

UNDERSTANDING THE CFIUS PROCESS

This paper provides an overview of the national security-based foreign investment review process overseen by the Committee on Foreign Investment in the United States (“CFIUS”), an interagency Executive branch committee.

Background and Purpose: As the leading recipient of foreign direct investment (“FDI”) in the world, the United States remains committed to an open investment policy that provides national treatment to foreign investors. CFIUS plays a critical role in this open investment framework, ensuring that the United States welcomes foreign investment while safeguarding important U.S. national security interests. To that end, the purpose of CFIUS is simple: “[t]o ensure national security while promoting foreign investment and the creation and maintenance of jobs.”¹ Consistent with this statutory purpose, CFIUS reviews only the small portion of FDI that could have national security implications; the vast majority of FDI into the U.S., including all greenfield investments, does not require CFIUS review.

Composition of CFIUS: CFIUS is an interagency committee chaired by the Department of the Treasury and comprised of eight other voting members (the Departments of Commerce, Defense, Homeland Security, Justice, State, and Energy; the U.S. Trade Representative; and the 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 White House offices that act as observers and, on a case-by-case basis, participate in CFIUS reviews. Treasury’s designation as the CFIUS chair was purposeful; Treasury is the agency most responsible for capital flows and investment, and its status as chair sends a signal to the world that the U.S. welcomes foreign investment.

Authorities: CFIUS was originally established in 1975 by Executive Order and expanded in 1988 following the enactment of the Exon-Florio Amendment, which authorized the President to suspend or prohibit any foreign acquisition, merger or takeover of a U.S. corporation that is determined by the President to threaten the national security of the United States (this authority was delegated to CFIUS). In 2007, CFIUS was further strengthened through FINSA.²

The President, acting through CFIUS, is authorized to review a “covered transaction” — i.e., any transaction that could result in control of a U.S. business by a foreign person — to determine the effect of the transaction on U.S. national security. CFIUS may investigate and approve a covered transaction, including with conditions to mitigate a threat to U.S. national security (addressed below), or it may refer the matter to the President for final action. Only the President retains the

¹ Preamble to the Foreign Investment and National Security Act of 2007 (“FINSA”).

² Today, CFIUS operates pursuant to Section 721 of the Defense Production Act of 1950, as amended by FINSA and as implemented by Executive Order 11858, as amended, and the regulations at 31 C.F.R. Part 800.

ultimate authority under the statute to prohibit or unwind a transaction where there is credible evidence that the transaction threatens to impair U.S. national security and the threat cannot be adequately mitigated.

Filings and Review Process: The CFIUS process is triggered when parties to a merger or acquisition make a filing with CFIUS (called a “notice”) and answer a series of transaction and security-related questions. Filing is typically voluntary, although CFIUS also has the authority to compel a filing if it independently identifies a transaction that possibly presents national security issues. Filings are made to the CFIUS staff in the Department of the Treasury. CFIUS is required to evaluate transactions on a case-by-case basis, applying the same criteria to each transaction that is filed.

The statutorily-mandated timeline for CFIUS action is as follows:

- Initial **30-day review** following receipt of notice;
- Up to **45-day “investigation”** for transactions requiring additional review following the initial 30-day period; and
- **Presidential Review**, with decision required within 15 days.

Thus, the formal part of the CFIUS review process ranges from 30 to 90 days. Most cases are concluded in the first 30 days and result in the transaction being approved without condition. However, from 2009 through 2011, 37 percent of all cases proceeded to a second-stage investigation. There have been only two cases — in 1990 and 2012 — where the President has blocked a foreign merger, acquisition or takeover on national security grounds.

Confidentiality: The CFIUS process is legally bound by strict confidentiality requirements intended to protect both national security and the commercially sensitive proprietary information pertaining to the parties involved. CFIUS does not disclose whether a notice has been filed or the results of any filing, but does provide a confidential report to Congress upon the conclusion of its review.

National Security Considerations: While neither the statute nor the regulations precisely define “national security,” there are certain statutorily enumerated factors that CFIUS must consider when reviewing a covered transaction. These include, for example, ensuring the domestic capability and capacity necessary to fulfill national defense requirements, the impact of a transaction on U.S. technological leadership in an area affecting national security, the potential effects on U.S. critical infrastructure, effects on critical technologies, long-term U.S. energy needs, whether the transaction involves an acquirer that is controlled by a foreign government, and whether the home country of the acquirer adheres to U.S. policy on non-proliferation and export control requirements. In addition, in its annual report to Congress, CFIUS has identified additional considerations that have arisen in its review of cases, such as the existence of government contracts relevant to national security, cyber security and supply chain considerations, the impact of a transaction on national security-related law enforcement interests, and proximity of the target U.S. business to certain U.S. government facilities.

Foreign Government-Controlled Investments: Foreign government-controlled transactions are subject to greater scrutiny by CFIUS. FINSA created a statutory presumption that notices involving foreign government ownership will proceed to the 45-day investigation phase, unless senior-level officials (the Secretary or Deputy Secretary of the Treasury, and an equivalent official at another designated “lead” agency within CFIUS) determine that the proposed transaction will not impair national security. For those acquisitions by state-owned companies that reach the investigation stage, the law requires an assessment of the foreign country’s compliance with U.S. and multilateral counter-terrorism, nonproliferation, and export control regimes.

Risk Analysis and Mitigation: CFIUS applies a three-part national security analysis to each transaction that it reviews: (i) it assesses whether the acquirer has the ability or intent to exploit or cause harm (the “threat analysis”); (ii) it considers the U.S. business at issue, including its relationship to any weakness or shortcoming in the U.S. national defense or any susceptibility to impairment of U.S. national security (the “vulnerability analysis”); and (iii) it evaluates the consequences if threat and vulnerability interact as the result of a particular transaction (the “risk analysis”).

If, as a result of this risk analysis, CFIUS concludes the transaction threatens national security, CFIUS may enter into a so-called mitigation agreement with the parties to the transaction. Mitigation agreements provide conditions on the transaction to address the national security risks; these may include a mix of governance measures, security requirements, and monitoring/verification mechanisms, among other conditions. From 2009 through 2011, roughly eight percent of all cases reviewed by CFIUS resulted in the use of legally binding mitigation measures.

Conclusion: The United States derives tremendous benefits from the strong and open flow of investment from around the world. With its narrow and non-political mandate, the CFIUS process helps to ensure the necessary balance between the protection of vital national security interests and the promotion of global investment in the U.S. economy.

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