

US revamps foreign-investment regulation

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The US government has tightened the country's legislation on reviewing national security measures for foreign investment. The amendments are likely to increase the number of deals requiring regulatory approval.

Changes to the Exon-Florio Act include a clearer definition of 'national security'; a more rigorous review process; and civil penalties for violations.

The reforms follow a number of controversial decisions by CFIUS, the committee on foreign investment in the US, to allow foreign government-controlled companies to acquire US assets related to national security.

In 2006 CFIUS rejected Dubai Ports World's proposed acquisition of six US ports; the previous year it blocked China National Offshore Oil Corporation's US\$18.5 billion bid for Unocal.

"September 11th obviously had a lot to do with prompting this," says Leon Greenfield, competition specialist at WilmerHale in Washington, DC. "Congress believed the process needed some reforms and more congressional oversight. But, with the exception of certain controversial deals and acquisitions by foreign-government controlled entities, the legislative changes themselves may not make a tremendous difference in CFIUS practice."

Greenfield adds that CFIUS reviews often dovetail with antitrust analysis: "You can be examining similar issues," he says. "For example, sometimes there are concerns about whether there are sufficient US suppliers where you get into a situation where there's overlapping analysis for the reviews."

"You can often get in similar negotiating issues, such as allocating deal risk, timing, and specifying potential divestitures," he adds. "And the 30-day initial waiting period was deliberately made parallel with the antitrust waiting period."

"Many law firms, especially outside Washington, don't have a dedicated CFIUS specialist, and so antitrust specialists may have to deal with these issues, at least in the first instance," Greenfield stresses.

Ilene Knable Gotts, partner at Wachtell Lipton Rosen & Katz in New York, notes that the trend of tightening national-security investment legislation is not just limited to the US. "Other countries, including Canada, are now considering tightening their foreign investment oversight," she says.

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