

The ins and outs of CFIUS filing

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The Foreign Investment and National Security Act of 2007, or Finsa, applies to takeovers of U.S. businesses by non-U.S. persons, replacing the Exon-Florio provisions. A transaction subject to Finsa is a covered transaction. Parties to a covered transaction have the option to make a voluntary filing with the Committee on Foreign Investment in the United States.

The filing, in effect, requests that CFIUS determine that the covered transaction does not impair U.S. national security. If the parties do not make a filing, then CFIUS can unilaterally review whether the transaction impairs national security and, if it finds possible or actual impairment, seek to block or unwind the transaction. During the three years ended Dec. 31, 2007, CFIUS reviewed 313 notices. In 85% of the cases, the noticed transactions proceeded. The risks associated with not filing, together with the agency's track record, show reason that parties should file. However, the CFIUS regulations that became effective last December make filing somewhat onerous and subject filers to potential liability.

In deciding whether to file, parties should consider the information that the regulations specify for presentation. That information includes data identifying the parties and their parent entities, a description of the transaction, the anticipated completion date and identities of financial advisers, underwriters and financing sources, as well as prior dealings between the parties and CFIUS.

CFIUS has estimated that the average filing requires about 100 hours. There is no mandated form, but failure to provide complete information can lead CFIUS to reject the filing. Material misstatements and omissions can also lead to civil penalties. Unless CFIUS modifies a request for particular information or the filer and CFIUS agree that a request is not applicable, a voluntary notice will not comply if any information is missing.

Most common problems with filings are unclear descriptions of business lines and of the business rationale for the transaction. It may not be possible for all parties to provide all requested information. For example, in a hostile takeover, each party is to provide information regarding itself and with respect to non-notifying parties, but only to the extent known or reasonably available.

The preponderance of the filing relates to the U.S. business. The filing must describe the activities, products and service categories, market shares and competitors of the U.S. business and describe its business operations and critical technologies. The filing discloses whether the U.S. business supplies products or services to the U.S. government, is or has been a party to contracts with the U.S. government involving classified information or with certain agencies, manufactures or provides services for other parties that are rebranded or incorporated into other products and is or has been a party to any priority-rated contracts under the Defense Priorities and Allocations System. In addition, the filing must disclose whether the business produces products or provides services subject to various defense-related statutes or regulations, has a cyber-security plan, holds other licenses from the U.S. government and has any technology with military applications.

The foreign person that is a party to the transaction and its parent entities provide information that permits CFIUS to determine whether the foreign person is, or is controlled by, a foreign government. Information furnished must indicate whether that foreign entity holds or controls any ownership interests, has the power to appoint any principal officers or any board members, holds any rights that relate to control or has any arrangements with other foreign persons that hold any interests in the acquiring foreign person.

The notice must also include any plans of the acquiring foreign party and its parents to materially alter the U.S. business by eliminating research and development facilities, changing product quality, shutting down or removing facilities, consolidating or selling any product lines and modifying contracts involving classified information or contracts with certain governmental agencies or eliminating domestic supply.

Acquiring foreign parties must also provide detailed information for each board member, each executive officer and each individual owning more than 5% of the party.

Similarly, each immediate, intermediate and ultimate parent (an owner of 50% or more) must provide the same information as to its directors, officers and owners. Individuals are to disclose name, address, date and place of birth and national identity number and related data, plus provide a curriculum vitae or an equivalent. In an effort to determine national security ramifications, the filing must disclose the dates and nature of service with a foreign government and foreign military service.

In addition, the completed notice requires attachments — annual reports of the U.S. business, annual reports of the acquiring foreign person and its intermediate and ultimate parents, the agreement governing the covered transaction, organizational charts for acquiring

foreign person and its parents, the cyber-security plan of the U.S. business and any agreements among foreign persons that hold ownership interests in the acquiring foreign person.

While the matter is pending, each filer must promptly advise CFIUS of critical changes in the plans, facts and circumstances addressed in the notice. Each filer is also required to file amendments to the notice describing material changes.

Finally, to ensure that the information provided fully complies with Finsa's requirements and is complete and correct, each party must provide two certifications. Sample certifications may be found at the CFIUS Web site. Certifications are to be provided with the initial filing and again at the conclusion of the review or investigation. There is a civil penalty of up to \$250,000 for filing a false certification.

In terms of confidentiality, information filed with CFIUS is exempt from disclosure under the Freedom of Information Act, except for administrative or judicial proceedings. The exemption from disclosure also applies to materials that the parties provide to CFIUS during prenotice consultations, even if no notice ultimately is filed, as well as after the notice process is complete.

The parties file one paper copy of the notice and one digital copy with CFIUS. CFIUS requests that digital filings be divided into smaller files because of variations in technological capabilities among governmental agencies, with no file to exceed five megabytes. The proper certifications must accompany the filing. CFIUS accepts the filed notice one day after it determines that the notice complies with regulatory requirements. The national security review commences on acceptance.

As a result of the recently modified regulations, filing the voluntary notice is more complex than under Exon-Florio. Filing parties need to collect and present both their initial information and updating information in greater depth and with a higher degree of exactitude. Any departure from current procedure can slow or impede the CFIUS process, while adhering closely to its guidelines is a prerequisite for a successful and expeditious outcome of a foreign-based investment.

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