
CFIUS Guidance: National Security Concerns in Foreign Acquisitions of U.S. Businesses

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The Department of Treasury recently published guidance on the considerations examined by the Committee on Foreign Investment in the United States (“CFIUS”) to determine whether national security risks are presented by particular types of transactions covered by the Foreign Investment and National Security Act of 2007 (“FINSAs,” amending 50 U.S.C. App. 2170).¹ The guidance provides important insight into the manner in which CFIUS is likely to apply the new regulations it issued on November 21, 2008.²

Guidance Confirms Focus and Criteria of National Security Review

CFIUS’ national security review is intended to identify and address national security risks that may arise from a covered transaction. In the guidance, Treasury clarifies that “CFIUS focuses solely on any genuine national security concerns raised by a covered transaction, not on other national interests.”³ The guidance also states that CFIUS may pursue a risk mitigation measure only if other laws (e.g., the International Traffic in Arms (“ITAR”), Export Administration Regulations (“EAR”), and the National Industrial Security Program Operating Manual (“NISPOM”)) do not sufficiently address the risk at issue.

According to the guidance, CFIUS employs a two-step analysis when evaluating national security risks, examining both the threat (foreign person’s ability to cause harm) and the vulnerability (U.S. business/systems’ potential to harm national security) posed by the transaction. In assessing the national security risk, CFIUS will examine the factors listed in the governing statute, including the potential impact on domestic production for national defense, international technological leadership and critical technologies, energy sources and critical infrastructure, likelihood of chemical, biological and nuclear proliferation, and the pertinent foreign countries’ adherence to non-proliferation regimes.

¹ 73 Fed. Reg. 74,567 (Dec. 8, 2008).

² See Pillsbury Client Alert, International Trade, Vol. 1500, No. 1521.

³ 73 Fed. Reg. at 74,568.

Types of Transactions Posing National Security Considerations

The guidance explains that national security considerations can be presented based on the nature of the U.S. business being purchased or the foreign person making the acquisition. The guidance provides some examples of the types of U.S. businesses and foreign persons with respect to which national security considerations have frequently arisen.

Considerations Related to the U.S. Business

Government Contracts: Transactions involving U.S. Government contractors (prime or sub) or suppliers to such contractors, including:

- Companies with facility clearances involved in classified work;
- Companies in the defense, security, and law enforcement sectors;
- Companies in industries such as weapons and munitions manufacturing, aerospace, and radar systems; and
- Companies in the information technology, telecommunications, energy, natural resources, and industrial products sectors.

Industries Not Involving Government Contracts:

- **Energy Sector:** Various segments of this sector including natural resources, transportation (e.g., by pipeline), conversion to power, and the provision of power.
- **Transportation System:** Maritime shipping, port terminal operations and aviation maintenance, repair and overhaul.
- **Financial Systems:** Potential for significant and direct impact on U.S. financial system.
- **Critical Infrastructure:** Major energy assets, depending on the importance of the assets involved.
- **Advanced Technology:** Technologies with implications for defending U.S. national security, including semiconductor design and production, or other components with commercial and military applications, cryptography, data protection, Internet security, and network intrusion detection.
- **Export-Controlled Items or Technology:** Companies engaged in research and development, production, or sale of such items or technology.

Considerations Related to the Foreign Person

In General:

- Investor country's compliance with non-proliferation regimes.
- Potential for Foreign Person to terminate U.S. Government contracts related to national security.

Foreign government-controlled transactions (foreign government agencies, state-owned enterprises, government pension funds, and sovereign wealth funds):

- National security risk is less likely where: (i) there is a commercial basis for investment policies and decisions; (ii) there is independence of the investor's management and investment decisions from the controlling government; (iii) the investor has appropriate transparency and disclosure policies; and (iv) the investor has a high degree of compliance with regulatory and disclosure requirements.

Conclusion

Although the guidance confirms that CFIUS does not issue advisory opinions, it provides some greater transparency to the review process and will assist parties with structuring the information and positions presented in consultations with and filings to CFIUS.

Live Link

Final CFIUS Regulations for Foreign Investment Now Published; Pillsbury Client Alert; 21-Nov-2008 (PDF, 3 pages)

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