

❖ **Foreign Investment**

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The Committee on Foreign Investment in the United States

I. Introduction.

The events of 9-11 stunned the world when the United States of America became a target of Global terrorism. It also altered the way we conduct business; nowadays many Americans are more conscious about the foreign influence in many areas including increased foreign investment in the United States. Because of the heightened awareness of the National Security issue, the Executive and Legislative branches of United States are more likely to exercise their given power in reviewing commercial transactions of international nature.

In 2006, the Dubai Ports World's acquisition of U.S. Port leases propelled the once obscure Committee on Foreign Investment in the United States ("CFIUS") into the limelight. CFIUS is a twelve member committee chaired by the Secretary of the Department of Treasury. Its participants include the Departments of Defense, Commerce, Justice, and Homeland Security. It is also supported by U.S. intelligence agencies. The staff of the Office of International Investment of Department of Treasury administers the CFIUS. Its major function is to review the inbound foreign transactions for applicable national security implications.

II. Authority.

A. Statute. Section 5021 of the Omnibus Trade and Competitiveness Act of 1988 amended Section 721 of the Defense Production Act of 1950 (50 U.S.C. App. 2170) to provide authority to the President to suspend or prohibit any foreign acquisition, merger or takeover of a U.S. corporation that is determined to threaten the national security of the United States. The President can exercise this authority under section 721 (also known as the "Exon-Florio provision") to block a foreign acquisition of a U.S. corporation only if he finds:

- (1) there is credible evidence that the foreign entity exercising control might take action that threatens national security, and
- (2) the provisions of law, other than the International Emergency Economic Powers Act do not provide adequate and appropriate authority to protect the national security.

B. Factors. The Exon-Florio provision lists the following factors that the President or his designee may consider in determining the effects of a foreign acquisition on national security. These factors are:

- (1) domestic production needed for projected national defense requirements;
- (2) the capability and capacity of domestic industries to meet national defense requirements, including the availability of human resources, products, technology, materials, and other supplies and services;
- (3) the control of domestic industries and commercial activity by foreign citizens as it affects the capability and capacity of the U.S. to meet the requirements of national security;
- (4) the potential effects of the transaction on the sales of military goods, equipment, or technology to a country that supports terrorism or proliferates missile technology or chemical and biological weapons; and
- (5) the potential effects of the transaction on U.S. technological leadership in areas affecting U.S. national security.

C. Byrd Amendment. Section 837(a) of the National Defense Authorization Act for Fiscal Year 1993, called the "Byrd Amendment," amended Section 721 of the Exon-Florio provision. It requires an investigation in cases where:

- (1) the acquirer is controlled by or acting on behalf of a foreign government; and
- (2) the acquisition "could result in control of a person engaged in interstate commerce in the U.S. that could affect the national security of the U.S."

III. Application Process

The Exon-Florio provision does not define the national security. The preamble to the regulations provides guidance as to which products, services and technologies important to U.S. defense requirements would be significant to national security. Even though a notification is voluntary, CFIUS would consider a notification of these transactions appropriate.

A. Review. The CFIUS notification is voluntary without any mandated waiting period, unlike the Hart Scott Rodino (HSR) review. The confidential CFIUS review begins with a voluntary filing by one of the parties in the transaction. There is a 30 day review by the CFIUS review committee, and a potential 45 day investigation that would follow. After these steps, a recommendation to the President is made. The President of United States has a 15 day period in which to permit or deny the transaction after the CFIUS recommendation.

B. Pre-Filing Discussion. It is common to have a pre-filing discussion to eliminate any initial concerns. The majority of transactions are cleared within the initial 30 day review period. However, the parties should understand the risk involved in determining whether they should file a voluntary review. If a transaction involves a foreign person or may impact the national security, it may be appropriate for the parties to request a review by CFIUS. The

alternative to a voluntary review is that any one of CFIUS committee members can significantly derail the transaction or cause the transaction to be unconsummated.

IV. Ongoing Legislation.

The Defense Production Act and its amendments allow the President of United States to investigate any mergers, acquisitions and/or takeovers of U.S. assets or entities by foreign persons which may have a negative impact on U.S. National Security.

Foreign Investment and National Security Act of 2007. The recently enacted Foreign Investment and National Security Act of 2007 (“FINSA 2007”) is a year long legislative effort to reform CFIUS arising from the 2006 Dubai Ports World controversy. FINSA 2007 formally extends the scope of the reviews beyond traditional defense industry related assets to include telecommunications, energy, transportation and other industry assets critical to U.S. national security. It incorporated many previously issued executive orders into the statute, added the national intelligence agency to analyze the national security issues in the transactions. It also formalize the senior level officers involvement in the review, appointment of a lead agency by the Treasury Department, a foreign government controlled investors concept, and congressional oversight.

The congressional leaders may request a briefing on any review, investigation, and any required mitigation measures, along with receiving a detailed written notice, and annual report on CFIUS annual activities. Since the enactment of FINSA 2007 in July, the corresponding regulation to implement the new law has not been published. It is due in April 2008.

V. Conclusion.

The statutory interpretation of Presidential discretion is broad and the scope of industry covered can be unlimited. The practical implication to the transaction is that it may create additional cost and delay when a foreign person is identified as a potential buyer, which would cause a risk and delay premium or possibly a new breakup fee to be added to the transactional cost.

In reaction to FINSA 2007, German Chancellor Angela Merkel has called for a common European Union based effort to review foreign investment transactions similar to CFIUS reviews. Recently Korean Government also made its intent to enact similar statutory regulations in the near future. Therefore, National Security will become an additional issue that a foreign corporation needs to contend with in its quest to invest in the United States market.

