
FINAL CFIUS REGULATIONS FOR TRANSACTIONS INVOLVING FOREIGN INVESTMENT IN THE U.S. TO TAKE EFFECT ON DECEMBER 22, 2008 – IMPLICATIONS FOR THE ENERGY INDUSTRY

WHAT HAPPENED: On November 21, 2008, the U.S. Department of Treasury issued final regulations implementing the changes to the Exon-Florio Amendment, Section 721 of the Defense Production Act of 1950 (the “Exon-Florio Amendment”) that were made by the Foreign Investment and National Security Act of 2007 (“FINSA”). The final regulations will take effect on December 22, 2008.

The Exon-Florio Amendment, which was added in 1988, authorizes the President to review mergers, acquisitions, and takeovers by or with any foreign person which could result in foreign control of any person engaged in interstate commerce in the U.S. When Congress passed FINSA in July 2007, it significantly amended the Exon-Florio process and codified aspects of the structure, role, process, and responsibilities of the Committee on Foreign Investment in the U.S. (“CFIUS”), the inter-agency committee which conducts such national security reviews. FINSA became effective on October 24, 2007.

WHAT IT MEANS: FINSA codified the procedural framework and practice under which CFIUS had been operating. The parties to a transaction covered by FINSA have the right (but are not obligated) to make voluntary notifications of acquisitions for CFIUS to review. Once a notification filing is made, CFIUS commences a 30-day preliminary national security review of the filing. FINSA requires that CFIUS designate a lead agency to have primary oversight of the review. At the end of the 30-day period, CFIUS must either determine that there are no national security concerns with the proposed transaction or that it needs to convene a 45-day investigation to fully ascertain the effects of the transaction on national security. At the end of the 45-day investigation, CFIUS provides its findings and recommendations to the President, who has 15 days to suspend or prohibit the transaction or to take no action.

FINSA and the final regulations implementing FINSA contain a number of changes or clarifications important to the energy industry, including the following:

- FINSA added the Department of Energy as a permanent member of CFIUS, indicating the government’s desire to focus more on transactions in the energy industry.
- FINSA does not define the term national security. However, under FINSA, one of the six factors to be considered by CFIUS when determining whether a transaction is a threat to national security is whether the transaction has a security-related impact on “critical infrastructure,” including major energy assets. With “major energy assets” given as the only example of critical infrastructure, it is clear once again that there will be a greater focus on energy.
- FINSA authorizes CFIUS to review “covered transactions,” including mergers, acquisitions, or takeovers that could result in foreign control of a U.S. business. The



final regulations exempt asset acquisitions from the definition of covered transaction to the extent the assets acquired by the foreign person do not constitute a U.S. business. Not all asset acquisitions will be exempt, however, as a U.S. business can include assets, whether or not organized as a legal entity, operated as a business undertaking in a particular location or for particular products or services.

- FINSA creates a heightened level of scrutiny for acquisitions involving an acquirer that is controlled by a foreign government, which will include government-controlled oil companies.

The representative from the Department of Energy assigned to CFIUS has indicated in the past that, with respect to energy transactions, CFIUS is mainly concerned with (i) supply, including where and how production will be sold; (ii) security, including any technology that will be part of the transaction; (iii) infrastructure, including pipelines, gathering systems, and refineries; and (iv) the background of the acquirer and its officers (a national security review of each officer and director is conducted). With respect to energy deals, CFIUS has also indicated it is more concerned when the acquirer is foreign-government controlled. Since FINSA went into effect, the number of CFIUS filings reporting energy transactions has increased considerably. It is expected that the number will continue to rise.

TO GET MORE INFORMATION: To see a full text of the final FINSA regulations, click [here](#). If you have any questions about the issues discussed in this client alert, you may contact Sarah E. McLean, a Partner in the Corporate and Securities Practice Group in our Austin and Houston offices, or any of the Thompson & Knight attorneys with whom you regularly work.

Sarah E. McLean

512.469.6139 (Austin)

713.217.2848 (Houston)

Sarah.McLean@tklaw.com

This client alert is sent for the information of our clients and friends. It is not intended as legal advice or an opinion on specific circumstances and is not intended or written to be used, and may not be used, by any person for the purpose of avoiding penalties that may be imposed under U.S. federal tax laws. The lawyers at Thompson & Knight are available to assist you in working through any of these topics.