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NEWSLETTER OF THE MERGERS & ACQUISITIONS PRACTICE GROUP OF MANATT, PHELPS & PHILLIPS, LLP

Final CFIUS Regulations Retain & Committee's Latitude to Determine Which Foreign Transactions May Threaten U.S. National Security

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Review by the Committee on Foreign Investment in the United States (CFIUS) of mergers, acquisitions or takeovers by foreign interests has remained highly public, political and sensitive since the proposed acquisition in 2006 by Dubai Ports World of port assets in the U.S. CFIUS, comprised of representatives of several federal agencies, is charged with recommending to the President whether a transaction should be prohibited because it could impair U.S. national security. On November 14, the U.S. Treasury Department took the next step in revising CFIUS's legal and regulatory processes with the issuance of implementing regulations under the Foreign Investment and National Security Act of 2007 (FINSIA).

The final regulations continue past practice that eschews bright line tests of which transactions could pose a national security threat. The regulations attempt to refine concepts such as "control" by providing additional illustrative examples of interests that could confer such control. These can include certain convertible voting instruments, joint ventures, long-term leases, and private equity arrangements. The regulations refine terms such as "passive investment," which is an investment of less than 10 percent when the holder maintains a solely passive intent and takes no action to the contrary. But they do not substantially define other key concepts, such as "critical infrastructure."

The regulations clarify the impact of a review of a "covered transaction." Once such a transaction has been reviewed, additional incremental investments do not create a new potential "covered transaction." However, incremental

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acquisitions can turn a previously non-covered transaction into one that triggers CFIUS review.

The regulations make explicit some current informal CFIUS practices. These practices include encouraging parties to engage in pre-filing consultations with CFIUS agencies and submitting extensive identifier information on the backgrounds of members of the boards of directors and senior company officials in the ownership chain of a foreign acquirer.

FINSA, and now the implementing regulations, are the first significant changes to the CFIUS process since 1991. However, they are unlikely to end debates about which foreign mergers, acquisitions or takeovers should elicit a CFIUS recommendation to prohibit such transactions or to require mitigating actions. In fact, the Treasury Department will issue additional guidance by describing the kinds of cases it has reviewed in the past even before December 22, when the regulations take effect.

The incentives to invoke CFIUS also have not fundamentally changed. CFIUS remains the primary procedure for two companies to obtain assurances that the U.S. government will not challenge a covered transaction or later order it unwound. But it leaves open the use of the CFIUS process by a target of an unfriendly acquisition. The application of FINSA and the regulations also may be tested with the current global economic downturn and the investment opportunities the downturn may create.



Susan M. Schmidt Ms. Schmidt's practice focuses on international trade, business, advocacy and government relations. In her work with Manatt, and prior to that with the U.S. Diplomatic Service, she has developed effective strategies to address international opportunities and complex disputes, with experience as an advocate, negotiator and public speaker.