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Treasury's 2024 Annual CFIUS Conference Highlights Final Rule Enhancing Monitoring and Enforcement Provisions of CFIUS Regulations

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On November 19, 2024, the U.S. Department of the Treasury ("Treasury"), as lead agency for the Committee on Foreign Investment in the United States ("CFIUS" or the "Committee"), hosted the 2024 Annual CFIUS Conference in Washington, D.C. Among the key topics discussed was the November 18, 2024 final rule (the "Final Rule") that updates and enhances the monitoring and enforcement tools available to CFIUS.

Key Takeaways:

1. As investment structures become increasingly complex, the Committee is placing a heightened focus on understanding fund structures and the identities and roles of limited partners ("LPs").
2. CFIUS is increasingly vigilant in evaluating covered real estate transactions in proximity to facilities that may pose national security risks.
3. CFIUS encourages proactive, timely, and transparent communications at all stages of the process.
4. The new Final Rule includes significant changes to the types of information CFIUS can require and subpoena authorities available to collect information, the circumstances under which a civil monetary penalty can be assessed and maximum civil monetary penalty available for violations, and timelines related to responding to risk mitigation proposals and to petitions for reconsideration.

Analysis:

Limited Partnerships: CFIUS is committed to examining the investment structures of funds that purport to include passive investment by non-U.S. limited partners. Panelists at the conference emphasized the need for such funds to provide the Committee with the identities of all LPs with a greater than 5% interest in a fund and all LPs (regardless of the size of their interest) located in a country of concern, as well as copies of any agreements or side letters that grant LPs control or special access rights. Officials recognized that fund agreements often contain confidentiality provisions that prohibit disclosure of limited partners, but these agreements usually contain exceptions for disclosures required by government agencies. CFIUS takes the view that its requests, even in the context of a voluntary declaration, trigger such disclosure exceptions. Officials also stressed the seriousness with which all agencies on the Committee take their confidentiality obligations and the care with which such information is handled.

Committee staff emphasized the difficulty they have in recommending approval of a transaction and preparing clearance memoranda when key information, such as the identity of limited partners, is withheld. They also noted in this context that fund managers should not assume that the Committee does not have other means for obtaining this information. Fund managers must ensure that they know their investors because, with the help of the intelligence community, CFIUS almost certainly will.

Real Estate Proximity Considerations: CFIUS continues to expand its ability to review real estate transactions by foreign persons in proximity to sensitive locations. Earlier this month, nearly 60 military installations were added to the list of facilities over which CFIUS has jurisdiction and the jurisdiction was expanded from 1 mile to 100 miles for eight installations. Officials explained the process through which the Committee assesses the threat, vulnerabilities, and consequences to national security related to a covered real estate transaction. In each instance, a threat assessment is conducted to determine whether the foreign acquirer, based upon its links to governments or entities of concern, might have the intent to harm U.S. national security interests and whether the transaction provides a capability to do such harm. In assessing the capability to do harm, the Committee evaluates whether the transaction may create an ability to disrupt military operations or critical infrastructure, collect data or intelligence, or compromise food security or vital supply chains.

In May 2024, the President ordered a limited partnership ultimately owned by Chinese nationals to divest real estate located on the fence line of F.E. Warren Air Force Base, Wyoming. OneMine Partners Limited ("OneMine") purchased the property in 2022 and made improvements to the property for use as a cryptocurrency mining center within one mile of the strategic missile base. The real estate purchase fell within the authority provided to CFIUS in the Foreign Investment Risk Review Modernization Act of 2018 ("FIRRMA"), but OneMine chose not to file with CFIUS at the time of its acquisition of the property. CFIUS initiated an investigation of the non-notified transaction based upon a tip it received from the public and determined that the national security risk posed could not be sufficiently mitigated, which led to the referral to the President. Officials at the conference highlighted that CFIUS uses a wide variety of means to identify potential risks related to proximity to sensitive facilities and recommended that investors reach out to base commanders or operators of critical infrastructure that are within proximity to potential investments to discuss concerns in advance.

Communicate Early, Often and Openly: Throughout the conference, CFIUS encouraged parties to engage with the staff informally and formally. In particular, officials stressed the Committee's need to understand the motivations for the deal and the long-term plans for the U.S. business. Parties who have been, or expect to be, repeat filers were advised to include descriptions of their overall investment strategy, so that the Committee can understand the aggregate national security risks, if any, of the strategy. A description of the strategy can be included in filings specific to a transaction, but parties were also invited to request an opportunity to present their investment plans to Committee staff outside the context of a specific transaction. Filers were also encouraged to submit or reference materials outside the four corners of the filing (e.g., company websites, speeches by executives, industry reports) that describe and corroborate their strategy.

Officials also discussed the importance of open communication and prompt disclosure to the CFIUS Monitor Agency ("CMA") related to issues that arise with mitigation agreements. CFIUS expects that parties that enter into a mitigation

agreement understand the requirements of the agreement and are prepared to comply on Day One. However, if a party to a mitigation agreement has questions or comes to believe that a term is ambiguous, they are expected to reach out to the CMA immediately for clarification. Likewise, if a party to a mitigation agreement identifies a possible violation—even a minor violation—they are expected to notify the CMA immediately. The Committee understands such a notification will likely be incomplete, and further investigation may be required, but immediate notification is needed to allow the Committee to assess the national security risks that may have been created by the violation.

November 18 Final Rule: The Final Rule is designed to strengthen the tools available to the Committee as it increases its focus on compliance, monitoring, and enforcement. The Final Rule includes:

- Expansion of the categories of information that CFIUS may request from parties and third parties: CFIUS has been authorized to request information from the parties to the transaction related to whether the transaction is a covered transaction. The Final Rule authorizes CFIUS to also request information related to whether the transaction raises national security considerations and whether a mandatory submission was required, and CFIUS may request such information from third parties in addition to the parties to the transaction. For example, the Committee contemplates circumstances in which it might seek information from banks, underwriters, or service providers to transaction parties.
- Ability to impose time limits on responses to proposed mitigation measures: To address delays that have resulted from protracted mitigation negotiations, the Final Rule allows CFIUS to impose a time limit, to be no shorter than 3 days, to respond to proposed risk mitigation terms.
- Expansion of subpoena authority: The Final Rule allows CFIUS to subpoena information to assess and monitor compliance with Section 721 of the Defense Production Act of 1950 or a mitigation agreement, as well as to determine whether a party has made a material misstatement or omitted material information in a submission to the Committee.
- Expansion of civil monetary penalty authority: Under the Final Rule, CFIUS may impose a civil penalty on any person who makes a material misstatement or omission in response to any authorized request for information from the Committee. Previously, misstatements, omissions, or false certifications must have been made by a person in the context of submitting a declaration or notice to incur a civil monetary penalty.
- Increase in maximum civil monetary penalty: The maximum civil monetary penalty (a) for a materially misstatement has been increased from \$250,000 to \$5,000,000 per violation; (b) for failure to make a mandatory filing from the greater of \$250,000 or the value of the transaction to the greater of \$5,000,000 or the value of the transaction; and (c) for violations of mitigation agreements entered into after the effective date of the Final Rule from the greater of \$250,000 or the value of the transaction to the greater of \$5,000,000, the value of the person's interest in the U.S. business at the time of the transaction, the value of the person's interest in the U.S. business at the time of the violation, or the value of the transaction filed with the Committee. These changes are primarily intended to address circumstances in which the structure of the deal results in a low stated value of the transaction relative to the actual value of the interest in the U.S. business.
- Extensions of time limits related to petitions for reconsideration: The Final Rule allows a party who receives a notice of penalty twenty, rather than fifteen, business days to submit a petition for reconsideration, and allows the committee twenty, rather than fifteen, days to review the petition and issue a final penalty determination.

A consistent theme, echoed by every virtually every speaker and panelist, was the Committee's ongoing commitment to effectively balancing the protection of national security with maintaining the United States' status as the world's top destination for foreign direct investment, and the Final Rule is designed to give CFIUS additional tools to execute that mandate. Hughes Hubbard is well-positioned to help clients understand and develop strategies to meet the Committee's expectations as they continue to evolve in the incoming Administration.

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