SECTION IV

International Trade

CHAPTER 13

CFIUS and Foreign Investment

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Foreign direct investment in the United States is on the rise and, at the same time, U.S. government scrutiny of mergers and acquisitions potentially affecting national security has never been more intense. In this chapter, the authors examine the interagency Committee on Foreign Investment in the United States (CFIUS) and the process by which it reviews corporate transactions resulting in foreign control of U.S. businesses. That process has been conducted entirely in secret, with the "common law" developed over the years known only to a relative few. CFIUS reform efforts since the Dubai Ports World fiasco—specifically, the Foreign Investment and National Security Act of 2007 and implementing Treasury regulations effective December 22, 2008—have yielded a review process that is more streamlined and substantive standards that, although still very broad and flexible, are better understood. This chapter explores these developments, as well as industry-specific foreign ownership restrictions and investment review regimes in other countries.

Foreign acquisitions of U.S. companies are a routine fact of commercial life. But government and media scrutiny of deals in industrial sectors with potential homeland security implications have become more demanding since September 11, 2001. Although the U.S. is generally open to foreign acquisitions, there are inevitable tensions between pro-

1. The authors are very grateful for the extraordinary assistance of Zachary Clopton in the preparation of this chapter.

moting open markets, free trade, and competition, on the one hand, and ensuring U.S. national security, on the other. Responsibility for resolving those tensions falls largely on the multi-agency Committee on Foreign Investment in the United States (CFIUS).[2] In addition, several federal departments or agencies oversee industry-specific regimes—in telecommunications, air transport, and nuclear power—that allow government review of direct foreign investment with national security concerns.

Spurred by the weak dollar and booming government revenues in China and several oil-rich countries, acquisitions in the United States by foreign entities reached $407 billion in 2007, up 93 percent from 2006.[3] Foreign buyers accounted for 46 percent of the $230.5 billion of U.S. mergers and acquisitions in the fourth quarter of 2007,[4] the largest percentage of foreign buyers since 1998.[5] Although CFIUS is 20 years old, controversial transactions since 9/11—most notably the outcry over the initial approval of United Arab Emirates–based Dubai Ports World's acquisition of a company operating marine terminals in a number of major U.S. ports—have elevated CFIUS from relative obscurity to the front pages. The increasing investments in the United States by sovereign wealth funds—large pools of investment capital controlled by foreign governments—have also raised new questions in Congress and the executive branch about the regulation of foreign investment.[6] As with investments by other sorts of foreign investors, investments by sovereign wealth funds emanating from countries such as China and the Gulf Arab states, with which the United States has important strategic and geopolitical entanglements, have raised particular concerns.

Responding to these trends, Congress passed the Foreign Investment and National Security Act (FINSA) in late 2007,[7] which brought some

2. *See* U.S. Dep't of the Treasury, Committee on Foreign Investment in the United States (CFIUS), http://www.ustreas.gov/offices/international-affairs/cfius.

3. *Weak Dollar Fuels China's Buying Speed of U.S. Firms*, WASH. POST (Jan. 28, 2008).

4. Zachary R. Mider, *International Deals: Americans Sell Out to Foreign Firms at Record Rate*, Bloomberg News Serv., Jan. 9, 2008.

5. *Id.*

6. For helpful brief overviews, see Robert M. Kimmitt, *Public Footprints in Private Markets*, FOREIGN AFFAIRS, Vol. 87, No. 1, at 119–30 (Jan./Feb. 2008); *Asset-backed Insecurity*, THE ECONOMIST 78–80 (Jan. 19, 2008).

7. Pub. L. No. 110-49, 121 Stat. 246 (2007).

significant changes to the CFIUS regime. The president provided additional clarification through an executive order on January 23, 2008.[8] Further clarification has come in the Treasury Department's revised CFIUS regulations, required under FINSA, and effective as of December 22, 2008.[9] Industry-specific regimes managed by various departments and agencies have also continued to develop alongside the CFIUS process.

All of these developments are pointed reminders that, although the United States prides itself on openness to foreign investments, such transactions may raise special regulatory and political issues. Parties to potential foreign acquisitions of U.S. companies or assets need to consider carefully the CFIUS and other regulatory processes in planning—and potentially in valuing—such transactions.

CFIUS

Basic Framework and History

In response to concerns about possible effects of foreign direct investment on national security, in 1988 Congress enacted the Exon-Florio Amendment to the Defense Production Act of 1950. Exon-Florio authorizes the president to investigate the impact on U.S. national security of mergers, acquisitions, and takeovers by foreign persons that result in foreign control over a U.S. company or certain U.S. assets.[10] If the president finds (1) credible evidence that a transaction would impair national security, and (2) that no other provision of law grants him authority to take steps to ameliorate this impact, he may act to block the transaction.[11] The president's findings are not subject to judicial review.[12]

Exon-Florio applies both to proposed mergers and acquisitions and to completed transactions. Unless a party to the transaction voluntarily seeks pre-consummation review, there is no time limit on the president's authority to investigate a completed transaction. A voluntary notice that results in CFIUS clearance grants the transaction a safe harbor from

8. Exec. Order: Further Amendment of Executive Order 11,858 Concerning Foreign Investment in the United States, Jan. 23, 2008.
9. *See* 73 Fed. Reg. 70,702 (Nov. 21, 2008).
10. 50 U.S.C. app. § 2170.
11. *Id.* at § 2170(d)(4).
12. *Id.* at § 2170(e).

post-closing review and challenge (except possibly if the parties make material misrepresentations in noticing the transaction or materially breach a condition of CFIUS's clearance approval).[13]

CFIUS is charged with implementing Exon-Florio. An interagency body, CFIUS was initially established by executive order and has now been codified in statute by FINSA.[14] Chaired by the secretary of the treasury, it includes among its members the secretaries of defense, homeland security, and commerce, and the attorney general. The Director of National Intelligence serves as an ex officio member. The committee's review process is confidential, and the process is intended to focus on the true national security implications of particular deals rather than political considerations.[15]

The CFIUS notification process is voluntary, requires no filing fee, and imposes no mandatory waiting period before closing the transaction, although parties to a CFIUS review or investigation typically wait until the process is complete before closing. The CFIUS process involves four steps: (1) a voluntary filing submitted by one or both parties to the transaction; (2) a 30-day committee review of the transaction; (3) a potential additional 45-day committee investigation; and (4) a 15-day period during which the president decides to permit or block the acquisition (or seek divesture after an ex post facto review).[16]

CFIUS had traditionally approved the vast majority of notified transactions during the initial 30-day period, but a growing number of transactions are now being subjected to a second-phase 45-day investigation. Indeed, in 2006 alone, CFIUS launched seven 45-day investigations, as many as had been initiated in the previous five years combined.[17] In 2007, CFIUS conducted six 45-day investigations and parties withdrew at least six voluntary notices.[18] This trend will almost certainly continue,

13. *Id.* at § 2170(b)(1)(D)(iii).

14. Pub. L. No. 110-49, 121 Stat. 246 (2007), and Exec. Order 11,858, discussed below.

15. *See* 50 U.S.C. app. § 2170.

16. *Id.* at § 2170(b) and (d).

17. *See* Testimony of Treasury Assistant Secretary Clay Lowery before the House Financial Services Committee, Feb. 7, 2007, *available at* http://www.treas.gov/press/releases/hp250.htm.

18. *See* Government Accountability Office, *Foreign Investment: Laws and Policies Regulating Foreign Investment in 10 Countries*, Report to the Hon. Richard Shelby, Ranking Member, Committee on Banking, Housing, and Urban Affairs, U.S. Senate, GAO-08-320, February 2008, at 6; Council on Foreign Relations, Global FDI Policy Meeting, Washington, D.C., June 26, 2008.

especially in light of increased political pressure from Congress for CFIUS to scrutinize transactions and the general increase in foreign investment in the United States.

Scope and Focus of CFIUS Review

In determining whether to seek "safe harbor" protection by notifying CFIUS of a potential transaction, parties should consider three threshold questions: (1) does the transaction involve a "foreign person" acquiring a "U.S. business"? (2) might the transaction implicate U.S. national security interests? and (3) might the structure of the transaction bring it outside CFIUS's jurisdiction altogether?

The first question can be surprisingly tricky and sometimes requires close analysis of the Exon-Florio provisions and the CFIUS regulations. For instance, under Exon-Florio, the same entity could be a "foreign entity" or "U.S. business" depending on whether it is the target or the acquirer.[19] Any entity is a U.S. business to the extent of its business activities in the United States. Accordingly, the application of the statute could be triggered if a foreign company acquires (directly or indirectly) the U.S. branch office or subsidiary of a foreign company.[20] On the other hand, the same foreign-controlled U.S. branch or subsidiary would itself be deemed a foreign person for Exon-Florio purposes if it acquires a U.S. company or U.S. assets because the new regulations define a "foreign person" to include "any entity over which control is exercised or exercisable by a foreign national, foreign government, or foreign entity."[21]

The second inquiry is extraordinarily open-ended and may be susceptible to changing public policy concerns. The notion of national security interests can be writ quite large. The newly enacted FINSA gives some limited guidance, making clear that national security includes homeland security concerns but not, apparently, economic security.[22] FINSA also makes clear that transactions involving critical infrastructure, critical technologies, and major energy assets may well raise national security concerns.[23] The new regulations, described more fully below, offer

19. *See* 31 C.F.R. § 800.216 (2008) (examples 3 and 4); *id.* § 800.226.
20. *See* 31 C.F.R. § 800.226 (2008).
21. *See* 31 C.F.R. § 800.216 (2008).
22. 50 U.S.C. app. § 2170(a)(5).
23. *Id*. at § 2170(f)(6) & 2170(f)(7).

some additional clarity but still leave considerable room for debate and executive branch discretion.

As a practical matter, CFIUS has often shown particular interest in transactions when the target U.S. company has classified contracts with the U.S. government or provides products or services involving U.S. export-controlled technologies; operates or supplies U.S. critical infrastructure, such as the telecommunications network; has significant holdings in strategic natural resources, such as petroleum; or when CFIUS member agencies have specific "derogatory intelligence" about the foreign purchaser. CFIUS may also examine whether the transaction will result in an absence of U.S.-controlled companies that supply technology or products deemed important to U.S. security.

Finally, the limits of CFIUS's jurisdiction have become an increasingly important subject for inquiry as foreign entities have stepped up the pace of investment in the United States. Under the statute, only transactions that "could result in foreign control" are covered transactions subject to CFIUS review.[24] The new regulations, described below, provide additional guidance about the meaning of "foreign control" in the CFIUS context.

Recent Developments

Foreign Investment and National Security Act of 2007

In 2007, Congress enacted the Foreign Investment and National Security Act of 2007 (FINSA). FINSA addresses many of the issues that have been the focus of concern with CFIUS review and codifies elements of CFIUS membership and process.

FINSA established the membership of CFIUS by statute.[25] The secretary of the treasury chairs the committee, but under FINSA other agencies may be appointed "lead agency" with respect to particular

24. 50 U.S.C. app. § 2170(a)(3).

25. *See id.* at § 2170(k) (listing the membership as: "(A) the Secretary of the Treasury; (B) the Secretary of Homeland Security; (C) the Secretary of Commerce; (D) the Secretary of Defense; (E) the Secretary of State; (F) the Attorney General of the United States; (G) the Secretary of Energy; (H) the Secretary of Labor (nonvoting, *ex officio*); (I) the Director of National Intelligence (nonvoting, *ex officio*); and (J) the heads of any other executive department, agency, or office, as the President determines appropriate, generally or on a case-by-case basis.")

investigations depending on the nature of the transaction.[26] The departments of Defense, Homeland Security, Commerce, and Justice often take the most active roles in the CFIUS process. Other cabinet departments and economic and national security bodies within the executive office of the president also serve on the committee.[27] An important addition that FINSA mandated is a defined role for the director of National Intelligence, who is now an ex-officio member and must evaluate a transaction's national security implications.[28]

Under FINSA, if CFIUS decides not to clear the transaction in the 30-day review period, then it must commence an additional 45-day investigation at or before the end of the initial review period.[29] FINSA requires an extended investigation whenever the transaction threatens to impair national security, is a foreign government–controlled transaction, or results in foreign control of critical infrastructure.[30] FINSA leaves CFIUS with broad discretion to determine if a transaction threatens national security. The statute also leaves the term "critical infrastructure" defined in only general terms;[31] experience suggests that telecommunications and transportation infrastructure would typically qualify, and the statute suggests that energy assets are a specific form of critical infrastructure.[32] The range of other assets that could fall within this definition seems almost limitless, however.

Among the additional factors CFIUS must now consider in its review are the impact of the transaction on critical infrastructure, broadly

26. *Id.*

27. *See* Exec. Order: Further Amendment of Executive Order 11858 Concerning Foreign Investment in the United States, Jan. 23, 2008.

28. 50 U.S.C. app. § 2170(b)(4)(D).

29. 50 U.S.C. app. § 2170(b)(2)(B)(i)(I).

30. *Id.* at §§ 2170(b)(2)(B)(i)(II) and 2170(b)(2)(B)(i)(III). An investigation of a foreign government–controlled or critical infrastructure transaction is not required if the secretary of the treasury (or the deputy secretary) and the head of the lead agency (or deputy head) jointly determine that the transaction will not impair the national security of the United States. *Id.* at § 2170(b)(2)(D).

31. *Id.* at § 2170(a)(6): "The term 'critical infrastructure' means, subject to rules issued under this section, systems and assets, whether physical or virtual, so vital to the United States that the incapacity or destruction of such systems or assets would have a debilitating impact on national security."

32. *Id.* at § 2170(f)(6).

defined, as well as energy assets and critical technologies.[33] In the case of foreign government–controlled transactions—that is, transactions in which the buyer is owned or controlled by a foreign government—CFIUS must also consider the relevant country's compliance with U.S. and multilateral counterterrorism, nonproliferation, and export control regimes.[34]

Reflecting the seriousness with which the U.S. government views foreign investment, FINSA requires high-level sign-off for foreign government–controlled or critical infrastructure transactions that do not proceed to the 45-day investigation stage.[35] In addition, high-level sign-off is required for certifications of completed investigations, which CFIUS must submit to Congress.[36] The act also creates specific authority for CFIUS to enforce mitigation agreements.[37] Furthermore, it explicitly establishes CFIUS's "evergreen" authority to reopen a transaction that has been approved if there has been an intentional breach, and no other remedies will suffice.[38]

Although FINSA preserved the review process's confidentiality requirements, Congress added requirements designed to allow it to exercise increased supervision. CFIUS must now report to Congress at the end of reviews and formal investigations and also report annually about its activities.[39]

As a result of FINSA, companies can expect that more transactions will be reviewed and that more reviews will be exacting, resulting in full, formal investigations. This is inevitable given both Congress's increased attention and the act's expansive view of national security—one that the CFIUS agencies already seem to have adopted. Because of this expected increase in scrutiny, as well as the act's clear support for spontaneous CFIUS review and action if any deal presents concerns, companies should be careful to consider whether any aspect of their transactions might trigger CFIUS's jurisdiction. That question may become more

33. "The term 'critical technologies' means critical technology, critical components, or critical technology items essential to national defense, identified pursuant to this section, subject to regulations issued at the direction of the President." *Id.* at § 2170(a)(7).

34. *Id.* at § 2170(f).

35. *Id.* at § 2170(b)(2)(D) (requiring sign-off at secretary or deputy level by Treasury and lead agency).

36. *Id.* at § 2170(b)(3)(C)(iv)(II)(bb).

37. *Id.* at § 2170(l)(1).

38. *Id.* at § 2170 (b)(1)(D)(iii)(I).

39. *Id.* at § 2170(g).

complex as companies employ innovative financial structures for their acquisitions. Companies also should expect more involved mitigation undertakings given FINSA's mandate to CFIUS to use such measures. Finally, they should expect longer-term interaction with, and oversight by, the relevant CFIUS agencies in the wake of any deal that raises national security concerns.

Executive Order

On January 23, 2008, President Bush issued Executive Order 13,456, amending Executive Order 11,858, concerning foreign investment in the United States.[40] The new executive order provides guidance concerning the implementation of FINSA.[41]

The order carefully reiterates the administration's pro-investment policy, stating that the United States unequivocally supports international investment, which promotes economic growth, productivity, competitiveness, and job creation, while stressing that such investment must be consistent with the protection of the national security. That same careful balancing act can be seen in the order's addition of new members and observer agencies to CFIUS: on the pro-business side, the order adds the U.S. trade representative as a member and the Office of Management and Budget, the Council of Economic Advisors, and the Assistant to the President for Economic Policy as observers. On the national security side, the order adds the Office of Science and Technology Policy as a member and, as observers, the Assistants to the President for National Security Affairs and for Homeland Security and Counterterrorism.

At the same time, the order contains several provisions clearly designed to formalize and strengthen Treasury's authority over the CFIUS process. The order expressly delegates to Treasury the president's power to initiate review of a transaction that has been submitted to CFIUS or to initiate a review unilaterally. It also provides Treasury with explicit authority (after consultation with the committee) to request that the Director of National Intelligence prepare an analysis of the risks presented by a proposed transaction.

40. Exec. Order 13456: Further Amendment of Executive Order 11858 Concerning Foreign Investment in the United States, Jan. 23, 2008.

41. Whether President Obama will revise the executive order further remains to be seen. Until then, President Bush's Order 13456 will continue to be effective.

Some of the clarifying measures adopted in the executive order may have a more direct impact on transactions subject to CFIUS. For example, the order provides that CFIUS must initiate a 45-day, second-stage investigation of a transaction if even one member agency so requests. Under the order, CFIUS may require a mitigation agreement to remedy "any national security risk"; however, the agency proposing that agreement must provide the committee with a written showing concerning the perceived national security risk posed by the transaction and the risk mitigation measures that will address such national security risks, and CFIUS must decide whether to approve the mitigation proposal. Such agreements should not, except in extraordinary circumstances, require that a party consent to comply with existing law. The order also provides that the provision in FINSA permitting reopening of a previously reviewed transaction should be read narrowly, as the administration expects that it will be triggered only in extraordinary circumstances.

Finally, the order reminds the agencies that will carry out FINSA that they are bound not to disclose information that could impair "foreign relations, national security, the deliberative processes of the Executive, or the performance of the Executive's constitutional duties"—a provision likely designed as a reminder to CFIUS agencies of the administration's emphasis on executive secrecy in the face of FINSA's new emphasis on reports to Congress.

New Regulations

FINSA required the Treasury Department to issue new implementing regulations, and on November 21, 2008, Treasury published the final regulations in the *Federal Register*.[42] The regulations became effective December 22, 2008.[43] The new regulations do not govern transactions where the parties had made a commitment to enter into the transaction before December 22, 2008, whether, for example, by signing a written agreement with material terms, making a public offer to purchase shares, or soliciting proxies in the election of the board of directors of a target company.[44] Transactions noticed to CFIUS before December 22, 2008, will continue to be governed by the prior procedural regulations.[45]

42. *See* 73 Fed. Reg. 70,702 (Nov. 21, 2008). For the proposed regulations, see 73 Fed. Reg. 21,861 (Apr. 23, 2008).

43. *See* 31 C.F.R. § 800.210 (2008).

44. *See* 31 C.F.R. § 800.103 (2008).

45. *See id.*

The new regulations address both the process and substance of CFIUS review. Overall, they make the review process a little more streamlined and the substantive standards a little more fully defined, often codifying the CFIUS "common law" that had evolved in secret over the past two decades. Procedurally, the regulations encourage pre-filing submissions,[46] more detailed information in the voluntary notice,[47] and certifications of accuracy (with civil penalties of up to $250,000 per material misstatement or omission).[48] The regulations also authorize the CFIUS chairperson to designate one or more agencies as a lead agency for all or a portion of a review, investigation, negotiation, or mitigation agreement monitoring assignment, as established in FINSA.[49]

The new regulations also address many definitional issues, three of which warrant particular mention. First, the proposed regulations adopt a functional definition of *control*, and avoid a categorical bright-line test.[50] Recall that CFIUS jurisdiction extends only to transactions that involve a change in control. The proposed regulations include a list of 10 "important matters affecting an entity," as well as a list of six minority shareholder protections that are not generally considered to confer control. While the lists clearly expand upon the prior regulations, most of the new provisions simply codify the common law of CFIUS—that is, the practice that often had been followed in particular cases to come before CFIUS. Common minority shareholder protections, such as the power to prevent the sale or pledge of all or substantially all of the assets of an entity and the power to purchase additional shares to prevent dilution, are among the rights that will not, in and of themselves, be deemed to confer control. On the other hand, the ability to select new business lines or ventures that an entity will pursue, and the power to appoint or dismiss officers or senior managers, are deemed to be indicia of control.[51]

Notably, the new regulations preserve the so-called "10 percent rule"—that purchases of no more than 10 percent of voting securities made solely for the purpose of investment are not covered transactions.[52] They

46. *See* 31 C.F.R. § 800.401(f) (2008).
47. *See* 31 C.F R § 800.402 (2008).
48. *See* 31 C.F.R. §§ 800.701 and 800.801 (2008).
49. *See* 31 C.F.R. § 800.218 (2008).
50. *See* 31 C.F.R. § 800.204 (2008).
51. *See* 31 C.F.R. § 800.204(a)(5), (a)(8) (2008).
52. *See* 31 C.F.R. §§ 302(b), 800.223 (2008).

do provide useful clarification by reference to examples. Thus, the new version of the 10 percent rule makes clear that a 10-percent-or-less investment does not satisfy the rule where, among other things, the foreign person has contractual rights that give it the power to control important matters or where the foreign person has the right to appoint one or more board seats.[53]

Second, the proposed regulations broaden the definition of *foreign person* to include foreign entities, which are defined to mean companies, branches, trusts, associations organized under the laws of a foreign country "whose equity securities are primarily traded on one or more foreign exchanges" or whose "principal place of business is outside the United States," unless the entity can demonstrate that a majority of its equity "is ultimately owned by U.S. nationals."[54]

Third, the regulations track the statutory definition of *critical infrastructure* as "a system or asset, whether physical or virtual, so vital to the United States that the incapacity or destruction of the particular system or asset of the entity over which control is acquired pursuant to [the] covered transaction would have a debilitating impact on national security," while making clear that this determination is to be made on a case-by-case basis with reference to the particular assets at issue in the proposed transaction.[55] The statutory definition of *critical technologies*, however, is expanded upon to incorporate by reference the definitions from various existing regulatory regimes that deal with the export, trade, or handling of sensitive goods, technologies, and services. Specifically, the new regulations define critical technologies to include, among other things, "[d]efense articles or defense services covered by the United States Munitions List"; "[t]hose items specified on the Commerce Control List . . . that are controlled pursuant to multilateral regimes (i.e., for reasons of national security, chemical and biological weapons proliferation, nuclear nonproliferation, or missile technology), as well as those that are controlled for reasons of regional stability or surreptitious listening"; certain "nuclear equipment, parts and components, materials software and technology specified in the Assistance to Foreign Atomic Energy Activities regulations"; and "[s]elect agents and toxins specified in the Export and Import of Select Agents and Toxins regulations."[56] The regulations state that voluntary notices filed with

53. *See id.* (examples 2 and 3).
54. *See* 31 C.F.R. §§ 800.216(a), 800.212 (2008).
55. *See* 31 C.F.R. § 800.208 (2008).
56. *See* 31 C.F.R. § 800.209 (2008).

CFIUS shall identify, among other things, any critical technologies produced or traded by the U.S. business that is the subject of the covered transaction.[57]

Sovereign Wealth Funds

The increasing prominence of sovereign wealth funds has added an extra layer of concern about the possible national security significance of foreign investment. Sovereign wealth funds presently control about $2.5 trillion, and that figure is expected to grow by perhaps $1 trillion per year for the next decade at least.[58] Sovereign wealth funds' present holdings represent only about 3 percent of global assets, but they already top the capital held by private equity firms and hedge funds.[59]

The U.S. government has taken notice. FINSA itself mandates an additional 45-day investigation where the buyer is a foreign sovereign wealth fund or other state-owned enterprise. The executive order described above directs the Department of Commerce to monitor and report on foreign investment trends and significant developments. The Treasury Department has initiated a review of policies related to sovereign wealth funds, has engaged in bilateral talks with governments controlling significant funds, and has encouraged dialogue between investor and recipient countries. The United States has also pushed for the International Monetary Fund, with the help of the World Bank, to develop a set of best practices to encourage transparency and strictly market-based, rather than politically motivated, investment by sovereign wealth funds. At the same time, the United States has supported efforts by the Organization for Economic Cooperation and Development (OECD) to encourage a parallel set of best practices for recipient countries, emphasizing openness to investment and evenhandedness in the treatment of foreign investors.[60]

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57. *See* 31 C.F.R. § 800.402(c)(4) (2008).

58. Robert M. Kimmitt, *Public Footprints in Private Markets*, FOREIGN AFFAIRS, Vol. 87, No. 1, at 119 (Jan./Feb. 2008).

59. *Asset-backed Insecurity*, THE ECONOMIST (Jan. 19, 2008), at 79.

60. On all these efforts, *see* Kimmitt, *Public Footprints in Private Markets*, *supra* note 58. In September 2008, the International Working Group of Sovereign Wealth Funds, coordinated by the IMF, reached agreement on a draft set of Generally Accepted Practices and Principles (GAPP). *See* Press Release No. 08/04, Sept. 2, 2008, *available at* http://www.iwg-swf.org/pr/swfpr0804.htm. In April 2008, the OECD published a report on recipient country investment

These steps suggest that, for the moment, the executive branch does not see the need for any legislative modifications of the CFIUS process to deal with sovereign wealth funds. But some voices in Congress are already questioning that approach and suggesting that further revision of the CFIUS statute may be necessary.[61]

Investment Review Regimes in Other Countries

The United States is not alone in regulating foreign direct investment with an eye toward national security. In the last few years, at least 11 major recipients of foreign direct investment have approved or are considering new laws that could create barriers to foreign investment. Countries have passed new laws protecting economic security, established new national security review processes for foreign investment, or created additional mechanisms to address investment by foreign governments. According to a Council on Foreign Relations report, three common forces are driving the new investment restrictions: the appearance of new sources of investment, greater governmental ownership and involvement in cross-border investment, and the strong economic positions of host countries.[62]

INDUSTRY-SPECIFIC REVIEW REGIMES

Beyond the general rules of CFIUS and FINSA, the U.S. government has established regulations for foreign investment as it relates to specific industries.

Telecommunications

The Communications Act of 1934 includes various mechanisms by which the Federal Communications Commission (FCC) may review foreign

policies, encouraging openness to sovereign wealth fund investment. *See* OECD—Investment Committee Report, *Sovereign Wealth Funds and Recipient Country Policies*, Apr. 4, 2008, *available at* http://www.oecd.org/dataoecd/34/9/40408735.pdf.

61. *See, e.g.*, Hearing of the Senate Foreign Relations Committee, Sovereign Wealth Funds: Foreign Policy Consequences in an Era of New Money, FED. NEWS SERV., June 11, 2008; *Sovereign Funds Need Best Practices, Not New Legislation, Treasury Official Says*, BNA Daily Rep. for Execs. A-28 (Feb. 14, 2008).

62. DAVID M. MARCHICK & MATTHEW J. SLAUGHTER, GLOBAL FDI POLICY: CORRECTING A PROTECTIONIST DRIFT (Council on Foreign Relations Press, June 2008).

participation in the telecommunications industry. First, the FCC can regulate foreign participation in the U.S. telecommunications industry at the license issuance and transfer stages. The FCC must approve any application for any new license. The FCC is required to consider the public interest, which can include national security considerations vis-à-vis foreign applicants.[63] Similarly, any transfer of a license requires FCC approval and includes a public interest factor.[64] As a condition of granting (or approving the transfer of) a license, the FCC may ask applicants to sign Network Security Agreements with various executive agencies, which are designed to mitigate the government's concerns with particular applications.[65] Unlike CFIUS mitigation agreements, Network Security Agreements are generally made public as part of the license.[66]

In addition, the Communications Act regulates the ownership of wireless communication, including radio stations, broadcast television, cellular telephone companies, and most land-line telephone companies (but not cable companies), regardless of whether a technical acquisition or transfer of the license occurred.[67] Section 310(b) proscribes direct ownership by aliens, corporations organized under the laws of any foreign government, and corporations where more than one-fifth of the capital stock is owned of record or voted by aliens, foreign governments, foreign corporations, or their representatives.[68] This section also allows the FCC to deny licenses to corporations that are more than 25 percent owned by aliens or foreign governments if the commission finds that the public

63. 47 U.S.C. § 309(a). *See* 47 C.F.R. §§ 20.5, 22.5, 22.7, 24.12, 27.12, 27.302, 73.3564, & 90.1303. A similar requirement and review procedure exists for submarine cable licenses pursuant to 47 U.S.C. § 34–35.

64. 47 U.S.C. § 310(d).

65. The FCC's authority to require Network Security Agreements derives from its various authorities to approve license applications and other communication-related transactions. The FCC may append the Network Security Agreement to a license pursuant to an informal request for commission action under 47 C.F.R. § 1.41. *See also* Rules and Policies on Foreign Participation in the U.S. Telecomm. Mkt. & Mkt. Entry and Reg. of Foreign-Affiliated Entities, Report and Order on Reconsideration, 12 F.C.C.R. 23,891, para. 59–66 (1997) (Foreign Participation Order).

66. *See* FCC Web site, http://www.fcc.gov.

67. Recall that under *Exon-Florio*, CFIUS reviews transactions only if a change in control occurs.

68. 47 U.S.C. § 310(b).

interest will be served by such refusal.[69] No analogous provision relating to foreign ownership or control over wire licenses exists. Still, the FCC may review applications for and the transfer of such licenses.

Air Carriers

The Federal Aviation Act defines an "air carrier" as "a citizen of the United States undertaking by any means, directly or indirectly, to provide air transportation."[70] The act provides that, in order to be a citizen of the United States, an air carrier must satisfy each of the following requirements: (1) the carrier (if a corporation) must be organized under the laws of the United States or a state, the District of Columbia, or a U.S. territory or possession; (2) the carrier's president and at least two-thirds of its board of directors and other managing officers must be U.S. citizens; (3) at least 75 percent of the voting interest in the carrier must be owned or controlled by U.S. citizens;[71] and (4) the carrier must be under the actual control of U.S. citizens.[72]

The first three elements set forth above essentially constitute a bright-line numerical citizenship test. The final element, by contrast, involves an assessment by the U.S. Department of Transportation (DOT) as to whether (assuming a carrier satisfies the numerical test) the carrier is under the actual control of U.S. citizens. DOT review is mandatory.[73] DOT makes its actual control determinations on a case-by-case basis, reviewing "the totality of the circumstances of an airline's organization, including its capital structure, management, and contractual relationships"[74]

69. *Id.* This provision is another mechanism by which the FCC has discretion with respect to foreign direct investment. The FCC issued the Foreign Participation Order, which expressed a general policy encouraging foreign applications and provided certain benefits to applicants from World Trade Organization member countries. *See* Foreign Participation Order, *supra* note 65, at para. 29. *See also* Foreign Ownership Guidelines for FCC Common Carrier and Aeronautical Radio Licenses, *available at* http://www.fcc.gov/ib/Foreign_Ownership_Guidelines_Erratum.pdf.

70. 49 U.S.C. § 40102(a)(2).

71. Although the statute only permits non-citizens to own up to 25% of the voting equity in a U.S. air carrier, DOT policy may permit non-citizens to own up to 49% of a U.S. carrier's total equity (as long as the non-citizens' total voting interest does not exceed 25%). DOT Order 91-1-41.

72. 49 U.S.C. § 40102(a)(15).

73. 49 U.S.C. § 41101 *et seq.*

74. 70 Fed. Reg. 67,389 & 67,390 (Nov. 7, 2005) (Docket OST-03-15759).

to ascertain that non-citizens could not "exert any substantial influence" over the carrier's affairs.[75] This interpretation of actual control is sometimes referred to as the "no semblance of foreign control" test.[76] It appears that DOT's definition of control is broader than CFIUS's definition, although neither entity has stated so explicitly. Moreover, it remains uncertain whether a foreign investment in a U.S. airline should ever undergo CFIUS review when, by law, DOT must determine that the airline is under the actual control of U.S. citizens, applying arguably a stricter control requirement than CFIUS.

Nuclear Power

The Energy Reorganization Act of 1974 empowers the Nuclear Regulatory Commission (NRC) to issue licenses for the ownership and operation of nuclear power plants.[77] The act prohibits the NRC from issuing licenses to any entity that the "[c]ommission knows or has reason to believe is owned, controlled, or dominated by an alien, a foreign corporation, or a foreign government."[78] The NRC has adopted fluid standards for determining ownership, control, or domination with "an orientation toward safeguarding the national defense and security."[79]

To implement this proscription, the NRC has adopted a Standard Review Plan.[80] Three aspects of the plan merit attention here. First, the NRC will review each co-applicant for a nuclear power license independently to determine whether it is subject to foreign ownership, control, or domination. Second, where a reviewer "has reason to believe that [an] applicant may be owned, controlled, or dominated by foreign interests,"

75. 71 Fed. Reg. 26,425 & 26,426 (May 5, 2006) (Docket OST-03-15759).

76. Memorandum from Jeffrey N. Shane, Under Secretary for Policy, U.S. Dep't of Transp., dated Dec. 15, 2005, at 1 (Docket OST-03-15759). DOT makes its actual control determinations on a case-by-case basis by reviewing "the totality of the circumstances of an airline's organization, including its capital structure, management, and contractual relationships, . . ." to ascertain that non-citizens could not "exert any substantial influence" over the carrier's affairs. 70 Fed. Reg. 67,389 & 67,390 (Nov. 7, 2005) (Docket OST-03-15759); 71 Fed. Reg. 26,425 & 26,426 (May 5, 2006) (Docket OST-03-15759).

77. Pub. L. No. 93-438, 88 Stat. 1233.

78. 42 U.S.C. § 2133(d).

79. NRC Final Standard Review Plan on Foreign Ownership, Control, or Domination, 64 Fed. Reg. 52,355 & 52,358 (Sept. 28, 1999).

80. *Id.* at 52,357–58.

he or she will request additional information to supplement the application. Finally, the plan states that an applicant is foreign owned, controlled, or dominated when a foreign interest has the power to direct or decide matters affecting the management or operations—"the words 'owned, controlled, or dominated' mean relationships where the will of one party is subjugated to the will of another."[81]

CONCLUSION

With the anticipated increase in foreign direct investment in the United States, ever-evolving concepts of national security, and heightened awareness of the clearance process under Exon-Florio, one may expect CFIUS issues to arise more frequently and play a more significant role in M&A transactions for the foreseeable future. Virtually any deal involving foreign interests on the acquiring side and U.S. assets on the acquired side is a possible candidate for CFIUS review. And the wide-open standard as to what may constitute a threat to impair national security makes each CFIUS case a potential act of policy-making. This counsels careful consideration of CFIUS implications early in the negotiations between the parties, attention to the structure of the contemplated transaction as it may affect CFIUS jurisdiction, formulation of a comprehensive strategy addressing the regulatory and political risks associated with the transaction, and effective engagement with the CFIUS staff and stakeholder agencies to identify and resolve any national security concerns, to the extent possible, before the transaction is formally submitted for review.

81. *Id.* at 52,358.