

CFIUS Issues Penalty Guidelines for Enforcement

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Agency's announcement is important to anyone engaged in foreign investments or real estate transactions.

CFIUS has issued its first set of guidelines regarding the types of investment activity that could trigger penalties under the agency's expanded authority over foreign investments. The guidelines were issued on Oct. 20 following President Biden's Sept. 15 Executive Order 14083 outlining priorities for assessing national security threats.

The Committee on Foreign Investments in the U.S. ("CFIUS"), an interagency committee overseen by the Department of the Treasury, is tasked with evaluating the potential risks and impacts of foreign investments, including foreign real estate transactions, in the U.S. market.

In the new guidelines, CFIUS identified three major activities that could trigger penalties:

- 1. Failing to notify CFIUS of a transaction covered by Treasury's [guidelines](#) under the Foreign Investment Risk Review Modernization Act of 2018.** Notice is required for any "(1) a purchase, lease, or concession by or to a foreign person of real estate located in proximity to sensitive government facilities; (2) 'other investments' in certain U.S. businesses that afford a foreign person access to material nonpublic technical information in the possession of the U.S. business, membership on the board of directors, or other decision-making rights, other than through voting of shares; (3) any change in a foreign investor's rights resulting in foreign control of a U.S. business or an "other investment" in certain U.S. businesses; and (4) any other transaction, transfer, agreement, or arrangement designed to circumvent CFIUS jurisdiction."
- 2. Noncompliance with CFIUS mitigation.** The Foreign Investment Act grants CFIUS the authority to work with any entity or individual engaging in an investment which may be a national security risk to help mitigate the risk in completing the transaction. CFIUS can require parties to enter a mitigation agreement with CFIUS which can place conditions on transaction. These mitigation agreements can also apply to transactions that have been abandoned by the parties in order to address any lingering national security risks that may still exist as a result of the transaction negotiations.
- 3. Misleading CFIUS as to the nature of the transaction or the parties involved.** This can

include intentionally omitting or falsifying information on any of the documentation provided to CFIUS as part of its notice and oversight of the transaction.

Although any of these activities may result in fines, no guidance is given regarding whether the fines will be based on a pre-determined schedule or decided on a case-by-case basis.

Anyone engaged in foreign investments or real estate transactions which may be subject to CFIUS oversight must give notice of the transaction to CFIUS, fully disclose relevant information to the committee, engage in good faith in any mitigation requested by CFIUS.

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