

**REVIEWS OF FOREIGN INVESTMENTS BY
THE COMMITTEE ON FOREIGN INVESTMENT IN THE UNITED STATES (CFIUS)
AFTER THE FOREIGN INVESTMENT AND NATIONAL SECURITY ACT OF 2007**

	Current Law or Practice (Exon-Florio Amendment and Executive Orders)	After Foreign Investment and National Security Act of 2007 (FINSA)
Legal Basis for CFIUS	<ul style="list-style-type: none"> ▪ Executive order 	<ul style="list-style-type: none"> ▪ Exon-Florio Amendment, as amended by FINSA
CFIUS Leadership	<ul style="list-style-type: none"> ▪ Chair: Secretary of Treasury ▪ Day-to-day functions overseen by Treasury Deputy Assistant Secretary and a Treasury Staff Director 	<ul style="list-style-type: none"> ▪ Chair: Secretary of Treasury ▪ A designated “lead agency” for each transaction ▪ A new Assistant Secretary of the Treasury whose responsibilities include CFIUS
Committee Members	<ul style="list-style-type: none"> ▪ Secretaries of Treasury, Homeland Security, Commerce, Defense, State, and the Attorney General ▪ Director of the Office of Science and Technology Policy, Assistant to the President for National Security Affairs, Assistant to the President for Economy Policy, Director of the Office of Management and Budget, United States Trade Representative and Chairman of the Council of Economic Advisers ▪ Heads of any other executive department, agency or office, as the President deems appropriate 	<ul style="list-style-type: none"> ▪ Secretaries of Treasury, Homeland Security, Commerce, Defense, State, Energy, Labor (nonvoting and <i>ex officio</i>) and the Attorney General ▪ Director of National Intelligence (nonvoting and <i>ex officio</i>) ▪ Heads of any other executive department, agency or office, as the President deems appropriate
Time Limits on CFIUS Reviews	<ul style="list-style-type: none"> ▪ Review initiated upon joint voluntary notice or CFIUS self-initiation ▪ Initial 30-day review ▪ If national security issues are identified during initial review and not resolved, then CFIUS initiates a 45-day 	<ul style="list-style-type: none"> ▪ Same

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	<p>investigation</p> <ul style="list-style-type: none"> ▪ CFIUS reports findings and recommendations to President, who must act within 15 days (<i>i.e.</i>, by the 90th day following initiation) 	
Acquisitions by State-Owned Companies	<ul style="list-style-type: none"> ▪ Initial 30-day initial review, plus ▪ Second-stage, 45-day investigation ▪ Under CFIUS interpretation of law, no full investigation unless warranted by national security issues 	<ul style="list-style-type: none"> ▪ Initial 30-day initial review, plus ▪ Mandatory second-stage 45-day investigation, subject to statutory exception ▪ <u>Exception</u>: A 45-day investigation is not required if the Secretary of the Treasury and the Secretary of the lead agency (or their Deputy Secretaries) jointly determine that the transaction will not impair US national security
Role of the National Intelligence Director	<ul style="list-style-type: none"> ▪ Does not have a formal role on the Committee ▪ Provides background assessments of acquiring entity and other threat information 	<ul style="list-style-type: none"> ▪ An <i>ex officio</i> member of the Committee ▪ Does not serve a policy role on the Committee ▪ Provides analysis of any national security threat posed by a transaction not later than 30 days after date on which notice of such transaction is accepted by the Committee
Factors to be Considered by CFIUS	<ul style="list-style-type: none"> ▪ Domestic production needed for projected national defense requirements ▪ Capability and capacity of domestic industries to meet national defense requirements, including the availability 	<ul style="list-style-type: none"> ▪ Adds additional factors for consideration, including: <ul style="list-style-type: none"> ○ Potential effects of the proposed or pending transaction on sales of military goods, equipment or technology to any country identified by the

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	<p>of human resources, products, technology, materials and other supplies and services</p> <ul style="list-style-type: none"> ▪ Control of domestic industries and commercial activity by foreign citizens as it affects the capability and capacity of the US to meet national security requirements ▪ Potential effects of the proposed or pending transaction on sales of military goods, equipment or technology to any country (a) identified by the Secretary of State under the Export Administration Act of 1979 as a country that (i) supports terrorism, (ii) presents concerns regarding missile proliferation or (iii) presents concerns regarding the proliferation of chemical and biological weapons or (b) listed under Section 309(c) of the Nuclear Non-Proliferation Act of 1978 ▪ Potential effects of the proposed or pending transaction on US international technological leadership in areas affecting US national security 	<p>Secretary of Defense as posing a potential regional military threat to US interests</p> <ul style="list-style-type: none"> ○ Potential national security-related effects on US critical infrastructure, including major energy assets ○ Potential national security-related effects on US critical technologies ○ Whether the covered transaction is a foreign government-controlled transaction ○ An assessment of the adherence of the subject country to nonproliferation control regimes, including treaties and multilateral supply guidelines ○ An assessment of the relationship of the subject country with the US, specifically on its record on cooperating on counter-terrorism efforts ○ An assessment of the potential for transshipment or diversion of technologies with military applications, including an analysis of national export control laws and regulations ○ A long-term projection of the US requirements for sources of energy and other critical resources and material ○ Other factors as the President or the Committee may determine to be appropriate

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<p>Treatment of Critical Infrastructure</p>	<ul style="list-style-type: none"> ▪ No specific reference ▪ Statute sets forth related factors to consider in assessing whether a transaction poses national security risks (domestic production needed for projected national defense requirements; capacity and capacity of domestic industries to meet national defense requirements) 	<ul style="list-style-type: none"> ▪ Critical infrastructure defined as “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” ▪ Future publication of guidance by the Committee Chair on types of covered transactions that presented national security considerations, including transactions that would result in control of critical infrastructure ▪ Certified notices and reports to Congress on initial reviews and investigations on covered transactions involving critical infrastructure ▪ Annual reports to Congress with a discussion of all perceived adverse effects of covered transactions on the national security or critical infrastructure of the US ▪ A report by the Secretary of Treasury on its studies on foreign direct investments, including investments in critical infrastructure ▪ Triggers investigation of any transaction that would result in control of critical infrastructure in the United States by a foreign person if the Committee determines that such transaction could impair national security, <u>unless</u> the Secretary of the Treasury and the Secretary of the lead agency jointly determine that the transaction will not impair US national security

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Mitigation Agreements	<ul style="list-style-type: none"> ▪ No specific authority ▪ In practice, agencies have entered into such agreements with transaction parties in the form of commitment letters or assurances letters with conditions to mitigate identified threats 	<ul style="list-style-type: none"> ▪ Authorizes mitigation agreements based on a risk-based analysis conducted by the Committee ▪ Lead agency shall (a) negotiate, modify, monitor and enforce any mitigation agreement on behalf of the Committee, and (b) provide periodic reports to the Committee, the Director of National Intelligence, the Attorney General or any other Federal department or agency that may have a material interest in such modification ▪ Authorizes the Committee to develop and agree upon methods for evaluating compliance with any mitigation agreement
“Evergreen” Provisions Permitting Re-opening of CFIUS Review and Use of Exon-Florio Authority After Closing of Acquisition Transaction	<ul style="list-style-type: none"> ▪ No specific authority ▪ Negotiated in mitigation agreements 	<ul style="list-style-type: none"> ▪ Allows the President or the Committee to reopen transactions previously reviewed or investigated by the Committee if (a) any party to the transaction intentionally and materially breached a mitigation agreement or condition, (b) the Committee or the lead agency monitoring or enforcing such agreement or condition certifies such breach as an intentional breach and (c) the Committee determines that there are no other remedies or alternatives available to address such breach
Involvement of High-Level Officials	<ul style="list-style-type: none"> ▪ The President’s authority to conduct initial reviews or investigations of transactions upon notification by the transaction parties can be delegated 	<ul style="list-style-type: none"> ▪ Certain key decisions cannot be re-delegated below Deputy Secretary level, including:

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	<ul style="list-style-type: none"> ▪ In practice, only controversial decisions elevated to senior officials for decision 	<ul style="list-style-type: none"> ○ Decision to reopen transactions previously reviewed or investigated ○ Decision to forgo a 45-day investigation of foreign government-controlled or critical infrastructure transactions can only be delegated to the Deputy Secretary of the Treasury and a deputy head of the lead agency ○ Authority to submit certified congressional notification and reports of initial reviews can only be delegated to a presidential appointee who has been confirmed by the Senate ○ Authority to submit certified congressional notification and reports of investigations can only be delegated to a Deputy Secretary
Congressional Oversight	<ul style="list-style-type: none"> ▪ Reports to Congress by the President on whether or not to suspend or prohibit a transaction if he decides to take action not later than 15 days after an investigation has been completed with (a) an explanation as to why there is a threat to national security, (b) factors to consider and (c) provisions of law found inadequate to protect such national security matter threat ▪ Quadrennial reports to Congress furnished by the President and designated agencies investigating whether there is evidence of (a) a coordinated strategy by 1 or more countries to acquire US companies involved in research, development and production of critical technologies, or (b) industrial espionage activities by 	<ul style="list-style-type: none"> ▪ Briefings upon request on a covered transaction ▪ Certified notices to Congress upon completion of a review that (a) the lead agency recommends, and the Committee agrees, that an investigation be undertaken, or (b) results in a determination that the transaction (i) threatens to impair US national security and that threat has not been mitigated during or prior to the review, (ii) is a foreign government-controlled transaction or (iii) would result in control of any critical infrastructure of or within the US by or on behalf of any foreign person ▪ Annual reports regarding all covered transactions for

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	foreign governments against private US companies organized to gather critical technologies secrets	<p>the previous 12-month period</p> <ul style="list-style-type: none"> ▪ A report by the Inspector General of the Department of Treasury investigating the Department of Treasury's failures to make certain reports under the Exon-Florio Amendment ▪ A report by the Secretary of Treasury on its studies on foreign direct investments by governments that (a) comply with the boycott of Israel and (b) do not ban organizations designated by the Secretary of State as foreign terrorist organizations