

## INTERNATIONAL TRADE ALERT

### TREASURY ISSUES GUIDANCE ON TRANSACTIONS PRESENTING CFIUS NATIONAL SECURITY CONSIDERATIONS

The U.S. Department of the Treasury, as the chair of the Committee on Foreign Investment in the United States (CFIUS), has issued guidance required by the Foreign Investment and National Security Act (FINSA) regarding the types of transactions that CFIUS has reviewed and that have presented national security considerations. (*See* 73 Fed. Reg. 74567 (Dec. 8, 2008)). As described below, Treasury provides an “illustrative” list of transactions that present national security considerations, making clear that CFIUS does not focus on any specific business sectors but, rather, analyzes the “particular facts and circumstances of each transaction it reviews” in conducting its national security review. Treasury frames its guidance by emphasizing that CFIUS operates in the context of an “open investment policy” and reviews transactions focused “solely on any genuine national security concerns . . . not on other national security interests.”

### TRANSACTIONS PRESENTING NATIONAL SECURITY CONSIDERATIONS

Treasury’s guidance describes several covered transactions reviewed by CFIUS, both pre- and post-FINSA, that have presented “national security considerations” (defined as facts and circumstances that have potential national security implications). The national security considerations raised by these transactions relate to one or both of the following: (1) the nature of the U.S. business over which foreign control is being acquired, and (2) the nature of the foreign person acquiring control. Significantly, Treasury makes clear that transactions falling under these categories do not necessarily pose a “national security risk” (defined as whether the foreign person might take action that threatens to impair U.S. national security), only that the facts and circumstances surrounding the transactions have implicated national security factors that CFIUS considers.

## **CATEGORY 1: THE NATURE OF THE U.S. BUSINESS OVER WHICH FOREIGN CONTROL IS BEING ACQUIRED**

Treasury identifies two broad types of transactions that have presented national security considerations in the context of a CFIUS review based on the U.S. business acquired.

*U.S. businesses with government contracts.* The first type of transactions involves U.S. businesses that provide products and services to U.S. government agencies and state and local authorities, either as prime contractors or as subcontractors or suppliers to prime contractors.

These reviews have included, among others, U.S. businesses in the defense, security and national security-related law enforcement sectors, especially those with access to classified information, and such industry segments as weapons and munitions manufacturing, aerospace and radar systems. Acquisitions of U.S. businesses that supply goods or services with national security-relevant functions, such as telecommunications, information technology, energy and natural resources, have also presented national security considerations in the context of a review.

*U.S. businesses with relevance to national security.* The second type of transactions involves U.S. businesses whose operations, products or services may have implications for U.S. national security, *irrespective of government contracts*. According to Treasury's guidance, these transactions have involved the following—

- the energy sector (e.g., the exploitation, transportation and conversion into power of natural resources and the provision of power to U.S. government and civilian customers)
- the nation's transportation system (e.g., maritime shipping and port terminal operations and aviation maintenance, repair and overhaul)
- the U.S. financial system
- U.S. critical infrastructure (including energy assets), determined on a case-by-case basis, depending on the importance of the particular assets involved in the transaction
- the production of certain types of advanced technologies that may be useful in defending, or in seeking to impair, U.S. national security, such as equipment or components with both commercial and military applications (including the design and production of semi-conductors) and goods and services involving cryptography, data production, Internet security and network intrusion detection
- the research and development, production or sale of technology, goods, software or services that are subject to U.S. export controls.

## **CATEGORY 2: THE IDENTITY OF THE FOREIGN PERSON ACQUIRING CONTROL OF A U.S. BUSINESS**

Treasury also describes transactions that present national security considerations based on the identity of the foreign person acquiring control of a U.S. business.

*Background or intention of the foreign person.* CFIUS has reviewed transactions that present national security considerations because of the track record or intentions of the foreign person and its personnel with regard to actions that could impair U.S. national security. In this context, CFIUS evaluates whether the foreign person has plans to terminate contracts between the U.S. business and U.S. government agencies for goods and services relevant to national security.

*Foreign government control.* Given the presumption in FINSA that “foreign government-controlled transactions” raise national security considerations, CFIUS has reviewed transactions that may result in control of a U.S. business by, among others, foreign government agencies, state-owned enterprises, governmental pension funds and sovereign wealth funds. Treasury’s guidance stresses that, while foreign government control is clearly a national security factor to be considered, the fact that a transaction is a foreign government-controlled transaction does not mean that it poses national security risk.

Treasury outlines several factors that CFIUS takes into account in evaluating national security considerations for foreign government-controlled transactions, including: (1) the extent to which the basic investment management policies of the investor require investment decisions to be based solely on commercial grounds; (2) the degree to which the investor’s management and investment decisions are exercised independently from the controlling government; (3) the degree of transparency and disclosure of the purpose, investment objectives, institutional arrangements and financial information of the investor; and (4) the degree to which the investor complies with applicable regulatory and disclosure requirements of the countries in which they invest. CFIUS will also consider all other national security factors, including, in particular, the record of the country of the investor with respect to nonproliferation and other national security-related matters. Treasury indicates that CFIUS has reviewed numerous foreign government-controlled transactions without finding unresolved national security concerns.

*Corporate reorganization.* Treasury’s guidance indicates that corporate reorganizations raise national security considerations only in exceptional cases, since they usually would not result in a change in the ultimate parent of the U.S. business. As an example of a corporate reorganization that would present national security considerations, the guidance offers the case of the transfer of control of a U.S. business from one foreign corporation to another, both of which are controlled by the same parent corporation.

## CONCLUSION

Although Treasury's guidance underscores CFIUS's discretion to consider the facts and circumstances of each transaction on a case-by-case basis, it provides some visibility into the circumstances that CFIUS has viewed as presenting national security considerations. By providing examples of categories and types of transactions that have historically presented national security considerations, Treasury injects some transparency and predictability into an otherwise opaque process. Treasury's reaffirmation of the U.S. government's position that CFIUS carries out its responsibilities in the context of an open investment policy, with a review that is limited to national security considerations, is also noteworthy, particularly in light of the current financial crisis.

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