

# SECURE

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by RICHARD G. REINIS

## Practitioners should advise clients that any transaction involving foreign investment may come under the purview of CFIUS

The Committee on Foreign Investment in the United States, known as CFIUS, is a federal interagency body that regulates transactions. Its role supplements that of legislation that bars foreign investment in maritime, aerospace, and other industries. As part of the executive branch, CFIUS also allows the president of the United States to determine the effect on national security of a transaction that results in foreign control of a U.S. business. CFIUS has scrutinized foreign investments in gold mining, commercial space travel, undersea fiber optics, semiconductors, medical equipment, computer system design, cutting-edge technology, and oil companies. Parties to transactions in these areas must be mindful that CFIUS has the power to “impose, monitor and enforce mitigation agreements or conditions.”

Applying for CFIUS review is entirely voluntary, but the committee’s jurisdiction over transactions is statutory. Deals may be examined even when parties do not apply for review. Moreover, the president may suspend or prohibit a transaction, even retroactively, if there is credible evidence that a foreign investment will impair national security. Presidential findings are not subject to review.

A survey of recent cases demonstrates the willingness of CFIUS and the president to exercise these powers. In December, 2009, a firm backed by the United Arab Emirates and Virgin Galactic, a commercial space travel company, ended negotiations after a CFIUS review raised

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Richard G. Reinis is a transactional lawyer with Steptoe & Johnson LLP in its Century City office.

DENNIS IRWIN

# TRANSACTIONS



concerns that the acquirer could gain access to sensitive satellite launch technologies. The Obama administration also sought certainty that the deal would not violate the Missile Technology Control Regime. Virgin Galactic said it would resubmit its proposal, but there have been no announcements since.<sup>1</sup>

CFIUS blocked a proposed Chinese purchase of 51 percent of Firstgold Corporation, a U.S. gold mining company. CFIUS stated that the transaction presented significant national security concerns, particularly regarding the proximity of the target's properties near Reno, Nevada, to military installations and other classified assets. The Chinese investor withdrew from the transaction after the review process was concluded.

Transactional lawyers must familiarize themselves with CFIUS—and that may not be easy, because information is very limited. CFIUS comments on deals are usually cryptic. For example, Firstgold released detailed information of the kind that is rarely made public about the CFIUS review, but not much is to be learned from the Firstgold release that is not fact specific, and given the national security issues at the core of the law, the review process is generally protected from disclosure.<sup>2</sup> Members of the committee, including heads of the Departments of Treasury, Homeland Security, State, Commerce, Justice, Defense, and Energy,<sup>3</sup> maintain confidentiality regarding issues raised by CFIUS applications, their processing, and the bases for decisions.<sup>4</sup> The lack of bright-line rules, however, does not mean that an attorney cannot learn about the committee in order to protect clients involved in transactions that may affect American security. A short review of CFIUS legislation highlights the committee's legal mandate.

### Legislative Origins

In 1975, Congress was concerned over the scope and purpose of investments in American assets by OPEC countries.<sup>5</sup> President Gerald Ford signed an executive order<sup>6</sup> that established the basic structure of CFIUS, investing the committee with the primary responsibility within the executive branch for monitoring the effects of foreign investments in this country. A year after the order, Congress passed the International Investment Survey Act of 1976,<sup>7</sup> giving the president authority to collect information on international investment. From then to 1988, the committee, at the insistence of Congress and the Department of Defense, scrutinized transactions that related to classified or sensitive products, collecting data and reporting to Congress.

Foreign investment interest led to the passage of the Exon-Florio provision.<sup>8</sup> This legislation authorized the president to block a transaction involving foreign mergers, acqui-

sitions, or takeovers that threaten to impair national security. This bill was prompted, in part, by the 1987 proposed sale of Fairchild Semiconductor to Fujitsu. The Department of Defense was concerned that U.S. defense industries would become too dependent on foreign sources of such things as semiconductors, or that domestic production of components vital to the nation's defense would be controlled by foreign nations. As a result, the Reagan administration modified its support for foreign investment in the United States and established guidelines for blocking foreign private and government investment in industries of importance to national security.<sup>9</sup> This strengthened the president's authority, giving the chief executive a broad mandate to monitor, modify, condition, or disapprove transactions.

Congress tried to balance public concerns about foreign investments with the long-standing commitment to a free-trade environment. The United States is the largest foreign direct investor in the world and the largest recipient of foreign direct investment.<sup>10</sup> Voices on both sides of the aisle raised free market, protectionist, and security concerns. In 1992, the Byrd Amendment<sup>11</sup> authorized CFIUS to investigate proposed transactions in which the acquirer is controlled by or acting on behalf of a foreign government. This legislation became well known during the public debate over the 2006 Dubai ports transaction.

That incident resulted in changes to the operation of CFIUS. In connection with a transaction by which a French company may have gained access to sensitive work done by Bell Labs, President George W. Bush imposed a Special Security Agreement (SSA) on the parties that requires strict barriers to information access. CFIUS retained the right to reconsider approval if the parties were deemed to have violated the screening agreement. Previously, parties that voluntarily applied for CFIUS review did so in order to receive approval in advance of consummation of a deal. This SSA disrupted the safe harbor presumed in the old regulatory regime. The continuing supervision of CFIUS and potential unwinding of a deal created uncertainty and reduced voluntary notification. When CFIUS review could mean continuing scrutiny, an outcry arose from the U.S. Chamber of Commerce and others.

### The 2008 Regulations

This resulted in the passage of the Foreign Investment and National Security Act of 2007 (FINSAs),<sup>12</sup> and the issuance of new CFIUS regulations in November 2008. These regulations retained the voluntary notification system to CFIUS by the parties to an acquisition and established deadlines for the committee to review the application (30 days)

and investigate if necessary (45 days). The president also has a deadline (15 days) for a final determination. This 90-day deadline gives parties a measure of certainty. Moreover, from 1975 to 2008, CFIUS received 1,996 voluntary notices, only 60 of which became the subject of the 45-day investigation.<sup>13</sup> While the number of voluntary notices that resulted in investigations is low, it has increased somewhat in recent years.

The 45-day investigation concludes with CFIUS taking one of four actions: 1) dismissing the investigation, 2) drafting a mitigation agreement to alleviate a threat to national security, 3) allowing the parties to withdraw and resubmit, 4) or submitting the findings to the president to make a decision as to whether or not to allow the transaction to conclude or set it aside. Before a formal submittal, parties often submit larger transactions to CFIUS for an informal review, to avoid the potentially negative publicity that may follow an investigation. Once concerns raised by the informal review are addressed, the formal process begins with the 30-day review, and, if the parties and the CFIUS staff have adequately conferred, the submittal should be approved.

One very important change to the CFIUS process included in the 2008 regulations is the elimination of the presumption that a foreign direct investment in a U.S. business contributes positively to the American economy. Previously, CFIUS had to prove that a transaction threatened national security. Now the burden is on the parties to prove that the foreign investor does not pose a threat. The effects of September 11, 2001, are clearly at work in this change.

Although the rules for CFIUS review have changed over the years, the security of the nation remains the avowed purpose, and Congress has opposed modifying the committee's mandate to effect some form of domestic industrial protection. Until FINSAs and the 2008 regulations, Congress held firm to the initial goals of maintaining an open market and protecting national security. FINSAs's reforms, however, have led to an expansion of considerations of review to include the impact of a covered transaction on critical infrastructure<sup>14</sup> and key resources.

### Covered Transactions

A transaction may be reviewed if it could result in foreign control of an entity engaged in interstate commerce in the United States.<sup>15</sup> In deciding whether to file voluntarily with CFIUS, the parties should determine whether the subject of the deal or the identity of the foreign investor raises national security issues. Proposed transactions that need to be reviewed involve "products or key technologies essential to the U.S. defense indus-

trial base”<sup>16</sup> as well as those that may affect homeland security, including critical infrastructure.<sup>17</sup> If the target business involves goods or services with no special relation to national security (e.g., toys, games, food products, hotels, restaurants, or legal services), notice is generally not required. Before making a determination as to whether or not to file with CFIUS, an attorney should review not just defense-related concerns but also a broader rubric of national security.

The 2008 regulations focus on deals that may impair national security or critical infrastructure or that involve a foreign government. If a transaction falls into these categories, there ought to be no debate about filing. Given the complexity of the economy, the decision may not be that obvious. Foreign investment in Krispy Kreme should raise no doubt, but what about an investment in a business that manufactures cooking oils?

The nature of the business is only one concern; the identity of the buyer is another. A U.S. subsidiary under the control of a foreign entity (i.e., a “blocker”) is a foreign person for CFIUS purposes. Control may take many forms. “Control” is broadly defined as the “power, direct or indirect, whether or not exercised...to determine, direct, or decide important matters affecting an entity.”<sup>18</sup> It is not necessary that a foreign person own more than 50 percent of the voting or equity interests of the entity or that the foreign investor has influence over the fortunes of the venture. It does not require that foreign persons are directors or officers of the business. The form of the transaction does not matter. When it comes to who controls an entity, CFIUS law offers no bright lines.

In addition, CFIUS review of transactions for implications for national security includes consideration of critical infrastructure (e.g., major energy, communications, or transportation assets). “Critical infrastructure” is defined in broad terms as “any systems and assets, whether physical or cyber-based, so vital to the U.S. that the degradation or destruction of such systems or assets would have a debilitating effect on national security, including national economic security and national public health or safety.”<sup>19</sup> A transaction that the parties consider completely unrelated to national security may not be as far removed from concern as one may think. Is the U.S. target company located near a security sensitive installation? Is a wind farm in a flight path? Will a shoreline business facility present issues for the Coast Guard? Does the target perform engineering or computer technology work for U.S. government agencies? Could the technology of the target present a foreign person with information not otherwise readily available? Businesses should be mindful of the CFIUS process and

prepare for a potential review and a 90-day wait for the results.<sup>20</sup>

### Exceptions

An understanding of exemptions from filing offers guidance as to whether or not a particular proposed transaction should be submitted for review. Transactions not considered to be covered are solely for the purpose of investment<sup>21</sup> or those in which the foreign investor has “no intention of determining or directing the basic business decisions” of the target. Other exemptions include 1) transac-

initial foreign investments in new U.S. businesses may fall entirely outside the scope of the CFIUS regime. One must be cautious in evaluating whether a proposed transaction is greenfield. The regulations give this example:

Corporation A, a foreign person, makes a start-up, or “greenfield,” investment in the United States. That investment involves such activities as separately arranging for the financing of and the construction of a plant to make a new product, buying supplies and inputs, hiring personnel, and pur-



tions resulting from a stock split or dividend that do not involve a change in control, 2) acquisitions of any part of an entity or assets that are not a U.S. business, 3) acquisitions of securities by a securities underwriter in the ordinary course, and 4) acquisitions pursuant to a condition in an insurance contract made in the ordinary course.

A purchase of assets is not necessarily a purchase of a U.S. business. If a foreign person acquires land, for example, the purchase is not covered. What is critical is what is done on the land, and a reading of Firstgold’s press release shows that the location of the land may be of concern. If a foreign person enters into a long-term lease, it may not be covered if the foreign lessee does not make substantially all business decisions concerning operation of a leased entity, as an owner may. A loan is not a covered transaction so long as the foreign person does not have financial or governance rights, but a foreign lender about to foreclose on security sensitive collateral may be subject to CFIUS review.

The review process specifically excludes startup or greenfield investments. Therefore,

chasing the necessary technology. The investment may involve acquisition of shares in a newly incorporated subsidiary. Assuming no other relevant facts, Corporation A will not have acquired a U.S. business, and its greenfield investment is not a covered transaction.<sup>22</sup>

Before arriving at that happy conclusion, however, parties should closely examine what the foreign investor is purchasing. Is the purchase of stock or membership interests in an existing business? If the foreign investment is made in a business that has acquired certain development rights or secured trademark, patent, copyright protection, or development permits or transmission privileges, is that business developed beyond what may be considered greenfield?

When a foreign person purchases all or part of a recently begun enterprise, the determination of whether this exception applies is problematic. While the business may be considered a startup because it is relatively new, it will not be considered a greenfield investment if the entity is already operating. In

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that scenario, the foreign investment would be a covered transaction subject to CFIUS jurisdiction. Considering this distinction, parties seeking a greenfield exemption should consider structuring the transaction to be certain this exemption applies.

CFIUS considers the identity of the foreign investor when evaluating an application. Private investors are viewed differently from foreign government<sup>23</sup> investors. If a foreign government (or entity controlled by a foreign government) is involved, unless the secretary of the treasury or other officials have provided clearance, filing is the best course. Foreign government control of the investor constitutes a national security consideration. CFIUS may be more interested in acquisitions in defense-related sectors by certain countries (e.g., China, Russia, Middle Eastern countries) than by traditional allies such as Canada or the United Kingdom. The Firstgold case may have been affected by the fact that the acquiring entity was Chinese.

As China acquires more assets in the United States, CFIUS reviews will continue. In May 2010, the United States confirmed that it would uphold principles of nondiscrimination in CFIUS enforcement,<sup>24</sup> but it remains to be seen whether a pattern emerges as to the nationality of acquiring entities subject to the investigation phase of CFIUS reviews. Parties should consider what a foreign owner of a particular business could do with the acquired assets to damage national security. In Firstgold, the issue was not the sensitivity of the assets acquired but the proximity of the Relief Canyon mine to the Fallon Naval Air Station.<sup>25</sup> Would that “proximity” have been viewed differently if the purchaser were the Canadian government? Another example is a business that provides a foreign government access to the U.S. electric grid. If a foreign owner of a U.S. business could use that as a platform from which to engage in espionage or obtain sensitive technology, or to disrupt defense, transportation, or distribution channels, then national security may be an issue. After September 11, the drafters of the 2008 regulations considered a much different regulatory landscape than legislators did a decade earlier.

It is not just state-owned acquirers that are now of concern. Among other shifts attributable to September 11 was a shift from a state-based CFIUS focus to a broader concern for nonstate security threats.<sup>26</sup> “The very nature of the 9/11 attacks made it clear that the instruments of globalization could be used to attack the international order itself, and there was a resultant effort on the part of the United States to secure various commercial facilities, such as airports, chemical factories, and ports—exemplified in the formation of the Department of Homeland

Security to coordinate domestic security measures against terrorism.”<sup>27</sup> With such a large area of concern, it may be a surprise that the committee does not review more transactions than it does.

### CFIUS Report

In its 2009 Annual Report,<sup>28</sup> the committee provided information about the number of transactions subjected to its review during 2006, 2007, and 2008 (111, 138, and 155, respectively). A downward trend in the number of mergers and acquisitions between 1998 and 2003 was reflected in a decline in the number of CFIUS applications. Likewise, an increase in mergers and acquisitions from 2004 to 2008 led to the filing of more applications. The number dropped dramatically at the end of 2008, and reports are that the number of reviews in 2009 dropped 50 percent from 2008. Over 50 percent of the transactions that CFIUS has reviewed involve the Department of Defense.<sup>29</sup> For this reason, every target with defense contracts should file. Any technology company involving defense, chemicals, advanced manufacturing, telecommunications, semiconductor fabrication, biotech, nanotechnologies, marine technologies, or energy technology systems would be wise to invest the resources and set aside the time for filing.

From 2006 to 2008, CFIUS received more applications relating to the manufacturing sector than any other. Acquisitions of utilities accounted for more than half of the applications in the mining, utilities, and construction sector. This accounts for a focus on alternative energy investment—wind and solar in particular. Information technology reviews dropped from 42 percent in 2007 to 27 percent in 2008. The United Kingdom appears more than any other foreign nation in applications, and acquisitions by U.K. companies frequently involved critical technology companies. Other investors come from Canada, Australia, Israel, India, and France.

Of the 155 reviews in 2008, 23 were withdrawn, and of these, 3 were not resubmitted. Only two reviews resulted in mitigation agreements in 2008, sharply down from two prior years when 14 and 15 mitigation agreements were negotiated. By delaying approval of staff appointments, Congress has not helped CFIUS and has contributed to the slowness of the review process. Nor has the change in administrations helped. The process also slows down in years in which state-owned acquiring entities are especially active. Virgin Galactic and Firstgold were such cases. Delays—and rejections or demands for mitigation—have a chilling effect, as well as adding costs.

Even when a transaction is covered, as a first step the parties may consider making

an informal inquiry rather than filing. CFIUS encourages parties to begin informal consultations with a prenotice consultation. This prepares CFIUS staff for the filing, potentially shortening the time for review. The filing process is not onerous, and a notice can be prepared relatively quickly. A submission may include a business rationale for the transaction, organizational charts showing control, and ownership of the foreign entity (and its parent) that is a party to the transaction. Charts for the U.S. business may help, as are diagrams illustrating the ownership before and after the transaction.

### Application Contents

The application should include background information about the members of the board of directors and senior company officials of entities in the ownership chain of the foreign acquirer. Also required is information regarding U.S. government contracts. The applicant should identify if the U.S. business being acquired develops or provides computer systems, products, or services, or processes natural resources. Parties to a transaction that file a voluntary notice with CFIUS are required in every case to provide two certifications: one at the time of filing that covers the contents of the voluntary notice and another at the conclusion of a review or

investigation that covers all additional information filed subsequent to the original notice. The applicant certifies that the application is complete and accurate and that it complies with Section 721 of the Defense Production Act of 1950.<sup>30</sup> The applicant also certifies any agreement or condition that has already been entered into with CFIUS or any committee member. Penalties for material misstatements in any CFIUS certification include a \$250,000 fine for certain extraordinary violations.

There are 12 factors considered by CFIUS when reviewing a covered transaction:

- 1) Domestic production needed for projected national defense requirements.
- 2) Capability and capacity of domestic industries to meet national defense requirements.
- 3) Control of domestic industries and commercial activity by foreign citizens as it affects the capability and capacity of the United States to meet requirements of national security.
- 4) Potential effects of the transaction on the sales of military goods, equipment, or technology to a country that supports terrorism or proliferates missile technology or chemical and biological weapons; and transactions that pose regional military threats to U.S. interests.
- 5) Potential effects of the transaction on U.S. technological leadership in areas affecting



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national security.

6) Whether the transaction has a security-related impact on critical infrastructure.

7) Potential effects on critical infrastructure, including major energy assets.

8) Potential effects on critical technologies.

9) Whether the transaction is foreign government controlled.

10) In those cases involving a foreign government, consideration of the adherence of that country to nonproliferation control regimes, the country's record on cooperating in counterterrorism efforts, and the potential for transshipment or diversion of technologies with military applications.

11) Long-term projections of U.S. requirements for sources of energy and other critical resources.<sup>31</sup>

12) Other factors the president and the committee deem appropriate.

CFIUS considers energy matters as a national security matter. A Department of Energy Draft Directive of March 23, 2010, lists issues that are involved in its risk analysis under CFIUS: 1) criticality and vulnerability of the U.S. assets being acquired, 2) the threat to those assets posed by the acquiring entity and the consequences to national security if the threat is realized, 3) whether the proposed transaction involves major energy assets,<sup>32</sup> 4) whether the proposed transaction involves critical technologies, 5) long-term projections of U.S. energy requirements, and 6) in the instance of a foreign government-controlled covered transaction, an assessment of the adherence of the investor to nonproliferation regimes.

Of course, each department of the government represented on the committee will have its own criteria, all drawn from the enabling legislation and regulations. The Department of Homeland Security examines the potential effect of proposed foreign investment on current and planned critical infrastructure and key resources. The Department of Energy provides guidance, as it focuses on the foregoing factors and on the existence of classified and unclassified contracts or supply relationships, security clearances, and the like.

The worst economic crisis in 80 years has not put an end to global economic interdependence. Like it or not, what happens in Greece or China affects the U.S. economy. The United States benefits from the global stability that arises with successful economies in India, Russia, Brazil, China, and other nations. Nations that are reluctant participants in the global economy are frequently rocked by unrest that reaches beyond their borders. Nations invested in the United States are aligned with our interest in a healthy domestic economy. With this country's open investment environment, U.S. workers gain employment, capital is invested in industry,

and new opportunities arise. As Neal S. Wolin, deputy treasury secretary, put it, "Foreign investments in the U.S. are critical to economic growth and job creation here at home, but we have an obligation to prioritize national security."<sup>33</sup>

CFIUS regulations are intended to stop transactions that create a near- or long-term threat, but "only insofar as necessary to protect the national security," and "in a manner fully consistent with the international obligations of the United States."<sup>33</sup> U.S. government involvement in transactions involving domestic investment by foreign private parties or governments is a necessary consequence of globalization. Under the Obama administration, CFIUS continues to function well, faithful to the principles of open investment.<sup>34</sup> However, each administration and each Congress may have different views as to how involved the government should be in covered transactions, and CFIUS is at the center of that debate.

In any transaction, a knowledge of the law is not all that is needed to guide clients, and this includes whether to submit an application to CFIUS or to predict with certainty the likely outcome of a CFIUS review. A practitioner must also have knowledge of the political climate. In response to protectionist views or a new external security threat, Congress may increase pressure on CFIUS to reject foreign direct investment in industries and assets related to national security. When providing advice to parties to a transaction that may be a covered transaction, a practitioner must be aware of public sentiment. This requires constant information gathering and analysis. ■

<sup>1</sup> See, e.g., <http://www.spacepolitics.com/2009/12/18/acfius-problem-for-virgin>.

<sup>2</sup> See *In re Global Crossing, Ltd.*, 295 B.R. 720, 722 (Bankr. S.D. N.Y. 2003).

<sup>3</sup> The committee also includes representatives from the Office of the U.S. Trade Representative and the Office of Science and Technology Policy. The director of national intelligence and the secretary of labor are nonvoting, ex-officio members of CFIUS, with roles as defined by statute and regulation.

<sup>4</sup> A March 23, 2010, Draft Directive of the DOE requires that each DOE "element" (a responsible party assigned to CFIUS) must ensure that all electronic communications pertaining to CFIUS issues are adequately protected by encryption or stored on classified servers. See 50 U.S.C. App. 2170(c); 31 C.F.R. §800.102; <https://www.directives.doe.gov/directives>.

<sup>5</sup> *The Operations of Federal Agencies in Monitoring, Reporting on, and Analyzing Foreign Investments in the United States: Hearings Before a Subcommittee of the Committee on Gov't Operations, House of Representatives*, 96th Cong., 1st Sess., pt. 3, at 3 (July 30, 1979).

<sup>6</sup> Exec. Order No. 11858, 40 Fed. Reg. 20,263 §1(b).

<sup>7</sup> Pub. L. No. 94-472, 90 Stat. 2059; 22 U.S.C. §3101.

<sup>8</sup> Pub. L. No. 100-418, §5021, 102 Stat. 107, 1425 (1988); 50 U.S.C. app. §2170.

<sup>9</sup> See Omnibus Trade and Competitiveness Act of

1988, Pub. L. No. 100-418, 102 Stat. 1425.

<sup>10</sup> JAMES K. JACKSON, FOREIGN INVESTMENT, CFIUS, AND HOMELAND SECURITY: AN OVERVIEW 1 (Cong. Research Serv. 2010).

<sup>11</sup> Pub. L. No. 102-484, 106 Stat. 2315; 31 C.F.R. pt. 800.

<sup>12</sup> Pub. L. No. 110-49, 121 Stat. 246.

<sup>13</sup> GAO, Enhancements to the Implementation of Exon-Florio Could Strengthen the Law's Effectiveness 12-13 (2005), available at <http://www.gao.gov/new.items/d05686.pdf>; David Zaring, *CFIUS as a Congressional Notification Service*, 83 S. CAL. L. REV. 104 (2010); CFIUS, ANNUAL REPORT TO CONGRESS, Nov. 2009, at 3.

<sup>14</sup> 31 C.F.R. §800.208.

<sup>15</sup> 31 C.F.R. §800.207.

<sup>16</sup> 15 C.F.R. §806.15(a)(1).

<sup>17</sup> Pub. L. No. 110-49, 121 Stat. 24.

<sup>18</sup> 15 C.F.R. §806.15(a)(1).

<sup>19</sup> Pub. L. No. 110-49, 121 Stat. 246.

<sup>20</sup> The Department of Defense has developed the National Industrial Security Program, through which it has adopted various provisions under the term "Foreign Ownership, Control, or Influence." These provisions attempt to prevent foreign firms from gaining unauthorized access to critical technology and classified information through an acquisition of U.S. firms. This is a review independent of CFIUS.

<sup>21</sup> Defined as those in which the transaction does not involve owning more than 10% of the voting securities; or those investments that are undertaken directly by a bank, trust company, insurance company, investment company, pension fund, employee benefit plan, mutual fund, finance company, or brokerage company in the ordinary course of business. 31 C.F.R. §800.302.

<sup>22</sup> 31 C.F.R. §800.301(c), ex. 3.

<sup>23</sup> 31 C.F.R. §800.213.

<sup>24</sup> THE SECOND ROUND OF THE CHINA-U.S. STRATEGIC AND ECONOMIC DIALOGUE (May 24, 2010).

<sup>25</sup> *Firstgold Announces Extension Agreement*, HOU. CHRON., Sept. 21, 2009.

<sup>26</sup> James F. F. Carroll, Comment, *Back to the Future: Redefining the Foreign Investment and National Security Act's Conception of National Security*, 23 EMORY INT'L L. REV. 167 (2009). See also Eric Jensen, *Balancing Security and Growth: Defining National Security Review of Foreign Investment in China*, 19 PAC. RIM L. & POL'Y J. 16 (2010).

<sup>27</sup> *Id.* at 179-80.

<sup>28</sup> CFIUS ANN. REP. TO CONGRESS (Nov. 2009), available at <http://www.ustreas.gov/offices/international-affairs/cfius>.

<sup>29</sup> See Nova J. Daly, *CFIUS' Biggest Hits: Lessons for the Dealmaker*, FINANCIER WORLDWIDE (Apr. 2010), available at <http://www.wileyrein.com/publications.cfm?sp=articles&cid=6023>.

<sup>30</sup> 31 C.F.R. pt. 800.

<sup>31</sup> A Draft Directive by the Department of Energy, Mar. 23, 2010, indicates that for its purposes, this review should include issues arising under the Nuclear Non-Proliferation Act.

<sup>32</sup> One CFIUS observer, Bill Newman, points out that the interest in energy assets apparently does not extend to foreign direct investment in natural gas deposits in the Marcellus Shale formation. *Silence Is Golden: Is CFIUS Promoting FDI in Shale Gas Deals?* available at <http://www.usainbounddeals.com>. However, this is consistent with past CFIUS practices. Of 404 reviews from 2006 to 2008, only 4 involved oil and gas extractive industry transactions.

<sup>33</sup> Pub. L. No. 100-418, 102 Stat. 1425.

<sup>34</sup> E. Mark Plotkin & David N. Fagan, *Foreign Direct Investment and U.S. National Security: CFIUS under the Obama Administration*, FDI PERSPECTIVES, June 7, 2010.