

## THE FOREIGN INVESTMENT AND NATIONAL SECURITY ACT OF 2007 CODIFIES AND TIGHTENS THE EXON-FLORIO REVIEW PROCESS

July 27, 2007

*In the aftermath of last year's attempt by Dubai Ports World to acquire US transportation-related assets, Congress focused significant attention on the review process for foreign acquisitions of US companies established by the Exon-Florio Amendment to the Defense Production Act of 1950. Exon-Florio reviews are administered by the Committee on Foreign Investment in the United States (CFIUS), the interagency committee responsible for reviewing foreign acquisitions of US companies to determine their impact on US national security.*

*In the 110th Congress, the House and the Senate approved CFIUS-related legislation entitled, the Foreign Investment and National Security Act of 2007 (FINSA). President Bush signed the Act into law on July 26, 2007, effectively codifying the Exon-Florio process. While FINSA retains much of the current CFIUS structure and its procedural mechanisms, the Act does change aspects of the current Exon-Florio review process that are worthy of review. Most notably, the Act increases scrutiny of acquisitions involving foreign governments, requires CFIUS to consult with the Director of National Intelligence (DNI), and provides for greater Congressional oversight of CFIUS transactions.*

### **Amendments to the Exon-Florio Process**

#### *CFIUS Structure*

FINSA alters and codifies the membership of CFIUS. The Act retains the 12 existing CFIUS members which include the Departments of the Treasury, Commerce, Defense, State, and Homeland Security, as well as the Office of Management and Budget, Council of Economic Advisors, Office of the United States Trade Representative, National Economic Council, National Security Council, and Office of Science and Technology Policy, while adding the Department of Energy as a 13th member. Under FINSA, the President can designate additional members of CFIUS, but those members must be limited to agencies within the Executive Office of the President. Under the Act, the Department of the Treasury remains the chair of CFIUS. FINSA also permits the Secretary of the Treasury to designate, a member or members of CFIUS to be the lead agency or agencies on behalf of CFIUS.

#### *CFIUS 30-Day Review Period*

FINSA retains the current 30-day CFIUS transaction review period. Once CFIUS receives a notice from a party containing all the required information, it begins a 30-day review to determine whether (1) the transaction could result in control by a foreign person of a US person engaged in interstate commerce, (2) there is credible evidence to support a belief that the foreign person might take action that threatens to impair national security and (3) there are any other laws that provide adequate authority to protect national security. A significant change to this process, however, is that the Act expands the category of persons eligible to submit a voluntary notice of a transaction to CFIUS for review. In addition to any entity that is a party to a merger, acquisition, or takeover being able to initiate a 30-day review, the President, CFIUS, or any member of CFIUS could request that CFIUS review a transaction under certain circumstances. Furthermore, these parties can also re-open a previously reviewed transaction if a party either submitted

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Americas

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Europe

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Russia/CIS

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Asia Pacific

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Africa

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Middle East

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false or misleading information or intentionally materially breached a mitigation measure. The ability to re-open a transaction for material breach is constrained by a necessary finding by the "lead agency" of an intentional breach, and a finding by all members of CFIUS that no other remedies are available to deal with the breach.

Under FINSA, upon completion of the 30-day review, the Secretary of Treasury and the head of the lead agency must transmit a certified notice to members of Congress reporting the results of its review.

### ***The 45-Day Investigation Period and Presidential Decision***

FINSA codifies the standards for the initiation of 45-day investigations by CFIUS. The Act requires an investigation if a transaction threatens to impair national security and that threat has not been mitigated during the initial 30-day review period. FINSA also requires an investigation where the transaction could result in control of a US company by a foreign government or an entity controlled or acting on behalf of a foreign government. Following completion of a 45-day investigation, the Secretary of Treasury and the head of the lead agency must transmit to members of Congress a certified written report on the results of the investigation, unless the matter under investigation has been sent to the President for decision.

FINSA leaves in place existing Presidential authority to suspend or prohibit a proposed transaction. Once a 45-day investigation is complete, CFIUS must provide a report and recommendation to the President, who then has 15 days to determine whether to suspend or prohibit a proposed transaction. The President also has the authority to direct the Attorney General to seek appropriate relief, including divestment relief in the case of a completed transaction, in the district courts of the United States in order

to implement and enforce the President's decision.

### ***Review and Analysis by the Director of National Intelligence***

FINSA requires the DNI to "expeditiously carry out a thorough analysis" of any threat to national security posed by a transaction submitted for review to CFIUS. The DNI is directed to seek and incorporate the views of all affected or appropriate intelligence agencies as part of its analysis. Under the Act, the DNI must provide its analysis to CFIUS no later than 20 days after the date on which notice of the transaction is accepted by CFIUS. The DNI cannot be a member of CFIUS or play a policy role other than to provide such analysis.

### ***Withdrawals and Resubmissions of Notice***

FINSA prohibits withdrawals of a notice to CFIUS unless approved in writing by the Department of the Treasury, the CFIUS chair. Once a withdrawal has been approved, CFIUS will establish interim protections to address specific concerns that have been raised regarding the transaction, a resubmission timetable, and a process to track any actions taken by a party to the transaction prior to resubmission.

### ***Factors to be Considered by CFIUS and the President***

FINSA requires that CFIUS and the President, when evaluating a transaction, examine the five factors for consideration named in the original statute, which include: (1) the domestic production needed for projected national defense requirements, (2) the capability and capacity of domestic agencies to meet national defense requirements, (3) the control of domestic industries and commercial activity by foreign citizens as it affects US ability to meet national security require-

ments, (4) the potential effects of the acquisition on sales of military goods, equipment, or technology to countries supporting terrorism or countries of concern regarding missile or chemical/biological weapons proliferation, and (5) the potential effects on US international technological leadership in areas affecting national security.

FINSA also adds six new factors for mandatory consideration which include: (1) whether the transaction has a security-related impact on critical infrastructure, including major energy assets, (2) whether the transaction has a security-related impact on critical technologies, (3) whether the transaction involves control by a foreign government, (4) with respect to the transactions requiring an investigation by CFIUS, a review of the current assessment of, (i) the adherence of the subject country to nonproliferation control regimes, including treaties and multilateral supply guidelines, (ii) the relationship of such country with the United States, specifically on its record on cooperating in counter-terrorism efforts and (iii) the potential for transshipment or diversion of technologies with military applications, including an analysis of national export control laws and regulations, (5) the long-term projection of United States requirements for sources of energy and other critical resources and material, and (6) such other factors as the President determines are appropriate.

#### ***Mitigation Measures, Monitoring and Enforcement***

FINSA codifies the practice of applying mitigation measures to transactions that may pose a threat to national security. The Act empowers CFIUS or a lead agency to "negotiate, enter into or impose, and enforce any agreement or condition with any party to a covered transaction in order to mitigate any threat to the national security of the United States that arises as a

result of the transaction." FINSA provides that mitigation measures be based on risk-based analyses and monitored by a designated CFIUS agency. Additionally, the Act requires that the designated agency provide semi-annual reports to CFIUS on the implementation of the mitigation measures as well as periodic reports concerning any modifications to the mitigation measures. Under the Act, CFIUS must develop methods for evaluating compliance with mitigation agreements that will assure compliance without placing unnecessary burdens on a party to a transaction.

#### ***Confidentiality***

FINSA leaves intact existing confidentiality requirements for information or material provided to CFIUS or the President through the Exon-Florio process. Confidential information will be provided to Congress only after the relevant Congressional committee provides an assurance of confidentiality.

#### ***Congressional Oversight and Reporting***

FINSA provides for extensive *ex post* reporting to members of Congress on transactions that have been reviewed and investigations that have been completed by CFIUS. FINSA requires CFIUS to provide a written report to designated members of Congress promptly after the completion of an investigation. The members of Congress designated to receive such a report include the Majority Leader and Minority Leader of the Senate, the Speaker and Minority Leader of the House, the chair and ranking member of any Senate or House committee with jurisdiction over any aspect of the transaction (including the Committees on Foreign Affairs, Financial Services, and Energy & Commerce), and Senators representing states and members of Congress representing Congressional districts affected by the transaction. CFIUS is also required, upon request, to provide

This memorandum is intended only as a general discussion of these issues. It is not considered to be legal advice. We would be pleased to provide additional details or advice about specific situations. For additional information on this important topic, please feel free to call upon your LeBoeuf Lamb relationship partner.

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briefings on ongoing transactions or investigations, or compliance with mitigation agreements to Congressional and Senate members and their staff who are eligible to receive such reports.

Additionally, FINSA requires CFIUS to provide annual reports on its reviews and investigations to Congressional committees of jurisdiction, of which unclassified versions of such reports will have to be made public. The annual reports are required to include detailed information on review and investigation actions, perceived trends in reviews and investigations, analysis of transactions broken down by industry sector and acquiring country, and information on withdrawals, resubmissions, mitigation measures and compliance. FINSA continues to require the evaluation of (1) coordinated strategies by countries or companies to acquire US companies involved in critical technologies in which the United States is a leading producer, and (2) industrial espionage activities by foreign governments against US companies aimed at obtaining commercial secrets related to critical technologies.

FINSA also requires the Secretary of the Treasury in consultation with the Secretaries of State and Commerce to submit annual reports, with respect to investments in the United States by foreign governments or persons that comply with any boycott of Israel or do not ban organizations designated by the State Department as foreign terrorist organizations.

### ***Effective Date***

The provisions of FINSA will become effective on October 24, 2007. Therefore, it is likely that CFIUS filings made before the effective date will be considered under the old law.

### ***Conclusion***

While FINSA does present some significant changes to the Exon-Florio review process, the Act maintains a strong balance between national security and the promotion of foreign investment in the United States. FINSA enhances government scrutiny of transactions by foreign buyers in the United States that are deemed to have possible national security implications. Therefore, foreign investors need to consider seriously filing with CFIUS, unless they are certain that their transactions do not implicate US national security in any way.

Under FINSA, acquisitions by foreign investors in the US energy, infrastructure, telecommunications, or technology sectors are likely to receive increased scrutiny by CFIUS, as businesses in these sectors are deemed critical to US infrastructure. Therefore, foreign investors seeking to make acquisitions in these sectors must now approach the Exon-Florio process as an additional regulatory hurdle to the transaction, similar to antitrust and industry-specific regulatory reviews. The determination of whether to make an Exon-Florio filing and how to proceed successfully through the CFIUS process must become an integral component of the strategic planning process for foreign investors looking to undertake transactions in the United States.

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