



JONES DAY
COMMENTARY

CONGRESS REFORMS CFIUS REVIEW PROCESS

In 1988, Congress enacted the Exon-Florio amendment to the Defense Production Act of 1950, authorizing the President to investigate and block foreign acquisitions of U.S. assets that threaten national security. The same year, President Reagan delegated the investigatory authority to the Committee on Foreign Investment in the United States (“CFIUS”), an inter-agency panel established by Executive Order in 1975. Exon-Florio provided for voluntary notice of a transaction to CFIUS. Voluntary notification triggers a 30-day review, after which CFIUS clears most transactions. In a few cases, CFIUS has initiated a second 45-day investigation, after which the President has 15 days to decide whether to exercise his authority under Exon-Florio to block the transaction.

For 17 years, CFIUS operated in relative obscurity until it cleared the Dubai Ports World/P&O transaction in 2005. The ensuing uproar resulted in widespread calls for reforms of Exon-Florio and the CFIUS review process. At the same time, the increasing uncertainty over what constitutes a threat to the national security has prompted an unprecedented increase in the number of transactions notified to CFIUS for review.

On July 11, 2007, the House of Representatives passed the final version of a bill that significantly reforms Exon-Florio and the CFIUS review process. President Bush signed the Foreign Investment and National Security Act of 2007 on July 26, 2007. The reform will take effect 90 days thereafter, and CFIUS must promulgate regulations under the new law within six months of the effective date.

The reform leaves intact the basic substance and timelines for CFIUS’s review of foreign-investment transactions, while amplifying CFIUS’s ability to impose conditions and enforce agreements in order to mitigate national-security concerns. The following summarizes some of the major changes this legislation introduces.

CLARIFICATION OF “NATIONAL SECURITY”

CFIUS is charged with reviewing the national-security implications of foreign acquisitions of U.S. assets. The previous law did not define “national security” in this context, although it set forth a number of factors that

the President could consider. While the new legislation falls short of providing a comprehensive definition, it does indicate that “national security” encompasses issues relating to “homeland security” and “critical infrastructure.” It defines “critical infrastructure” as “systems and assets, whether physical or virtual, so vital to the United States that the incapacity or destruction of such systems or assets would have a debilitating impact on national security.”

CHANGES TO THE STRUCTURE OF CFIUS

A 1975 Executive Order created CFIUS, and a 1988 Executive Order delegated Presidential authority to review transactions to CFIUS. The new legislation officially recognizes CFIUS and directs it to “determine the effects of [foreign acquisitions of U.S. assets] on the national security of the United States.”

The new legislation also increases CFIUS’s membership from its current 12 member agencies. The Secretary of Energy will become a voting member, and the Secretary of Labor and the Director of National Intelligence (“DNI”) will serve as ex officio, nonvoting members.

CHANGES TO THE REVIEW AND INVESTIGATION PROCEDURES

The reform implements several changes to the CFIUS review procedure. First, for every covered transaction notified to CFIUS, the Secretary of the Treasury, CFIUS’s chairperson, will designate a “Lead Agency,” which will have responsibility for negotiating, and ensuring compliance with, mitigation agreements—that is, agreements that mitigate any national-security issues raised by the transaction.

Second, CFIUS must track the actions of parties that have withdrawn their notices and establish “interim protections” against any national-security concerns present between the withdrawal of a CFIUS notice and any refiling. The Lead Agency is charged with carrying out these duties.

Third, the reform requires the DNI to review all transactions. The DNI must seek advice from all affected or appropriate intelligence agencies and submit analysis to CFIUS. Furthermore, the DNI must keep the intelligence community involved throughout any investigation. The DNI will not serve a policy role within CFIUS.

Fourth, the reform permits CFIUS to reopen investigations if any party (1) submits false or omits material information or (2) intentionally materially breaches a mitigation agreement.

Finally, the reform legislation expands the circumstances under which CFIUS must conduct a full 45-day investigation to include any transaction where the Lead Agency recommends such an investigation and CFIUS “concur[s].” The reform bill requires a 45-day investigation in two additional circumstances unless both the Secretary of the Treasury and the head of the Lead Agency determine after the initial 30-day review that the transaction poses no threat to the national security. First, this mandate applies to transactions in which the buyer is a foreign government or is controlled by or acting on behalf of a foreign government. Second, the mandate applies where the transaction involves the acquisition of “critical infrastructure.”

CHANGES TO THE SUBSTANTIVE ANALYSIS

The new legislation enumerates six additional factors that CFIUS may consider: (1) potential regional military threats to the U.S.; (2) threats to critical infrastructure (including major energy assets); (3) threats to critical technologies; (4) foreign-government control of the buyer; (5) other characteristics of the buyer’s country, such as adherence to nonproliferation regimes, relationship to the U.S. in counterterrorism assistance, and the potential for theft of technologies with military applications; and (6) long-term projections of U.S. needs for energy sources and other critical resources and material.

INCREASED TRANSPARENCY

Currently, CFIUS reports to Congress every four years on potential trends regarding commercial and industrial espionage. The reform maintains the annual reporting on these issues and adds new reporting requirements intended to facilitate congressional oversight of the CFIUS process.

INCREASED ACCOUNTABILITY OF AGENCY HEADS

The reform restricts agency heads in their ability to delegate their authority to review transactions, to terminate investigations of transactions involving critical infrastructure or foreign-government control, and to certify required reports to Congress. These requirements are intended to ensure that CFIUS's decisions are made by senior government officials.

CIVIL PENALTIES

The reform directs the President to implement regulations imposing civil penalties upon anyone who violates Exon-Florio or breaches a mitigation agreement.

LAWYER CONTACTS

For further information, please contact your principal Firm representative or one of the lawyers listed below. General e-mail messages may be sent using our "Contact Us" form, which can be found at www.jonesday.com.

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