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NATIONAL SECURITY IMPLICATIONS OF FOREIGN INVESTMENT IN U.S. GOVERNMENT CONTRACTORS

By Joseph D. West, Judith A. Lee, Christyne K. Brennan, Dave M. Wharwood, and Patrick F. Speice, Jr.

Just as the smoke cleared over the recent Dubai Ports World controversy[1] and significant reform legislation was passed by Congress and signed by President Bush,[2] the U.S. Government is once again reviewing high-profile cases of foreign investment in U.S. companies. The review of such deals is conducted by the interagency Committee on Foreign Investment in the United States (CFIUS) under the Exon-Florio Amendment of the Omnibus Trade and Competitiveness Act of 1998.[3] Within the past few months, many deals have been announced that demonstrate the importance of managing the legal and political implications of the CFIUS review process.

In August 2007, for example, state-owned Dubai Aerospace Enterprise (DAE) announced that it would acquire Landmark Aviation and Standard Aero Holdings from Carlyle Group, a Washington, D.C.-based private equity firm, for almost $2 billion. Landmark Aviation is an aircraft maintenance company, and Standard Aero provides maintenance, repair, and overhaul services for engines and turbines used in small jets. To successfully manage the Government's review of the deal, at least four legal, lobbyist, and public relations firms reportedly registered on behalf of DAE to lobby Congress and the Executive Branch.[4]

IN BRIEF

Exon-Florio Amendment & CFIUS Review
- President's Authority
- CFIUS Membership
- Past CFIUS Activity
- Parties To A Transaction
- Foreign Control
- National Security
- Nature Of The Transaction
- Initiation Of CFIUS Review & Timing
- CFIUS Review As A "Safe Harbor"
- Risk Mitigation

FINSA Reforms
- New Factors For CFIUS Consideration
- Expanded Authority To Reopen A Review Or Investigation
- FINSA's Political Origins
- Potential Heightened Scrutiny

National Industrial Security Program
- Government Contractor Clearance Requirements
- Facility Security Clearance
- Personnel Security Clearance
- Change-In-Control Requirements
- FOCI Factors
- FOCI Mitigation Methods

Related Economic Sanctions & Export Control Issues
- Economic Sanctions
- Export Controls

Other Related Foreign Control Issues For Government Contractors
- Conflict-Of-Interest Rules
- Anti-Assignment Act & Novation
- Proposal Assignment
- Name Change

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In September 2007, Borse Dubai, the government-controlled stock exchange in Dubai, announced that it was acquiring almost 20% of the Nasdaq Stock Market. At the time they announced the deal, both Borse Dubai and Nasdaq also announced that the parties intended to file a voluntary notification to the U.S. Government for review.[5]

Another recent development, of which China's multi-billion dollar investment in the Blackstone Group and Abu Dhabi's purchase of a 7.5% stake in the Carlyle Group are examples,[6] is foreign investment in private equity firms. Many private equity firms may hold significant or even controlling investments in defense or strategic industry enterprises. How the CFIUS process would operate for such "indirect" investments remains to be seen.

The CFIUS interagency group includes representatives from a number of U.S. Government departments and agencies, including the U.S. Departments of the Treasury (which chairs the committee), Homeland Security, State, Defense, Commerce, and Justice, as well as, pursuant to the recent legislation, Energy and Labor and intelligence agencies under the coordination of the Director of National Intelligence.[7] To successfully navigate the CFIUS review process, it is critical for parties to transactions to coordinate their response to the concerns of these different regulatory bodies.

Following the Dubai Ports World controversy, a flood of voluntary notifications were filed with the U.S. Government by foreign buyers and U.S. sellers eager to get "safe harbor" treatment for the underlying deals. However, care should be taken to consider the underlying jurisdictional prerequisite for CFIUS review. Is there actually a transfer of "control" to a "foreign person"? Does the potential acquisition really pose national security concerns?

Rather than reflexively making a voluntary notification to CFIUS, parties to international deals should carefully consider these questions in light of the potential downside to making an otherwise unnecessary filing. As discussed below, CFIUS will frequently insist on certain "mitigation" conditions and agreements before finally approving a transaction, and these conditions could be avoided when there is clearly no transfer of control or implication of national security concerns.

In addition, because the review of foreign acquisitions of U.S. companies necessarily involves a review of the "national security" concerns implicated by the proposed transaction, antitrust, export control, and other regulatory requirements must be coordinated with the CFIUS process. For example, parties should give careful consideration to the requirements of the State Department's Directorate of Defense Trade Controls (DDTC) in connection with transfer of existing export licenses and agreements under the International Traffic in Arms Regulations, as well as the DOD's Defense Security Service in connection with the protection of classified information.[8] And, as in any transaction involving a change in control, where the company being acquired is a U.S. Government contractor, the parties must address issues related to rights and responsibilities under the ongoing contracts.

In the light of complex issues raised for Government contractors by the Government's scrutiny of the national security implications of foreign investment in U.S. companies and the

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recent statutory changes, this BRIEFING PAPER discusses the Exon-Florio Amendment and the CFIUS review process and describes the reforms to the process made by the Foreign Investment and National Security Act (FINSA) of 2007.[9] In addition, the PAPER discusses related economic sanctions and export control issues and the rules governing conflicts of interest, assignments and novations, and name changes that U.S. Government contractors involved in a deal resulting in a change-in-control must address.

Exon-Florio Amendment & CFIUS Review

■ President's Authority

Unlike many countries, the United States does not routinely screen inward investment but rather relies on certain targeted laws to ensure that such investments do not harm specific U.S. interests. Most prominently, in 1988, Congress passed the Exon-Florio Amendment to the Omnibus Trade and Competitiveness Act of 1988.[10] Exon-Florio grants the President broad authority to review certain foreign acquisitions, mergers, takeovers, or investments that would give a foreign interest control of a company that is engaged in interstate commerce in the United States and to suspend or block the transaction if such control "threatens to impair the national security of the United States."[11] Following review, the President may block any transaction deemed a threat to national security that cannot be addressed by other legislation (other than the International Emergency Economic Powers Act,[12] which gives the President authority to address any "unusual and extraordinary threat" to the national security, foreign policy, or economy of the United States after first declaring a national emergency).[13] Significantly, the President's determinations under Exon-Florio are not subject to judicial review.[14] Moreover, because Congress intended Exon-Florio to confer upon the President maximum latitude, neither the statute nor the implementing regulations define "national security."

■ CFIUS Membership

The task of reviewing foreign acquisitions for potential national security concerns is delegated to CFIUS, an interagency body created in 1975 whose membership is composed of the Secretaries of Treasury, State, Defense, Homeland Security, and Commerce; the Attorney General; the Director of the Office of Management and Budget; the U.S. Trade Representative; the Chairman of the Council of Economic Advisors; the Director of the Office of Science and Technology Policy; the Assistant to the President for National Security Affairs; and the Assistant to the President for Economic Policy.[15] When the recent CFIUS reform legislation, which is described more fully below, took effect on October 24, 2007, the Secretaries of Energy and Labor as well as the Director of National Intelligence became members of CFIUS, although the latter two officials will serve as nonvoting ex-officio members.[16] Typically, each member of CFIUS delegates his or her authority to an official with experience relevant to analyzing international transactions that may threaten national security. For example, an official from the Office of the Deputy Under Secretary of Defense for Industrial Policy conducts the analysis for the DOD, and an official from the Office of Foreign Financial and Investment Issues participates for the Department of Homeland Security. Officials from both the Office of Investment Affairs and the Office of Defense Trade Controls conduct the analysis for the Department of State.

■ Past CFIUS Activity

As described below, the Exon-Florio review process essentially provides "safe harbor" to parties to proposed investments or transactions that may raise national security issues. Since the 1988 enactment of Exon-Florio, CFIUS filings by parties to foreign transactions have been made in over 1,500 instances.[17] CFIUS has decided to investigate only 25 of these transactions. After CFIUS announced that it intended to conduct a full investigation, 13 of those 25 transactions were voluntarily withdrawn.[18] Moreover, only once has the President decided to prohibit a transaction.[19]

According to a 2002 General Accounting Office report, CFIUS initiates full investigations only when it cannot identify potential mitigation measures during the initial review period to resolve national security concerns or when it needs additional time beyond the initial 30-day period

to negotiate potential mitigation measures and the companies involved are unwilling to withdraw their notification.[20] Additionally, the report notes that when CFIUS has expressed concerns about a particular transaction but is unable to mitigate those concerns within the initial 30-day review period, it has often allowed companies to withdraw and resubmit their notification to provide additional time to negotiate possible mitigation measures. CFIUS might then approve the transaction without launching a full investigation.[21] Even in the aftermath of September 11, it appears that CFIUS continues to strive to strike a balance between protecting national security and maintaining an open investment policy:[22]

> As a matter of practice, the Committee tries to avoid the use of investigations and presidential determinations. The Committee reviews foreign acquisitions to protect national security while seeking to maintain the U.S. open investment policy. For many companies, being the subject of an investigation has negative connotations. Avoiding an investigation helps to maintain the confidence of investors that the government does not view the acquisition as problematic. Also, a presidential determination could be politically sensitive. According to one Committee staff member, the Committee looks for the best way to work out national security concerns without an investigation.

Although the CFIUS process has only once resulted in the President prohibiting a transaction, this statistic is quite deceptive. A number of proposed transactions have been abandoned or significantly restructured after initial CFIUS scrutiny signaled that approval was unlikely. The CFIUS process therefore not only allows a foreign purchaser to obtain comfort regarding the ultimate legality of a transaction but also to work with regulators to structure the transaction to avoid national security concerns. For transactions involving acquisition of a U.S. entity that holds security clearances or classified Government contracts, the companies typically negotiate with the Deputy Under Secretary of Defense for Industrial Affairs and the Defense Security Service. Issues related to the protection of classified information are discussed later in this PAPER.

■ Parties To A Transaction

The implementing regulations of Exon-Florio define the terms "U.S. person" and "foreign person" broadly to bring some foreign–foreign and some U.S.–U.S. transactions within its scope. That is, a U.S. subsidiary of a foreign company can be both a U.S. person and a foreign person. The definition of a "U.S. person" turns not on the nationality of the owners or the place of incorporation of an entity, but rather on whether the company is engaged in interstate commerce in the United States.[23] The definition of a "foreign person," on the other hand, turns on whether an individual or entity is controlled by a foreign interest, not on where it does business.[24] Exon-Florio, therefore, may apply to the acquisition of a foreign company's U.S. subsidiary by another foreign company, as well as to the acquisition of a U.S. company by the U.S. subsidiary of a foreign company.

■ Foreign Control

Exon-Florio applies to a broad range of acquisitions, mergers, and takeovers, i.e., any transaction that could result in foreign control of "persons" (also referred to as "entities" in this PAPER) engaged in interstate commerce in the United States.[25] "Control" is defined as[26]

> the power, direct or indirect, whether or not exercised, and whether or not exercised or exercisable through the ownership of a majority or a dominant minority of the total outstanding voting securities of an issuer, or by proxy voting, contractual arrangements or other means, to determine, direct or decide matters affecting an entity….

Of particular concern in determining whether foreign control exists is the ability of a foreign person to determine, direct, make, or cause decisions relating to transfer of a U.S. company's assets, the dissolution of a U.S. entity, closing or relocating any of a U.S. company's facilities, terminating a U.S. company's contracts, or amending the articles of incorporation and/or bylaws of a U.S. company.[27]

The Exon-Florio implementing regulations do not define what level of ownership triggers review, but ownership of less than 10% of a company for investment purposes does not typically trigger review.[28] The determination of who has control of an entity does not, therefore, turn merely on the percentage of ownership, but also on who has potential decision-making power. The regulations appear to envision that a foreign minority shareholder could, under some circumstances, exercise

control over a U.S. company for purposes of an Exon-Florio review if it could affect the material corporate decisions of the company.

In straight acquisitions or majority investments, the determination of foreign control is fairly straightforward. Minority investments, however, present difficulties. In analyzing the CFIUS decision-making regarding determinations of foreign control and foreign government control in select minority investments, the GAO found that CFIUS relies heavily on a company's stated intentions regarding the structure of the investment and the nature and character of the decision-making processes in the corporation.[29] CFIUS has not typically engaged in its own fact-finding missions regarding a purchaser's operations beyond the information submitted by the parties to a transaction, although CFIUS members may receive and consider information gathered by the U.S. intelligence community.[30]

■ National Security

Determining whether a transaction threatens to impair U.S. national security also requires CFIUS to weigh a variety of facts and circumstances. Neither Exon-Florio nor its implementing regulations define "national security," resulting in case-by-case determinations. CFIUS has noted that "transactions that involve products, services, and technologies that are important to U.S. national defense requirements will usually be deemed significant with respect to the national security."[31] Notice of the transaction to CFIUS, as discussed below, is therefore appropriate when the target company "provides products or key technologies essential to U.S. defense requirements."[32] The Exon-Florio Amendment, as revised effective October 24, 2007, provides that the President and CFIUS may consider the following factors in deciding whether U.S. national security will be impaired by a transaction:[33]

> (1) domestic production needed for projected national defense requirements;
>
> (2) 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;
>
> (3) the control of domestic industries and commercial activity by foreign citizens as it affects the capability and capacity of the United States to meet the requirements of national security;
>
> (4) the potential effects of the proposed or pending transaction on sales of military goods, equipment, or technology to [particular countries deemed to pose a threat to the United States]…; and,
>
> (5) the potential effects of the proposed or pending transaction on United States international technological leadership in areas affecting United States national security.
>
> (6) the potential national security-related effects on United States critical infrastructure, including major energy assets;
>
> (7) the potential national security-related effects on United States critical technologies;
>
> (8) whether the covered transaction is a foreign government-controlled transaction…;
>
> (9) as appropriate…a review of the current assessment of—
>
> (A) the adherence of the subject country to nonproliferation control regimes, including treaties and multilateral supply guidelines…;
>
> (B) the relationship of such country with the United States, specifically on its record on cooperating in counter-terrorism efforts…; and
>
> (C) the potential for transshipment or diversion of technologies with military applications, including an analysis of national export control laws and regulations;
>
> (10) the long-term projection of United States requirements for sources of energy and other critical resources and material; and
>
> (11) such other factors as the President or the Committee may determine to be appropriate, generally or in connection with a specific review or investigation.

The factors in paragraphs (6) to (10) were added by the recent reform legislation.[34] The implications of these additions to the factors on which CFIUS and the President base their review are discussed in more detail later in this PAPER.

The question whether a proposed transaction poses a national security risk is the most difficult—and often controversial—determination CFIUS can make. Beginning with the deliberations that culminated in the enactment of Exon-Florio, lawmakers and policy analysts have debated whether "national security" should be broadly construed to encompass "economic security" and whether CFIUS should be concerned with foreign

acquisitions that affect the competitiveness of particular U.S. industries. Certainly, there have been efforts to advance such arguments during the review of various transactions. In 2000, for example, members of Congress suggested that the Deutsche Telekom acquisition of VoiceStream Wireless would disadvantage U.S. industry.[35] Other transactions raise the question whether a foreign purchaser's elimination of U.S. jobs is an appropriate consideration in a CFIUS review. CFIUS investigations might also be concerned with the protection of classified information, significant reductions in competition for critical defense contracts, and potential transfers of technology to foreign parents, partners, or customers.

■ Nature Of The Transaction

The implementing regulations set forth a non-exclusive list of transactions that are subject to Exon-Florio, as well as a list of transactions that are not subject to Exon-Florio. Transactions subject to Exon-Florio include "(1) [*p*]*roposed or completed* acquisitions by or with foreign persons which could or did result in foreign control of a U.S. person, irrespective of the actual arrangements for control planned or in place for that particular acquisition" and "(2) [a] proposed acquisition by or with a foreign person, which could result in foreign control of a U.S. person, including, without limitation, an offer to purchase all or a substantial portion of the securities of a U.S. person."[36] The implementing regulations use the term "acquisition" to refer collectively to an acquisition, merger, or takeover.[37] The term includes, without limitation, "(1) the purchase of its voting securities, (2) the conversion of its convertible voting securities, (3) the acquisition of its convertible voting securities if that involves the acquisition of control, or (4) the acquisition and the voting of proxies, if that involves the acquisition of control."[38]

According to the implementing regulations, the following types of transactions, are *not* considered transactions subject to Exon-Florio:[39]

> (a) An acquisition of voting securities pursuant to a stock split or pro rata stock dividend which does not involve a change in control.
>
> (b) An acquisition in which the parent of the entity making the acquisition is the same as the parent of the entity being acquired.
>
> * * *
>
> (c) An acquisition of convertible voting securities that does not involve control.
>
> * * *
>
> (d) A purchase of voting securities or comparable interests in a United States person solely for the purpose of investment, as defined in [the implementing regulations], if, as a result of the acquisition,
>
> (1) The foreign person would hold ten percent or less of the outstanding voting securities of the U.S. person, regardless of the dollar value of the voting securities so acquired or held, or
>
> (2) The purchase is made directly by a bank, trust company, insurance company, investment, company, pension fund, employee benefit plan, mutual fund, finance company or brokerage company in the ordinary course of business for its own account, provided that a significant portion of that business does not involve the acquisition of entities.
>
> * * *
>
> (e) An acquisition of assets in the United States that does not constitute a business in the United States.…
>
> * * *
>
> (f) An acquisition of securities by a person acting as a securities underwriter, in the ordinary course of business, and in the process of underwriting.
>
> (g) An acquisition pursuant to a condition in a contract of insurance relating to fidelity, surety, or casualty obligations if the contract was made by an insurer in the ordinary course of business.
>
> (h) An acquisition of a security interest, but not control, in the voting securities or assets of a U.S. person at the time a loan or other financing is extended.…
>
> (i) An acquisition of voting securities or assets that does not involve an acquisition of control of a person engaged in interstate commerce in the United States.

■ Initiation Of CFIUS Review & Timing

With respect to transactions subject to Exon-Florio, CFIUS review is usually initiated once the parties have voluntarily submitted notice of the transaction. Any *party* to the transaction may—but is not required to—request a review of the transaction's national security implications.[40] In other words, an Exon-Florio filing is nominally made by the parties to a transaction as

a *voluntary* undertaking. However, the voluntary character of the filing is somewhat deceptive. In fact, any member of CFIUS may initiate a review by submitting a notice of a transaction that the member believes is subject to Exon-Florio and may threaten to impair national security.[41] Such involuntary reviews are rare and disfavored, however. In a case of a transaction that is likely to present national security concerns, but for which the parties have not notified CFIUS, CFIUS is most likely to inquire informally and suggest that the parties file voluntarily, eliminating the need to initiate an involuntary review.

A party may submit a voluntary notice of a proposed transaction by sending one signed copy, one electronic copy by e-mail, and thirteen paper copies of the required information to the Staff Chairman of CFIUS.[42] Among other things, an Exon-Florio notice must include the following:[43]

(1) The nature of the transaction.

(2) Information regarding the foreign person making the acquisition, its parents and affiliates, any relationships it has with foreign governments, and its current business activity.

(3) The names, addresses, and nationalities of the persons who will gain control of the target U.S. person.

(4) The foreign person's plans for the U.S. entity, including any plans to reduce, eliminate, or sell research and development facilities, to close or to relocate existing U.S. facilities, or to change product quality.

(5) Information regarding the U.S. person being acquired, its subsidiaries, and its business and assets, including classified contracts, security clearances, and products or technical data subject to U.S. export licenses.

Once notified, CFIUS has 30 days to decide whether to conduct a full investigation.[44] If CFIUS decides that no investigation is needed, the review process is concluded.[45] However, a full CFIUS investigation is mandatory with respect to "foreign-government controlled transactions,"[46] meaning transactions in which an entity owned, controlled by, or acting on behalf of a foreign government is the acquiring or investing party.[47]

If CFIUS decides that a full investigation is warranted, it must complete its work and submit a report on its findings to the President within 45 days.[48] The President then has 15 days to announce his intended course of action, which may include taking no action, prohibiting a proposed transaction, or, in the event that the transaction has been consummated, ordering a divestiture.[49]

■ CFIUS Review As A "Safe Harbor"

Generally, no CFIUS notice, review, or investigation can occur more than three years after the date of the transaction.[50] However, the Chairman of CFIUS may, in consultation with other members, request an investigation after the three years has passed.[51] Thus, transactions for which CFIUS does not receive notice potentially remain forever open to scrutiny. On the other hand, once a transaction clears CFIUS review or the President has decided to allow it, the transaction may not be reinvestigated unless the initial review was based on materially incorrect or incomplete information or, pursuant to the new legislation, a party to the transaction has "intentionally materially" breached a mitigation agreement or condition imposed by CFIUS.[52] Consequently, it is often in the parties' interest to notify CFIUS of a transaction involving a foreign entity early in the process to avoid lingering uncertainty. The CFIUS process is confidential, and CFIUS does not publish its decisions.[53] Failure to file and obtain a favorable determination from CFIUS in advance could result in transaction delays, disruptions, and possible forced divestment.

■ Risk Mitigation

During an Exon-Florio review, CFIUS may insist that the parties implement structural safeguards, such as a firewall concealing certain matters from foreign management, in cases in which foreign persons purchase U.S. companies that

do national security work. As discussed in more detail below, the industrial security regulations, which are published by the Under Secretary of Defense for Intelligence and administered by the Defense Security Service, set forth several measures that defense companies under foreign ownership or control may undertake to mitigate the risks posed by foreign ownership and obtain a security clearance or assume the clearance of a U.S. company that already has a clearance. These measures, which are described in the National Industrial Security Program Operating Manual, include proxy arrangements, which enable U.S. managers to exclude foreign owners from certain aspects of the company's classified business, and other special security arrangements intended to segregate foreign owners from sensitive operations.[54] These regulations often play an important role in guiding a CFIUS review process that involves a U.S. company with classified contracts. The interrelationship between increased CFIUS scrutiny and heightened security concerns is evident in recent, more difficult experience with Defense Security Service oversight of foreign ownership situations.

FINSA Reforms

On June 26, 2007, the President signed the Foreign Investment and National Security Act (FINSA) of 2007,[55] establishing CFIUS as a statutory body and giving it expanded powers to investigate and block cross-border transactions. FINSA took effect on October 24, 2007.[56] The new law adds or heightens CFIUS consideration of certain factors in its reviews, including effects on "critical technologies," adherence to nonproliferation control regimes, and cooperation with U.S. anti-terrorism efforts.[57] FINSA also expands the ability of CFIUS to monitor a company's compliance with a mitigation agreement after a transaction's closing.[58] And, as before, the President's determinations resulting from the CFIUS review are not subject to judicial review.[59]

■ New Factors For CFIUS Consideration

One of the new factors CFIUS must consider is a transaction's effect on "critical technologies."[60] The new law does not clearly define "critical technologies" but merely refers to technology, components, or items identified pursuant to the law.[61] The reforms also provide for special review of transactions involving "critical infrastructure," including "major energy assets."[62] "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."[63] This would include, for example, in addition to energy assets, communications and transportation systems and facilities. Such transactions automatically receive a 45-day review.[64] These new critical factors widen CFIUS' discretion to interfere with a transaction, giving it authority to identify economically or strategically important industries and granting specific encouragement to investigate transactions involving Internet-related industries. The addition of the Secretaries of Energy and Labor and the Director of National Intelligence as CFIUS members signify this broader focus.[65]

The law heightens CFIUS scrutiny of transactions involving foreign state-owned entities, adding a second level of review of transactions with such parties. The law now requires CFIUS to make a full investigation of any "foreign-government controlled transaction."[66] Such transactions are defined as those in which an entity owned, controlled by, or acting on behalf of a foreign government is the acquiring or investing party.[67] When a foreign government-controlled entity is involved, FINSA requires the consideration of factors not necessarily related to the transaction at hand, such as a country's compliance with U.S. and multilateral counter-terrorism, nonproliferation, and export control regimes.[68]

FINSA also expands the definition of "national security" to include "homeland security" issues.[69] This takes the CFIUS review beyond the traditional political or military issues to encompass public security in the broadest terms. While these clarifications do not delimit how CFIUS will now conceive of national security, with regard to its new discretion to target certain industries, CFIUS purview could be expanded to the full extent of public security matters.

■ Expanded Authority To Reopen A Review Or Investigation

FINSA's "evergreen provision" allows CFIUS to review a previously reviewed transaction where it finds that a party has provided "false or misleading material information to the Committee in connection with the review or investigation or omitted material information."[70] Before FINSA, reopening of a review on this basis was provided for only in the regulations, not the statute.[71] As noted above, FINSA also allows a review to be reopened when a party has "intentionally materially" breached a mitigation agreement or condition imposed by CFIUS.[72] A new CFIUS review might lead to new, tougher mitigation terms or a forced rescission of a transaction.

■ FINSA's Political Origins

Though the movement to update and amplify review of cross-border transactions has been developing over time, FINSA was primarily catalyzed by two events. First, in June 2005, the state-owned Chinese National Offshore Oil Corporation made a bid to purchase U.S.-based Unocal. This transaction was ultimately prevented due to the political furor against the prospect of a state-owned Chinese company gaining access to U.S. energy infrastructure.[73] Second, in February 2006, CFIUS approved Dubai-owned Dubai Ports World's acquisition of a British port management company that controlled operations at a number of U.S. ports. The transaction and CFIUS' failure to act against it gave rise to a politically charged discussion and highlighted the relationship between investment policy and anti-terrorism concerns. Congress reacted with sharp bipartisan rhetoric against the deal and with criticism of CFIUS review. Under heavy public pressure, Dubai Ports World ultimately agreed to transfer management of the ports to a U.S. company.[74]

■ Potential Heightened Scrutiny

The increased scrutiny of foreign investment under FINSA will challenge Government contractors' abilities to raise funds from foreign investors and to seek business opportunities through mergers and acquisitions. CFIUS' broader mandate and scope of review will mean that more transactions are reviewed. This broader review will likely focus more closely on technology and infrastructure, which will affect contractors in defense, energy, and high-technology sectors.

FINSA also creates greater possible transaction delays and increases financial risks accordingly. As noted, FINSA mandates the extension of national security reviews beyond the 30-day clearance period to the supplemental 45-day investigation phase in some cases. It requires that CFIUS investigate acquisitions involving sensitive critical infrastructure, unless major relevant Government agencies approve the deal at the highest levels. This mandated extension of the review period effectively shifts the burden of proof to the transaction parties in some cases, who must now convince political appointees that an extended review is unnecessary.

While the new emphasis on high-level agency review clearly allows political factors to affect deals, the new level of required congressional oversight fully exposes deals to the unpredictable winds of politics and public sentiment. FINSA requires CFIUS to brief Congress on its reviews and to provide annual reports.[75] CFIUS must give Congress notice of each review it makes, its actions, and its conclusions.[76] This transaction-specific political analysis opens the door to myriad potential political obstacles. An organized or concentrated political interest could commandeer the review process to seek a competitive advantage against a foreign investor or to exact a political penalty against its home country. This added uncertainty may require greater mitigation of risks and, in all cases, makes deals involving states geopolitically unpopular with the U.S. Government less attractive.

National Industrial Security Program

One of the primary factors that CFIUS will review—and that, in some cases, may drive its determination as to the acceptability of the transaction—is whether the target company holds a security clearance, and, if so, the extent of the target's classified contracts. For this reason, no CFIUS notification is complete without a discussion of how the Government's classified information will be protected.

■ Government Contractor Clearance Requirements

The National Industrial Security Program was established by Executive Order 12,829 to protect classified information "that is released to contractors, licensees, and grantees of the United States Government."[77] The DOD's Defense Security Service administers the program under the direction of the Under Secretary of Defense for Intelligence. In this regard, the National Industrial Security Program Operating Manual (NISPOM) implements the National Industrial Security Program by prescribing "the requirements, restrictions, and other safeguards to prevent unauthorized disclosure of classified information."[78] Specifically, the NISPOM sets forth requirements for contractors and their employees to obtain and maintain facility and personnel security clearances to gain access to classified information in their performance of a U.S. Government contract.[79]

■ Facility Security Clearance

The NISPOM requires a company to obtain a facility security clearance before it may have access to classified information under a U.S. Government contract.[80] A facility security clearance is defined as an "administrative determination that, from a security viewpoint, a company is eligible for access to classified information of a certain category (and all lower categories)."[81]

To be eligible for a facility security clearance, a contractor must (a) need access to the classified information in connection with a legitimate U.S. Government or foreign government requirement, (b) be organized and located in the United States, (c) have a reputation for integrity and lawful conduct in its business dealings, and (d) not be under foreign ownership, control, or influence.[82] If a company is owned, controlled, or influenced by a foreign interest, it will be unable to obtain or maintain a facility security clearance unless certain mitigation methods are implemented to negate risks to U.S. security, as discussed below.[83] Without a facility security clearance, however, a company is unable to perform work under classified U.S. Government contracts or to obtain classified information.[84]

■ Personnel Security Clearance

A company's *employees* must each obtain a personnel security clearance if they will require access to classified information in their performance of work under a U.S. Government contract.[85] A personnel security clearance is defined as an "administrative determination that an individual is eligible, from a security point of view, for access to classified information of the same or lower category as the level of the personnel clearance being granted."[86]

Only employees who are U.S. citizens are eligible for personnel security clearances, and companies must make certain that "[e]very effort…be made to ensure that non-U.S. citizens are not employed in duties that may require access to classified information."[87] In rare circumstances, however, a non-U.S. citizen may be granted a Limited Access Authorization (LAA) if the individual possesses a "unique or unusual skill or expertise that is urgently needed to support a specific U.S. Government contract involving access to specified classified information and a cleared or clearable U.S. citizen is not readily available."[88] However, it should be noted that an LAA is not valid for access to top secret information, restricted data, formerly restricted data, information that has not been determined releasable to the country of which the individual is a citizen, communications security information, and intelligence information.[89]

■ Change-In-Control Requirements

If a company has a security clearance, that clearance may be revoked or adjusted if a foreign interest acquires that company.[90] A "foreign interest" is defined as any "foreign government, agency of a foreign government, or representative of a foreign government; any form of business enterprise or legal entity organized, chartered or incorporated under the laws of any country other than the United States or its territories, and any person who is not a citizen or national of the United States."[91] It is important that the parties notify the appropriate Government officials in advance of any foreign acquisition in order that the U.S. company, the foreign acquirer or investor, and the U.S. Government might discuss potential mitigation methods. Indeed,

the NISPOM requires a company to notify the Cognizant Security Agency (CSA) responsible for safeguarding the classified information at issue (i.e, the DOD, DOE, Central Intelligence Agency, or Nuclear Regulatory Commission)[92] when it enters into negotiations for a proposed merger, acquisition, takeover, or investment by a foreign interest.[93] In its notification to the CSA, the company must (a) describe the type of transaction under negotiation (stock purchase, asset purchase, etc.), (b) identify the potential foreign interest investor, (c) provide a mitigation plan using one of the methods discussed below, and (d) submit copies of the loan, purchase and shareholder agreements, annual reports, bylaws, articles of incorporation, partnership agreements, and reports filed with other U.S. Government agencies to the CSA.[94]

■ FOCI Factors

A company is considered to be under foreign ownership, control, or influence (FOCI)[95]

> whenever a foreign interest has the power, direct or indirect, whether or not exercised, and whether or not exercisable through the ownership of the U.S. company's securities, by contractual arrangements or other means, to direct or decide matters affecting the management or operations of that company in a manner which may result in unauthorized access to classified information or may adversely affect the performance of classified contracts.

There are a number of factors that determine whether a company is owned, controlled, or influenced by a foreign interest:[96]

> a. Record of economic and government espionage against U.S. targets.
>
> b. Record of enforcement and/or engagement in unauthorized technology transfer.
>
> c. The type and sensitivity of the information that shall be accessed.
>
> d. The source, nature and extent of FOCI, including whether foreign interests hold a majority or substantial minority position in the company, taking into consideration the immediate, intermediate, and ultimate parent companies. A minority position is deemed substantial if it consists of greater than 5 percent of the ownership interests or greater than 10 percent of the voting interest.
>
> e. Record of compliance with pertinent U.S. laws, regulations and contracts.
>
> f. The nature of any bilateral and multilateral security and information exchange agreements that may pertain.
>
> g. Ownership or control, in whole or in part, by a foreign government.

■ FOCI Mitigation Methods

If it is determined that upon a foreign interest's acquisition of a company, the company will be under FOCI, certain methods must be applied to mitigate the risks associated with FOCI and to allow the company to maintain any security clearance.[97] Moreover, mitigation of FOCI risks is critical to a company's ability to obtain CFIUS approval of its transaction with the foreign acquirer or investor.[98] As a result, a company should raise potential FOCI mitigation methods with the CSA early on and obtain the CSA's approval of the selected method before CFIUS review. Such advance approval from the CSA should assist in expediting the CFIUS review process.

The NISPOM recognizes the following mitigation methods that may be used to negate the effect of FOCI:

(1) *Security Control Agreement or Special Security Agreement*—A Security Control Agreement (SCA) and a Special Security Agreement (SSA) are substantially identical arrangements that impose industrial security and export control measures within an institutionalized set of corporate practices and procedures to ensure that FOCI risks are mitigated. Both arrangements require active involvement of the company's senior management and certain board members (outside directors) in security matters who must be cleared U.S. citizens, provide for the establishment of a Government Security Committee to oversee classified and export control matters, and preserve the foreign interest's right to be represented on the board (inside directors) with a direct voice in the business management of the company while denying unauthorized access to classified information.[99]

An SCA is used when the company is *not* effectively owned or controlled by a foreign interest and the foreign interest is nevertheless entitled to representation on the company's governing

board.[100] For example, if a foreign interest owns 25% of the company's voting stock and that 25% ownership allows the foreign interest to appoint a representative to the company's governing board, an SCA may be adequate. It should be noted that an SCA has no access limitations.[101]

An SSA is used when a company is effectively owned or controlled by a foreign interest. Access to proscribed information by a company cleared under an SSA may require the Government Contracting Activity to complete a National Interest Determination to determine that release of proscribed information to the company will not harm the national security interests of the United States.[102]

(2) *Proxy Agreement and Voting Trust Agreement*—A Proxy Agreement (PA) or a Voting Trust Agreement (VTA) is used when a company is owned or controlled by a foreign interest. A PA and a VTA are substantially identical arrangements whereby the voting rights of foreign-owned stock are vested in U.S. citizens approved by the U.S. Government.[103] Neither arrangement imposes restrictions on the company's eligibility to have access to classified information or to compete for classified contracts.[104]

Establishment of a PA or a VTA involves the selection of proxy holders or trustees who must be directors of the cleared company's board.[105] The proxy holders or trustees exercise all of the prerogatives of ownership with complete freedom to act independently from the foreign stockholders, except that proxy holders or trustees must obtain approval from the foreign shareholder regarding the following matters: (a) the sale or disposal of the corporation's assets or a substantial part, (b) pledges, mortgages, or other encumbrances on the capital stock, assets, or ownership interests, (c) corporate mergers, consolidations, or reorganizations, (d) the dissolution of the corporation, and (e) a filing of a bankruptcy petition.[106]

The proxy holders or trustees assume full responsibility for the voting stock and for exercising all management prerogatives, except in the aforementioned instances. The difference between a PA and a VTA is that under a VTA the foreign owner transfers legal title in the company to the trustees who are approved by the U.S. Government.[107]

(3) *Board Resolution*—A board resolution is used when the foreign interest does not own voting stock sufficient to elect a representative to the company's governing board.[108] For example, if a foreign interest owns 10% of the company's voting stock and that 10% stock ownership does not allow the foreign interest to appoint a representative to the company's board of directors, a board resolution may be adequate. Under this FOCI mitigation method, the company's governing board must (a) identify the foreign shareholder and the type and number of foreign-owned shares, (b) acknowledge the company's obligation to comply with all industrial security program and export control requirements, and (c) certify that the foreign owner does not require, shall not have, and can be precluded from unauthorized access to classified information.[109]

(4) *Limited Facility Clearance*—A foreign-owned company may be eligible for a facility security clearance without any required mitigation plan if the U.S. Government has entered into an Industrial Security Agreement with the country of the foreign interest and the CSA determines that the U.S. National Disclosure Policy would allow release of the classified information.[110] The U.S. Government negotiates Industrial Security Agreements as an Annex to the General Security Agreement that is negotiated with a foreign country. The General Security Agreement is an agreement that requires "each government [to] provide the classified information provided by the other substantially the same degree of protection as the releasing government."[111]

Related Economic Sanctions & Export Control Issues

In addition to Exon-Florio, other laws and regulations enforced by the U.S. Government seek to protect disclosure and transfer of sensitive information and technology to countries, entities, and individuals that are hostile to U.S. interests. These laws and regulations set forth principles that may inform CFIUS' review of a particular transaction, as described below.

■ Economic Sanctions

The U.S. Treasury Department's Office of Foreign Assets Control (OFAC) maintains and enforces economic sanctions against a number of countries, including Burma, Cuba, Iran, North Korea, Sudan, and Syria, as well as particular individuals and entities (termed "specially designated nationals" or SDNs).[112] The sanctions enforced by OFAC apply to U.S. persons and entities, including (1) U.S. citizens and U.S. permanent residents, wherever located, (2) all persons physically present in the United States, regardless of nationality or residency status, and (3) businesses organized under U.S. laws, including foreign branches and other controlled offices and affiliates not separately organized under foreign laws. U.S. sanctions enforced against Cuba[113] and North Korea[114] also apply to foreign subsidiaries of U.S. companies and other non-U.S. companies that are owned or controlled by U.S. persons.

The sanctions generally prohibit all or nearly all transactions between U.S. persons and (a) the government (including government-owned or controlled entities) of a sanctioned country and (b) individuals and entities in those countries. Moreover, U.S. persons may not enter into transactions with any individual or entity designated by OFAC as an SDN. In addition, the sanctions prohibit "evasion" of the sanctions and "facilitation" by U.S. persons of transactions that would otherwise occur outside of U.S. jurisdiction. "Evasion" of U.S. sanctions laws may occur when a U.S. person refers or steers a prohibited transaction or investment to another individual or entity to whom the transaction is otherwise not prohibited.[115] The related concept of "facilitation," which OFAC interprets broadly, occurs when a U.S. person provides a medium through which non-U.S. persons can complete a transaction that would be prohibited to the U.S. person or approves, supports, or assists non-U.S. persons with entering into or implementing a transaction that would be prohibited to the U.S. person.[116]

Accordingly, CFIUS is likely to review transactions that may result in the release of information or transfer of technology to a sanctioned government, entity, or individual with a high degree of skepticism. Indeed, the regulations that prescribe the contents of a voluntary notice to CFIUS specifically request that the parties to a transaction detail the nationality of the foreign person making the acquisition, the nationality of the acquirer's parents and affiliates, and the nationality of any persons or interests that will control the U.S. company being acquired post-transaction.[117] Additionally, the company being acquired may wish to conduct due diligence regarding the foreign acquirer before consummating the transaction to ensure that it is not violating the sanctions by transacting with that foreign person.[118]

■ Export Controls

(1) *Dual-Use Export Controls Enforced by the U.S. Department of Commerce*—The U.S. Commerce Department's Bureau of Industry and Security (BIS) enforces the export controls set forth in the Export Administration Regulations (EAR).[119] These export controls regulate the unlicensed transfer and retransfer of U.S.-origin goods and technology by any individual or entity, regardless of nationality or residency status, to (a) particular countries, (b) particular individuals and entities, (c) any individuals or entities engaged in particular activities (prohibited end-uses), and (d) foreign nationals who are not permanent U.S. residents, even if employed in the United States or abroad by a U.S. person ("deemed exports"). The EAR restrict the transfer of dual-use goods, technology, and services that have potential military or strategic applications. Individuals and entities that wish to export items subject to the EAR must obtain an export license from BIS before transferring any controlled items to a prohibited destination.

Because of the potential national security implications associated with transferring items or technology that may have military applications to foreign countries, CFIUS carefully reviews foreign acquisitions of U.S. companies that lawfully export controlled items and technology pursuant to an export license. In fact, the regulations that prescribe the contents of a voluntary notice to CFIUS specifically request information regarding any products manufactured by the U.S. person being acquired that have potential military applications.[120] Moreover, the same regulation

requests that the U.S. person being acquired provide information and classifications for any items or technology that it exports under a license granted by BIS.[121]

Separately, the EAR list specific procedures that the parties to a transaction must follow when transferring an existing license granted by BIS to a foreign party acquiring a U.S. person that exports items or technology under that license.[122] BIS reviews any such requests for transfer of a license, and the foreign acquirer must be willing and able to certify its ongoing compliance with the EAR.[123]

(2) *Military Export Controls Enforced by the U.S. Department of State*—In addition to the dual-use export controls enforced by BIS, the State Department's Directorate of Defense Trade Controls (DDTC) enforces export controls set forth in the International Traffic in Arms Regulations (ITAR).[124] These controls restrict unlicensed exports of weapons and weapons technology, which are listed on the U.S. Munitions List (USML).[125] Given the nature of the items and technology listed on the USML, it is not surprising that the controls enforced by the DDTC are more stringent than those imposed by BIS. In addition, the ITAR require that manufacturers of defense articles and services register with the DDTC.[126]

Because of the potential national security implications of transferring military items or services to foreign countries, CFIUS carefully reviews foreign acquisitions of U.S. companies that are registered with the DDTC or that export items listed on the USML. As noted above, the regulation that prescribes the contents of a voluntary notice to CFIUS requests information regarding any items or technology with potential military applications that the U.S. person being acquired manufactures. Specifically, the regulation asks whether the U.S. person being acquired produces defense articles and defense services under the ITAR.[127]

Apart from the CFIUS review process, the ITAR set forth a requirement that any company registered with the DDTC must notify DDTC 60 days in advance of a planned sale to a foreign person, which affords the DDTC the opportunity to object to the transaction.[128] Assuming that the DDTC does not object to the transaction, the ITAR also require a post-transaction notification in which the successor entity provides information to the DDTC to request an amendment to substitute the successor entity's name for the U.S. person's name on the U.S. person's previous registration and any export licenses.[129]

Other Related Foreign Control Issues For Government Contractors

■ Conflict-Of-Interest Rules

When a company enters into negotiations with a foreign interest, the parties should investigate any potential conflict of interest that may cause the company to be disqualified from future procurements or create a conflict of interest under its ongoing contracts. The Federal Acquisition Regulation provides that an organizational conflict of interest may result when "factors create an actual or potential conflict of interest on an instant contract, or when the nature of the work to be performed on the instant contract creates an actual or potential conflict of interest on a future acquisition."[130] Whether organizational conflicts of interest exist is also one of the key issues that the relevant Government agency will consider when deciding whether to allow the assignment of an ongoing contract to the new entity formed as a result of the foreign acquisition.[131]

■ Anti-Assignment Act & Novation

Under the Anti-Assignment Act, no "contract or order, or any interest therein, shall be transferred by the party to whom such contract or order is given to any other party, and any such transfer shall cause the annulment of the contract or order transferred, so far as the United States is concerned."[132] The relevant U.S. Government agency, however, may waive the effect of the Anti-Assignment Act and, at its discretion, recognize the assignment of a contract to the new entity formed as a result of the foreign acquisition.[133] The FAR provides that the Government may recognize a third party as a successor in interest to the Government contract

when the third party's interest arises out the transfer of (a) all of the contractor's assets or (b) the entire portion of the assets involved in performing the contract.[134] Moreover, it should be noted that transfers or assignments occurring by operation of law are exempt from the Anti-Assignment Act. For example, corporate mergers, consolidations, and reorganizations, "where in essence the contract continues with the same entity, but in a different form," are considered transfers or assignments occurring by operation of law and, therefore, are not subject to the Anti-Assignment Act.[135]

Generally, a transfer of rights under an ongoing contract will "be upheld when the government recognizes it either expressly as by novations or implicitly as by ratification or waiver."[136] Under a novation agreement executed by the contractor (transferor), successor in interest (transferee), and the Government, the transferor guarantees performance of the contract, the transferee assumes all obligations under the contract, and the Government recognizes the transfer of the contract and related assets.[137] When a company requests a novation of its contract or contracts with the Government, the contractor must submit to the Government the proposed novation agreement, as well as (1) the document describing the proposed transaction, (2) a list of all affected contracts between the contractor and the Government, (3) evidence of the third party's capability to perform, and (4) any other information requested by the Government.[138]

■ Proposal Assignment

If a company has submitted a proposal in response to a U.S. Government solicitation but has not yet been awarded the contract, the Anti-Assignment Act does not apply. As held by the GAO, the "transfer or assignment of rights and obligations arising out of a bid or proposal is permissible where the transfer is to a legal entity which is the complete successor in interest to the bidder or offeror by virtue of merger, corporate reorganization, the sale of an entire business or the sale of an entire portion of a business embraced by the bid or proposal."[139] However, the company should be aware of any change in financial resources or performance record as a result of such transfer that may affect the Government agency's responsibility determination of the company.[140]

■ Name Change

Even if novation of the current contract or contracts is not required upon the foreign acquisition, the company and relevant Government agency will still be required to enter into a change-of-name agreement if the contractor changes its name upon acquisition by the foreign interest.[141] When forwarding the executed change-of-name agreement to the Contracting Officer, the company must submit (1) the document effecting the name change, (2) an opinion of the contractor's counsel stating that the name change was properly effected, and (3) a list of all affected contracts and purchase orders remaining unsettled between the contractor and Government.[142]

GUIDELINES

These *Guidelines* highlight the key considerations for parties to a transaction that involves any investment by a foreign entity or company in a U.S. Government contractor. They are not, however, a substitute for professional representation in any specific situation.

1. In considering whether to file a voluntary notification with CFIUS, construe the relevant factors very broadly. For example, "transfer of control" should be considered to include any significant ownership interest and other indicia of control, including minority shareholder rights. "National security" should construed very broadly as well, to include critical infrastructure, law enforcement issues, antiterrorism programs, and strategic industries.

2. At the same time, identify the ownership structure of the foreign buyer, including all indirect ownership interests. It is essential to determine the extent of all foreign government interests in the buyer.

3. Notify all interested parties, regulatory contacts, and procurement officers of the pending acquisition as soon as practicable. It will be critical to identify and address any concerns these officers may have about the acquisition because

they may have the power to derail the CFIUS review process.

4. Determine whether the target maintains sensitive, classified, or export-controlled information and technologies. Does the technology require an export license (by either the Commerce Department or the State Department) to be transferred to the country of the buyer? If so, pay particular attention to "deemed export" concerns. There may have already been a "deemed export" violation in the context of the negotiations leading up to the deal. If so, you need to know this ahead of time.

5. Identify all contracts the target has with the DOD, the Department of Homeland Security, or any intelligence agency. Identify and review all security clearances, facility clearances, and DD254s (the DOD Contract Security Classification Specification form).

6. Conduct a thorough review of the export control compliance program of the target and the buyer and put in place any necessary or advisable improvements to integrate the target into that program.

7. Review and identify early any potential mitigation options or requirements, as well as organizational conflicts of interest. Could the surviving entity be barred from certain types of defense business? If so, what mitigation might remedy this? Determine if there are any potential conflicts of interest or restrictions on members of the proxy committee.

8. Before making the final decision to make a voluntary CFIUS notification, consider all disadvantages of making a filing, including the costs of generating the information required for the filing, making the necessary submissions, and meeting with the Committee; the delays in the review process; the mitigation agreements CFIUS might require in return for approval of a transaction; and the risk that notification itself might raise the visibility of the transaction.

9. Consider how political interests, competing bidders, business rivals, or other stakeholders might attempt to kill the deal through the CFIUS process. A potential U.S. buyer may persuade the target to sell to it rather than the foreign buyer to avoid the CFIUS filing.

10. Conduct a thorough review of the export control requirements involved in the proposed transaction. Does the target have products or technologies subject to the ITAR or controlled by the Commerce Department? Is the target registered with the DDTC?

★ REFERENCES ★

1/ See generally Gourley, "CFIUS: New Congress Continues Effort To Increase Scrutiny of Foreign Investment in the U.S.," 4 IGC ¶ 17; Hodgson & Aminian, "CFIUS: Tightening the Screws on the Foreign Investment Review Process," 3 IGC ¶ 28; 3 IGC ¶ 22.

2/ Foreign Investment and National Security Act of 2007, Pub. L. No. 110-49, 121 Stat. 246 (July 26, 2007) (amending 50 U.S.C.A. app. § 2170).

3/ 50 U.S.C.A. app. § 2170.

4/ "Dubai Aerospace To Buy Carlyle Aircraft Service Units for $1.8 Billion," A.P., Apr. 3, 2007, http://www.cnbc.com/id/17902964.

5/ Tse, "Dubai Agrees To Acquire 20% Stake in Nasdaq Market," Wash. Post, Sept. 21, 2007, at D3.

6/ Sorkin & Barboza, "China To Buy $3 Billion Stake in Blackstone," N.Y. Times, May 21, 2007; Heath, "Government of Abu Dhabi Buys Stake in Carlyle," Wash. Post, Sept. 21, 2007, at D1.

7/ 50 U.S.C.A. app. § 2170(k) (as amended by Pub. L. No. 110-49, § 3).

8/ See generally West, Lee & Monahan, "U.S. Export Control Compliance Requirements for Government Contractors," Briefing Papers No. 05-12 (Nov. 2005); Irwin, Katirai & Lorello, "Due Diligence & Compliance Risk Management Abroad for Government Contractors," Briefing Papers No. 07-6 (May 2007); Dover, "Mergers & Acquisitions—Special Considerations When Purchasing Government Contractor Entities," Briefing Papers No. 04-8 (July 2004); Burgett & Sturm, "Foreign Nationals in U.S. Technology Programs: Complying With Immigration, Export Control, Industrial Security & Other Requirements," Briefing Papers No. 00-3 (Feb. 2000).

9/ Pub. L. No. 110-49.

10/ Pub. L. No. 100-418, § 5021, 102 Stat 1107, 1425 (1988) (adding 50 U.S.C.A. app. § 2170).

11/ 50 U.S.C.A. app. § 2170(d).

12/ 50 U.S.C.A. §§ 1701–1706.

13/ 50 U.S.C.A. app. § 2170(d)(4).

14/ 50 U.S.C.A. app. § 2170(e).

15/ Exec. Order No. 11,858, 40 Fed. Reg. 20,263 (May 7, 1975) (listing the eight original members of CFIUS); Exec. Order No. 12,860, 58 Fed. Reg. 47,201 (Sept. 8, 1993) (expanding the membership of CFIUS to include the Director of the Office of Science and Technology Policy, the Assistant to the President for National Security Affairs, and the Assistant to the President for Economic Policy); Exec. Order No. 13,286, 68 Fed. Reg. 10,619 (Mar. 5, 2003) (expanding the membership of CFIUS to include the Secretary of Homeland Security).

16/ 50 U.S.C.A. app. § 2170(k)(2) (as amended by Pub. L. No. 110-49, § 3).

17/ Jackson, Cong. Research Serv., CRS Report for Congress: Committee on Foreign Investment in the United States (CFIUS) 11 (2007) (hereinafter CRS Report).

18/ Id.; see also GAO, Defense Trade: Mitigating National Security Concerns Under Exon-Florio Could Be Improved 5 (GAO-02-736, Sept. 12, 2002) (hereinafter Mitigating Concerns) (stating that CFIUS only investigated four of 320 transactions from 1997 through 2001).

19/ CRS Report, supra note 17, at 11.

20/ Mitigating Concerns, supra note 18, at 2.

21/ Id.

22/ Id. at 6.

23/ 31 C.F.R. § 800.222.

24/ 31 C.F.R. § 800.213.

25/ 31 C.F.R. § 800.301(a).

26/ 31 C.F.R. § 800.204(a).

27/ 31 C.F.R. § 800.204(a).

28/ 31 C.F.R. § 800.302(d)(1).

29/ GAO, Foreign Investment: Implementation of Exon-Florio and Related Amendments 8 (NSIAD-96-12, Dec. 21, 1995).

30/ Id. at 12.

31/ Regulations Pertaining to Mergers, Acquisitions, and Takeovers by Foreign Persons, 56 Fed. Reg. 58,774, 58,775 (Nov. 21, 1991) (adding 31 C.F.R. pt. 800).

32/ 56 Fed. Reg. at 58,775.

33/ 50 U.S.C.A. app. § 2170(f) (as amended by Pub. L. No. 110-49, § 4).

34/ Pub. L. No. 110-49, § 4 (amending 50 U.S.C.A. app. § 2170(f)).

35/ See, e.g., Dreazen, "Deutsche Telekom Deal Wins FCC Votes," Wall St. J., Apr. 26, 2001, at B7 (discussing Senator Ernest F. Hollings' opposition to the Deutsche Telekom deal).

36/ 31 C.F.R. § 800.301(b)(1), (2) (emphasis added).

37/ 31 C.F.R. § 800.201(a).

38/ 31 C.F.R. § 800.201(a).

39/ 31 C.F.R. § 800.302.

40/ 50 U.S.C.A. app. § 2170(b)(1)(C) (as amended by Pub. L. No. 110-49, § 2); see 31 C.F.R. § 800.401(a).

41/ 31 C.F.R. § 800.401(b).

42/ 31 C.F.R. § 800.401(a).

43/ 31 C.F.R. § 800.402(c).

44/ 50 U.S.C.A. app. § 2170(b)(1)(E) (as amended by Pub. L. No. 110-49, § 2); see 31 C.F.R. § 800.404.

45/ 31 C.F.R. § 800.502(a).

46/ 50 U.S.C.A. app. § 2170(b)(2)(B)(i)(II) (as amended by Pub. L. No. 110-49, § 2).

47/ 50 U.S.C.A. app. § 2170(a)(4) (as amended by Pub. L. No. 110-49, § 2).

48/ 50 U.S.C.A. app. § 2170(b)(2)(C) (as amended by Pub. L. No. 110-49, § 2); see 31 C.F.R. § 800.504.

49/ 50 U.S.C.A. app. § 2170(d) (as amended by Pub. L. No. 110-49, § 6).

50/ 31 C.F.R. § 800.401(c).

51/ 31 C.F.R. § 800.401(c).

52/ 50 U.S.C.A. app. § 2170(b)(1)(D)(ii), (iii) (as amended by Pub. L. No. 110-49, § 2); see 31 C.F.R. § 800.601(d), (e).

53/ 50 U.S.C.A. app. § 2170(c); see 31 C.F.R. § 800.702(a).

54/ NISPOM ¶¶ 2-300 to 2-310.

55/ Pub. L. No. 110-49, 121 Stat. 246 (July 26, 2007) (amending 50 U.S.C.A. app. § 2170).

56/ Pub. L. No. 110-49, § 12.

57/ Pub.L.No.110-49,§4(amending50U.S.C.A. app. § 2170(f)).

58/ Pub. L. No. 110-49, § 5 (adding 50 U.S.C.A. app. § 2170(l)).

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60/ 50 U.S.C.A. app. § 2170(f)(7) (as amended by Pub. L. No. 110-49, § 4).

61/ 50 U.S.C.A. app. § 2170(a)(7) (as amended by Pub. L. No. 110-49, § 2).

62/ 50 U.S.C.A. app. § 2170(f)(6) (as amended by Pub. L. No. 110-49, § 4).

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65/ 50 U.S.C.A. app. § 2170(k)(2) (as amended by Pub. L. No. 110-49, § 3).

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68/ 50 U.S.C.A. app. § 2170(f)(9) (as amended by Pub. L. No. 110-49, § 4).

69/ 50 U.S.C.A. app. § 2170(a)(5) (as amended by Pub. L. No. 110-49, § 2).

70/ 50 U.S.C.A. app. § 2170(b)(1)(D)(ii) (as amended by Pub. L. No. 110-49, § 2).

71/ See 31 C.F.R. § 800.601(e).

72/ 50 U.S.C.A. app. § 2170(b)(1)(D)(iii) (as amended by Pub. L. No. 110-49, § 2).

73/ Kahn, "China's Costly Quest for Energy Control," N.Y. Times, June 27, 2005. See generally Gourley, "CFIUS: New Congress Continues Effort To Increase Scrutiny of Foreign Investment in the U.S.," 4 IGC ¶ 17; Hodgson & Aminian, "CFIUS: Tightening the Screws on the Foreign Investment Review Process," 3 IGC ¶ 28.

74/ See generally Gourley, "CFIUS: New Congress Continues Effort To Increase Scrutiny of Foreign Investment in the U.S.," 4 IGC ¶ 17; Hodgson & Aminian, "CFIUS: Tightening the Screws on the Foreign Investment Review Process," 3 IGC ¶ 28; 3 IGC ¶ 22.

75/ 50 U.S.C.A. app. § 2170(g), (m) (as amended by Pub. L. No. 110-49, § 7).

76/ 50 U.S.C.A. app. § 2170 (m) (as amended by Pub. L. No. 110-49, § 7(b).

77/ Exec. Order No. 12,829, 58 Fed. Reg. 3479 (Jan. 6, 1993).

78/ NISPOM ¶ 1-100.

79/ See NISPOM ch. 2. See generally Dover, "Mergers & Acquisitions—Special Considerations When Purchasing Government Contractor Entities," Briefing Papers No. 04-8, at 8–11 (July 2004).

80/ NISPOM ¶ 2-100.

81/ NISPOM app. C, at C-3.

82/ NISPOM ¶ 2-102.

83/ NISPOM ¶ 2-300c; see NISPOM ¶ 2-303.

84/ NISPOM ¶ 2-100.

85/ NISPOM ¶ 2-200.

86/ NISPOM app. C, at C-4.

87/ NISPOM ¶ 2-209.

88/ Id.

89/ NISPOM ¶ 2-210.

90/ NISPOM ¶ 2-300e.

91/ NISPOM app. C, at C-2.

92/ NISPOM ¶ 1-104a & app. C, at C-2.

93/ NISPOM ¶ 2-302b.

94/ Id.

95/ NISPOM ¶ 2-300a.

96/ NISPOM ¶ 2-301.

97/ NISPOM ¶¶ 2-300c, 2-303.

98/ See NISPOM ¶ 2-310.

99/ NISPOM ¶ 2-303c.

100/ NISPOM ¶ 2-303c(1).

101/ Id.

102/ NISPOM ¶ 2-303c(2).

103/ NISPOM ¶ 2-303b.

104/ Id.

105/ NISPOM ¶ 2-303b(1).

106/ Id.

107/ NISPOM ¶ 2-303b.

108/ NISPOM ¶ 2-303a.

109/ Id.

110/ NISPOM ¶ 2-309.

111/ NISPOM ¶ 10-102.

112/ 31 C.F.R. pts. 500–598. See generally Irwin, Katirai & Lorello, "Due Diligence & Compliance Risk Management Abroad for Government Contractors," Briefing Papers No. 07-6, at 4–6 (May 2007).

113/ See 31 C.F.R. pt. 515.

114/ See 31 C.F.R. pt. 500.

115/ E.g., 31 C.F.R. § 538.210 (prohibiting evasion of the sanctions enforced against Sudan); see also Low & McGlone, "Avoiding Problems Under the Foreign Corrupt Practices Act, U.S. Antiboycott Laws, OFAC Sanctions, Export Controls, and the Economic Espionage Act," in Negotiating and Structuring International Commercial Transactions 206–07 (Sandstrom & Goldsweig eds., 2d ed. 2003).

116/ E.g., 31 C.F.R. § 538.206 (prohibiting facilitating violations of the sanctions enforced against Sudan); see also Low & McGlone, "Avoiding Problems Under the Foreign Corrupt Practices Act, U.S. Antiboycott Laws, OFAC Sanctions, Export Controls, and the Economic Espionage Act," in Negotiating and Structuring International Commercial Transactions 206 (Sandstrom & Goldsweig eds., 2d ed. 2003).

117/ 31 C.F.R. § 800.402(c)(1)(iii), (v), (vi).

118/ See generally Irwin, Katirai & Lorello, "Due Diligence & Compliance Risk Management Abroad for Government Contractors," Briefing Papers No. 07-6 (May 2007).

119/ 15 C.F.R. pts. 730–774. See generally West, Lee & Monahan, "U.S. Export Control Compliance Requirements for Government Contractors," Briefing Papers No. 05-12 (Nov. 2005).

120/ 31 C.F.R. § 800.402(c)(3)(v)(B).

121/ 31 C.F.R. § 800.402(c)(4)(i) .

122/ 15 C.F.R. § 750.10.

123/ 15 C.F.R. § 750.10.

124/ 22 C.F.R. §§ 120–130. See generally West, Lee & Monahan, "U.S. Export Control Compliance Requirements for Government Contractors," Briefing Papers No. 05-12 (Nov. 2005).

125/ 22 C.F.R. pt. 121.

126/ 22 C.F.R. pt.122.

127/ 31 C.F.R. § 800.402(c)(4)(ii).

128/ 22 C.F.R. § 122.4(b).

129/ 22 C.F.R. § 122.4(c).

130/ FAR 9.502(c). See generally Cantu, "Organizational Conflicts of Interest/Edition IV," Briefing Papers No. 06-12 (Nov. 2006); Dover, "Mergers & Acquisitions—Special Considerations When Purchasing Government Contractor Entities," Briefing Papers No. 04-8, at 5–6 (July 2004).

131/ FAR 42.1204(d).

132/ 41 U.S.C.A. § 15(a). See generally Dover, "Mergers & Acquisitions—Special Considerations When Purchasing Government Contractor Entities," Briefing Papers No. 04-8, at 2–4 (July 2004).

133/ Maffia v. United States, 143 Ct. Cl. 198, 203 (1958) ("Despite the bar of the Anti-Assignment statute (41 U.S.C.A. § 15), the Government, if it chooses to do so, may recognize an assignment.").

134/ FAR 42.1204(a).

135/ Westinghouse Elec. Co. v. United States, 56 Fed. Cl. 564, 569 (2003), 45 GC ¶ 251; see also Johnson Controls World Servs., Inc. v. United States, 44 Fed. Cl. 334 (1999).

136/ Westinghouse Elec., 56 Fed. Cl. at 569.

137/ FAR 2.101.

138/ FAR 42.1204(e).

139/ Sunrise Int'l Group, Inc., Comp. Gen. Dec. B-266357, 96-1 CPD ¶ 64; Harnischfeger Corp., Comp. Gen. Dec. B-224371, 86-2 CPD ¶ 296. See generally Dover, "Mergers & Acquisitions—Special Considerations When Purchasing Government Contractor Entities," Briefing Papers No. 04-8, at 4–5 (July 2004).

140/ Consortium HSG Technischer Serv. GmbH, Comp. Gen. Dec. B-292699.6, 2004 CPD ¶ 134.

141/ FAR 42.1205.

142/ FAR 42.1205(a).