



## CFIUS 102

# A Primer on the “New” Committee on Foreign Investment in the United States

1

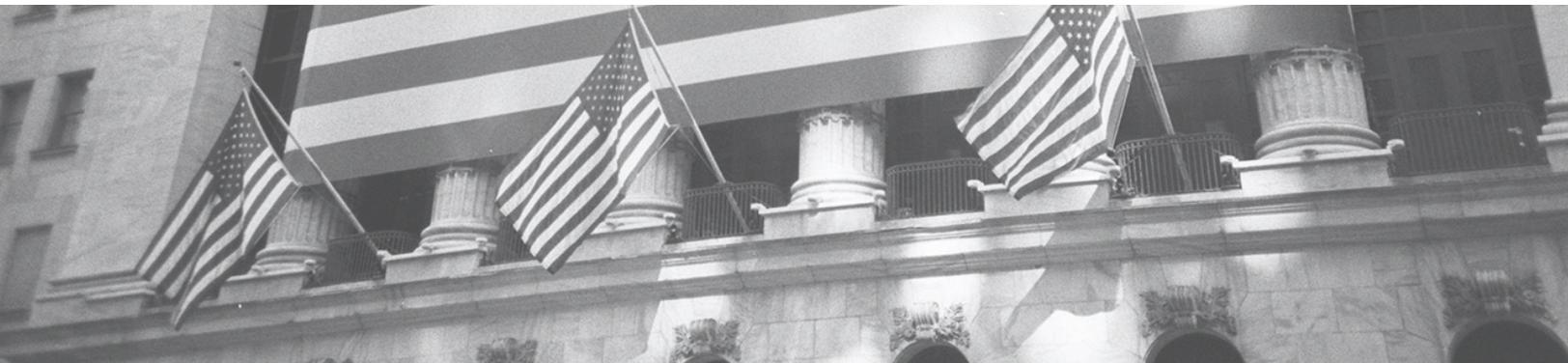
A number of high-profile legislative and executive actions in the past few years, from statutory and regulatory expansions to dramatic interventions by the President of the United States in private transactions, put a spotlight on the role of the Committee on Foreign Investment in the United States (“CFIUS”) in cross-border mergers and acquisitions. Indeed, in dealmaking circles CFIUS is called the “ultimate regulatory bazooka” in the United States.

Given the importance of CFIUS to cross-border investment and the significant changes that have taken place, this document provides transaction parties with a summary of the “new” CFIUS, its mission, and how its process unfolds.

### WHAT IS CFIUS?

CFIUS is a federal regulatory panel composed of the heads of various federal agencies, including the departments of Defense, State, Justice, Homeland Security, Energy and Commerce. It is chaired by the Secretary of the Treasury. CFIUS reviews investments by foreign persons into U.S. businesses to determine the impact of those investments on U.S. national security.

CFIUS can block pending investments, unwind completed transactions or place conditions on them to address particular national security concerns. For parties that do not obtain CFIUS approval to complete their transaction, this authority exists in perpetuity after closing. To eliminate this risk, parties proactively participate in a CFIUS review process. Clearance from CFIUS generally guarantees the parties that CFIUS cannot exercise its authorities after closing.



## CFIUS 102

# A Primer on the “New” Committee on Foreign Investment in the United States

2

### WHAT TRANSACTIONS DOES CFIUS REVIEW?

CFIUS is empowered to review acquisitions of “control” of U.S. businesses by foreign persons. The CFIUS standard for control is very low, however, and not subject to a bright-line rule. Generally speaking, any investment of 10% or greater in a target’s voting securities, in particular if they afford the investor any governance rights in the target, warrant careful examination to determine whether CFIUS jurisdiction may apply.

Under its expanded jurisdiction, the bar for CFIUS jurisdiction is even lower if the target is a “Technology, Infrastructure or Data” U.S. business (a “TID U.S. Business”). In the first instance, any of the following types of transactions can trigger CFIUS jurisdiction:

- Investments that provide the foreign investor membership on the board of directors
- Investments that provide the investor access to material nonpublic technical information in the possession of the U.S. business;
- Investments that provide the investor any other involvement in substantive decision-making

Additionally, any change in an existing foreign investor’s rights that provides the investor any of these abilities can trigger CFIUS jurisdiction.

Importantly, real estate transactions (including leases and other conveyances) where the real estate is located within proximity of certain government facilities can also trigger CFIUS jurisdiction.

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## CFIUS 102

# A Primer on the “New” Committee on Foreign Investment in the United States

3

### WHAT IS A “TID U.S. BUSINESS”?

The determination of whether a business qualifies as a “TID U.S. Business” typically requires careful analysis. As a general rule of thumb, if any of the following factors apply to the target, further diligence is warranted:

- Ownership of, operation within, or service to, the U.S. “critical infrastructure” (e.g., energy, financial, transportation, telecommunications and technology sectors, among many others);
- Access to personal data of U.S. persons, including credit information, protected health information or other sensitive data;
- Development (including design, testing or production) of technologies that require any export licenses from any federal authority (e.g., the Department of Commerce (the Export Administration Regulations), Department of State (the International Traffic in Arms Regulations), Department of Energy (nuclear licensing authorities), etc.).
  - This includes companies that produce “emerging” or “foundational” technologies, which are yet to be defined by the Department of Commerce.

Importantly, a business not meeting the exact definition of a TID U.S. Business is likely to still be of interest to CFIUS. These definitions are intended to articulate specific concerns at a high level, but not to rule out the potential for issues in companies that operate similarly to, but not formally as, a TID U.S. Business.



## CFIUS 102

# A Primer on the “New” Committee on Foreign Investment in the United States

4

### **WHAT OTHER COMPANIES DOES CFIUS COVER?**

CFIUS technically has jurisdiction over any investment by a foreign person into any U.S. business that meets the structural criteria outline above. For “control” acquisitions, jurisdiction attaches irrespective of the target’s bearing on U.S. national security; however, targets meeting any of the following criteria should pay careful attention to CFIUS issues when considering investment from abroad:

- Any TID U.S. Business
- Businesses adjacent to TID U.S. Businesses that may not be fully captured by the relevant definitions
- Any provider of services or goods, directly or indirectly, to the U.S. government
- Any business that has taken grants or loans from the U.S. government or academic institutions
- Any developer or distributor of technology that can be widely available in the enterprise or personal markets (e.g., operational software for businesses, consumer or enterprise cybersecurity software, social media software applications, etc.)
- Any business with a substantial user base, in particular if users register their products or otherwise establish accounts with the business
- Any business that develops, distributes or uses technology or projects of strategic importance to the U.S. national security
- Any business that develops technology that requires substantial R&D spending

These factors indicate that CFIUS is an issue to consider in a transaction, but transaction-specific factors always must be considered as well. Additionally, the identity of the buyer can impact the need to file, including by triggering mandatory filing requirements.



## CFIUS 102

# A Primer on the “New” Committee on Foreign Investment in the United States

5

### WHAT COUNTS AS A “FOREIGN” INVESTOR?

This is often one of the more complex questions in a CFIUS analysis. Generally, a foreign investor is (a) any foreign citizen; (b) any entity ultimately “controlled” (see below) by foreign citizen(s); or (c) any investment fund that (i) has one or more foreign persons as managers/principals of the fund; (ii) has a substantial amount of foreign capital or that otherwise affords foreign investors substantial formal or informal influence over the fund’s operations; or (iii) affords foreign investors access to nonpublic information about portfolio company technology.

For this analysis, the threshold of “control” can be any interest that is not explicitly passive. Thus, a foreign person who has an 8% equity stake in a business and a seat on its board may cause that business to count as “foreign” for CFIUS purposes. There is no bright-line rule here.

Importantly, corporate organization in the U.S. does not exempt an entity from being “foreign.” A Delaware corporation or LLC, if any foreign person or entity controls that entity, is foreign for CFIUS purposes.

### WHAT DOES THE CFIUS PROCESS ENTAIL?

There are two primary forms of CFIUS review. First, there is a “short form” process, whereby the parties voluntarily submit a “declaration” to CFIUS that provides high-level information about the transaction. After 30 days, CFIUS can clear the transaction, request a “long form” notice or unilaterally initiate a review of the subject transaction. CFIUS also has the authority to take no action at the expiration of a short form review—in which case the parties are free, but not required, to submit a “long form” notice.

In the long form process, the parties file a full notice to CFIUS that provides a more detailed set of information about the transaction. This process includes a 45-day review of the transaction and, potentially, an additional 45-day investigation. During investigation, if there is an issue of concern, the agencies may negotiate a package of conditions with the parties prior to clearing the transaction, which is referred to as a “mitigation agreement.”



## CFIUS 102

# A Primer on the “New” Committee on Foreign Investment in the United States

6

### **IS FILING MANDATORY?**

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Many transactions may require filing, in particular if the target’s technology requires licensing from one or more regulators to export. In most other instances, parties file voluntarily due to transaction-specific risks. Absent a mandatory filing requirement, CFIUS still retains significant enforcement authority. This firm has worked on a number of enforcement matters, including one stemming from an investment that occurred nine years prior to when CFIUS took action.

CFIUS often, and increasingly, initiates enforcement actions in cases where filing was not mandatory but the parties opted not to file voluntarily.

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### **MY TRANSACTION SIMPLY CANNOT BE DELAYED FOR A CFIUS REVIEW. What should we do?**

Proactively filing with CFIUS is the ideal method of managing CFIUS-related risk. There are often ways, however, to manage these risks within the timing constraints of any particular transaction. These are highly case-specific considerations.

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### **IS THERE ANYTHING ELSE I SHOULD KNOW ABOUT CFIUS?**

Yes. A number of transactions that undergo CFIUS reviews have related issues. For example, the target’s technology may export licensing, or the target may have access to classified U.S. government information. In such cases, engagement with additional regulators may be necessary to ensure a successful closing.

Of course, in any transaction where CFIUS may be an issue, seek counsel. Any experienced CFIUS practitioner can efficiently determine if a transaction is likely to trigger CFIUS jurisdiction or entail CFIUS risk.