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## CFIUS Publishes Two New FAQs that have Material Implications for Parties Filing with CFIUS

By Shawn Cooley, Nathan Cunningham, Christina Carone, and William Looney

The Committee on Foreign Investment in the United States (“[CFIUS](#)” or “[the Committee](#)”) has [published](#) two new frequently asked questions (“[FAQs](#)”) and answers that have material implications for parties notifying CFIUS of transactions. The first FAQ clarifies how CFIUS determines the “completion date,” in assessing when a mandatory filing should be submitted, where the foreign person first acquires an equity interest, but will not receive control or covered investment rights until after CFIUS’ review. In effect, this will limit parties from using a springing rights construct to delay the onset of a mandatory filing obligation. The second FAQ clarifies that CFIUS can request certain information from passive investors, such as limited partners, that merely are indirectly involved in the transaction at any level. As discussed further below, each of these FAQs demonstrate that CFIUS will disregard the text of transaction documents and other contractual arrangements between parties as warranted by national security considerations. Accordingly, parties involved in transactions that may be subject to CFIUS’ jurisdiction are well advised to conduct a fulsome CFIUS risk analysis prior to signing.

### [Key Takeaways:](#)

- Parties are no longer able to delay the onset of a mandatory filing requirement by deferring acquisition of control, governance, or information access rights, but otherwise closing the investment. Instead, in such a case, the mandatory filing obligation attaches to the transfer of the equity interest.
- Parties now are required to submit a mandatory CFIUS notification no later than 30 days prior to the transfer of equity interests, even if the parties have negotiated to delay the transfer of control, governance, or information access rights until after CFIUS approval or until the satisfaction of other conditions.
- CFIUS may request information on all foreign investors involved (directly or indirectly) in a transaction, including limited partners that have passively invested in a fund (at any level) managed by the acquiring foreign person, regardless of any confidentiality provisions or arrangements limiting such disclosures.

## **A. CFIUS Has Removed Parties' Use of Springing Rights to Delay the Onset of a Mandatory Filing Obligation**

Following the Foreign Investment Risk Review and Modernization Act of 2018 (“FIRRMA”) and CFIUS’ promulgation of its regulations implementing FIRRMA (the “FIRRMA Regulations”), certain transactions between a foreign person and a U.S. business have required a mandatory filing with CFIUS. Prior to FIRRMA, there were no CFIUS mandatory filings. The FIRRMA Regulations, including CFIUS’ statements in response to public comments, have established when a transaction triggers a mandatory CFIUS filing, as discussed further below.

Businesses routinely require expeditious injections of capital in exchange for equity interests that transfer upon execution of the definitive transaction documents. Since CFIUS promulgated the FIRRMA Regulations, parties have commonly utilized a springing rights construct to manage the timing of when they must file a mandatory notification with CFIUS. Until very recently, parties have used successfully, and without any critical comment from CFIUS, a springing rights construct to permit the parties to submit a mandatory notification to CFIUS after the equity interests transferred, but before any control, governance, or information access rights transferred to the foreign person. Typically, the use of a springing rights construct was limited to instances where the transfer of equity interests alone was insufficient to provide the foreign person with control over a U.S. business. In these cases, the definitive transaction documents explicitly contemplated the immediate transfer of equity interests, with the control, governance, and/or information rights transferring only after the parties received CFIUS approval.

While parties’ use of springing rights has been a standard practice, this strategy is no longer viable in light of the Springing Rights FAQ (defined below). The Springing Rights FAQ, however, appears inconsistent with a prior public comment response from CFIUS. In response to public comments on the interim FIRRMA Regulations, CFIUS stated “in the event that a covered transaction will be effectuated through multiple or staged closings, the completion date is the earliest date on which any transfer of interest or change in rights that constitutes a covered transaction occurs” (emphasis supplied).<sup>1</sup> Nonetheless, the Springing Rights FAQ is consistent with private letters and recent public statements from CFIUS indicating parties were in non-compliance with the mandatory filing requirement because they did not file 30 days in advance of transferring an equity interest, regardless of agreements to delay the transfer of any covered investment rights until after CFIUS approval or other conditions were obtained. The Springing Rights FAQ clarifies this recent change in CFIUS practice and interpretation.

### **1. Background on the CFIUS Mandatory Filing Requirement**

FIRRMA and the FIRRMA Regulations require parties to submit a mandatory notification for transactions (a) subject to CFIUS jurisdiction involving a U.S. business that produces, tests, designs, fabricates, develops, or manufactures certain critical technologies<sup>2</sup> (a “Critical Technology Company”) or (b) where

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<sup>1</sup> Federal Register Volume 85, Issue 12 (January 17, 2020) at 3114.

<sup>2</sup> 31 C.F.R. § 801.204. Generally, “critical technologies” are (1) items, software, or technology covered by the U.S. Munitions List pursuant to the International Traffic in Arms Regulations (ITAR) or by the Commerce Control List pursuant to the Export Administration Regulations; (2) select agents and toxins; and (3) nuclear items, facilities, software, or technology.

<sup>3</sup> 31 C.F.R. § 800.248. The term TID U.S. business means any U.S. business that: (a) Produces, designs, tests, manufactures, fabricates, or develops one or more critical technologies; (b) Performs enumerated critical infrastructure functions; or (c) Maintains or collects, directly or indirectly, sensitive personal data of U.S. citizens

certain foreign governments have a 49% or greater voting interest in an investor that is acquiring at least a 25% interest in a U.S. business that is involved with critical technologies, critical infrastructure, or sensitive personal data.<sup>3</sup> A transaction is subject to CFIUS' jurisdiction if a foreign person is acquiring "control"<sup>4</sup> over or "covered investment"<sup>5</sup> rights with respect to a U.S. business. A mandatory filing requirement imposes a 30-day waiting period that begins to run only upon notification of the transaction to CFIUS.

Please see our client alert, [Committee on Foreign Investment in the U.S. Issues Final Regulations Implementing 2018 Statutory Overhaul](#), for more information on CFIUS mandatory filing requirements.

## 2. A Springing Rights Construct Can No Longer Delay the Onset of a Mandatory Filing Requirement

The new CFIUS FAQ states:

**Question:** How does CFIUS determine the "completion date," in assessing when a mandatory filing should be submitted, where the foreign person first acquires equity interest but will not receive control or covered investment rights until after CFIUS's review?

**Answer:** The "completion date" is the earliest date upon which any ownership interest is conveyed, assigned, delivered, or otherwise transferred to a person [31 C.F.R. § 800.206]. In a transaction where the ownership interest is conveyed before the foreign person receives the corresponding rights, the "completion date" is the earliest date upon which the foreign person acquired any of the equity interest. For example, if Company A acquired a 25 percent ownership interest in Company B on July 1, but its right to control Company B was deferred until after CFIUS reviews the transaction, the "completion date" for the transaction is July 1. If the transaction is subject to the mandatory declaration requirement pursuant to 31 C.F.R. § 800.401, the latest date that the parties can file the transaction with CFIUS is June 1. Note that contingent equity interests are assessed separately under 31 C.F.R. § 800.207.

With this FAQ (the "[Springing Rights FAQ](#)"), CFIUS clarifies that a mandatory filing obligation exists as of the date the equity interest transfers even if the parties have negotiated that the attendant rights do not transfer with the equity interest, and instead would transfer later in time. Accordingly, it is clear that parties can no longer rely on a springing rights construct to delay the onset of a mandatory filing obligation. For instance, if a foreign person is acquiring on July 1 a 4% equity interest in a U.S. business, which produces a critical technology that would require an export license to export to the foreign person,

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<sup>4</sup> 31 C.F.R. § 800.208. Generally, the term control means the power to determine, direct, or decide important matters affecting an entity. The regulation provides examples of control, which include the ability to determine, direct, take, reach, or cause decisions regarding (i) of the transfer of principal assets; (ii) entering into or terminating significant contracts; and (iii) appointing or dismissing senior officers. CFIUS' concept of control is broader than the typical corporate understanding of control such that we are aware that CFIUS has asserted that a 10% equity interest plus one representative on the board of directors is sufficient to constitute control.

<sup>5</sup> 31 C.F.R. § 800.211. A "covered investment" affords a foreign investor rights that fall short of CFIUS' definition of control, but nevertheless are significant, including: (i) access to any material nonpublic technical information; (ii) membership or observer rights on the board of directors; or (iii) any involvement, excluding through voting of shares, in substantive decisionmaking regarding sensitive personal data, critical technologies, or critical infrastructure.

and has negotiated for it to obtain a board observer right only after CFIUS clearance, the parties must submit a notification to CFIUS no later than June 1. Therefore, if the parties were unable to submit a notification to CFIUS by June 1, the parties would be required to delay the transfer of the equity interest (and the consequent transfer of funds to the U.S. business) until at least 30 days had elapsed after the parties submitted the notification to CFIUS.

Notably, the Springing Rights FAQ does not change parties' ability to close a transaction prior to receipt of CFIUS approval. Instead, this FAQ clarifies that a 30 day waiting period applies to the transfer of equity interests pursuant to the type of transaction described above.

## **B. CFIUS Confirms It Has the Right to Request Detailed Information on All Foreign Persons Involved in a Transaction**

CFIUS also published a FAQ clarifying that the Committee is not limited to requesting information on the filing parties during CFIUS' review process (the "LP Information FAQ"). Rather, CFIUS may request information on any foreign investor indirectly involved in a transaction, including limited partners ("LPs") in an investment fund of the acquiring foreign person, as part of its diligence. CFIUS will determine on a case-by-case basis whether to request details (e.g., questions on identifying information, jurisdiction, and governance rights) on direct or indirect foreign investors involved in transactions to assist its review for national security purposes. Notably, CFIUS also makes clear that it can require information on foreign investors regardless of any arrangements that may otherwise limit disclosures, such as confidentiality provisions or side letters negotiated by the LP and the foreign investor. The LP Information FAQ states:

Question: Does CFIUS require information on all foreign persons, such as limited partners in an investment fund that would hold an interest in a U.S. business, whether directly or indirectly, as part of the transaction?

Answer: In addition to the information required for submission of a complete filing with CFIUS, to facilitate its review, CFIUS through the Staff Chairperson may request follow-up information with respect to all foreign investors that are involved, directly or indirectly, in a transaction, including limited partners in an investment fund. Like other aspects of the CFIUS process, the scope of such a request depends on the facts and circumstances of each transaction. For example, CFIUS often requests identifying information for indirect foreign person investors, including limited partners, their jurisdiction(s) of organization, and ultimate ownership, among other information, regardless of any arrangements that may otherwise limit the disclosure of such foreign person's identity. CFIUS may also request information with respect to any governance rights and other contractual rights that investors collectively or individually may have in an indirect or direct acquirer or the U.S. business to facilitate the Committee's review regarding jurisdictional or national security risk-related considerations. Such information, as with all information filed with CFIUS pursuant to 50 USC 4565, is subject to the confidentiality protections afforded by 50 USC 4565(c).

Similar to the Springing Rights FAQ, an implication of the LP Information FAQ is that CFIUS does not consider itself bound by or subject to the strictures and provisions negotiated by parties pursuant to definitive transaction documentation. Notwithstanding confidentiality arrangements entered into by the LP and the foreign investor, CFIUS may require the foreign investor to submit information such as the identity of the LP, a copy of the LP's bylaws and other internal governance documents, and a copy of all agreements and other arrangements negotiated by the LP and the foreign investor.

Especially where a foreign investor is engaging in a transaction with a sensitive U.S. business and where the foreign investor has admitted LPs of higher risk nationality (such as Chinese or Russian), the foreign investor should be prepared to submit these types of documents pertaining to the LP to CFIUS.

The LP Information FAQ follows public statements by CFIUS officials that the mere LP construct may not be enough to obviate or address a national security risk identified by CFIUS. In assessing the national security risk posed by a specific LP, CFIUS will consider information such as the LP's nationality, the LP's identity, and the intent and capabilities of the LP. In all cases, CFIUS utilizes intelligence in its possession, whether from the Intelligence Community or from CFIUS' own intelligence gathering activities.

If you have questions concerning the contents of this alert, or would like more information, please speak to your regular contact at Weil or to the authors:

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