



## **CFIUS Reform: Final Regulations Issued on November 14, 2008**

The U.S. Treasury Department, on behalf of the Committee on Foreign Investment in the United States (CFIUS), issued final regulations governing CFIUS on November 14, 2008. The regulations implement Section 721 of the Defense Production Act of 1950, as amended by the Foreign Investment and National Security Act of 2007 (Section 721). The regulations also codify improvements to the CFIUS process informed by seventeen years of practice. Issued in proposed form on April 21, 2008, the final regulations reflect CFIUS's careful consideration of all comments received during the public comment period, as described in the discussion that precedes the regulatory text. By increasing clarity and transparency and ensuring that the CFIUS process is efficient, the regulations reinforce the United States' longstanding commitment to open investment.

### **Regulations Clarify What Constitutes a “Covered Transaction”:**

- Only “covered transactions” are subject to CFIUS review under Section 721.
- *Covered transaction*: Any transaction proposed or pending after August 23, 1988, by or with any foreign person, which could result in control of a U.S. business by a foreign person.
- *“Greenfield” investment*: Greenfield, or start-up investment, is not covered.
- *Asset acquisition*: Not a covered transaction if the assets acquired by a foreign person do not constitute a “U.S. business.”
- *Long-term lease*: May be a covered transaction only if a foreign lessee makes substantially all business decisions concerning operation of a leased U.S. business, as if it were the owner.
- *Lending transaction*: Not a covered transaction unless the foreign person acquires financial or governance rights characteristic of an equity investment, but not of a loan. Imminent default giving a foreign person actual control of collateral that constitutes a U.S. business is a covered transaction – but lenders in the ordinary course may qualify for an exception.
- *Incremental acquisition*: After CFIUS concludes action on a covered transaction, the foreign person's acquisition of additional interest in a U.S. business is not a new covered transaction.

### **Regulations Clarify the Key Concept of “Control”:**

- *Functional test*: CFIUS will continue to consider all relevant facts and circumstances, rather than applying a bright-line test to determine whether a transaction results in foreign control.
  - *Important matters*: Expand the illustrative list of “important matters.” Control is defined as the “power, direct or indirect, whether or not exercised ... to determine, direct, or decide important matters affecting an entity.”
  - *Private equity*: Add examples to clarify that certain structures create ownership interests but not control, clarifying that CFIUS focuses on person's powers, not transaction form.
  - *Joint ventures*: Revise treatment of joint ventures to ensure that using a JV to acquire a U.S. business is a covered transaction to the same extent as a direct acquisition.
  - *Passive investment*: Clarify that there is no automatic exclusion for acquisitions of ten percent or less. That rule applies only if the investor is passive, maintains that sole intent, and takes no action to the contrary.



- *Minority shareholder protections*: Identify negative rights that do not, in themselves, confer control, and provide that other rights held by minority shareholders also could be found not to confer control on a case-by-case basis.
- *Influence versus control*: Add new examples and expand others to clarify the difference between “control” and mere “influence.”
- *Aggregating interests*: Clarify when CFIUS, in determining control, may consider relationships or arrangements to act in concert between persons.
- *Convertible voting instruments*: Identify factors CFIUS takes into account in determining whether to consider, at the time of acquisition or at a later date, the rights a foreign person will receive upon conversion of convertible voting instruments, for purposes of assessing control.

**Regulations Clarify Additional Aspects of the CFIUS Process and Ensure Efficient Review:**

- *Pre-filing*: Encourage pre-filing consultations to aid parties in preparing notices and to ensure efficient reviews.
- *Clear timelines*: Ensure an efficient process by requiring prompt action throughout the review process by the Staff Chair and by parties to transactions, within the context of the strict deadlines established by statute for reviews (30 days) and investigations (45 days).
- *Contents of notice*: Increase transparency by requiring in a voluntary notice the types of information CFIUS requests in practice, which also aids efficient review by CFIUS.
- *Confidentiality*: Explicitly extend confidential treatment to information pre-filed with CFIUS, including if no notice is ultimately filed.
- *Penalties*: Set a limit on civil penalties and provide the right to petition for reconsideration of any penalty, which may be imposed upon any person who makes a material misstatement or omission in a notice filed with CFIUS, makes a false certification to CFIUS, or breaches a mitigation agreement.
- *Secretary of Labor*: Define the role of the Secretary of Labor as advising on whether mitigation terms would violate U.S. employment laws.
- *Critical infrastructure*: Clarify that CFIUS considers the particular assets involved in a transaction, rather than designating whole classes of assets as “critical infrastructure.”

For a link to the final regulations, as well as additional information on CFIUS, please consult <http://www.treas.gov/offices/international-affairs/cfius/>.