

## Does Your Foreign Investment Transaction Need A CFIUS Review?

The recently enacted Foreign Investment and National Security Act of 2007 (“FINSA”) substantially enhances U.S. Government scrutiny of foreign investment in the United States, which previously took place pursuant to the Exon-Florio provision of the Omnibus Trade and Competitiveness Act of 1988. It is now more important than ever for attorneys involved in transactions in which a foreign-owned entity will acquire a substantial stake in a U.S. company to consider early on whether the deal should be notified voluntarily to the Committee on Foreign Investment in the United States (“CFIUS”) for pre-clearance.

By statute, the President is empowered to order the divestment of a foreigner’s controlling interest in U.S. assets should he determine that such control threatens U.S. “national security.” FINSA does not define the term “national security,” nor did the preceding Exon-Florio provision, thus giving the President broad discretion. Clients should consider seeking a CFIUS review whenever the U.S. company or assets to be acquired play any role in U.S. national security, defined broadly.

For example, FINSA specifically covers acquisitions involving “critical infrastructure” and “critical technologies.” CFIUS’ proposed regulations define the first term to cover virtual infrastructure as well as physical infrastructure, and the second term to cover the full range of technologies controlled for export purposes according to classifications in the International Traffic in Arms Regulations (“ITAR”) and the Export Administration Regulations (“EAR”).

CFIUS recently has begun inquiring into transactions consummated without pre-clearance to determine whether failure to seek CFIUS review was an attempt to avoid national security scrutiny. When the parties to a transaction submit it to CFIUS for pre-clearance, however, CFIUS’ approval provides a safe harbor, preventing the President from undoing the deal.

This recommendation to consider CFIUS review when national security implications may seem remote applies even when one foreign entity might be transferring control to another. The Dubai Ports World controversy, which triggered the passage of FINSA, arose when control over certain port facilities was to move from a British to a Middle Eastern owner. Similarly, a CFIUS review may be in order when one U.S. company acquires another should the acquirer be under foreign control.

The International Trade practice at Baker & Hostetler LLP is well-equipped to assist in assessing whether particular proposed transactions should be notified to CFIUS and in getting through the CFIUS process. We are familiar with all of the relevant agencies that make up CFIUS, and our lawyers have been handling CFIUS notifications for clients since the passage of the original Exon-Florio provision in 1988. We also are experts on classifying technologies in accordance with the ITAR and EAR.

Baker Hostetler is uniquely positioned to provide complete service in this domain. A key element of success in CFIUS reviews is congressional and media neutrality or support. Congressman Michael Oxley's experience in drafting early versions of the FINSA legislation, with Peggy Peterson's assistance, and in managing congressional relations, could be indispensable to Baker Hostetler's clients. Both are key members of the firm's Legislative Practice.

Should you have any questions, please contact Elliot J. Feldman or John J. Burke in the Washington office at 202.861.1679 or 202.861.1625.

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