

OFII: CFIUS Fact Sheet

FACT SHEET

COMMITTEE ON FOREIGN INVESTMENT IN THE UNITED STATES (CFIUS)

HISTORY

The Committee on Foreign Investment in the United States (CFIUS), an interagency committee chaired by the Department of Treasury, was authorized through the Exon-Florio Amendment to the Omnibus Trade and Competitiveness Act (1988) to review and potentially block foreign acquisitions of U.S. companies that threaten to impair U.S. national security. Exon-Florio was not adopted to halt or slow foreign investment; rather, the Amendment solely focused on those transactions that implicate U.S. national security interests. "National security" was deliberately left undefined as to allow for the greatest presidential control and discretion when determining whether to block a transaction.

CFIUS includes the following 12 members: the Director of the Office of Science and Technology Policy, the Assistant to the President for National Security Affairs, the Assistant to the President for Economic Policy, Secretaries of Treasury (Chair), State, Defense, Homeland Security and Commerce, the Attorney General, the Director of the Office of Management and Budget, the U.S. Trade Representative, and the Chairman of the Council of Economic Advisers.

PROCESS

Filing a notice with CFIUS of a foreign acquisition is voluntary and typically done at the initiative of the parties. However, parties are motivated to file by the fact that the law empowers CFIUS and the President to dissolve the acquisition at any time in the future, even after an acquisition has been completed, if a filing was not made.

After a transaction has been filed, CFIUS conducts an initial review, utilizing the full intelligence and national security infrastructure of the U.S. government, based on detailed information from the parties, which frequently receive questions and requests for clarification from CFIUS. The scope of these reviews focus on two key thresholds:

Test 1: Is there credible evidence that the foreign interest exercising control might take action that threatens national security?

Test 2: If yes, do laws other than Exon-Florio and the International Emergency Economic Powers Act provide adequate and appropriate authority for the President to protect national security?

If consensus exists that no credible threat to national security exists, or threat has been mitigated, CFIUS decides - within 30 days - not to open a further investigation.

If threats exist, or agencies are divided, CFIUS conducts an investigation for an additional 45 days, after which CFIUS is required to file a report with the President. The President will have 15 days to make a decision whether or not to block a transaction.

It is important to note that in practice, both the 30 day review and the longer 45 day investigation provides CFIUS with the opportunity to negotiate with the parties regarding changes to the terms of the acquisition that may improve the protection of national security.

In most transactions, the parties to a transaction will consult informally and negotiate such agreements with CFIUS before filing and starting the clock. In the past, certain parties have dropped out of transactions when CFIUS's national security concerns have been insurmountable, made commitments regarding the composition of the Board of Directors (adding American citizens or guaranteeing that a Board will only be composed of Americans), committed to full access for U.S. law enforcement agencies, or even committed to maintain research and development in the United States.

In other words, CFIUS can leverage the approval process to win concessions that further improve and guarantee U.S. national security. Transactions involving foreign companies owned or controlled by foreign governments are typically subjected to heightened scrutiny.

STATISTICS

- To date, more than 1500 notices have been filed with CFIUS;
- Twenty-five transactions required an investigation; importantly, four transactions have required investigations since September 11, 2001, more than the previous 10 years combined;
- Of the 25 investigations, 12 were sent to the President requiring a decision as to whether to block the transaction; and
- Of the 12 deals that were sent to the President, one was prohibited (In 1990, China National Aero Technology Import & Export Corp. was required to sell its interest in a Seattle-based aircraft component company called Mamco Manufacturing Inc.).
- Thirteen transactions have been withdrawn without a decision.