

Considerations in Voluntarily Filing Notice with the Committee on Foreign Investment in the United States

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Parties to a cross-border transaction must determine whether to voluntarily file notice with the Committee on Foreign Investment in the United States (CFIUS). This article describes (i) the considerations as to whether to file notice, (ii) pre-filing consultation with CFIUS, (iii) the notice and certification, (iv) the CFIUS process where notice is filed and (v) enforcement, in light of the U.S. Treasury Department's final regulations regarding CFIUS, which became effective in December 2008. These regulations implement Section 721 of the Defense Production Act of 1950, as amended by the Foreign Investment and National Security Act of 2007, and codify CFIUS process.

Considerations

The parties first need to determine whether (i) there is a covered transaction—whether the transaction (*i.e.*, a proposed or completed merger, acquisition or takeover) is by or with any foreign person (*i.e.*, a foreign national, foreign government or foreign entity

or an entity over which control is exercised or exercisable thereby) which could result in foreign control of a U.S. business.¹ Control means the “power, direct or indirect, whether or not exercised...to determine, direct, or decide important matters affecting an entity...”² Control can be shown by ownership of voting interests, board representation, proxy voting, special shares, contractual arrangements, formal or informal arrangements to act in concert or other means.

The parties also need to determine whether the transaction could present national security considerations. According to U.S. Treasury Department guidance published in December 2008 about the types of transactions CFIUS has reviewed that have presented national

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One Year Subscription ■ 10 Issues ■ \$444.00
(ISSN#: 1093-3255)

security considerations, these transactions have involved U.S. businesses that provide products and services to U.S. Government agencies and state and local authorities and companies that supply goods and services—as prime contractors or subcontractors or suppliers to prime contractors—to U.S. Government agencies with functions relevant to national security (e.g., information technology, telecommunications, energy, natural resources, industrial products and goods and services that affect the national security-relevant functions of the U.S. Government agency or create vulnerability to sabotage or espionage).³

These transactions also have involved U.S. businesses without regard to government contracts, where there are U.S. national security implications (including the energy sector, the nation's transportation system, U.S. businesses that could significantly and directly affect the U.S. financial system, companies that produce certain types of advanced technologies that may be useful in defending or seeking to impair U.S. national security, U.S. businesses that are engaged in research, development, production or sale of technology, goods, software or services subject to U.S. export controls and where U.S. critical infrastructure is involved (e.g., major energy assets)).

Other situations include whether a transaction is foreign government-controlled and the record of the country of the investor regarding nonproliferation and other national security-related matters. Also, the track record or intentions of the foreign person and its personnel regarding actions that could impair U.S. national security (including the intent to terminate contracts between the U.S. business and U.S. Government agencies for goods and services relevant to national security) have been considered. This guidance is illustrative and does not describe all national security considerations that CFIUS may identify and analyze in reviewing a transaction.

Pre-Filing Consultation with CFIUS

Parties are encouraged to consult with CFIUS before filing notice or in connection with filing a draft notice, at least five business days before filing notice.⁴

Notice and Certification

If the parties determine to file notice, the notice must, among other things, include information

about the transaction, the parties, the expected or actual completion date and a good faith approximation of the net value of the interest acquired in the U.S. business.⁵ The parties must provide certifications and certain other documents together with the notice.⁶ A final certification needs to be submitted at the conclusion of a review or investigation for each party that has filed additional information after the original notice, at least one or two days before the anticipated closing date of the review or investigation.⁷ All information and documentary material filed with CFIUS is afforded confidential treatment.⁸

CFIUS Process

After a notice is filed with CFIUS, there is a 30 calendar-day review period. Upon accepting a notice, the Staff Chairperson of CFIUS advises the parties in writing of the start date of the review period.⁹ CFIUS examines whether (i) the transaction is by or with any foreign person and could result in foreign control of a U.S. business, (ii) there is credible evidence to support a belief that any foreign person exercising control of that U.S. business might take action that threatens to impair the national security of the U.S. and (iii) provisions of law other than Section 721 of the Defense Production Act of 1950 and the International Emergency Economic Powers Act provide adequate and appropriate authority to protect the national security of the U.S.¹⁰ CFIUS also can review a transaction for which no voluntary notice has been filed, even after completion.¹¹

National Security Risk. CFIUS identifies all facts and circumstances that have potential national security implications to assess whether the transaction poses national security risk. CFIUS assesses whether a foreign person has the capability or intent to exploit or cause harm (i.e., whether there is a threat) and whether the nature of the U.S. business or its relationship to a weakness or shortcoming in a system, entity or structure creates susceptibility to impairment of U.S. national security (i.e., whether there is a vulnerability). National security risk is a function of the interaction between threat and vulnerability and the potential consequences of that interaction for U.S. national security.¹²

Section 721 describes the following factors for CFIUS to consider in assessing whether the transaction poses national security risk: (i) the potential ef-

fects of the transaction on the domestic production needed for projected national defense requirements; (ii) the potential effects of the transaction on 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); (iii) the potential effects of a foreign person's control of domestic industries and commercial activity on the capability and capacity of the U.S. to meet the requirements of national security; (iv) the potential effects of the transaction on U.S. international technological leadership in areas affecting U.S. national security; (v) the potential national security-related effects on U.S. critical technologies; (vi) the potential effects on the long-term projection of U.S. requirements for sources of energy and other critical resources and material; (vii) the potential national security-related effects of the transaction on U.S. critical infrastructure (including major energy assets); (viii) the potential effects of the transaction on the sales of military goods, equipment or technology to countries that present concerns related to terrorism, missile proliferation, chemical, biological or nuclear weapons proliferation or regional military threats; (ix) the potential that the transaction presents for transshipment or diversion of technologies with military applications (including the relevant country's export control system); (x) whether the transaction could result in the control of a U.S. business by a foreign government or by an entity controlled by or acting on behalf of a foreign government and (xi) the relevant foreign country's record of adherence to nonproliferation control regimes and record of cooperating with U.S. counterterrorism efforts. CFIUS also may consider other appropriate factors in determining whether a transaction poses national security risk.¹³

No National Security Concerns. If CFIUS concludes that there are no unresolved national security concerns, the transaction may proceed without the possibility of subsequent suspension or prohibition.¹⁴ The U.S. Treasury Department will notify the parties of the CFIUS determination to not to undertake an investigation and to conclude action.¹⁵

Investigation. CFIUS will undertake an investigation where (i) the transaction threatens to impair U.S. national security and the threat has not been mitigated, (ii) the transaction is a foreign government-

controlled transaction, (iii) the transaction would result in control by a foreign person of critical infrastructure that could impair national security and the impairment has not been mitigated or (iv) recommended by a lead agency and CFIUS concurs.¹⁶ The investigation must be completed within 45 days after commencement.

Following the investigation, CFIUS must send a report to the President requesting the President's decision if: (i) CFIUS recommends that the President suspend or prohibit the transaction; (ii) the members of CFIUS are unable to reach a decision on whether to recommend that the President suspend or prohibit the transaction or (iii) CFIUS requests that the President make a determination regarding the transaction. Otherwise, CFIUS may decide to conclude all action without sending a report to the President and the U.S. Treasury Department will notify the parties in writing of the CFIUS determination to conclude action.¹⁷

Enforcement

A person that either intentionally or through gross negligence submits a material misstatement or omission in a notice or makes a false certification to CFIUS may be subject to a civil penalty up to \$250,000 per violation. A person that either intentionally or through gross negligence violates a material provision of a mitigation agreement with, or a material condition imposed by, the United States may be subject to the greater of (i) a civil penalty up to \$250,000 per violation or (ii) the value of the transaction.¹⁸

NOTES

1. 31 CFR § 800.207; 31 CFR § 800.216; 31 CFR § 800.224.
2. 31 CFR § 800.204.
3. 73 Fed. Reg. 74567 (December 8, 2008).
4. 31 CFR § 800.401(f); U.S. Department of the Treasury, Office of Information Security, Committee on Foreign Investment in the United States, Filing Instructions (<http://www.ustreas.gov/offices/international-affairs/cfius/filing-instructions.shtml>).
5. 31 CFR § 800.402(c).
6. 31 CFR § 800.402(c) and (l); 31 CFR § 800.202.
7. 31 CFR § 800.701(d); 31 CFR § 800.202; U.S. Department of the Treasury, Office of Information

Security, Committee on Foreign Investment in the United States, Filing Instructions (<http://www.ustreas.gov/offices/international-affairs/cfius/filing-instructions.shtml>).

8. 31 CFR § 800.702.
9. 31 CFR § 800.502; U.S. Department of the Treasury, Office of Information Security, Committee on Foreign Investment in the United States, Filing Instructions (<http://www.ustreas.gov/offices/international-affairs/cfius/filing-instructions.shtml>).
10. 31 CFR § 800.501.
11. 31 CFR § 800.401(c) and § 800.502(b).
12. 73 Fed. Reg. 74569 (December 8, 2008).
13. 73 Fed. Reg. 74569-74570 (December 8, 2008).
14. 31 CFR § 800.601.
15. 31 CFR § 800.504.
16. 31 CFR § 800.503.
17. 31 CFR § 800.506.
18. 31 CFR § 800.801.

