



CFIUS Publishes New FAQs Regarding Mandatory Filings and Disclosure Requirements for Investment Funds

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The Committee on Foreign Investment in the United States (“CFIUS” or the “Committee”) recently issued two new frequently-asked-questions (“FAQs”) on its [website](#). The new FAQs provide additional guidance on (1) timing for mandatory filings and (2) ownership disclosure requirements for investment funds. CFIUS does not have many FAQs—and they are not frequently updated—so the new FAQs are particularly noteworthy and provide helpful insight into the areas where CFIUS is most focused.

One new FAQ makes clear that transaction parties are required to submit a mandatory CFIUS filing at least 30 days before closing, even if the transaction parties have structured the transaction so that the foreign investor obtains only passive economic rights at closing and will not obtain any other governance or contractual rights (e.g., control rights, board seats, access to information) until after the transaction clears a subsequent CFIUS review.

For example, if Company A acquires a 25% ownership interest in Company B on July 1, but its right to control Company B is deferred until after CFIUS reviews the transaction, the transaction parties must still submit a mandatory filing by June 1. The transaction parties cannot close the transaction on July 1 and then submit a CFIUS filing 30 days before the foreign investor obtains its right to control Company B. If the transaction parties fail to submit a mandatory filing by June 1, they will have breached the mandatory filing provision, making them subject to a potential enforcement action.

The other new FAQ makes clear that CFIUS has the right to request information about **all** foreign investors that are involved in a transaction, directly or indirectly, including limited partners (“LPs”) in an investment fund. The FAQ notes that CFIUS expects to receive information about foreign LPs even if the investment fund made prior arrangements to limit disclosure of the identity of any foreign LPs, such as a non-disclosure agreement. The FAQ further notes that CFIUS may also request information with respect to any governance rights and other contractual rights that the foreign LPs may have in the fund or the fund’s portfolio companies.

Key Takeaways for Investment Funds and Other Dealmakers

CFIUS appears focused on enforcing the mandatory filing requirement, which requires transaction parties to submit a CFIUS filing at least 30 days before closing for certain transactions. Some transaction parties may be trying to

structure around this requirement by having foreign investors obtain only passive, economic rights at closing and deferring any non-passive rights until after the transaction passes a subsequent CFIUS review. By structuring a transaction this way, the transaction parties are likely trying to close the transaction more quickly (thereby giving the U.S. business access to funds) without violating the mandatory filing requirement. However, CFIUS's new FAQ makes clear that structuring a transaction this way—economic rights now, control rights later—is not a viable option for avoiding the mandatory filing requirement. Parties should consider themselves on notice that CFIUS may bring an enforcement action if transaction parties fail to submit a mandatory filing after structuring a deal in this way.

CFIUS also appears to be shining a spotlight on foreign LPs. Under CFIUS's governing statute and regulations, the Committee is supposed to focus on transactions where foreign investors obtain control or other non-passive rights in U.S. businesses. Typically, foreign LPs are passive investors who have no rights to control an investment fund or its portfolio companies. Nevertheless, it appears that CFIUS is taking a hard look at the identity of foreign LPs in investment funds and scrutinizing whether foreign LPs are obtaining governance or other contractual rights in the fund or its portfolio companies. It further appears that some funds may be trying to avoid disclosing the identity of their foreign LPs by citing to non-disclosure agreements. CFIUS's new FAQ makes clear that it does not accept that response. By issuing the new FAQ, CFIUS is making clear that investment funds that invest in the United States must be prepared to disclose their governance documents and capitalization tables upon request.

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