
Senate Passes the *Foreign Investment and National Security Act of 2007*: One Step Closer to Final CFIUS Reform

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Last week, the Senate passed S160, the *Foreign Investment and National Security Act of 2007*. The bill is the Senate's version of so-called and long-awaited "CFIUS reform." Like House Bill H.R. 556, the Senate bill would shore up the Exon-Florio Amendment, which established a framework for the review of foreign acquisitions of US assets by the Committee on Foreign Investment in the United States.

CFIUS reform has been in the works since the Dubai Ports World transaction passed through CFIUS without a formal investigation, leaving a surprised and angry Congress determined to avoid a repetition of that scenario. Impetus for reform first began, however, when the China National Offshore Oil Corporation publicly announced an interest in UNOCAL in 2005, and even earlier that same year, when a GAO report revealed the lack of Congressional oversight and the degree to which some CFIUS transactions were escaping formal investigation through withdrawal of applications, among other things.

S1610, which is widely believed to be the form final legislation will take, addresses many of the issues that have been the focus of concern since the 2005 report: it establishes transaction-specific and general Congressional notification requirements, creates rules that dictate how applications before CFIUS may be withdrawn, and specifically includes energy supplies among critical US assets requiring special consideration.

More generally, the bill establishes more stringent rules for the review and formal investigation of transactions, especially those involving foreign governments or critical infrastructure assets. It also requires senior-level involvement in various required certifications and reports, limiting the agencies' delegation authority. In general, then, the bill's provisions convey the seriousness with which Congress expects the CFIUS agencies to approach future reviews.

The bill's key provisions—which differ only slightly from the House Bill—are as follows:

- The bill establishes the **membership of CFIUS** by statute, and creates a defined role for the **Director of National Intelligence as an ex-officio member** who must evaluate the transaction's national security implications.

- On each future transaction, one of the **member agencies would play a lead role**, in addition to Treasury, depending on the transaction's subject matter. The lead agency would be responsible for negotiating and overseeing mitigation agreements.
- Transactions that involve **foreign governments**, a threat to **national security**, or **control of critical infrastructure** must be subject to a **45-day formal investigation**, except that exceptions are possible for foreign government transactions if the Secretary or Deputy Secretary of Treasury and the lead agency certify that there is no national security threat.
- The bill requires **sign-off at the assistant secretary level** (or above) that a transaction does not fall into one of these categories and need not go beyond the **30-day review period**. Similar sign-off is required **at the close of the 45-day** investigation period to confirm that the transaction **does not threaten national security**.
- CFIUS must **report to Congress** at the end of **reviews** and **formal investigations**. The bill also requires **annual reports** to Congress on the activities of CFIUS.
- The bill provides explicit authority to CFIUS to require **mitigation agreements**.
- Among the factors **CFIUS must consider** in its review are the impact of the transaction on **critical infrastructure**, broadly defined, as well as **energy assets** and **critical technologies**. In the case of foreign-government transactions, CFIUS must also consider the relevant country's compliance with US and multilateral **counter-terrorism, non-proliferation, and export control regimes**.
- The bill creates specific authority for CFIUS to enforce **mitigation agreements**.
- Further, 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.

The bill also requires the publication of regulations that will standardize the filing process, as well as the process by which CFIUS communicates results to parties. And it requires CFIUS to publish guidelines concerning the types of transactions that have presented national security considerations, which could be helpful for companies trying to determine whether to make the so-called "voluntary" filing decision, especially now that withdrawals will be more closely regulated.

If the bill becomes law, as is expected, 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 bill'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 bill'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 complex as companies employ innovative financial structures for their acquisitions. Companies also should expect more involved mitigation undertakings given the bill'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.

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