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Key Takeaways From Six Months Into New Mandatory CFIUS Declarations Pilot Program

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What You Need To Know:

- While the Pilot Program targets 27 identified industry sectors, any involvement with a U.S. business in one of those sectors could bring you under CFIUS jurisdiction.
- CFIUS will issue new regulations, including additional guidance on emerging technologies that impact national security.
- The new declarations procedure sets out a voluntary declaration procedure that must be filed 45 days before a transaction closes. CFIUS may then decide whether to conclude the review based on the declaration or require a full notice.

It's been nearly six months since the Committee on Foreign Investment in the United States (CFIUS) mandated filing declarations with the committee in connection with certain foreign investments involving certain "critical technology" by establishing a pilot program under the new statutory 2018 changes made by Congress to the CFIUS statute. The move is part of the committee's ever-evolving identity from a voluntary investment review organization into a much more robust and proactive organization.

- Companies should consider the decision for a mandatory case under the pilot program to file a full notice from the beginning rather than a declaration. Buyers and sellers that make a five-day notice often do not receive the comfort they hoped for by making the declaration. In more than a third of cases, deal parties are not receiving a clear answer from the government. CFIUS may reply with a "shrug," indicating that it did not have enough time or information to make a determination. This leaves the parties with the same choice they started with—file a full notice or bear the risk.
- Companies may be subject to the committee's mandatory requirements even if they are seemingly not related to one of the 27 specific industries that the pilot program initially established. **The Department of Commerce (DOC) has started issuing regulations on items that are considered emerging technologies and are flagged because of their potential to impact national security.** Last month, the DOC added discrete microwave transistors (which are often found in DVD players and military radars), continuity of operation software, post-quantum cryptography, underwater transducers, and air-launch platforms to the list of controlled items.
- Companies often assume they are off the hook if they are not one of the 27 North American Industry Classification System codes associated with the pilot program industries. However, if the company produces, designs, tests, manufactures, fabricates, or develops a product used with a pilot program industry, that company could be subject to the mandatory filing.

- Significant attention is being paid to foreign ownership in all forms. Sellers are requiring side letters, representations, or certifications regarding foreign ownership and foreign government ownership.
- Buyers are requiring more certifications and/or indemnities regarding the target company's activities with possible links to national security, critical technology, sensitive data, and/or critical infrastructure.
- Finally, CFIUS concerns are arising in odd places. For example, a paper company uses a chemical that has a dual use in rocket fuel. Sometimes it is difficult for organizations to know all the capabilities of their products. Concerns are easily missed if normal assumptions are made.

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