

Legal Updates & News

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Congress Passes CFIUS Reform

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On July 11, 2007, Congress passed the Foreign Investment and National Security Act of 2007 (the "Act"), sending it to the President to sign into law. The Act amends the Exon-Florio Amendment to the Defense Production Act of 1950 ("Exon-Florio") to revise the procedures applicable to reviews by the Committee on Foreign Investment in the United States ("CFIUS") of foreign acquisitions of U.S. entities and assets. As described below, the Act's reforms of the CFIUS review process include enhanced congressional reporting requirements and the establishment of stricter formal review procedures. The Act is to become effective 90 days after it is signed by the President.

Exon-Florio permits the President of the United States to prevent acquisitions, mergers, or takeovers of U.S. companies or assets by foreign-owned or -controlled entities when, in the President's view, such transactions threaten the national security of the United States. Parties to a transaction that potentially implicate Exon-Florio may **voluntarily** file a notification with CFIUS to give the U.S. Government an opportunity to review the transaction and address any potential national security concerns. CFIUS is an interagency committee chaired by the Secretary of the Treasury and composed of various representatives of the executive branch of the U.S. Government.

The significant changes to the existing CFIUS review process include the following:

- Requiring the Secretary of the Treasury to designate a lead agency to review each transaction, and granting that agency the authority to negotiate, modify, monitor, and enforce mitigation agreements.
- Requiring a full 45-day national security investigation whenever a transaction involves a foreign government-controlled buyer or whenever a transaction would result in unmitigated foreign control of critical infrastructure, broadly defined to include any physical or virtual system or asset the incapacity of which would have a debilitating effect on national security. Significantly, a full investigation is not required if the Secretary of the Treasury and the head of the lead agency jointly determine that the transaction will not impair the national security of the United States.
- Increasing the role of congressional oversight by requiring CFIUS to provide, following completion of every initial review and investigation, a certified notice to Congress specifying the action taken by CFIUS and the determinative factors considered, as well as a detailed annual report and briefings of key members of Congress upon request.
- Appointing the Director of National Intelligence as an ex officio member of CFIUS and requiring that the Director perform a national security threat analysis for any proposed transaction notified to CFIUS.

CFIUS was criticized last year for its approval of the sale of U.S. port management businesses to Dubai Ports World International, and CFIUS reform has been under consideration since then. The final version of the Act reflects considerable input from the business community and is generally viewed as striking a reasonable balance between protecting U.S. national security and encouraging foreign investment in the United States.

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