

# Torys on Mergers and Acquisitions

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## Final CFIUS Regulations on Reviewing Foreign Investments in the United States

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The Committee on Foreign Investment in the United States (CFIUS) reviews foreign investments in U.S. businesses for the impact of these investments on national security. On November 21, 2008, the Treasury Department, which chairs CFIUS, published final regulations that govern the way those national security reviews will be conducted when the regulations become effective on December 21, 2008.<sup>1</sup>

In April 2008, the Treasury Department issued proposed regulations to implement the Foreign Investment and National Security Act of 2007 (FINSA), which was enacted on the heels of a proposed deal whereby a Dubai government-controlled company would have gained control of some U.S. port operators. The public comment period on the proposed regulations ended in June. The final regulations largely follow the proposed regulations and codify existing CFIUS practice. The following summary highlights some important changes.

### Control

CFIUS has jurisdiction to review any “covered transaction,” which is a transaction that results or could result in a foreign person controlling a U.S. business. CFIUS defines “control” as the power “to determine, direct, or decide important matters affecting an entity.” The definition intentionally omits any bright-line rules regarding control, instead requiring CFIUS to consider all relevant facts when determining whether a foreign entity controls a U.S. business. Although practitioners had previously focused on a 10% safe harbor threshold below which CFIUS would not find control, the final regulations explicitly reject the 10% threshold as a safe harbor, except when the investment is solely for the purpose of “passive investment”; therefore, this exception does not apply if the foreign entity plans or intends to gain control over the U.S. business.

Although there are no bright-line rules regarding voting thresholds that confer control, the proposed regulations identified a non-exclusive list of minority shareholder rights that alone would not confer control. The final regulations add two rights to the list. CFIUS will consider on a case-by-case basis whether other minority rights confer control.

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<sup>1</sup> For further background on CFIUS regulations, see Torys’ M&A bulletin, [The Expanding CFIUS Mandate for Review of Foreign Investment in the United States](#), and the article [“CFIUS and FINSA: Foreign Investment Under the New Exon-Florio.”](#)

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The final regulations also distinguish between control and ownership by adding two new examples that deal with certain private equity structures. In the first example, a limited partnership consisting of two limited partners, each holding a 49% interest, and a general partner holding a 2% interest is controlled only by the general partner when it has the sole authority to determine, direct and decide important matters affecting the partnership and the fund it operates. In the second example, the facts are the same, except that the limited partners can veto major investments proposed by the general partner and choose the fund's representatives on the boards of its portfolio companies. In the second example, each partner would be deemed to have control over the partnership and the fund.

### **Incremental Acquisitions**

One commenter asked whether the acquisition of an additional interest would be a covered transaction if CFIUS had previously reviewed the initial acquisition and had taken no action. The final regulations add a new subsection and an example for this scenario. If the same entity acquires an additional interest in the same U.S. business, this subsequent transaction would not be considered a covered transaction and would therefore not be subject to a second CFIUS review. If, however, CFIUS did not review the original transaction, this exemption would not apply.

### **Contents of a Voluntary Notice**

The final regulations greatly expand the volume of information required in a voluntary notice submitted to CFIUS, but they narrow the scope set forth by the proposed regulations. For example, the contracts that must be identified are no longer those contracts with *any* government agency, but only those with agencies that have a national security, homeland security or law enforcement component.

### **CFIUS Review Process**

The FINSA system continues to be based on the filing of voluntary notices to CFIUS, although CFIUS may review a transaction that has not been voluntarily filed. A 30-day initial review period and second-stage 45-day investigatory review period continue to apply; however, the final regulations explicitly provide that parties should contact and engage with CFIUS (including, when appropriate, by filing a draft of their joint application) before making a formal filing. Each party is required to certify the accuracy and completeness of its notice, and material misstatements or omissions may result in the notice being rejected or a completed review being reopened.

### **Guidance Expected Soon**

FINSA mandates that CFIUS publish guidance on the types of transactions reviewed and that have presented national security considerations. That guidance is expected soon and will be critical in helping parties determine whether their proposed transaction is the type that CFIUS typically reviews. **11**