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US TREASURY DEPARTMENT'S GUIDANCE ON CFIUS ENFORCEMENT AND PENALTIES

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Presenters



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Agenda

- CFIUS Background
- Mitigation, Monitoring, and Enforcement
- Violations
- New Enforcement and Penalty Guidelines
- Past Enforcement
- Aggravating and Mitigating Factors
- Discovery
- Process
- Practice Points
- Questions

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CFIUS Background

- Interagency committee originally established in 1975, comprised of nine cabinet-level Executive Branch agencies
 - Departments of the Treasury (chair), Justice, Homeland Security, Commerce, Defense, State, and Energy, Office of the U.S. Trade Representative, and Office of Science & Technology Policy
- Reviews national security implications of foreign investments in U.S. companies, and addresses risk as needed including by negotiating, or when necessary imposing, mitigation measures to address national security risks
- Advises the President on matters of national security arising from foreign investments, and may recommend that the President issue an order to block a transaction or require divestment
- Can pull in non-notified transactions for review

CFIUS Background

- Section 721 of the Defense Production Act of 1950 (DPA) (50 U.S.C. § 4565) authorizes CFIUS to impose monetary penalties and seek other remediation for violations of Section 721, the associated regulations, mitigation orders, conditions, or agreements pursuant thereto.
- The Department of the Treasury, in coordination with the rest of the Committee, administers the regulations that address the imposition of these penalties.
- CFIUS is devoting increased attention and resources to compliance and enforcement.

Mitigation, Monitoring, and Enforcement

- Mitigation enables CFIUS to clear transactions despite risk.
- New Enforcement and Penalties Guidelines were released by CFIUS in October 2022.
- Guidelines provide transparency into CFIUS enforcement process.
 - Procedures for Committee notices, investigations, and final determinations are detailed at 31 C.F.R. § 800.501-800.604.
- CFIUS aims to incentivize compliance.
- CFIUS wants to increase filings where appropriate.

Violations

Penalties and Damages (31 C.F.R. § 800.901- 800.902)

- Failure to file a mandatory notice or declaration
 - \$250,000 civil penalty or the value of the transaction
- Non-compliance with CFIUS mitigation
 - \$250,000 civil penalty or the value of the transaction, or liquidated damages
- Material misstatement, omission or false certification
 - \$250,000 civil penalty

Violations will not necessarily lead to a penalty, but rather CFIUS will exercise discretion.

New Enforcement and Penalty Guidelines

So, did the new guidelines
actually change anything?



Past Enforcement



- 2018 - \$1,000,000 for repeated breaches of a 2016 mitigation agreement
- 2019 - \$750,000 for violations of a 2018 interim order, including failure to restrict and adequately monitor access to protected data
- Most of the factors considered by CFIUS in these cases were not publicly disclosed.

Discovery

- Self disclosure
- Mitigation agreement monitors or auditors
- Site visits
- Public tips
- Other government agencies and information sources
- Publicly available information

Aggravating and Mitigating Factors

- Harm to national security
- Negligence, awareness and intent
- Frequency and duration of conduct, and timing
- Response and remediation
- Voluntary disclosure
- Sophistication and record of compliance



Process

- Notice of penalty
- 15 days to submit petition for reconsideration
- Within 15 days, final penalty determination
 - 31 C.F.R. § 800.901(f)

Parties may reach an agreement on a remedy any time before the final penalty determination is issued.

Practice Points

- Conduct proper and thorough diligence when entering into a transaction to ensure CFIUS filing compliance.
- Ensure CFIUS filings are complete and accurate, and do not misstate or omit material information.
- Negotiate mitigation measures that are feasible to comply with.
- Put in place policies, procedures and personnel training to ensure compliance with mitigation agreements.

Practice Points

- Promptly respond to:
 - Requests for information; and
 - Penalty notices.
- Mitigation compliance must be a priority, including at the C-Suite level.
- If you discover a violation:
 - Disclose in a timely manner; and
 - Proactively develop and implement a corrective action plan.
- Cooperate with CFIUS.



A photograph of a modern building's glass and metal facade at dusk. The building features a prominent spire on the right side. The sky is a deep blue, and the building's structure is illuminated from within, creating a warm glow. The foreground shows a grid of glass panels and metal beams, receding into the distance.

Questions?

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David Plotinsky, the former acting chief of the US Department of Justice's Foreign Investment Review Section, represents clients such as venture capital, private equity, and infrastructure firms. In particular, he steers clients through government national security review processes for foreign investment, including by the Committee on Foreign Investment in the United States (CFIUS) and Team Telecom. In addition, David focuses on trade, information communications technology and services, and critical and emerging technology. He maintains a security clearance and advises clients on their most sensitive matters.

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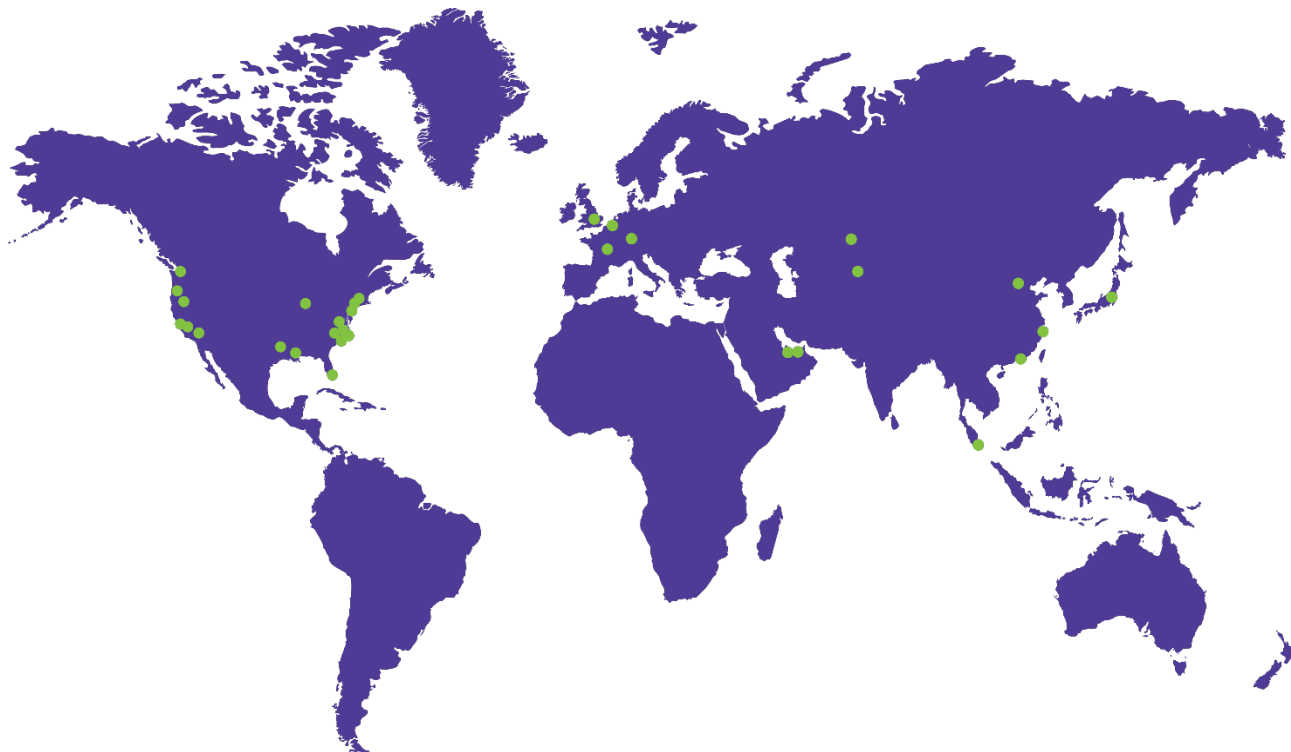
Heather C. Sears is a veteran trade compliance counsel who represents global businesses on compliance with and extraterritorial application of US laws and regulations relating to international trade, foreign investment, and corporate compliance. She also serves as the vice chair on the board of the National Council for International Trade Development and is a past member of the US State Department's Defense Trade Advisory Group. Prior to joining Morgan Lewis, Heather worked in house for various foreign owned companies, where she served as the Technology Control Officer and supported the negotiation of and implementation of corresponding mitigation agreements with CFIUS and DSCA.

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