



# Foreign Investment Update

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## New Foreign Investment Legislation Enacted

### New Development

On July 26, 2007, President Bush signed the Foreign Investment and National Security Act of 2007 (the “Act”), marking the conclusion of bipartisan efforts in Congress to enact legislation designed to codify and reform the process by which the Committee on Foreign Investment in the United States (“CFIUS”) reviews acquisitions of U.S. companies by foreign and foreign-owned companies.

The Act is supported by the U.S. Chamber of Commerce and the Financial Services Forum, a trade association comprised of the CEOs of the twenty largest financial service institutions. Both groups praised Congress for achieving the appropriate balance between encouraging foreign investment and protecting U.S. national security interests.

### Background

CFIUS came under intense media and political focus in early 2006 as a result of the Dubai Ports World attempt to acquire the right to operate terminals at several U.S. ports. Although the proposed transaction initially was cleared by CFIUS, the ensuing public and Congressional outcry caused the company to divest itself of its interest in the terminal operations and led

to more than a year of hearings and debate that created an uncertain climate for foreign investors.

### Overview and Key Provisions

#### *Congressional Intent*

Members of Congress made clear that their intent in passing new legislation was to encourage foreign investment in the United States, while protecting its national security interests. As Congressman Barney Frank, Chairman of the House Financial Services Committee, stated during final House passage of the measure: “[t]his is an effort by the Congress to make clear that we welcome foreign direct investment as a rule, but we will have procedures in place to prevent those exceptional examples where it might be problematic, where it might cause a security problem.”

#### *Summary and Analysis of Key Provisions*

The Act, which will become effective upon the expiration of the ninety day period following enactment, enshrines CFIUS and its membership and process in legislation, ensuring that any future changes will require Congressional approval. For the most part, the Act maintains the existing framework of foreign invest-

ment review, making only modest changes to the CFIUS process which the Treasury Department had already begun to reform. However, the Act endows CFIUS with certain additional powers, requires increased Congressional oversight, and mandates increased transparency of the review process.

Consistent with the current statute and regulations, the Act authorizes CFIUS to review any “covered transaction”—*i.e.*, “any merger, acquisition, or takeover that is proposed or pending after August 23, 1988, by or with any foreign person which could result in foreign control of any person engaged in interstate commerce in the United States”—and authorizes the President to suspend or prohibit any covered transaction that threatens to impair the national security of the United States.

Importantly, the Act now provides clarification that the previously undefined term “national security” should be construed to include homeland security and “critical infrastructure” (defined broadly to include “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”) as well as energy-

related infrastructure. In addition, CFIUS is expressly directed to consider, among other things, the potential national security-related effects of a covered transaction on “critical technologies” (to be identified by regulation), and the record of the foreign country involved with respect to non-proliferation, counter-terrorism, and export controls. Although CFIUS reviews have focused on these factors in the past, enumeration in the Act fosters better understanding of the process on the part of foreign investors.

On the procedural front, the Act continues CFIUS as a multi-agency committee, maintains the Secretary of the Treasury as the Chairperson, and identifies certain existing CFIUS members as mandatory—*i.e.*, the Secretaries of Treasury, Homeland Security, Commerce, Defense and State, and the Attorney General. The Secretary of Energy will become a new mandatory member, the Secretary of Labor and the Director of National Intelligence (“DNI”) will become nonvoting, *ex officio* members, and the President may continue to appoint additional members (currently, there are twelve CFIUS members appointed by the President, only six of whom are explicitly required by the Act to be members going forward). Consistent with current CFIUS practice, the Act specifically authorizes the Chairperson to designate a member of the Committee to be the lead agency to review any covered transaction and negotiate any mitigation agreements or other conditions necessary to protect national security. As in the past, the CFIUS process will begin with a 30-day review, followed, in the case of transactions for which the initial review has identified an unmitigated threat to national security, a 45-day investigation and, within 15 days thereafter, a decision by the President regarding whether to suspend or prohibit the transaction. The role of the DNI is for-

malized, requiring preparation of a threat analysis for submission to CFIUS within twenty days of the commencement of its initial review.

Significantly, the Act makes it clear that, consistent with CFIUS application of the current law, transactions involving foreign government control or critical infrastructure need not proceed to a mandatory 45-day investigation if the Secretary of the Treasury and the head of the lead agency determine on the basis of the initial review that the transaction will not impair the national security of the United States.

The Act authorizes CFIUS or the lead agency to impose and enforce any agreement or condition with any party to the transaction to mitigate any threat to the national security of the United States. Under the Act, the authority of the President and CFIUS to re-open reviews of covered transactions will be expanded to include situations in which an agreement or condition has been breached. In addition, CFIUS will have the authority to track transactions with respect to which the parties have withdrawn their notice to CFIUS.

Increased Congressional oversight is mandated by requiring certified reports to specified Members of Congress upon conclusion of reviews and investigations, briefings upon request of such Members, and a detailed annual report to Congress. Such reports and briefings will be subject to confidentiality requirements and may be classified, although an unclassified version of the annual report will be made available to the public.

In addition to requiring a public version of the annual report to Congress, the Act will lead to increased transparency of the CFIUS process by requiring additional published regulations and guidance. Of particular assistance to foreign investors in identifying whether a transaction is “covered” for CFIUS

purposes will be guidance required to be issued within 180 days of the effective date of the Act on the types of transactions that CFIUS has reviewed and found to have presented national security considerations.

Some of the details of the new legislation such as the scope of the terms, “critical infrastructure” and “critical technologies” will be left to Treasury to determine in new regulations.

## Conclusions and Recommendations

This legislation confirms that foreign investment is welcome in the United States, while recognizing the need to protect national security. Having said that, Congressional attention over the past year has emphasized the importance of the government relations and media aspects of such transactions. Accordingly, although CFIUS review remains, in most instances, a voluntary process, we recommend that foreign investors take advantage of the certainty it affords, particularly in transactions that may impact national security and critical U.S. infrastructure and technologies. In addition, we will be monitoring the regulatory process closely and providing updates as regulations and guidance are issued. ■

If you have questions or desire assistance, please contact:

**On the CFIUS process:**  
Barbara D. Linney, Partner  
[linney@Blankrome.com](mailto:linney@Blankrome.com)

or

**On the legislation:**  
Joan Bondareff, Of Counsel  
[Bondareff@Blankrome.com](mailto:Bondareff@Blankrome.com)

or call 202.944.3000

Additional information  
may be found on our website  
[www.BlankRome.com](http://www.BlankRome.com).