

# CFIUS REVIEW OF FOREIGN INVESTMENT IN U.S. BUSINESSES INVOLVING U.S. NATIONAL SECURITY CONSIDERATIONS

*Smarter Way to Cross Blog Archives*  
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**Attorneys**

David Reed

The United States has a long history of welcoming foreign investment. As the United States works its way out of the current recession, U.S. companies are increasingly looking for that investment. As a general rule, U.S. laws treat U.S. and foreign investors the same. A prominent exception to that rule is that mergers, acquisitions, and takeovers that will result in a foreign investor obtaining control of a U.S. business (referred to as "covered transactions") are subject to review by the Committee on Foreign Investment in the United States (CFIUS) if the transaction may involve U.S. national security considerations. If CFIUS determines that a covered transaction may pose a national security risk, CFIUS may impose conditions on the parties to mitigate the risk or may refer the transaction to the president, who has authority to suspend or prohibit the transaction, or even unwind a completed transaction.

CFIUS is an interagency committee comprised of members from prominent federal agencies, including the secretaries of defense, state, homeland security, commerce, energy, justice and the treasury. CFIUS recognizes the importance of foreign investment and focuses solely on national security concerns raised by covered transactions, not on other national interests.

There has been a substantial increase in the number of transactions reviewed by CFIUS over the past several years. This increase may be due in part to the expansion by Congress in 2007 of the scope of CFIUS review beyond areas traditionally viewed as involving national security (such as nuclear and defense areas) to include the area of U.S. critical infrastructure. This blog provides a brief overview of the CFIUS process.

## **History of CFIUS**

In 1988, amid concerns over foreign acquisition of certain types of U.S. businesses, Congress enacted Section 721 of the Defense Production Act of 1950 (Section 721). Section 721 gives the president broad authority to investigate covered transactions and to prohibit those that pose a threat to national security. If the president determines that a transaction poses a national security risk and that no other provision of law can ameliorate the risk, the president may suspend or prohibit the

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transaction. The president delegated the review of covered transactions to CFIUS, which reports its findings to the president.

In 2007, Congress enacted the Foreign Investment and National Security Act of 2007 (FINSA), which amended Section 721. Notably, FINSA added the area of critical infrastructure as a component of national security CFIUS and the president must consider when reviewing covered transactions and requires CFIUS to investigate all covered transactions where the foreign investor is a foreign government or an entity owned or controlled by a foreign government, regardless of the nature of the U.S. business involved. In late 2008, the Department of Treasury issued final regulations (the Regulations) that clarify what constitutes a covered transaction and also issued a guidance (the Guidance) that provides insight into how CFIUS identifies the national security effects of covered transactions.

### **Covered Transactions**

Only mergers, acquisitions, and takeovers that will result in a foreign investor obtaining control of a U.S. business are subject to CFIUS review. The Regulations define control as “the power, direct or indirect, whether or not exercised, through the ownership of a majority or a dominant minority of the total outstanding voting interest in an entity, board representation, proxy voting, a special share, contractual arrangements, formal or informal arrangements to act in concert, or other means, to determine, direct, or decide important matters affecting an entity.” CFIUS considers all relevant facts together in light of their potential impact on a foreign investor’s ability to decide important matters affecting an entity, rather than applying a bright-line test to determine whether a transaction results in foreign control. The Regulations include examples of transactions and structures that constitute foreign control and others that do not, including certain minority shareholder protections and private equity structures that do not constitute control.

### **National Security Considerations**

CFIUS conducts national security risk assessments based on information provided by the parties and also from public and government sources. Section 721’s intent is to interpret the term “national security” broadly and includes a non-exclusive list of factors that CFIUS and the president must consider in determining whether a transaction poses a national security risk. The Guidance defines a national security risk as “a function of the interaction between threat and vulnerability, in light of the potential consequences of that interaction for U.S. national security.” National security considerations are facts that “have potential national security implications.” A national security consideration may give rise to a finding of a national security risk. The Guidance emphasizes, however, that a finding of a national security consideration does not also mean a finding of a national security risk.

The addition of critical infrastructure under Section 721 allows CFIUS to consider more transactions to be within the scope of its review than in the past. Section 721 defines “critical infrastructure” as “systems or 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.” CFIUS does not focus on any particular U.S. business sectors and has reviewed a wide range of transactions including those involving the information technology, telecommunications, energy, natural resources, industrial products, transportation, and the financial system sectors.

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Factors that have heightened CFIUS review include transactions where:

1. The U.S. business has contracts with the U.S. government;
2. The foreign investor is from China, Russia, the Middle East or another country that is not a traditional U.S. ally;
3. The type of U.S. business is important to national security, especially businesses in the telecommunications, energy, transportation, and intelligence-gathering industries and businesses that supply technology for defense, law enforcement or national security applications or goods or services subject to export controls; and
4. The foreign investor is a foreign government or an entity controlled or owned by a foreign government.

### **CFIUS Review Process**

The CFIUS review process is based on a voluntary notice system, although CFIUS can initiate a review on its own. The information required in a notice includes a description of the transaction, the U.S. business and any government contracts or licenses it holds, the foreign investor and its plans for the U.S. business, and the value of the transaction. CFIUS encourages the parties to consult with CFIUS prior to filing a notice to help ensure it contains the information CFIUS will need to conduct its review. Information submitted to CFIUS is confidential and exempt from public disclosure.

Generally, the CFIUS review process takes no longer than 90 days to complete and consists of the following four steps if a review progresses through all of them:

1. Initiation of a review voluntarily by the parties or unilaterally by the president or CFIUS
2. An initial 30-day review by CFIUS;
3. A potential additional 45-day investigation by CFIUS; and
4. A 15-day period after CFIUS has completed its review within which the president must decide whether to permit or take action on the transaction.

CFIUS concludes action on most transactions within the initial 30-day review period.

If CFIUS determines that a transaction does not present national security risks or that other provisions of law can address the risks, CFIUS will issue a notice indicating that it has concluded all action under Section 721 with respect to the transaction. If CFIUS issues this notice, or the president decides not to take action on the transaction if CFIUS refers it to him for consideration, then the parties receive a “safe harbor” and, subject to any conditions imposed on the parties by CFIUS to mitigate any risks, the transaction can close without the possibility of suspension or prohibition.

### **Conclusion**

Voluntarily submitting a transaction for CFIUS review can have its disadvantages including the costs associated with making the filing, the delays inherent in the review process, the risk that CFIUS could impose conditions on the parties in exchange for its approval of the transaction and the risk that the filing could raise issues that would not otherwise have triggered scrutiny. However, since covered transactions not voluntarily notified to CFIUS can be investigated and subject to mitigation remedies or even unwound after they close, the parties to a covered transaction that may arguably involve U.S.

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national security considerations should carefully consider whether to file for CFIUS review in an attempt to obtain the safe harbor discussed above and the peace of mind that comes with it.

