

ORDER

DOE O 142.5

Approved: 10-8-2010

COMMITTEE ON FOREIGN INVESTMENT IN THE UNITED STATES



**U.S. Department of Energy
Office of Policy and International Affairs**

COMMITTEE ON FOREIGN INVESTMENT IN THE UNITED STATES

1. **PURPOSE.** To establish the requirements and responsibilities for the U.S. Department of Energy (DOE) in meeting its statutory obligations for the review of covered transactions filed with the Committee on Foreign Investment in the United States (CFIUS). It is the goal of this process to:
 - a. maintain enhanced visibility and transparency of the CFIUS review process;
 - b. utilize DOE's expertise in assessing the potential implications for U.S. critical infrastructure and critical technologies resulting from a covered transaction;
 - c. consider the impact on U.S. national security interests, critical technologies, critical infrastructures, long-term projections of U.S. requirements for sources of energy, and issues arising under the Nuclear Non-Proliferation Act;
 - d. maintain the quality and responsiveness of DOE's review of a covered transaction;
 - e. guarantee that the confidentiality requirements of Title 50 United States Code (USC) App. 2170(c) and Title 31 Code of Federal Regulations (CFR) 800.702 are maintained;
 - f. ensure that DOE monitors compliance with mitigation agreements entered into pursuant to 50 USC App. 2170(l) to which DOE is a party; and
 - g. ensure that adequate staff and budget resources are available to DOE elements for monitoring and certifying compliance by parties to mitigation agreements with DOE.
2. **CANCELLATION.** None.
3. **APPLICABILITY.**
 - a. **Departmental Applicability.** This Order applies to all Departmental elements.

The Administrator of the National Nuclear Security Administration (NNSA) must ensure that NNSA employees comply with their respective responsibilities under this directive. Nothing in this Order will be construed to interfere with the NNSA Administrator's authority under section 3212(d) of Public Law (P.L.) 106-65 to establish Administration-specific policies, unless disapproved by the Secretary.
 - b. **Contractors.** This Order does not apply to DOE contractors.
 - c. **Equivalencies/Exemptions.**

Equivalency. In accordance with the responsibilities and authorities assigned by Executive Order 12344, codified at 50 USC sections 2406 and 2511, and to

ensure consistency throughout the joint Navy/DOE Naval Nuclear Propulsion Program, the Deputy Administrator for Naval Reactors (Director) will implement and oversee the requirements and practices of this Directive for activities under the Director's cognizance, as deemed appropriate.

4. REQUIREMENTS.

- a. Each DOE element must establish a point of contact and internal process to accommodate CFIUS filings.
 - (1) The Office of Policy and International Affairs (PI) will conduct an initial review of covered transactions submitted to CFIUS, identify any DOE equities, and, as deemed appropriate, contact DOE elements for additional review by subject matter experts. DOE elements that are contacted by PI will analyze, at a minimum, any questions arising from the initial PI review and, in consultation with PI, provide input to DOE's risk analysis of a covered transaction based on criteria in paragraph 4.a.(2) and/or any other case-specific considerations. The general timeframe for the analysis will be 14 days from the day PI staff contacts the DOE element, unless otherwise specified.
 - (2) DOE risk analysis of a CFIUS case must include, to the extent possible, an assessment of:
 - (a) the criticality and/or vulnerability of the U.S. assets being acquired;
 - (b) the threat to those assets posed by the acquiring entity and the consequences to national security if the threat is realized;
 - (c) the impact of a covered transaction on classified or unclassified contracts, facility security clearances, or other agreements between DOE and the parties to the transaction;
 - (d) whether the transaction involves critical infrastructure, as defined by 31 CFR 800.208, to include major energy assets;
 - (e) whether the transaction involves critical technologies, as defined by 31 CFR 800.209(c);
 - (f) the impact of a covered transaction on long-term projections of U.S. requirements for sources of energy; and
 - (g) in the instance of a foreign government-controlled covered transaction, an assessment of the adherence of the subject country to nonproliferation control regimes, including treaties and multilateral supply guidelines.

- (3) Any DOE element that identifies an unresolved national security issue during its initial review, and therefore requires CFIUS to conduct a second-stage investigation, should notify PI staff that an investigation may be required and provide justification for the request.
 - b. If any DOE element, during its review, identifies national security issues that cannot be resolved under existing authorities, that DOE element, in consultation with PI, should provide input on whether risks can be mitigated to an acceptable level through use of a mitigation agreement pursuant to 50 USC App. 2170(l).
 - c. In cases that require DOE to be a party to a mitigation agreement pursuant to 50 USC App. 2170(l), PI, on behalf of DOE, will negotiate, draft, enter into, and enforce such an agreement with any party to the covered transaction, in coordination with the Office of Health, Safety, and Security (HS), the Office of General Counsel (GC)(for DOE elements), the Office of the General Counsel, NNSA (for NNSA components), and other DOE elements, as appropriate. Additionally, PI will coordinate with HS, NNSA, and other DOE elements, as appropriate, to monitor compliance with mitigation agreements after consummation of the transaction. The terms of mitigation agreements and the requirements for compliance will be determined on a case-by-case basis.
 - d. Each DOE element must comply with the confidentiality requirements of 50 USC App. 2170(c) and 31 CFR 800.702. Each DOE element must ensure that all electronic communications pertaining to CFIUS cases are adequately protected by encryption (such as Entrust or an equivalent type of electronic encryption capability) or stored on classified servers, and that all physical material pertaining to CFIUS cases is adequately protected from unauthorized disclosure or dissemination consistent with established Departmental procedures for sensitive but unclassified information. If DOE elements cannot support encrypted or classified electronic communications, other arrangements will be made to appropriately transmit and protect CFIUS information.

5. RESPONSIBILITIES.

- a. Secretary.
 - (1) Attends meetings as a permanent member of CFIUS, as appropriate.
 - (2) Provides full cooperation with CFIUS including ready access to DOE elements and information.
 - (3) Leads review of a covered transaction when delegated by the Secretary of the Treasury. As lead reviewer—
 - (a) Certifies to CFIUS that a covered transaction will not impair the national security or that a further investigation should commence.

- (b) Negotiates, enters into, imposes, and enforces mitigation agreements or conditions to address or reduce national security concerns, when appropriate.
 - (c) Signs and transmits to specified members of Congress a notice of completion of a CFIUS review, certifying that there are no unresolved national security concerns with the covered transaction that is the subject of the notice.
 - (d) Signs and transmits to specified members of Congress a written report on the results of a CFIUS investigation, certifying the absence of any unresolved national security concerns, unless the matter under investigation has been referred to the President for decision.
 - (e) Delegates the above responsibilities to the Deputy or appropriate Assistant Secretary based on the action required.
- b. Deputy Secretary. Carries out any duties listed under paragraph 5.a. when delegated by the Secretary.
- c. Assistant Secretary for Policy and International Affairs (ASPI).
- (1) Carries out any duties listed under paragraph 5.a. when delegated by the Secretary.
 - (2) Provides general supervision of the Principal Deputy Assistant Secretary for Policy and International Affairs (PDAS) for the duties outlined in paragraph 5.d.
 - (3) Acts on recommendations from the PDAS with regard to actions to be taken on covered transactions.
- d. Principal Deputy Assistant Secretary for Policy and International Affairs (PDAS).
- (1) Serves as the DOE representative to CFIUS and the primary DOE point of contact with the staff of the lead reviewer of a covered transaction including any queries for the parties to or the status of meetings about a covered transaction.
 - (2) Provides to appropriate DOE management a status report on pending covered transactions.
 - (3) Provides to DOE senior leadership summaries of all covered transactions that possess implications to national security interests.
 - (4) Recommends to the Secretary, Deputy Secretary, and/or ASPI whether DOE should recommend that CFIUS approve, mitigate, subject to a

45-day investigation, or recommend that the President block a covered transaction.

- (5) Determines which DOE elements should perform ongoing CFIUS case processing and, on a case-specific basis, which reviewers should augment a CFIUS review to ensure a robust and thorough review.
- (6) Determines, in cooperation with DOE elements, any proposals for enhancing the effectiveness of the CFIUS review process.
- (7) Recommends and implements policies and procedures for DOE's participation in the CFIUS review process.
- (8) Following receipt of a CFIUS filing, conducts an initial analysis consisting of:
 - (a) in consultation with the Department of the Treasury, a tentative determination of foreign government control and determination of co-lead agency status;
 - (b) identification of the existence of DOE unclassified contracts or supply relationships involving the parties to a covered transaction;
 - (c) identification of classified contracts, facility security clearances, or security agreements by the parties to a covered transaction; and
 - (d) identification of any issues or interests arising from the proposed covered transaction related to DOE.
- (9) After initial analysis, contacts relevant DOE elements and provides appropriate information pertaining to a covered transaction, to include a summary of the initial analysis under paragraph 5.d.(16)(a), and any questions arising from this analysis to assist the DOE elements performing further review.
- (10) Reviews, evaluates, and coordinates comments from all DOE elements. Where national security issues have been identified—
 - (a) calls and chairs meetings with affected DOE elements to clarify issues and arrive at a consensus with regard to a DOE position in the CFIUS filing; and
 - (b) shares intelligence reports submitted by the Director of National Intelligence with cleared personnel to further evaluate a case.
- (11) Determines, along with relevant DOE elements, the appropriate mitigation monitoring strategy and responsibilities if DOE is party to a mitigation agreement.

- (12) Notifies the ASPI of all CFIUS covered transactions that have adverse implications for national security.
- (13) Following the receipt of reports from all DOE elements, formulates and recommends a DOE position on each CFIUS filing through the ASPI.
- (14) Following the initial review, recommends one of the following:
 - (a) that DOE clear the covered transaction with no further action, or
 - (b) that CFIUS proceed to a 45-day national security investigation, or
 - (c) that DOE clear the case, conditioned upon one or more of the parties to a covered transaction entering into a mitigation agreement with some or all CFIUS member agencies, or
 - (d) that the Secretary vote to recommend to the President to block the covered transaction.
- (15) Ensures that the DOE report in each CFIUS filing forwarded through the ASPI contains:
 - (a) a summary of the parties;
 - (b) the lead agency reviewers;
 - (c) a summary of the covered transaction, including the total value;
 - (d) a statement on whether the U.S. business possesses critical infrastructure or critical technologies;
 - (e) a statement on whether the U.S. business has the ability to impact long term national energy concerns and requirements for energy sustainability;
 - (f) a statement on the impact, if any, to issues regarding the Atomic Energy Act or the Nuclear Non-Proliferation Act;
 - (g) to the extent that such information is not classified, an assessment of any impact to national security; and
 - (h) preliminary identification of any proposed or recommended mitigation agreements, whether originating within DOE or another agency.
- (16) As the representative to CFIUS, is the primary point of contact for the DOE reviewing and coordinating officials, based on the nature and classification of covered transactions.

- (a) For CFIUS cases in which either senior DOE management requests early assessments and/or there are complex technical issues, the DOE element with the most technical expertise in a CFIUS transaction may share primary responsibility with regard to analyzing, reviewing, and coordination.
 - (b) For cases where a DOE element shares primary responsibility with the PDAS under the conditions described in paragraph 5.d.(16)(a), other DOE elements with interest in the case, in whole or in part, must be copied on all communications involving expedited analysis and decision memoranda, if feasible, before the communications are delivered to senior DOE management.
- (17) Forwards final DOE positions on covered transactions to the CFIUS Chair.
- (18) Delegates the above responsibilities to certain PI staff members, based on the action required.
- e. DOE Element Point of Contact.
 - (1) Becomes familiar with the statutory and regulatory requirements for the CFIUS review process, including all timelines and procedures.
 - (2) Completes initial analysis within 14 days of receipt of the case file and notifies PI immediately upon discovery of potential national security concerns.
 - (3) Evaluates covered transactions when required and, under PI's overall lead, serves as the primary office in DOE responsible for:
 - (a) submitting a signed recommendation to PI by the lead Secretarial Officer of the program/office for a covered transaction;
 - (b) determining a rationale and objective for requiring further investigation in accordance with paragraph 4.a.(3);
 - (c) providing assistance in drafting and negotiating any mitigation agreements;
 - (d) supporting the PDAS in drafting decision memoranda for DOE senior leadership;
 - (e) briefing DOE senior leadership as required;
 - (f) attending DOE CFIUS meetings in relevant cases in support of the PDAS;

- (g) assisting the PDAS in developing DOE input for a report to the President when required; and
- (h) assisting in the long term monitoring of mitigation agreements.

6. REFERENCES.

- a. The Foreign Investment and National Security Act of 2007 (“FINSA”), Public Law 110-49, 121 Stat. 246. FINSA amends section 721 of the Defense Production Act of 1950 (50 USC App. 2170) and codifies aspects of the structure, role, process, and responsibilities of the Committee on Foreign Investment in the United States.
- b. 31 CFR Part 800. Regulations Pertaining to Mergers, Acquisitions, and Takeovers by Foreign Persons. Issued by the Department of the Treasury, 31 CFR Part 800 implements the provisions of FINSA.
- c. 73 Federal Register (FR) 74567. Guidance Concerning the National Security Review Conducted by the Committee on Foreign Investment in the United States. Issued by the Department of the Treasury, 73 FR 74567 (Dec. 8, 2008) provides guidance to U.S. businesses and foreign persons that are parties to transactions covered by section 721 of the Defense Production Act, as amended, regarding the types of transactions that the Committee on Foreign Investment in the United States has reviewed and that have presented national security considerations. 73 FR 74567 is an additional information source to assist in implementing the directive.
- d. Executive Order 13456. Further Amendment of Executive Order 11858 Concerning Foreign Investment in the United States. Executive Order 13456 is an additional information source to assist in implementing the directive.

7. DEFINITIONS.

- a. CFIUS. The Committee on Foreign Investment in the United States as defined in Title 50, United States Code (USC) App. 2170.
- b. Covered transaction. Any merger, acquisition, or takeover that is proposed or pending after August 23, 1988, by or with any foreign person, which could result in foreign control of any person engaged in interstate commerce in the United States.
- c. Critical infrastructure. Has the meaning given in 31 CFR 800.208.
- d. Critical technologies. Has the meaning given in 31 CFR 800.209.
- e. Principal Deputy Assistant Secretary for Policy and International Affairs (PDAS). The DOE officer responsible for managing the DOE CFIUS review process and developing a unified DOE response to any and all CFIUS matters.

- f. DOE elements. All organizational entities and offices within DOE.
 - g. DOE element point of contact. A person or persons in individual DOE offices who are the primary contacts between PI and the DOE element.
 - h. FINSA. The Foreign Investment and National Security Act of 2007, Public Law 110-49, 121 Stat. 246.
 - i. Mitigation Agreement. An agreement between parties of a covered transaction and one or more CFIUS agencies to reduce identified national security risks that cannot be addressed under existing authorities or other provisions of law.
 - j. Report to the President. A written recommendation by CFIUS to the President to take a specific action related to covered transaction.
8. CONTACT. For assistance, contact the Office of Policy and International Affairs at 202-586-5800.

BY ORDER OF THE SECRETARY OF ENERGY:



DANIEL B. PONEMAN
Deputy Secretary