



CFIUS REFORM OVERVIEW

A series of significant reforms implemented in the last two years have increased the ability of the Committee on Foreign Investment in the United States (CFIUS) to safeguard national security while reinforcing the longstanding U.S. commitment to open investment. The reforms reinforce CFIUS's narrow focus on genuine national security concerns alone, not on broader economic or national interests. Post-reform, CFIUS continues to be a voluntary process that concludes action in a timely manner – when all national security concerns have been resolved – on those select transactions it reviews.

CFIUS Reforms Since 2006 Include Five Major Elements:

- **Internal Procedures:** Significant improvements made by CFIUS agencies and Treasury as chair.
- **Statute:** Foreign Investment and National Security Act of 2007 (FINSAs) passed Congress with bipartisan and Administration support and became effective October 24, 2007.
- **Executive Order (EO):** EO 11858 of May 7, 1975, was amended by EO 13456 on January 23, 2008.
- **Regulations:** Final revised regulations were made public on November 14, 2008, after considering all public comments received on proposed regulations that were issued April 21.
- **Guidance:** Guidance will be published soon in the Federal Register on the types of transactions that CFIUS has reviewed and that have presented national security considerations.

FINSAs

- Amends Section 721 of the Defense Production Act of 1950 and establishes CFIUS by statute, giving it explicit authorities to negotiate risk mitigation agreements, and requiring that any exercise of those authorities be justified by a risk-based analysis.
- Maintains a narrow focus on national security and strict deadlines for CFIUS and Presidential action.
- Adds to illustrative list of national security factors for CFIUS's and President's consideration.
- Increases senior-level accountability within CFIUS, requiring Secretary or Deputy Secretary level decision to conclude action on any investigation and any reviews of foreign government-controlled transactions and certain transactions involving critical infrastructure.
- Improves reporting to Congress, including an annual report and certifications describing each covered transaction reviewed – but only after CFIUS or the President has reached a final decision on the case.

Executive Order 11858, as amended

- Creates framework for an efficient and effective process by defining the relationship between CFIUS and the President and the roles of the chair of CFIUS, lead agencies, and other CFIUS members.
- Requires additional analytical and procedural rigor before CFIUS may negotiate risk mitigation, *e.g.*, justification by a written national security risk analysis, limitations when other laws adequately address risks, and prohibition on using the CFIUS process as leverage to advance other policies.
- Strengthens the role of Treasury as Chair.

Regulations

- Implement FINSAs and the 2008 amendment to Executive Order 11858, and make improvements informed by the many years of CFIUS practice since CFIUS regulations were first issued in 1991.
- Clarify the standard for determining whether a transaction is covered by Section 721, including the scope of foreign “control” and what constitutes a “foreign person” and a “U.S. business.”
- Reiterate that the determination of control is a functional test and clarify the difference between influence and control.

For additional information on CFIUS, please consult <http://www.treas.gov/offices/international-affairs/cfius/>.

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