

**CONGRESS STRENGTHENS PRESIDENTIAL AUTHORITY OVER FOREIGN  
INVESTMENT IN THE UNITED STATES**

On July 26, 2007 President Bush signed into law the Foreign Investment and National Security Act of 2007 (“FINSA”). FINSA amends the Exon-Florio provision of U.S. law to provide for greater scrutiny by the executive and legislative branches of transactions in which foreign persons seek to acquire U.S. companies. FINSA broadens the national security impact standard in the Exon-Florio law to require assessment of the effect of transactions on U.S. critical infrastructure, energy assets, and critical technologies. Foreign businesses and investors contemplating acquisitions in the United States should be aware of the new procedures, requirements, and criteria that FINSA establishes, and of the implicitly less open U.S. attitude toward foreign direct investment that FINSA reflects.

Currently, under the Exon-Florio provision of U.S. law, the President has the authority to accept, reject, or require changes to a merger, acquisition, or takeover that results in the ownership or control of a U.S. person by a foreign person (a “covered transaction”) and “threatens to impair the national security” of the United States. If the President determines that a covered transaction threatens national security, the Exon-Florio provision allows him to act only if no other provision of U.S. law can adequately address those security concerns.

By executive order, the President’s authority has been delegated to the Committee on Foreign Investment in the United States (“CFIUS”), consisting of twelve government agencies and led by the Treasury Department. Although they are under no legal obligation to do so, parties may voluntarily notify CFIUS of a planned covered transaction and thereby obtain a CFIUS review. Otherwise, CFIUS is empowered to initiate review unilaterally of a covered transaction even after it has closed. Once CFIUS is notified or becomes aware of a covered transaction, it must initiate a 30-day review to examine a host of specified factors in order to determine the transaction’s impact on national security. The review includes an examination by U.S. intelligence agencies. In recent years, CFIUS has regularly entered into mitigation agreements with foreign acquirers with the intent of limiting the impact of foreign acquisitions that CFIUS determines could impact U.S. national security. If CFIUS does not raise national security concerns in the initial 30-day review, or if national security concerns have been mitigated, the transaction is deemed to be “cleared.”

If CFIUS determines that a transaction does raise national security concerns, and these concerns cannot be addressed during the initial 30-day review, the Exon-Florio law authorizes CFIUS to undertake a 45-day investigation. Such an investigation is mandatory for transactions involving a foreign government-controlled acquirer. At the conclusion of its investigation, CFIUS may (a) clear the transaction, (b) request that the parties make changes to the transaction to mitigate national security concerns, or (c) indicate that the transaction poses serious national security concerns and should receive a final review by the President. The President then has 15 days to approve, modify, or reject the transaction.

Because of the burdens associated with a formal investigation and the desire to avoid direct Presidential involvement, if national security questions are unsettled near the completion of an initial review, CFIUS currently allows, and in some cases encourages, parties to withdraw notification of a transaction and refile, so as to obtain an additional 30-day review period.

FINSA makes several important amendments to Exon-Florio, which fit into three general categories: (a) codification of current practices, (b) expansion of the CFIUS national security inquiry, and (c) additional requirements for notification to Congress.

FINSA formally codifies provisions in existing CFIUS regulations and many of the more informal steps in the CFIUS review and investigation processes as well. It establishes CFIUS in law, provides statutory support for the use of mitigation agreements, and codifies the role of the National Director of Intelligence (“NDI”) in analyzing transactions.

FINSA provides that the Secretary of the Treasury shall designate one CFIUS member as the “lead agency” for a given transaction. This agency spearheads the review process, leads negotiations of any mitigation agreements, and monitors compliance with any agreed-upon conditions. FINSA authorizes the lead agency to sue to enforce mitigation agreements, and permits CFIUS to re-open its review of a cleared transaction in the event of a material breach of a mitigation agreement.

In addition, FINSA significantly tightens the CFIUS review and investigation processes by mandating additional considerations to determine whether a transaction threatens national security. One major addition is heightened scrutiny for foreign acquisitions of “critical infrastructure.” When a foreign person acquires a company involved in critical infrastructure, CFIUS must now engage in a 45-day investigation of the transaction if it “could impair” (rather than “threaten”) national security and CFIUS’s concerns cannot be abated by a mitigation agreement. Although FINSA generally makes investigations mandatory for transactions involving either critical infrastructure or a party controlled by a foreign government, an investigation is not required if the initial review convinces both the Secretary of the Treasury and the head of the lead agency that the transaction does not impair the national security of the United States.

FINSA adds a number of other factors to evaluate a transaction’s impact on national security. These include the national security effects of the transaction on United States critical infrastructure and technology. FINSA makes explicit that a foreign government’s control over a party bears on a transaction’s national security impact. FINSA further provides a number of considerations that derive from a foreign party’s country of origin, namely whether the country (a) adheres to nonproliferation control regimes, (b) cooperates with the United States in its fight against terrorism, or (c) has potential to transship or divert technologies with military applications. CFIUS must now also examine a transaction’s effect on weapons sales to countries posing a regional military threat to the United States. Finally, CFIUS must consider the United States’ long-term need for energy and other critical resources.

FINSA also includes more government officials in the CFIUS review process. First, the NDI must within 20 days conduct an analysis of the national security concerns of every transaction CFIUS reviews. The NDI's only duty is providing the required analysis; he or she has no policy or voting role with respect to a transaction. FINSA requires the President to appoint an Assistant Secretary of the Treasury whose duties include those related to CFIUS and who reports directly to the Treasury Undersecretary for International Affairs. Finally, FINSA adds the Secretary of Energy as a full CFIUS member and the Secretary of Labor as a nonvoting member.

Further, FINSA specifies procedures by which CFIUS will track withdrawn notices. To withdraw a notice, a party must now submit a written request and have it approved by CFIUS. If a notice is so withdrawn before CFIUS completes its review or investigation, CFIUS must create interim protections addressing any security concerns uncovered prior to withdrawal. CFIUS must also provide the parties with deadlines for resubmission and create procedures to track any action taken in furtherance of the transaction after withdrawal.

FINSA provides that the CFIUS chairperson must publish in the *Federal Register* guidance on types of transactions that raise national security concerns.

FINSA limits the extent to which the heads of the CFIUS member agencies can delegate responsibility to agency subordinates. Only Deputy Secretaries or Under Secretaries of member agencies can unilaterally initiate a review. Additionally, only the Deputy Secretary of the Treasury or the deputy head of the lead agency can decline to investigate a transaction involving a foreign government-controlled acquirer or critical infrastructure. Only a presidentially appointed official of the Treasury Department or lead agency can sign completed reviews, reports or congressional notices. Only the Deputy Secretary of the Treasury or deputy head of the lead agency can sign completed investigations.

FINSA also significantly increases the level of communication between CFIUS and Congress with respect to completed transactions. CFIUS must now submit a certified notice to Congress upon the completion of every review and a certified report upon the completion of every investigation. Notices and reports must include a description of the actions CFIUS has taken and identify which specified factors were determinative in its decision. Under prior practices, CFIUS notified Congress only of transactions that proceeded to the investigation stage. Now, information about every transaction receiving CFIUS review will be presented to Congress.

The amendments to the Exon-Florio law in FINSA become effective 90 days after enactment. Transactions notified after this date will be subject to increased scrutiny by CFIUS and Congress.

As a result of these changes, foreign persons contemplating an acquisition of a U.S. business involved in national security-related operations – especially those involving infrastructure – should take care to comply with changes enacted by FINSA. The new provisions may also affect the interests of other parties to a transaction, including the target of the acquisition and the entities financing the transaction.

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If you have any questions regarding FINSA, please contact Russell Smith (202-303-1116, [rsmith@willkie.com](mailto:rsmith@willkie.com)) or the attorney with whom you regularly work.

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July 31, 2007

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