

Client Alert

Financial Markets Developments

US Sanctions, Export Controls and Foreign Investment Controls

Treasury Publishes Guidance Concerning CFIUS National Security Reviews

On December 8, 2008, the US Treasury Department published guidance (the "Guidance") regarding the types of transactions the Committee on Foreign Investment in the United States (CFIUS) has reviewed that have presented national security considerations.

I. Background

CFIUS is an interagency body charged with reviewing acquisitions, mergers and takeovers resulting in foreign control of US businesses to determine their potential effects on US national security, under authority of the Exon-Florio Amendment to the Defense Production Act of 1950 ("Exon-Florio"). Transactions that CFIUS deems to be a threat to national security can be blocked or, in the case of completed transactions, buyers may be obligated to divest. Parties to potentially sensitive transactions can seek prior clearance from CFIUS by filing a voluntary notice.

The Guidance issued this week fulfills a requirement of the Foreign Investment and National Security Act of 2007 (FISIA), which mandated that the Treasury Department publish general information regarding the reviews CFIUS has conducted in which national security concerns were present. Congress enacted FISIA, which became law on July 26, 2007, to strengthen CFIUS reviews following criticism of the handling of several controversial proposed foreign acquisitions.

II. The US Treasury Department Guidance

The new Guidance describes the types of transactions that have tended to raise national security concerns in the course of CFIUS reviews, including those in which the US business or proposed transaction:

- Is a federal, state, or local government contractor or supplier at any level, particularly in areas such as weapons and munitions manufacturing, aerospace, radar systems, information technology, telecommunications, energy, natural resources and industrial products;
- Operates in the energy sector, at various stages of the value chain, including exploitation of natural resources, transportation of resources (e.g., pipelines), conversion of resources to power and the delivery of power;
- Affects the US transportation system, including maritime shipping, port terminal operations and aviation maintenance, repair and overhaul;
- Could significantly and directly affect the US financial system;
- Involves US critical infrastructure, including major energy assets;



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- Engages in the production of advanced technologies, including semiconductors, cryptography, data protection, internet security and network intrusion detection; or
- Engages in the research and development, production, or sale of technology, goods, software, or services subject to US export controls.

The Guidance also lists attributes of foreign investors that may raise national security concerns, including:

- Foreign parties from countries with poor records on nonproliferation and other national security-related matters;
- Foreign parties whose intentions could impair US national security, including plans to terminate contracts with the US government;
- Foreign government-controlled parties, including foreign government agencies, state-owned enterprises, government pension funds and sovereign wealth funds.

Finally, the Guidance recommends that parties to a transaction voluntarily provide certain information in addition to the expanded disclosure requirements of the new regulations, which were issued in November 2008, such as whether the US business deals in:

- Support for common business operations, such as e-commerce, e-mail, and database systems;
- Telecommunications or internet systems;
- Systems for control of sensitive processes and physical functions, such as supervisory control, data acquisition and process and distributed control systems;
- Safety, security, support and other specialty systems, such as fire, intrusion detection, access control, people-mover and heating, ventilation and air conditioning systems;
- Processing natural resources and material, or production and transportation of energy.

III. Implications and Next Steps

While the new Guidance document describes past transactions reviewed by CFIUS, its utility lies in its ability to guide US businesses and their prospective foreign investors as they contemplate potential Exon-Florio issues attendant to their transactions. This Guidance reveals the growing breadth of CFIUS's mandate, now specifically including transactions involving natural resources and items subject to export controls, and potentially embracing sectors as varied as weapons manufacturing and specialty HVAC systems.

Taken together with the new CFIUS regulations, issued November 2008, the Guidance points to a more activist CFIUS and a foreign investment review regime that will implicate a greater proportion of cross-border transactions going forward. Given these recent changes to the regulatory environment, parties involved in US investment and their advisors will need to give careful consideration to Exon-Florio issues and whether a voluntary notice may be warranted.

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