

## FOREIGN INVESTORS FACE FEW RESTRICTIONS IN THE U.S.—PART II

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A prior article summarized three restrictions applicable to foreign investors in the U.S. This article summarized three more requirements.

The **Foreign Investment in Real Property Tax Act** (“FIRPTA”) requires any person who acquires an interest in U.S. “real property” from a foreign person is required to deduct and withhold from the transferor, and pay to the Internal Revenue Service (“IRS”), an amount equal to 10 percent of the amount realized by the transferor on the disposition of the real property interest. No withholding is required where the property interest is acquired for use by the transferee as a residence and the amount realized by the transferor upon the disposition of such property is no more than \$300,000.

The IRS generally requires that transferee report and pay any tax withheld by the twentieth day after the date of the transfer. IRS Forms 8288 and 8288-A are used for this purpose.

The **Hart-Scott-Rodino Antitrust Improvements Act of 1976** (“HSR Act”) and the HSR Antitrust Improvements Act of 2000 (“2000 Act”) require certain parties intending to merge with or acquire other parties to make detailed filings with the Federal Trade Commission (“FTC”) and the Department of Justice (“DOJ”). The parties must then wait for a statutory period, typically 30 days from filing, to elapse before closing the transaction. The period gives the antitrust enforcement authorities the opportunity to review the transaction before it closes. Prior to the end of the waiting period, which may be shortened or extended, the antitrust agencies may request additional information from the parties, seek divestitures, or file suit to block allegedly anticompetitive transactions.

As a general rule, a transaction is reportable under the HSR and 2000 Acts and FTC regulations if it does not meet one of 12 exemptions; if it is valued at \$50 million or more; and if a person with total assets or annual net sales of \$100 million or more is acquiring voting securities or assets of a person with total assets or annual net sales of \$10 million or more, or a person with total assets or annual net sales of \$10 million or more is acquiring voting securities or assets of a person with total assets or net annual sales of \$100 million or more. “Person” is defined for these purposes as the entity involved and all other entities controlled by the “ultimate parent” of such entity.

If the transaction does not meet one of the 12 exemptions and is valued at \$200 million or more, it is reportable regardless of the size of the parties.

Once it has been determined that a transaction is reportable, completion of the Antitrust Improvements Act Notification and Report Form for Certain Mergers and Acquisitions is required. The Form requires the reporting parties to describe the transaction in detail.

The **Exon-Florio Amendment to the Defense Production Act of 1950** authorizes the President, following a review by the inter-agency Committee on Foreign Investment in the U.S. (“CFIUS”), to prohibit or suspend mergers or acquisitions that may result in foreign control of a U.S. business, if the President determines that the merger or acquisition would “threaten to impair the national security.”

Exon-Florio enumerates five factors to be considered in conducting an investigation or taking other action pursuant to the law. As a general rule, Exon-Florio is a potentially significant restriction only in transactions involving defense, technology, and telecommunications firms.

The U.S. also imposes some industry-specific restrictions and reporting requirements, primarily for investors in the aviation, shipping, banking, fishing, communications, and mineral and energy resources industries. Potential foreign investors with additional questions about U.S. restrictions and reporting requirements are welcome to contact our office.

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