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The Revised National Security Review Process for FDI in the US

by

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On December 22, 2008, new regulations setting forth the U.S. government's national security review process for foreign mergers and acquisitions of U.S. businesses became effective. They are the ultimate step in a lengthy effort to revise and strengthen the reviews undertaken by the Committee on Foreign Investment in the United States ("CFIUS").¹

CFIUS administers the so-called Exon-Florio statute, which provides the U.S. President with the authority to review mergers, acquisitions and takeovers ("M&As") that may result in foreign control over a U.S. person or entity engaged in interstate commerce in the United States. (Greenfield investments are not subject to CFIUS review.) For M&As that threaten to impair U.S. national security in a manner that cannot be mitigated or that is not, in the President's judgment, otherwise addressable through other U.S. laws, the President can suspend or prohibit such foreign investments — a decision not subject to any judicial review.

The Exon-Florio statute itself, and CFIUS as the statute's administering body, came under political attack in the wake of the 2006 Dubai Ports World debacle. Some in the U.S. Congress sought to tighten drastically the legal regime for foreign investment in the United States. Fortunately, through the leadership of certain key Members of Congress, the Administration and the business community, the debate shifted to improving the review process in a manner that protects national security while preserving the openness of the U.S. to foreign investment. The end result was the Foreign Investment and National Security Act of 2007, which thoughtfully enhanced Exon-Florio and the CFIUS process. The Treasury Department, working with the other CFIUS agencies, has now issued final regulations implementing the Act.

The amended CFIUS process maintains the formal existing timeframes for reviewing M&As, providing a critical measure of certainty to foreign investors and U.S. parties. The timeframe for CFIUS review — and Presidential action, when necessary — can be summarized as follows:

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¹ In addition to the Department of Treasury, which chairs CFIUS, the Committee is comprised of eight other voting members (the Departments of Commerce, Defense, Homeland Security, Justice, State, and Energy; the U.S. Trade Representative; and White House Office of Science and Technology); two permanent non-voting members (the Director of National Intelligence and the Department of Labor); and several other executive branch offices that act as observers and, on occasion, participants in CFIUS reviews.

- CFIUS conducts an initial 30-day review following receipt of a voluntary notice filed jointly by the foreign acquirer and the U.S. business. The vast majority of CFIUS cases are concluded following this initial 30-day review.
- For transactions deemed to require additional review following the initial 30 days, the statute authorizes CFIUS to conduct an investigation for up to an additional 45 days.
- If CFIUS has not unanimously resolved a threat to U.S. national security at the end of the 45-day investigation period, CFIUS will provide a formal report to the President. The President then has 15 days to issue his decision in the case. (Few transactions reach the stage of requiring a Presidential decision.)
- CFIUS is now required to report to Congress on its reviews, but those reports occur only after the review is concluded. There is no formal prior role for Congress.

For foreign investors and U.S. parties, there are a number of other notable aspects of CFIUS's authority and jurisdiction under the amended law and regulations. First, the CFIUS regime continues to employ a broadly flexible definition of "control" by a foreign person for purposes of determining CFIUS jurisdiction.

Second, the applicable law and regulations do not precisely define the meaning of "national security." CFIUS's national security assessment in turn remains a case-by-case determination. Even the presence of foreign government-control over the investor — for which there is a statutory presumption of heightened scrutiny — does not necessarily create a national security risk; CFIUS still considers all facts and circumstances related to the particular M&A at issue in determining what, if any, national security risk is presented.

Third, while CFIUS has authority to initiate its own reviews of M&As, the CFIUS review remains an inherently voluntary process, affording parties with discretion on when and whether to notify CFIUS of a "covered transaction" (i.e., a M&A involving investment by a foreign person).

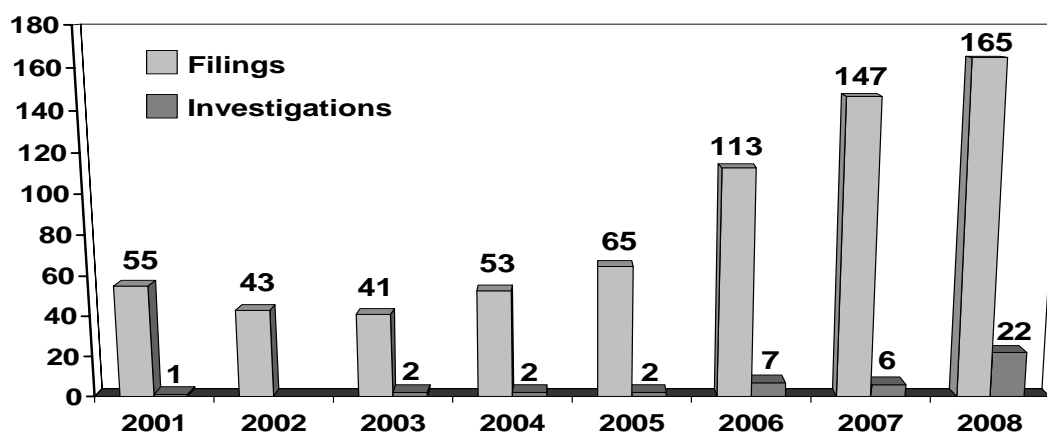
Fourth, while CFIUS's amended legal authorities provide, in practice, for a more deliberative process that can result in enhanced scrutiny in certain cases and, in turn, a greater number investigations, they also create an arguably higher bar for CFIUS to extract formal (and potentially costly) risk-mitigation commitments from M&A parties as a condition of approval.

Together, these characteristics of the amended CFIUS regime offer CFIUS the latitude to review transactions likely to raise real (or perceived) national security risks and to address those risks reasonably, without trampling the overall U.S. policy of promoting foreign investment. They also offer transactional parties discretion on whether to condition the consummation of covered M&As upon CFIUS approval. Consequently, while the number of M&As filed with CFIUS has been rising steadily in recent years (see the table below), CFIUS likely will continue to review just a fraction — generally estimated to be less than 10% — of foreign investments in U.S. businesses. Furthermore, even with the enhanced number of filings and increased investigations, the vast majority of CFIUS's reviews will continue to conclude in the initial 30-day time period.

It is important to note, however, that M&A parties should tread carefully with their discretion on when and whether to notify CFIUS of a transaction and to require CFIUS approval before closing the

transaction. CFIUS does monitor M&A activity, and it is always preferable for parties to raise a transaction with CFIUS voluntarily rather than to have CFIUS formally come calling after the transaction is announced. Moreover, while relatively few covered M&As raise potential national security concerns, the President and CFIUS have the power to unwind a transaction after closing. Conversely, a CFIUS review and approval provides a form of safe harbor for a transaction that can only be revisited in very limited, exceptional circumstances. Given this dynamic, parties are well advised to assess the CFIUS-related ramifications of a potential transaction involving foreign investment — and to determine whether a CFIUS review is advisable — in advance of entering into a covered M&A.

Table 1. CFIUS Filings and Investigations, 2001-2008



Source: US Treasury Department.

In the end, the revised CFIUS regime largely preserves existing practices and timeframes; provides somewhat greater clarity to transaction parties; establishes greater accountability within the CFIUS process and of CFIUS to the U.S. Congress; and strengthens political confidence in, and respect for, the CFIUS review system. Given the difficult place where the political process commenced after Dubai Ports World, this is a positive result, and benefits foreign investors and U.S. parties alike by assuring greater transparency and stability in the CFIUS review process.

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Previous Columbia FDI Perspectives

No. 1. Karl P. Sauvnt, “The FDI Recession has Begun,” November 22, 2008.