANTAGES OF VOLUNTARY NOTIFICATION

- Cost and delay
- May draw attention to a transaction that would otherwise go unnoticed
- Notification imposes burdensome requirements to produce information
- May lead to pressure from U.S. agencies to alter the transaction

• **Voluntary CFIUS notification is an insurance policy**

- As with any insurance policy, the question is one of balancing the cost against risk
- Complicating the calculation here is that the decision not to file may increase the risk of adverse outcomes if a review is later commenced as CFIUS typically subjects non-notified transactions to greater scrutiny
- The risk calculation is increasingly complex given that expanded CFIUS jurisdiction implicates a wider range of transactions that do not carry the same level of CFIUS risk as an acquisition of control

Contents of a Full Notification

- CFIUS notifications are joint and are required to include:
 - Details about the transaction (including valuation) and foreign entities involved
 - Organizational chart showing all entities in foreign acquirer's ownership chain (and related shareholdings)
 - Details about the target's business, products, services, and market share and the acquirer's plans for the target
 - Description of any U.S. products produced, designed, tested, manufactured, or developed by the U.S. business, including any relevant export classifications and details on how the U.S. business reached those classifications
 - Details on the target's U.S. government contracts
 - Detailed "personal identifier information" for all board members, senior management, shareholders holding 5% or more of the acquirer, and its immediate, intermediate, and ultimate parents (including passport numbers and details on foreign military and government service)
 - A certification from an officer of each party that the information provided is correct to the best of his or her knowledge and a certification regarding the valuation of the transaction
- Parties should explain the business rationale (and can choose to make presentations to CFIUS)
- CFIUS can ask additional questions at any point after submission, and, once on the official CFIUS review clock, parties must respond within three business days or risk having the filing rejected
 - CFIUS consistently asks a few common questions (e.g., details of significant shareholders and the acquirer's business in sanctioned countries) and parties may prepare to answer before submission
 - Questions reflect individual concerns from CFIUS members and can range from additional information regarding governance to questions regarding the technical specifications of the U.S. business's products

III. CFIUS Considerations for Investment Funds

The “Investment Funds” Carveout

FIRRMA and the final February 2020 regulations provide that investments by foreign limited partners in funds that are accompanied by advisory board positions will not be subject to CFIUS’ jurisdiction as “*other investments*” in certain identified circumstances.

1. The fund is managed exclusively by a general partner, a managing member, or an equivalent;
2. The foreign person is not the general partner, managing member, or equivalent;
3. The advisory board or committee does not have the ability to approve, disapprove, or otherwise control: (i) Investment decisions of the investment fund; or (ii) Decisions made by the general partner, managing member, or equivalent related to entities in which the investment fund is invested;
4. The foreign person does not otherwise have the ability to control the investment fund, including without limitation the authority: (i) To approve, disapprove, or otherwise control investment decisions of the investment fund; (ii) To approve, disapprove, or otherwise control decisions made by the general partner, managing member, or equivalent related to entities in which the investment fund is invested; or (iii) To unilaterally dismiss, prevent the dismissal of, select, or determine the compensation of the general partner, managing member, or equivalent;
5. The foreign person does not have access to material nonpublic technical information (“MNPTI”) as a result of its participation on the advisory board or committee; and
6. The foreign person does not otherwise have access to MNPTI; board membership or observer rights (or the right to nominate a board member or observer); or involvement in substantive decision-making regarding certain matters relating to sensitive personal data, critical technologies, or critical infrastructure.

Note: Certain waivers are technically permitted (*e.g.*, conflicts of interest).

Important caveat: CFIUS has broad authority to find jurisdiction, and may still find that a limited partner has a “controlling” stake, or is non-controlling but “non-passive” such that a declaration could be required or advisable.

Is an Investment Fund “Foreign”?

- This question requires a holistic analysis – there is no *“one size fits all.”*
- In the September 2019 proposed regulations, Treasury declined to give specific guidance for U.S. general partners as to the specific factors that may make their funds “foreign-controlled.”

Who owns the general partner and investment manager?

Who are the fund’s limited partners?

How much capital, in the aggregate, comes from foreign persons?

Are any limited partners formally or informally affiliated with foreign governments?

What are the thresholds for termination of the general partner?

What rights (affirmative or negative) do limited partners have?

Do any foreign persons own part of the carry (even if passive) or the investment manager?

Do any foreign persons hold positions at the general partner or the investment manager?

Select Fundraising Considerations

What is the fund's anticipated investment universe?

What percentage of LP interests will be beneficially held by "foreign persons"?

How should CFIUS be addressed in investment documents (e.g., private placement memoranda)?

Are LPs associated with foreign governments?

Could any rights held by LPs be perceived as conferring influence or leverage over the fund's investment decisions?

What is the threshold for termination of the general partner ("GP")?

Can the general partner be terminated without cause?

Do any LPs have relationships with the GP independent of their investment in the fund that could give them leverage over the GP?

GP Stakes Deals

These transactions are becoming more common; however, there are many pitfalls.

CFIUS views even minority foreign ownership of the general partner or manager with skepticism.

Need to consider other potential disclosure obligations (*e.g.*, DCSA, FCC/Team Telecom, ITAR) and deal impacts

Very important to include CFIUS/foreign investment provisions in LPAs and other governing documents (*e.g.*, LLC agreements)

Key Questions for Private Equity – Fund Formation

Generally, the formation of a new fund where no underlying assets exist will not trigger CFIUS review.

However, there are still CFIUS considerations, particularly if the fund may be active in the United States and/or has a high-risk strategy (e.g., cybersecurity, infrastructure).

Consider documentary protections and disclosures (e.g., PPMs, certifications, LPA provisions, cooperation covenants, certifications)

Some general partners / limited partners may seek indemnification for CFIUS issues

Key Questions for Private Equity – Investment

Would the fund's composition make a CFIUS filing advisable, or trigger a mandatory notification?

Will a transaction involve co-investors? Syndication? If so, would additional capital come in before or after closing?

Has CFIUS previously reviewed a transaction involving the asset?

What are the sources of debt financing?

To what extent would a request to file disadvantage the sponsor vis-à-vis other potential bidders?

What other regulatory notifications will be required (*e.g.*, DSS)?

Key Questions for Private Equity – Disposition

What is the universe of potential buyers for an asset?

Which buyers may be subject to mandatory notifications?

Will the seller roll equity?

How should CFIUS risks be addressed / balanced in the purchase agreement?

What other regulatory notifications will be required (*e.g.*, DSS)?

Will the transaction require any public filings (*e.g.*, with the SEC or a foreign securities regulator)?

IV. Takeaways

Takeaways

- CFIUS remains skeptical of complex private equity and co-investment structures
- Consider CFIUS and other foreign investment / national security regimes early in the fund formation and design process
 - Treatment of these issues should be tailored to a fund's ownership and control profile – and risk tolerance
- “Market standard” provisions matter, but even these remain in flux
- Other relevant regulatory regimes (e.g., FCC) may overlap with CFIUS and require separate, concurrent filings

Thank You

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