

## President Issues Executive Order Concerning Foreign Investment in the United States

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On January 23, President Bush issued an Executive Order (Order) amending Executive Order 11858, concerning foreign investment in the United States. The Order provides guidance concerning the implementation of the Foreign Investment and National Security Act (FINSA), which was signed into law on July 26, 2007. Such "guidance," which was issued pursuant to the President's "executive power" under Article II of the Constitution and under the Defense Production Act of 1950, has the full "force and effect of law" and is binding on the executive agencies that are members of the Committee on Foreign Investment in the United States (CFIUS or the Committee).[i]

The Executive Order has been the subject of speculation and some dispute for several months. Rumors abounded in CFIUS-watching circles that the Order was intended to empower the pro-business agency members of CFIUS, such as the Treasury Department, while reducing the role of the national security agencies. In response, the latter agencies, as well as members of Congress, made clear their view that this would undermine a key intention of the CFIUS reform enacted by FINSA.

In fact, however, the final Order does not make drastic changes to FINSA in either direction. The Order carefully reiterates this administration's 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 is seen in the Order's addition of new members and observer agencies to CFIUS: on the "pro-business" side, the order adds the US 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.

As anticipated, however, the Executive Order contains several provisions clearly designed to formalize and shore up Treasury's authority over the CFIUS process. For example, 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;

- clarifies that Treasury, as the chairperson of CFIUS, may communicate with the public and Congress on CFIUS's behalf, and otherwise act on the Committee's behalf "exclusive" of the other members; and
- 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.

Despite the buzz preceding the Order's release, these and similar provisions of the Order are, in all likelihood, not intended as "pro-business" or "anti-security agency" measures. The CFIUS review process requires complex, interagency cooperation--a difficult goal even in the absence of CFIUS's stringent timelines. If the process is to run--and if Treasury, as the CFIUS "chairperson" is to have any ability to make it run--the rules of the road have to be clear. These and other procedural guidelines imposed by the Executive Order should help ensure that the member agencies can focus on substance rather than inter-agency politics--to the benefit of any party subject to a CFIUS transaction. As several business groups observed in a joint statement released in response to the Order: "A clear and certain CFIUS process helps the United States to remain an attractive location for global capital."<sup>[i]</sup>

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.
- The member agencies are permitted to conduct their "own inquiry" into a transaction, though any interaction they have with parties to the transaction is to take place in the company of the lead agency for the transaction or the CFIUS chairperson (i.e., Treasury).
- 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 provision in the Act permitting "reopening" of a previously reviewed deal should be read narrowly, as the Administration expects that it will be triggered only in "extraordinary circumstances."

The Order also includes a nod to the ongoing controversy on sovereign investment funds, directing the Department of Commerce to monitor and report on foreign investment trends and significant developments. 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 that might be designed as a subtle reminder to CFIUS agencies in the face of FINSA's new emphasis on reports to Congress.

Ultimately, parties should not expect to see dramatic changes in the wake of the Executive Order, though the Order makes some of the internal processes more transparent and definitive. Substantive guidance on CFIUS reviews, if it comes at all, is more likely to be found in the regulations Treasury is empowered--and obligated--to issue later this year.

[i] See, e.g., *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 583 (1952) (holding that the President has the power to issue valid Executive Orders if there was authority from either "an act of Congress or from the Constitution itself."); *Farkas v. Tex. Instrument, Inc.*, 375 F.2d 629, 632 n.1 (5th Cir. 1967) (noting that when it is clear the President has valid statutory authority to issue an Executive Order, the Order will have the same force and effect of law); *Indep. Meat Packers Ass'n v. Butz*, 526 F.2d 228, 234 (8th Cir. 1975) ("Presidential proclamations and orders have the force and effect of laws when issued pursuant to a statutory mandate or delegation of authority from Congress.").

[ii] See Business Groups' Issue Statement on Foreign Investment/National Security Executive Order, available at <http://www.financialservicesforum.org/site/apps/nl/content2.asp?c=mtJ2J7MKIsE&b=1531035&ct=4969713> (reflecting statement of Business Roundtable, The Financial Services Forum, the Organization for International Investment and the US Chamber of Commerce).

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