Date: November 19, 2008

To: Interested Persons

Re: FINSA Final Regulations

I. INTRODUCTION

On November 14, 2008, the United States Department of the Treasury issued final regulations (the "New Regulations" or "Regulations") to implement the Foreign Investment and National Security Act of 2007 ("FINSA"). The New Regulations will become effective 30 days after publication in the Federal Register. As publication is expected on November 21, 2008, the New Regulations should become effective on December 22, 2008 (the "Effective Date").[1] FINSA amended the 1988 "Exon-Florio" statute, which regulates foreign acquisitions of U.S. businesses that could raise national security risks, including businesses with state-of-the-art technology or products or services of importance to defense or homeland security. FINSA formally recognized the inter-agency Committee on Foreign Investment in the United States (the "Committee" or "CFIUS") as the entity responsible for reviewing relevant transactions and named the Treasury Department as its Chairperson.

The New Regulations reflect changes mandated by FINSA, incorporate some of the current practices of the Committee, and add some new requirements. They also maintain most of the structure and substance of the existing regulations.[2] The supplementary information provided with the Regulations (the "Preamble") notes that CFIUS "will continue its practice of focusing narrowly on genuine national security concerns alone, not broader economic or other national interests."

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[1] Some provisions of the New Regulations (containing certain definitions and provisions about coverage of the regulations) do not apply to specified grandfathered transactions, the terms of which have essentially been locked in before the Effective Date. However, if after applying the definitions and other relevant sections of the prior regulations to a grandfathered transaction, the parties decide to make a voluntary filing with CFIUS, they must comply with the procedures for notice contained in Subpart D of the New Regulations, and are subject to all other provisions of the New Regulations.

[2] The Regulations also retain many of the features of the proposed regulations, issued for notice and comment on April 21, 2008. These were described in the Davis Polk memorandum *FINSA Proposed Regulations* of April 30, 2008. Changes to the proposed regulations include clarification of what constitutes a "covered transaction" and "control" by adding to the list of minority shareholder protections that will not be deemed to confer control in themselves and by providing additional guidance about how CFIUS will view convertible voting instruments when making a determination about control.

The Preamble also states that the Treasury Department will publish guidance regarding the types of transactions that the Committee has reviewed that have presented national security considerations (the "Guidance"). The Guidance is to include a discussion of certain types of information that the Committee, based on past experience, considers useful for filing parties to provide. No date has yet been given for the issuance of the Guidance.

II. EXECUTIVE SUMMARY: HIGHLIGHTS OF NEW REGULATIONS

The New Regulations maintain the basic structure and purpose of the pre-existing Exon-Florio process, including voluntary notice (or self-initiation by the Committee), a 30-day "**review**" and a follow-on 45-day "**investigation**" if necessary, and the authority of the President to prohibit or suspend a transaction that threatens to impair national security. The Regulations, like FINSA, also make a number of significant changes, including:

- expanding the range of transactions subject to review;
- broadening the authority of the Committee to negotiate, enter into, impose, modify, monitor and enforce agreements and conditions to mitigate national security threats;
- authorizing the Committee to reopen reviews and investigations where there has been an intentional material breach of mitigation agreements or conditions;
- introducing the concept of one or more lead agencies ("Lead Agency") for each covered transaction to take the lead role in, among other things, negotiating, monitoring and enforcing mitigation agreements or other conditions;
- mandating an investigation for any transaction that threatens to impair U.S. national security unless the threat has been mitigated;
- unless an exception is granted, mandating investigations for: (1) transactions by purchasers controlled by foreign governments; and (2) transactions that would result in foreign control of critical infrastructure (if the national security risk has not been mitigated during the review);
- authorizing civil penalties for violations of FINSA or a mitigation agreement or condition; and
- increasing Congressional oversight.[3]

In addition to changes mandated by FINSA, other highlights include:

[3] A more detailed explanation of the changes mandated by FINSA is contained in the Davis Polk & Wardwell memorandum *Foreign Investment and National Security Act of 2007* of July 26, 2007.

- a significant increase in the information required to be provided in a filing, including personal information about the directors, key officers and 5% or greater shareholders of the foreign person; information about market share and the methodology for calculating it; export classifications relevant to various products and services; information about homeland security and national security contracts as well as those related to defense; and information about any plan to protect the U.S. business against cyber attacks;
- making formal the Committee's practice of encouraging parties to consult with CFIUS in advance of filing a notice and to pre-file information related to the transaction; and
- additional guidance about what constitutes a "covered transaction" and "control."

III. THE NEW REGULATIONS

A number of important provisions of the New Regulations are described below, with emphasis on changes from the existing regulations.

A. Covered Transactions

The Regulations add the term "covered transaction" and define it as a transaction that could result in control of a U.S. business by a foreign person. The term is further clarified by defining the key elements of the definition, as discussed below. Only covered transactions are subject to review.

Transaction

Under the New Regulations, the term "transaction" means a proposed or completed merger, acquisition or takeover, including: (1) the acquisition of an ownership interest in an entity;[4] (2) the acquisition or conversion of convertible voting instruments; (3) the acquisition of proxies from holders of a voting interest; (4) a merger or consolidation; (5) the formation of a joint venture[5]; and (6) a long-term lease under which a lessee makes substantially

[4] The New Regulations define "entity" to mean: any branch, partnership, group or sub-group, association, estate, trust, corporation or division of a corporation, or organization (whether or not organized under the laws of any State or foreign state); assets (whether or not organized as a separate legal entity) operated by any one of the foregoing as a business undertaking in a particular location or for particular products or services; and any government (including a foreign or U.S. national or subnational government, and any of their respective departments, agencies, or instrumentalities).

[5] Elsewhere, the Regulations make clear that joint ventures are only covered where they could result in control by a foreign person of a U.S. business that has been contributed to the joint venture.

all business decisions concerning the operation of a leased entity, as if it were the owner.[6] Note that whether a "transaction" is a "covered transaction" will depend on whether a foreign person could control the U.S. business that is the subject of the transaction.

Control

"Control" is a keystone concept under the Exon-Florio statute and an important focal point in an Exon-Florio analysis. The concept of control is relevant in a number of contexts, including when determining whether an entity is a foreign person and assessing whether a transaction could result in foreign control of a U.S. business. The New Regulations state that they maintain "the long-standing approach of defining 'control' in functional terms as the ability to exercise certain powers over important matters affecting an entity." CFIUS does not apply a bright-line test. The Regulations do emphasize, however, that the statutory standard is not satisfied by anything less than control, and that acquisition of influence falling short of control is not sufficient to make an acquisition a covered transaction. The Regulations include new and expanded examples to clarify the difference between "control" and mere "influence."

The term "control" continues to be defined generally as "the power, direct or indirect, whether or not exercised . . . to determine, direct, or decide important matters affecting an entity; in particular, but without limitation, to determine, direct, take, reach or cause decisions" on specified matters or any other similarly important matters.[7]

[6] Note that a corporate reorganization that results in a new foreign person acquiring control of a U.S. business would also be a covered transaction, even though the ultimate parent of the U.S. business may not have changed. However, the Preamble confirms that such a reorganization will present national security considerations only in exceptional cases, as will be explained in greater detail in the Guidance.

[7] The Regulations set forth an expanded list of "important matters" affecting an entity. The entire list, including matters covered by the existing regulations, is as follows: (1) the sale, lease, mortgage, pledge, or other transfer of any of the tangible or intangible principal assets of the entity, whether or not in the ordinary course of business; (2) the reorganization, merger, or dissolution of the entity; (3) the closing, relocation, or substantial alteration of the production, operational, or research and development facilities of the entity; (4) major expenditures or investments, issuances of equity or debt, or dividend payments by the entity, or approval of the operating budget of the entity; (5) the selection of new business lines or ventures that the entity will pursue; (6) the entry into, termination, or non-fulfillment by the entity of significant contracts; (7) the policies or procedures of the entity governing the treatment of non-public technical, financial, or other proprietary information of the entity; (8) the appointment or dismissal of officers or senior managers; (9) the appointment or dismissal of employees with access to sensitive technology or classified U.S. government information; and (10) the amendment of the

Under the New Regulations, the right to determine, direct or decide important matters of an entity, even if unexercised or not exercisable for a specific, known period, constitutes control. Also, in examining questions of control where more than one foreign person has an ownership interest in an entity, the Committee will consider whether (1) the foreign persons are related or have formal or informal arrangements to act in concert, (2) the foreign persons are agencies of the government of a single foreign state, and (3) a given foreign person and another person that has an ownership interest in the entity are both controlled by the government of a single foreign state.

"Control" over an entity is not deemed to be conferred by negative rights, some of which are listed, that are intended only to protect the investment-backed expectations of minority shareholders.[8] The Preamble indicates that the list of investment-related shareholder protections is not intended to be exhaustive, and that the Committee will consider on a case-by-case basis whether other investment-related minority shareholder protections also would not confer such control.[9]

Articles of Incorporation, constituent agreement, or other organizational documents of the entity with respect to the foregoing matters.

[8] The minority shareholder protections listed in the Regulations are: (1) the power to prevent the sale or pledge of all or substantially all of the assets of an entity or a voluntary filing for bankruptcy or liquidation; (2) the power to prevent an entity from entering into contracts with majority investors or their affiliates; (3) the power to prevent an entity from guaranteeing the obligations of majority investors or their affiliates; (4) the power to purchase an additional interest in an entity to prevent the dilution of an investor's *pro rata* interest in that entity in the event that the entity issues additional instruments conveying interests in the entity; (5) the power to prevent the change of existing legal rights or preferences of the particular class of stock held by minority investors, as provided in the relevant corporate documents governing such shares; and (6) the power to prevent the amendment of the Articles of Incorporation, constituent agreement, or other organizational documents of an entity with respect to the matters described in (1)-(5). However, negative rights that give the foreign person a veto over important matters affecting strategic decisions on business policy or day-to-day management of a U.S. business would constitute control.

[9] The Preamble provides that the Committee will consider favorably in the context of specific transactions the parties' opinion that the following minority shareholder protections do not in themselves confer control: (1) the power to prevent changes in the capital structure of the entity, including through mergers, consolidations, or reorganizations, that would dilute or otherwise impair existing shareholder rights; (2) the power to prevent the acquisition or disposition of assets material to the business outside the ordinary course of business; (3) the power to prevent fundamental changes in the business or operational strategy of the entity; (4) the power to prevent incursion of substantial indebtedness outside the ordinary course of business; (5) the power to prevent fundamental changes to the entity's regulatory, tax or liability status; and (6) the power to prevent any amendment of the Articles of Incorporation, constituent agreement, or other organizational documents of an entity.

In response to requests for guidance about how the Committee will review transactions involving private equity funds, the New Regulations make clear that the Committee will focus on "control" within any transaction structure. Where, as is common, the general partner of such a fund has the sole authority to determine, direct and decide important matters affecting the partnership and a fund operated by the partnership, the general partner alone will be deemed to control the partnership and the fund. Where limited partners have rights to veto major investments or choose the fund's representatives to the boards of portfolio companies, they will be deemed to have control along with the general partner. This approach is consistent with the Committee's longstanding approach of focusing on parties' powers, rather than transaction form.

Finally, the New Regulations add guidance with respect to incremental acquisitions. Once the Committee has completed all action with respect to a covered transaction, the foreign person's acquisition of an additional interest in a U.S. business will not constitute a new covered transaction. (Note that mitigation agreements may include measures to address any national security risk posed by an increase in a foreign person's ownership interest in a U.S. business). However, if a foreign person that did not acquire control of the U.S. business in that prior covered transaction is a party to a subsequent transaction involving the same U.S. business, the later transaction may or may not be a covered transaction, depending on whether the new foreign person acquires control (with, or instead of, the foreign person who previously acquired control).

U.S. Business

The New Regulations continue to define a "U.S. business" as any entity, irrespective of the nationality of the persons that control it, engaged in U.S. interstate commerce, but only to the extent of its activities in interstate commerce. Thus, even a U.S. branch of a foreign company would be considered a U.S. business, although it would also be a foreign person (see below) for purposes of acquiring another U.S. business.

Foreign Person and Foreign Entity

The term "foreign person" is defined as any foreign national, "foreign government" or "foreign entity," or any other entity controlled by any of the foregoing. The term "foreign entity," in turn, is defined to mean any branch, partnership, group or sub-group, association, estate, trust, corporation or division of a corporation, or organization organized under the laws of a foreign state if either its principal place of business is outside the U.S. or its

equity securities are primarily traded on foreign exchanges[10] unless it can be demonstrated that a majority of the equity interest in it is ultimately owned by U.S. nationals.[11]

Foreign Government and Foreign Government-Controlled Transactions

The Regulations define "foreign government" to mean any government or body exercising governmental functions, other than the United States government or a subnational government of the United States. The term "foreign government-controlled transaction" means any covered transaction that could result in control of a U.S. business by a foreign government or a person controlled by or acting on behalf of a foreign government. The Preamble makes clear that the Committee may treat investments by foreign government officials as investments by foreign governments where the circumstances warrant, including where an official invests to advance governmental objectives.

According to the Preamble, the Guidance will clarify that when a foreign government-controlled entity operates on a purely commercial and market-driven basis, that is among the important factors the Committee takes into consideration when assessing whether foreign government control in a particular transaction poses concerns about possible impairment of U.S. national security.

B. Transactions that are Not Covered Transactions

Certain transactions continue to be exempt from the Exon-Florio process since they could not result in foreign control over a U.S. business and are therefore not "covered transactions." "Greenfield" or start-up investments are an example. Similarly, an acquisition of assets that do not constitute a U.S. business would not be a covered transaction, nor would an acquisition of convertible voting instruments that does not involve control.[12] Where a foreign person will acquire

[10] The Preamble explains that the term "foreign entity" is intended to cover situations where there is significant foreign ownership but ownership is dispersed.

[11] The Preamble points out that it is possible for an entity organized outside the U.S. to be a *foreign person* (because it is controlled by a foreign person) even if it is not a *foreign entity* (because a majority of the equity interest is ultimately owned by U.S. nationals).

[12] In making a determination about whether to include the rights that a holder of convertible voting instruments will acquire upon conversion of those instruments in its assessment of whether a transaction is a covered transaction, CFIUS will focus on factors such as the imminence of conversion, whether conversion depends on factors within the control of the acquiring party and whether the amount of voting interest and the rights that would be acquired upon conversion can be reasonably determined at the time of acquisition. Even if the acquisition of convertible voting securities is not a covered transaction, the conversion itself might be,

or hold 10% or less of the voting interest and that interest is held solely for purposes of "*passive* investment," the transaction is also exempt. *There is no automatic exemption for acquisitions of 10% or less; intent is critical.* An interest is held solely for purposes of passive investment if the investor does not intend to exercise control, maintains its sole passive investment purpose, and does not take any action inconsistent with that intention, such as obtaining rights to make decisions about important matters affecting the entity, whether or not it intends to exercise them.[13] A foreign person's acquisition of a less than 10% interest in a U.S. business would not be an investment made solely for the purpose of passive investment where the purchaser obtains the right to appoint a board member, since that right is inconsistent with an intent to hold an interest solely for passive investment purposes.[14] However, this does not necessarily mean that the transaction would be a covered transaction, since that determination requires an analysis of whether the non-exempt transaction confers control.

The Regulations provide, consistent with the existing ones, that the extension of a loan or a similar financing arrangement by a foreign person to a U.S. business, regardless of whether accompanied by the creation of a security interest in assets of the U.S. business, does not, by itself, constitute a covered transaction. They also provide that the Committee will accept notices concerning such a loan or a similar financing arrangement only at the time that, because of imminent or actual default or other condition, there is a significant possibility that the foreign person may obtain control of a U.S. business as a result. When a notice is provided to CFIUS in such a situation and it involves a foreign person that makes loans in the ordinary course of business, CFIUS will take into account whether the foreign person has made any arrangements to transfer management decisions and day-to-day control over the U.S. business to U.S. nationals for purposes of determining whether the loan or financing arrangement constitutes a covered transaction. The Regulations also make clear, however, that if pursuant to a loan or a similar financing arrangement, a foreign person acquires an interest in profits of a U.S. business, the right to appoint members of the board, or other comparable financial

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depending on the facts. In addition, the Preamble provides, "[o]nce the conversion of the instruments becomes imminent, it may be appropriate for the Committee to consider the rights that would result from conversion and whether the conversion is a covered transaction."

[13] The Preamble notes that the rule applies to all types of investments and does not assume that certain types of institutions are passive investors.

[14] The Preamble states that the New Regulations make clear that the Committee will consider whether the foreign person's negotiation of rights constitutes evidence that the foreign person possesses a purpose other than passive investment.

or governance rights characteristic of an equity investment but not of a typical loan, such arrangement may constitute a covered transaction.[15]

C. Processes and Procedures

The New Regulations make significant modifications to the processes and procedures by which Exon-Florio notices are filed and transactions are reviewed. As noted above, a number of these modifications are a codification of the Committee's existing, informal practices and procedures.

Pre-submission Communication

The New Regulations encourage parties to a transaction to consult with CFIUS in advance of filing a formal notice and, in appropriate cases, to file a draft notice or other documents at least five days before filing a formal notice.[16] The Preamble notes that these consultations and submissions could also include informing the Staff Chairperson orally of a transaction that may be filed, asking procedural questions, or requesting a meeting with the Staff Chairperson, other Treasury official or other Committee staff to provide information on the transaction and allow the government officials to pose questions that may help the parties identify information they may wish to include in the notice. Particularly where a party to a transaction with national security implications is not well-known to CFIUS or where the transaction is unusually complex, pre-filing consultation is likely to help ensure that a notice, once filed, will provide the Committee with the information needed to do its work in a timely fashion.

Commencement of 30-Day Review

The 30-day review begins on the next business day after the Chairperson of CFIUS has determined that the notice is complete and disseminated it to all members of the Committee. This means that a review will take more than 30 days from the date of filing, although the Chairperson is instructed to review the notice "promptly" for completeness.

Certifications

[15] The New Regulations also provide that if a foreign lender acquires a voting interest in, or assets of, a U.S. business as a result of a default on a loan made by a bank syndicate that included one or more such foreign lenders, that acquisition would not constitute a covered transaction unless the foreign lender could be said to acquire control, either because it could take actions on its own vis-à-vis the debtor or could otherwise exercise control.

[16] The New Regulations extend confidentiality protection to information pre-filed with CFIUS.

The New Regulations require the parties' chief executive officers or other "duly authorized designees" to sign certifications of the accuracy of all information submitted to CFIUS. They also require each party to file a final certification at the conclusion of the review or investigation if it has submitted any information beyond that in the voluntary notice. Failure to file a final certification is grounds for rejection of the notice. Samples of certifications are available on the Committee's website.[17]

Rejection or Deferral of Notice

The New Regulations, like the existing ones, provide for rejection (or deferral of acceptance) of a notice if the parties fail to submit required information in the filing, and for rejection after a filing if there is a material change in the transaction or the Committee finds that the transaction is not a covered transaction. They further allow CFIUS to reject a previously accepted notice if: (1) information surfaces contradicting material information provided by the parties; (2) the required certifications are not filed; or (3) a party fails to provide requested follow-up information within three business days of the request, unless a longer period has been granted in writing by the Chairperson in response to a written request.

Investigations

Under the New Regulations, CFIUS must undertake an investigation of any transaction that it has determined to be a covered transaction if: (1) any member of the Committee believes that the transaction threatens to impair the national security and the threat has not yet been mitigated; or (2) the Lead Agency recommends, and the Committee concurs, that an investigation should be undertaken. It must also ordinarily undertake an investigation if: (1) the proposed purchaser is controlled by a foreign government; or (2) the transaction would result in control by a foreign person of critical infrastructure[18] of or within the United States and CFIUS has determined that the transaction could impair the national security, unless the potential impairment has already been mitigated. In these latter two cases, however, a mandatory investigation would not be required if the Chairperson of CFIUS and the head of the Lead Agency, or their respective deputies, determine, on

[17] http://www.treasury.gov/offices/international-affairs/cfius/index.html

[18] FINSA incorporated the concept of critical infrastructure, including major energy assets, as a factor in the Committee's analysis of national security risks. A transaction involves critical infrastructure when the incapacity or destruction of the assets at issue would have a debilitating impact on national security. The New Regulations do not clarify the term's meaning, but the Preamble confirms that, in determining whether a covered transaction involves critical infrastructure, the Committee will consider the "particular" systems or assets involved, rather than defining certain classes of systems or assets as critical infrastructure.

the basis of the review, that the covered transaction will not impair the national security. Upon completion of an investigation, which may last for up to 45 days, the Committee may decide to close the investigation or send a report to the President recommending the suspension or prohibition of the transaction or requesting that he make a determination with respect to the transaction.

Withdrawal of a Notice

Parties wishing to withdraw their notices must file a written request, stating the reasons, and obtain written approval to withdraw, which will normally be granted. When such a request is granted, the Staff Chairperson, in consultation with the Committee, must establish, as appropriate: (1) a process for tracking actions taken by a party to a withdrawn transaction before notice is re-filed; and (2) interim protections to address any specific concerns that have been identified. The Staff Chairperson is also required to specify a time frame, as appropriate, for the parties to resubmit a notice and advise the parties of that time frame.

D. Notice

The New Regulations call for a significant expansion of the required contents of the voluntary notice, adding to what was already a long list of information required from the parties.[19] Some of the added material is information that CFIUS has requested in the past to supplement the voluntary notice, but some is new. Modifications, cutting back on the information required, may be requested, but even if they are granted, CFIUS reserves the right to request the omitted material after the notice has been filed, and if the information is not provided within three business days, CFIUS may reject the submitted notification.[20] Noteworthy additions to the existing information requirements include the following:

[19] Under the current regulations, the notice must describe, among other things: (1) the transaction; (2) the business activities of the U.S. entity, including recent and existing contracts with any U.S. government agency with national defense responsibilities; (3) any products or services it supplies directly or as a subcontractor to the Department of Defense; (4) the locations of the U.S. facilities that provide products or services to the military; (5) any technology with military applications; (6) any products or technical data for which validated export licenses are required; (7) the ultimate parent or parents of the foreign acquirer; (8) any ownership interests, convertible voting interests, contingent interests or other specified rights of a foreign government or entity controlled by a foreign government with respect to the acquirer; and (9) the plans of the foreign person for eliminating or reducing research and development, changing product quality, shutting facilities down or moving them offshore, or modifying or terminating contracts for goods and services affecting national security.

[20] In addition, the Preamble notes that the Committee will not consider waiving the requirement to provide personal identifier information regarding key personnel.

- An opinion by each party regarding whether: (1) it is a foreign person; (2) it is controlled by a foreign government; and (3) the transaction could result in foreign control of a U.S. business by a foreign person (*i.e.*, whether the transaction is a "covered transaction"), and the reason for its view.
- The names of all financial institutions involved in the transaction, including as advisors, underwriters, or a source of financing for the transaction.
- For the U.S. business and its subsidiaries:
    - The product or service categories of each business activity, including an estimate of the U.S. market share for such product or service categories, the methodology used to determine market share and a list of direct competitors for those primary product or service categories;
    - Any products or services it supplies to third parties that it knows are rebranded or incorporated into the products of another entity, together with related information;
    - For the prior three years, the number and level of priority-rated contracts or orders that the U.S. business has received or placed with others under the Defense Priorities and Allocation Systems (DPAS) regulations, together with the proposed purchaser's plan to ensure that the U.S. business continues to comply with the DPAS regulations;
    - A description and copy of any plan to protect against cyber attacks on the operation, design and development of the U.S. business's services, networks, systems, data storage, and facilities;
    - Descriptions of the items produced or traded by the U.S. business which are subject to the U.S. Export Administration Regulations, grouped by general product category, if appropriate, together with the relevant commodity classification numbers;
    - Descriptions of, and other information about, the critical and emergent technologies that the U.S. business produces or trades in;[21] and
    - Any other licenses, permits, or other authorizations granted to the U.S. business by the U.S. government.

[21] Information is sought with respect not only to defense articles, services, and related technical data covered by the United States Munitions List (USML) but services for which commodity jurisdiction requests are pending and articles and services, including those under development, that may be designated or determined in the future to be covered by the USML. "Critical technology" is defined to include: (1) defense articles or defense services covered by the USML; (2) those items on the Commerce Control List that are controlled pursuant to multilateral regimes or are controlled for reasons for regional stability or surreptitious listening; (3) nuclear equipment, parts and components, materials software and technology subject to identified regulations; and (4) select agents and toxins.

- For the foreign person and its parents
    - A description of any affirmative or negative rights or powers of a foreign government or government-controlled person in the purchaser that could be relevant to the Committee's determination of foreign government control;[22]
    - A description of any formal or informal arrangement among foreign ownership interest holders in the foreign person that is a party to the transaction or between the foreign person and other foreign persons to act in concert on particular matters affecting the U.S. business, and a copy of the relevant documents;
    - An organization chart illustrating all the entities or individuals above the foreign person that is a party to the transaction, including the percentage of shares held by each; and
    - Personal information for the board members and officers[23] of the foreign person making the acquisition, and its intermediate and ultimate parents and for any individual having an ownership interest of 5% or more in the acquirer and the acquirer's ultimate parent, including
        - full name(s), including aliases, business address and country and city of residence;
        - date and place of birth;
        - a *curriculum vitae* or similar professional synopsis;[24]
        - U.S. social security number and/or national identity number;
        - U.S. or foreign passport number(s) and U.S. visa type and number, if any; and
        - dates and nature of foreign government and foreign military service (where applicable), other than military service at a rank below the top two non-commissioned ranks.
- Certified English translations of required supplementary materials, such as annual reports, that are in a foreign language.

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[22] Examples include convertible debt and the terms and timing of their conversion; power to appoint any of the principal officers or board members of the foreign person that is a party to the transaction or any parent of that foreign person; contingent interests (such as might arise from a lending transaction) in the foreign acquiring party and the rights covered by the contingent interest as well as the manner in which they would be enforced; golden shares; and shareholder agreements.

[23] The New Regulations indicate that these include the president, senior vice president, executive vice president and other persons who perform duties normally associated with such titles.

[24] This information is to be submitted as part of the main notice. All other personal information, which the New Regulations call "personal identifier information," is to be submitted separately to ensure limited distribution.

E. Mitigation Agreements and Liquidated Damages

As noted above, the Lead Agency is authorized to negotiate, enter into, impose and monitor agreements or other conditions designed to mitigate risk.[25] CFIUS is authorized under the New Regulations to include a provision for liquidated damages in a new or amended mitigation agreement based on a "reasonable assessment of the harm to the national security that could result from a breach of the agreement." If a liquidated damages provision is included it must include a provision specifying that CFIUS will consider the severity of the breach in deciding whether to seek a lesser amount than that stipulated in the agreement.

F. Monetary penalties

Under the New Regulations, CFIUS may impose a civil penalty of up to $250,000 on any person who intentionally or through gross negligence submits a material misstatement or omission in a notice or makes a false certification. Any person who intentionally or through gross negligence violates a material provision of a mitigation agreement entered into with, or a material condition imposed by, the United States could be liable for a civil penalty of up to $250,000 per violation *or* the value of the transaction, whichever is greater. The Regulations provide that such penalties are to be based on the nature of the violation and are separate from any liquidated damages for breach of the mitigation agreement. Such penalties are also without prejudice to any other penalties, civil or criminal, available under law. A petition for reconsideration of the civil penalties must be submitted to CFIUS within 15 days following receipt of the notice of penalty and acted upon by the Committee within 15 days thereafter. The United States may bring a civil action to recover any civil penalties imposed under the Regulations. If one or more parties has submitted false or misleading material information to CFIUS, or omitted material information, the Committee can also reopen its review, even after the transaction has closed.

If you have any questions regarding this memorandum, please contact any of the lawyers listed below or your regular Davis Polk contact.

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[25] The New Regulations provide that, if requested by the Chairperson, the Secretary of Labor shall advise on whether the terms of a mitigation agreement would violate U.S. employment laws.