

INTERNATIONAL TRADE UPDATE

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President Bush to Sign Act to Reform U.S. Government Review of Foreign Investments in the United States

Through the Exon-Florio Amendment to the Defense Production Act of 1950, the President is authorized to bar or impose significant restrictions on acquisitions by non-U.S. entities of U.S. companies if such acquisitions threaten U.S. national security interests. Reviews of foreign direct investments under Exon-Florio are conducted by the Committee on Foreign Investment in the United States (CFIUS). Following the controversy over the CFIUS review of the Dubai Ports World acquisition of a British company operating port facilities in some major U.S. cities, Congress considered a number of proposals to strengthen the CFIUS review process.^{1/} This week President Bush is expected to sign the Foreign Investment and National Security Act of 2007, reforming the process by which the U.S. government reviews the national security impact of foreign direct investments in the United States and increasing the level and duration of government scrutiny given to certain direct investments.

In summary, the Act strengthens the CFIUS review process by mandating expanded reviews in the case of certain transactions, expanding the factors considered by CFIUS in assessing security risks, authorizing the re-consideration of approved transactions under certain circumstances, and increasing congressional oversight.

Initiation of Review and Investigation

National security reviews are not mandatory; they are generally initiated through voluntary notice of the parties, although CFIUS has the power to self-initiate a review. At the conclusion of an initial 30-day review of a transaction, CFIUS must determine whether to terminate its review or proceed to a more extensive 45-day investigation (to date, most reviews have concluded at the end of the 30-day period). Under the Act, the 45-day investigation will be mandatory whenever a transaction could result in the control of a U.S. entity by a foreign government or an entity controlled by or acting on behalf of a foreign government. The Act also seeks to give more attention to acquisitions of critical infrastructure by requiring a full investigation of such acquisitions if CFIUS determines that the acquisition *could* impair national security and such potential impairment has not been appropriately mitigated. The Act also provides for an investigation whenever the Lead Agency

^{1/} See our [International Trade Update](#) of March 7, 2007, for a description of the review procedures in effect prior to passage of the Act.



(explained below) with the concurrence of the Committee so recommends. However, the latter change is more form than substance as it has been the informal practice of CFIUS for some time to proceed to an investigation if even a single CFIUS member so requests.

The Act provides some flexibility from these mandatory investigation provisions by giving the Lead Agency and the Secretary of the Treasury, acting jointly, the power to exempt a transaction from a full investigation if they determine the transaction will not impair the national security.

The Act omits a number of elements contained in earlier versions of the legislation, including those requiring: (1) a roll-call vote of the Committee and assent of the Chair and two newly created Deputy Chairs for the approval of the results of a review or investigation; (2) presidential assent to a transaction if any Committee member voted against approval in the case of the control of a U.S. entity by a foreign government (or an entity under its control); and (3) presidential assent if the transaction involved a foreign party from a country whose government had been designated a supporter of international terrorism.

Expansion of Committee Powers and Scope of Review

The Act will expand the scope of the CFIUS process. In reviewing transactions, the Committee now must consider not only the effects on U.S. national security, but also: (1) the potential effects on “critical infrastructure;”^{2/} (2) the long-term projection of U.S. requirements of energy and other critical resources and materials; and (3) in cases involving acquisitions by foreign governments, the adherence of the acquirer’s country to arms control, nonproliferation, and disarmament regimes and its cooperation in counter-terrorism efforts; as well as the potential for transshipment or diversion of technologies with military applications.

The Act omits the requirement in the prior House bill that the Committee consider the consequences of a transaction for U.S. efforts to curtail human trafficking and drug smuggling. It also omits the earlier controversial grant of authority to the Committee to collect evidence by mandating the production of all relevant documents and taking sworn testimony.

The Act provides for the designation on a case-by-case basis by the Secretary of the Treasury of any member or members of the Committee to serve as the Lead Agency or Agencies to act on behalf of the Committee in reviewing, investigating, and monitoring an investment transaction. The Act also calls for a national security threat analysis to be provided to the Committee by the Director of National Intelligence (DNI), who is called upon to seek and incorporate the views of all affected or appropriate intelligence agencies. At the same time, the Act clearly states that the DNI shall not be a member of the Committee and shall serve no policy role other than to provide analysis to the Committee. The Committee’s membership also will be expanded to include the Secretary of Energy and, on an *ex officio* basis, the Secretary of Labor.

^{2/} “Critical infrastructure” is defined as “any systems and assets, whether physical or cyber-based, so vital to the United States that the degradation or destruction of such systems or assets would have a debilitating impact on national security, including national economic security and national public health or safety.”

Expansion of CFIUS Monitoring

The Act strengthens monitoring by CFIUS. Where notices filed with CFIUS subsequently are withdrawn to ensure that appropriate interim protections are in place, CFIUS is required to establish procedures to track transactions. CFIUS, through the designated Lead Agency, also will be required to establish procedures to monitor the implementation and fulfillment of any mitigation agreement (an agreement between CFIUS (or certain CFIUS agencies) and the foreign acquiror designed to mitigate national security risks).

Significantly, the Act also will impose a so-called “evergreen” provision, authorizing CFIUS to reopen a prior review under certain conditions, including: (1) the submission of false or misleading material information, or the omission of material information, during the review or investigation; and (2) the intentional material breach of a mitigation agreement, but only (unlike earlier provisions) if the Lead Agency certifies such and the Committee determines that no other remedies are available. Nevertheless, the inclusion of the evergreen provision is a reflection of the importance the U.S. government attaches to compliance with the terms of any mitigation agreement negotiated in the context of the CFIUS review.

Increased Congressional Oversight

The Act provides a more significant oversight role for Congress. CFIUS is required to notify specified members of Congress at designated stages of review of a transaction. At the request of certain members of Congress, the Committee will be required to report on a covered transaction, on a classified basis if necessary. The Committee also will be required to submit an annual report to the relevant congressional committees covering the basic information concerning the parties, transactions, and CFIUS actions, as well as cumulative and trend information; the report will include an assessment of the vulnerability of critical technologies. The Act provides that confidentiality protections currently applied to documents and information submitted to the CFIUS will continue to apply to materials subsequently provided by the Committee to Congress.

Conclusion

U.S. policymakers continue to publicly support foreign direct investment in the United States. Nevertheless, non-U.S. persons interested in acquiring U.S. businesses would be well-advised to consider the potential impact of Exon-Florio and the CFIUS process in their acquisition strategy, especially in connection with acquisitions in critical infrastructure industries or acquisitions by companies with foreign government ownership interests. In particular, attention should be given to the potential demand for a mitigation agreement to alleviate any national security concerns. In light of the enhanced congressional oversight of CFIUS, acquirors should also consider the potential interest of Congress in any contemplated transaction.

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