# Treasury Department Issues Final Regulations on National Security Examinations of Foreign Direct Investment in the United States

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On November 21, 2008, the U.S. Department of the Treasury published final regulations to implement the Foreign Investment and National Security Act of 2007 (the "FINSA"), a comprehensive rewrite of the Exon-Florio law.[1] The final regulations, which become effective on December 21, 2008, reinforce movement toward more formal, intensive scrutiny of a broader range of transactions in which a foreign person gains control over a US business.

Exon-Florio authorizes the President to block or order divesture of foreign acquisitions of and mergers with US businesses for national security reasons. While not legally required to do so, parties may voluntarily notify transactions and subject them to screening by the Committee on Foreign Investment in the United States (the "CFIUS"). CFIUS screenings are typically concluded at the end of a 30-day "review." Transactions that are deemed more sensitive are subjected to an additional 45-day "investigation." Exon-Florio screening is designed to take no more than 90 days.

If, after examination, CFIUS informs the parties that it will forego any action, the transaction is generally insulated from disruption under Exon-Florio. If a foreign investment transaction is not screened under Exon-Florio, it is indefinitely exposed to the possibility of adverse action.

The final regulations largely track proposed regulations that the Treasury Department published in April 2008, although there are some significant departures and clarifications. The changes relate largely to refining the bounds of covered transactions and elaborating upon the screening process.

- Foreign "Control": In the absence of a bright line criterion, the regulations provide additional examples of the types of "control" by a foreign person over a US business that can make an acquisition a "covered transaction" under Exon-Florio. The additional guidance concerns, for example, minority shareholder rights and limited partnerships.

[1] Regulations Pertaining to Mergers, Acquisitions, and Takeovers by Foreign Persons, 73 Fed. Reg. 70,702 (Nov. 21, 2008). These regulations implement the Foreign Investment and National Security Act of 2007, Pub. L. No. 110-49, 121 Stat. 246 (effective October 24, 2007) amending Defense Production Act of 1950, 50 U.S.C. App. § 2170 (popularly known as the "Exon-Florio" law).

- Foreign Control Safe Harbor: The final regulations retain a “safe harbor” provision for passive foreign investments of ten percent or less in a US business, which are considered not to be covered transactions. CFIUS, however, is scrutinizing more closely whether minority foreign ownership interests are in fact passive.

- Lending Transactions: The new regulations clarify the circumstances in which special financing terms can cause a loan by a foreign party to constitute a covered transaction. In particular, the regulations identify loan rights that make a debt sufficiently close to equity to provide the level of control needed to bring the transaction under Exon-Florio. Examples include interests in the profits of the US business, the right to appoint members of the board of directors of the business, and day-to-day control of business operations.

- Critical Infrastructure: The FINSA directs CFIUS to consider whether covered transactions entail acquisitions of “critical infrastructure” in assessing whether they threaten the national security. The statute defines critical infrastructure as a system and asset that is “so vital to the United States that the incapacity or destruction of the particular system or asset . . . would have a debilitating impact on national security.” The final regulations reinforce that CFIUS will take a case-by-case approach to evaluating whether any given system or asset is critical infrastructure rather than designating as critical infrastructure classes of systems and assets.

- Contents of a Voluntary Notification: The Treasury Department has greatly expanded the volumes of information required for a voluntary notice to initiate Exon-Florio screening of a transaction. For example, the new regulations codify a requirement that foreign acquirers disclose extensive, detailed personal information about officers, directors, and major owners of the foreign acquirer and its parent companies.

- Confidential Treatment of Submitted Information: The regulations expand the scope of information that private parties can expect to submit for a review and that CFIUS is to treat as being confidential. The confidentiality obligation will now expressly apply even when CFIUS determines that a notified transaction is not a covered transaction. It will also apply to information submitted informally by parties in anticipation of submitting an Exon-Florio notice and even when they decide not to submit a notice.

Perhaps the greatest significance of the new regulations is that they further and deepen what businesses can expect to be the major thrusts in CFIUS screening as a result of the enactment of FINSA:

- A broader reach of national security on a case-by-case basis into such areas of concern as terrorism and homeland security;

- A focus on critical infrastructure that relates only indirectly to national security;

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 Dewey & LeBoeuf relationship partner.

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- A far more intensive review of the character and integrity of a foreign acquirer, including its principal officers and directors;
- An increased inclination to resolve national security concerns by extracting broad-ranging commitments from foreign acquirers in the form of mitigation agreements;
- Much greater scrutiny attached to acquisitions by foreign governments or sovereign wealth funds;
- Strong administration dedication to the principle of open investment and a continuing high reluctance to prohibit, formally and unilaterally, a foreign acquisition; and
- Greater Congressional activism and involvement with the CFIUS process.

*Questions concerning Exon-Florio examinations and other matters relating to foreign investment may be directed to the partners identified below or to any other Dewey & LeBoeuf LLP attorney with whom you regularly consult.*

*Harry L. Clark at +1 202 346 7980 or hclark@deweyleboeuf.com*
*W. Clark McFadden II at +1 202 346 7955 or cmcfadden@deweyleboeuf.com*
*Melvin S. Schwechter at +1 202 346 8011 or mschwechter@deweyleboeuf.com*