

III. CFIUS Review: What Foreign Acquisitions Pose National Security Concerns?*

The Committee on Foreign Investment in the United States (CFIUS or the Committee) reviews mergers and acquisitions to identify and address any national security risks.⁵³ CFIUS has jurisdiction to review any deal in which a foreign person will obtain control of a U.S. business—a “covered transaction.” In November 2008, the CFIUS regulations were overhauled to implement changes required by the Foreign Investment and National Security Act (FINSAs).⁵⁴ CFIUS jurisdiction and review processes are now more clear.

One remaining puzzle is determining whether to submit a particular deal for CFIUS review. The decision turns on whether CFIUS is likely to identify any national security considerations. CFIUS review is voluntary (though the Committee can self-initiate a review), and the parties must decide whether to file a voluntary notice. Most do not file: “historically fewer than ten percent of all foreign acquisitions of U.S. businesses are noti-

* Adrienne Goins is a senior associate with Vinson & Elkins LLP. She thanks Michael Howes, a student at the University of Virginia School of Law, for his research assistance.

53. Members are the Secretaries of the Treasury, Homeland Security, Commerce, Defense, State, Energy, and Labor (non-voting); the Attorney General; the Director of National Intelligence (non-voting); and the heads of those other departments and agencies the President deems appropriate. *See* 50 U.S.C. App. § 2170(k)(2) (2007).

54. FINSAs amended § 721 of the Defense Production Act of 1950, 50 U.S.C. App. § 2170 (2007). The regulations are found at 31 C.F.R. §§ 800.101-801 (2008). For an overview of the changes, *see* Department of Treasury, Regulations Pertaining to Mergers, Acquisitions, and Takeovers by Foreign Persons, 73 Fed. Reg. 70,702-70,716 (Nov. 21, 2008).

fied to CFIUS.”⁵⁵ One reason to file is to gain the assurance that the Government will not unwind the transaction later. Neither CFIUS nor the President will exercise divestment authority for deals that have been approved.⁵⁶ The Committee’s high approval rate is another incentive to file. “Between 2005 and 2007, 313 voluntary notices of covered transactions were filed with CFIUS, and none of the transactions were prohibited.”⁵⁷

But what if a deal does not appear to implicate any national security considerations? Should precious resources be spent on a discretionary filing?⁵⁸ Based on a review of CFIUS guidance and reported data, as well as publicly available information on filings, this article describes the types of U.S. businesses involved in transactions reviewed by CFIUS.⁵⁹

CFIUS also closely considers the nature of the foreign acquirer.⁶⁰ Specifically, CFIUS considers whether the acquirer is foreign-government controlled or whether the acquirer’s country supports terrorism, is involved in proliferation of weapons of mass destruction, or is a potential regional military threat.⁶¹ Parties should analyze both aspects of any covered transaction when deciding whether to notify CFIUS voluntarily.

The parties must determine whether a covered transaction presents any national security considerations. This determination is not straightforward, as the term “national security” is not defined in the statute or regulations. The statute provides a list of factors that CFIUS may consider, but the Committee’s review expands concomitantly with the concept of national security. In addition to the listed factors, CFIUS considers “all other national security factors that are relevant to a covered transaction it is reviewing.”⁶²

Traditional Defense Grouping: Not surprisingly, a “significant number” of deals reviewed by CFIUS have involved foreign acquisitions of U.S. businesses that provide defense-related products and services to the U.S. government.⁶³ This traditional defense grouping includes companies with access to classified information, businesses related to law enforcement, and cyber-security. This defense grouping also includes businesses in certain critical technology sectors. FINSA defines “critical technologies” as “critical technology, critical components, or critical technology items essential to national defense.”⁶⁴ The critical sectors are advanced materials and processing, chemicals, advanced manufacturing, information technology, telecommunications, microelectronics, semiconductor fabrication equipment, military-related electronics, biotechnology, professional and scientific instruments, aerospace and surface transportation, energy, and space and marine sys-

55. 73 Fed. Reg. at 70,716.

56. See 31 C.F.R. § 800.601.

57. COMMITTEE ON FOREIGN INVESTMENT IN THE UNITED STATES, ANNUAL REPORT TO CONGRESS (2008), available at <http://www.treas.gov/offices/international-affairs/cfius/docs/CFIUS-Annual-Rpt-2008.pdf>, [hereinafter CFIUS Annual Report]. Some notices were withdrawn by the parties.

58. CFIUS review can take up to ninety days. See 31 C.F.R. §§ 800.501-506.

59. CFIUS review is confidential, but the Committee has published aggregate data and guidance. Some companies publicize information on CFIUS reviews in press releases and SEC filings.

60. Guidance Concerning the National Security Review Conducted by the Committee on Foreign Investment in the United States, 73 Fed. Reg. 74,567, 74,570 (Dec. 8, 2008) [hereinafter Guidance].

61. 50 U.S.C. app. § 2170(f)(4), (8), (9) (2007).

62. Guidance, 73 Fed. Reg. at 74,569.

63. *Id.* at 74,570.

64. 50 U.S.C. app. § 2170(a)(7).

tems.⁶⁵ These high-tech businesses are often involved in developing components with both military and commercial applications, known as “dual-use” components.

Energy: In the aftermath of the September 11, 2001 terrorist attacks, the concept of national security expanded beyond traditional defense concerns. The March 2005 attempt by the China National Offshore Oil Corporation (CNOOC) to buy Unocal was another formative event. Though CNOOC abandoned its bid, many lawmakers argued that CFIUS should have blocked the proposed deal and that the Department of Energy should have played a formal role. Two years later, FINSA made the Secretary of Energy a member of CFIUS and expanded the list of factors to be considered.⁶⁶ CFIUS must now consider the effects of a deal on “critical infrastructure, including major energy assets.”⁶⁷

Guidance published by CFIUS confirms that it has reviewed deals involving foreign acquisition of U.S. businesses in the energy sector. Energy companies drawing attention from CFIUS include businesses “at various stages of the value chain.”⁶⁸ The Committee has reviewed acquisitions of oil and gas exploration and production companies as well as pipeline transportation companies. Fifteen notices of transactions involving electric power generation, transmission, and distribution were reviewed between 2005 and 2007.⁶⁹ In one such transaction, an Australian-controlled entity purchased several power generation projects from Consolidated Edison. More recently, CFIUS reviewed Electricite de France’s acquisition of a stake in Constellation Energy.

Transportation: CFIUS has also reviewed foreign acquisitions of “businesses that affect the nation’s transportation system.”⁷⁰ Port operations and aviation maintenance are among the types of businesses in this group. The Dubai Ports World transaction of 2006 is a prominent example. The company, owned by the United Arab Emirates, acquired an English company with leases to operate several American ports. CFIUS approved the transaction, but the ensuing political uproar led Dubai Ports World to sell the English company’s U.S. port operations.

Technical and Financial Services: CFIUS reports that more than one third of the deals submitted for review between 2005 and 2007 were in the “information sector.”⁷¹ This sector overlaps with the traditional defense sector, as it includes telecommunications companies. It also includes businesses offering professional, scientific, and technical services, such as engineering, computer systems design, scientific research, and consulting.⁷² Finally, this category includes financial companies.⁷³ In its December 2008 guidance,

65. CFIUS Annual Report, *supra* note 57, at 27. Some of the business categories are overlapping. While both energy and transportation are listed as critical sectors, those types of businesses are also considered separate groupings when the connection to national defense is less direct.

66. 50 U.S.C. app. § 2170(k)(2)(G).

67. *Id.* § 2170(f)(6). The term “critical infrastructure” is defined as “systems and assets, whether physical or virtual, so vital to the United States that the incapacity or destruction of such systems or assets would have a debilitating impact on national security.” *Id.* § 2170(a)(6).

68. Guidance, 73 Fed. Reg. at 74,570.

69. CFIUS Annual Report, *supra* note 57, at 8-9.

70. Guidance, 73 Fed. Reg. at 74,570.

71. CFIUS Annual Report, *supra* note 57, at 6-7.

72. *Id.* at 8.

73. *Id.* at 7.

CFIUS confirmed that it has reviewed transactions involving “businesses that could significantly and directly affect the U.S. financial system.”⁷⁴

The expanding concept of national security, as reflected in FINSA, and the revised regulations and guidance effectively obligates parties to scrutinize foreign acquisitions of U.S. businesses outside the traditional defense sector. As has historically been true, parties should voluntarily notify CFIUS of deals in that sector. CFIUS review has now expanded to consider potential risks to U.S. energy and transportation infrastructures. The national security considerations involved in acquisitions of technical consulting and financial companies are less obvious, but nevertheless should also be analyzed. Finally, as noted above, parties should also consider the nature of the foreign acquirer when determining whether to voluntarily notify CFIUS of a proposed transaction.

74. Guidance, 73 Fed. Reg. at 74,570.