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M&A in the United States: What Korean Companies Need to Know about CFIUS Review in 2013

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On March 15, 2012, the U.S.-Korea Free Trade Agreement (KORUS FTA) entered into force.¹ The KORUS FTA, the United States' most commercially significant free trade agreement since the North American Free Trade Agreement (NAFTA), eliminates 95% of each nation's tariffs on consumer and industrial products by 2016 and virtually all remaining tariffs by 2021.² The KORUS FTA also incorporates many of the basic protections that domestic and foreign investors already enjoy in the U.S.³

Given the wide range of trade and investment issues covered by the Agreement, the KORUS FTA will have substantial economic implications for both the U.S. and Korea. The two nations are already major economic partners; Korea is the seventh largest trading partner of the U.S., and the U.S. is Korea's third largest trading partner.⁴ Exactly how that relationship will adjust under the KORUS FTA remains to be seen, but various studies estimate the total increase in goods and services produced and exchanged will be as high as \$25 billion for each nation.⁵ Regardless of the exact number, the overall improved investment provisions and trade benefits will create greater opportunities for Korean companies investing in the U.S. in the future.

Even before the KORUS FTA, Korean companies had steadily increased their investments in the U.S. by billions of dollars. Since the Asian financial crisis of the late 1990s, investments by Korean companies into the U.S. have grown by a compound annual growth rate of 18 percent.⁶ From a low of \$1.4 billion in 2003, Korean foreign direct investments soared to a record high in 2011, with \$18.4 billion directed to the U.S.⁷ The bulk of the investment in 2011 was in the wholesale trade industry, which accounted for \$14.0 billion, while \$3.1 billion was invested in manufacturing assets and the balance spread among banking, finance and real estate assets.⁸

The types of investments have also expanded. Recent acquisitions by Korean companies include the U.S.-based owner of several leading golf brands, and several landmark buildings and real estate development projects in major U.S. cities. In 2011, the Korean National Oil Corporation (KNOC) invested \$1.55 billion in a Texas-based shale-oil company.⁹ In 2012, the Hanwha Group completed an acquisition with a California-based solar company to launch Hanwha SolarEnergy America (HSEA).¹⁰ These energy-related investments can be expected to continue to meet Korea's high energy demand.¹¹

These acquisitions are not without a regulatory check as some investments by foreign companies are subject to national security review by the Committee on Foreign Investment in the United States (CFIUS). The 2012 CFIUS annual report provides the latest insight into the committee's national security considerations (Exon-Florio review) and the potential challenges foreign companies may face when considering certain M&A transactions and other investments in the U.S. This article provides an overview of the Exon-Florio review process, the timeframe for decision-making, and practical guidance for Korean companies considering transactions in the U.S. in 2013 and beyond. In general, CFIUS involvement should not deter Korean investment; it is telling that since 2008 only three Korean transactions have been reported to be before CFIUS and none were denied or withdrawn.¹²

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The Legislative Background

Congress enacted the Exon-Florio Amendment as part of the Omnibus Trade and Competitiveness Act of 1988. The law grants the President authority to block or suspend a transaction that would provide a foreign person with control over a U.S. business when there is “credible evidence” that it may “impair the national security.” To help the President make that determination, he relies on CFIUS, an inter-agency cabinet level committee chaired by the Secretary of the Treasury, to conduct the Exon-Florio review.

CFIUS’ statutory members include the Secretaries of the Treasury, Commerce, Energy, Defense, State, Homeland Security, and the Attorney General. One agency generally takes the lead on a CFIUS review. The Secretary of Treasury chairs the Committee, but other agencies may be designated as “lead agencies.” Information submitted to CFIUS is confidential and CFIUS does not issue public reports on its individual actions and determinations. There is little publicly available information about CFIUS reviews except for what the parties to a transaction voluntarily disclose.

The Exon-Florio review process was amended in 2007 by the Foreign Investment and National Security Act of 2007 (FISIA), which significantly expanded the scope of transactions to be reviewed, intensified the review process, and established penalties for noncompliance. Among its other provisions, FISIA¹³:

- Interprets “critical infrastructure” to reflect the national security effects of any incapacity or destruction of a particular system or asset a foreign entity would control, rather than an explicit classification of systems or assets¹⁴;
- Makes explicit the preference for pre-filing consultations and mitigation agreements between the government and transaction parties to resolve national security concerns;
- Requires transactions involving state-owned or controlled foreign entities or critical infrastructure be subject to an extended 45-day investigation; and
- Imposes civil penalties for material misstatements and omissions, false certifications, and breach of mitigation agreements.

Covered Transactions

In general, any acquisition by a “foreign person” of a U.S. business that involves a “change of control” and impairs “national security” will be a “covered transaction” that is subject to CFIUS jurisdiction. Thus, there are three threshold questions:

1. Does the transaction involve a “foreign person” acquiring a U.S. business?
2. Does the transaction involve a “change of control”?
3. Does the transaction impair U.S. “national security” interests?

1. Definition of “Foreign Person.”

The first question seems straightforward, but definitions of “foreign” and “United States persons” can be overlapping for CFIUS purposes. The same entity can be “foreign” or “United States” depending on whether it is the target or the acquirer. Any business entity is a U.S. business to the extent of its business activities in the United States.

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A U.S. branch office or subsidiary of a foreign-owned company is deemed a U.S. business, and CFIUS review could be triggered if a different foreign parent seeks to acquire the branch office or subsidiary. At the same time, if the U.S. branch office or subsidiary of a foreign-owned company acquires a U.S. company, it may also be subject to CFIUS review as it is under foreign control. In contrast, if a foreign person buys a branch office located entirely outside of the United States of a U.S. company, the branch office business is not deemed to be a U.S. business and the acquisition is not subject to Exon-Florio review.¹⁵

2. Scope of a “Change of Control” Transaction.

On the second question, only transactions that involve a change of control are covered transactions but change of control is broadly construed. CFIUS regulations define control as the power to “determine, direct, or decide important matters affecting an entity.”¹⁶ No one form or ownership structure determines control, however, and the substance of the transaction determines control more than the particular form. The regulations do state an acquisition is not a covered transaction if the acquirer will hold ten percent or less of the outstanding voting interest and the transaction is “solely for the purpose of passive investment.”¹⁷ Whether passive investment exists depends on secondary factors such as board representation or any special rights in “important matters” of the business.¹⁸ Other excluded transactions include:

- **Greenfield and Start-Up Investments.**¹⁹ Establishing a start-up may involve activities such as financing and construction of a new manufacturing facility, and acquiring needed technology. This is not “acquiring the business of a U.S. person” unless the transaction is, in essence, the acquisition of a U.S. business.
- **Joint Ventures.** Formation of a joint venture (JV) by a foreign person and a U.S. person, if it does not involve a change of control of a U.S. business to the foreign person, is not a covered transaction.²⁰ For example, if the U.S. person has contributed an identifiable business to the JV and the foreign person is entitled to elect a majority of the Board of Directors of the JV, it is subject to Exon-Florio review. If the U.S. person contributes assets to the JV that do not constitute a U.S. business (e.g., land or equipment), it is not a covered transaction.²¹
- **Underwriting, Commercial Loans, or Insurance-Related Transactions.**²² Other exclusions include underwriting, commercial lending or insurance-related transactions (a) that the foreign person makes in the ordinary course of business; and (b) that do not result in financing or governance rights characteristic of an equity investment, rather than a loan.
- **Acquisition of Assets, as Opposed to a Business.**²³ The acquisition of inventory, land, or machinery for export from different U.S. businesses is not subject to CFIUS review. The definition of “business” will be broadly construed, however, as evidenced by Huawei’s proposed acquisition of enterprise virtualization technology and intellectual property and certain other assets of 3Leaf in 2011.²⁴ CFIUS will examine an asset transaction to determine if it is, in essence, the acquisition of a U.S. business.
- **Technology Licensing.** In the case of technology, a non-exclusive technology license with or without a non-controlling minority interest investment, which may accomplish the business purpose if an acquisition is not feasible, is also excluded.²⁵ Export control laws may, however, restrict companies’ license transactions under this category.
- **Incremental Purchases.** Incremental purchases will not be considered covered transactions when the non-U.S. person is acquiring an additional interest in a U.S. business if the foreign acquiring

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party had previously obtained CFIUS clearance for its prior controlling investment and no other foreign persons are a party to the transaction.²⁶

3. Impairment of U.S. “National Security” Interests.

The third question is very open-ended and subject to the changing political climate. While “national security” is not defined, FINSA explicitly interpreted it to include issues related to critical infrastructure and critical technology. In addition to the traditional concerns about defense technologies, experience since enactment of FINSA suggests that transactions involving major energy production assets, telecommunications infrastructure, and cutting-edge information technologies receive high levels of scrutiny. “Critical infrastructure” as currently interpreted constituted approximately ten percent of Korean investment in 2011.²⁷

CFIUS scrutinizes not only directly relevant factors such as the character of the U.S. business target, but also the ownership background of the acquirer. State-owned entities (SOEs) may be subjected to CFIUS investigation on the theory that a U.S. company may come under foreign government control rather than that of a purely commercial entity. Two Korean transactions illustrate this, yet also show that a Korean government-sponsored company may pass CFIUS scrutiny:

4. A Korean company intended to acquire a U.S. defense-industry subcontractor that manufactured semiconductors; a government-owned bank financed a portion of the transaction on behalf of the company. CFIUS ultimately concluded the amount of financing by the government bank was insufficient to constitute foreign government control, and also concluded the national security concerns of the transaction were insufficient to merit a full review.²⁸
5. In 2011, Korean National Oil Corp. (KNOC), a state-owned energy company, purchased a stake in Anadarko Petroleum, a Texas shale oil exploration company for \$1.55 billion. KNOC acquired a 24% interest in Anadarko’s Texas basin rights by the transaction.²⁹ CFIUS did not oppose the transaction.

It should be noted that CFIUS considers other ownership factors in determining foreign government control; multiple layers of intervening control can sufficiently dilute foreign government control for CFIUS purposes, and an inability for the foreign government to appoint board members to the company may also suffice.³⁰

CFIUS’ decisions are based on a multifactor balancing test, rather than a bright-line rule. They can be susceptible to changing political and public policy concerns and take a tougher line towards acquirers from countries that historically are at odds with U.S. national security interests. Korea distinguishes itself in this regard as a longtime strategic ally of the U.S., and a strong economic partner through the historic KORUS FTA.

CFIUS has nonetheless cleared acquisitions in sensitive security-related sectors by companies from countries that do not have complete national security alignment with the U.S. For example, CFIUS cleared the June 2011 acquisition of U.S. aircraft manufacturer Cirrus Industries by China Aviation Industry General Aircraft (CAIGA), a Chinese-government controlled supplier of civil aircraft.

Real Estate Investments

FINSA has provided guidance on how real estate transactions could be subject to CFIUS review:

- If the assets to be acquired consist in whole or part of “critical infrastructure” or house the manufacture or storage of “critical technologies,” the transaction can be subject to CFIUS.

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- Unimproved land, if acquired solely with no other assets, assuming there are no other “relevant facts” such as proximity of the property to critical infrastructure, is excluded from characterization as a “covered transaction,” because such land alone is not a “U.S. business.”³¹
- An acquisition of a currently unused building, such as an empty warehouse, not including customer lists, intellectual property, or other proprietary information or transfer of personnel, assuming there are no other “relevant facts,” is not a covered transaction. If personnel, customer lists and inventory management software to operate the facility are also purchased, however, the transaction can be covered under CFIUS.³²

Review Timeline

The CFIUS review process has four steps:

1. A voluntary filing,
2. A 30-day preliminary review of the transaction,
3. A potential additional 45-day full investigation, and
4. A potential 15-day period during which the President decides to clear, suspend, condition, or deny the transaction.

Step One: Voluntary Filing

Formal review of a transaction is normally triggered by the filing of a notice with CFIUS by both parties to the transaction. The CFIUS notification process is voluntary, unlike the Hart-Scott-Rodino Act antitrust review. CFIUS, however, has the authority to review a transaction even when the parties have not filed a voluntary notice if (a) it believes that a transaction may raise national security considerations; or (b) a member of CFIUS has reason to believe a transaction is a covered transaction and may raise national security considerations.

A voluntary notice that results in CFIUS clearance, either after the 30-day preliminary review, or the 45-day full investigation or by presidential decision after the 45-day investigation, provides the transaction a safe harbor from post-closing review and challenge unless a party submitted false or misleading material information or omitted material information in its communications with CFIUS.

In contrast, if there is no formal CFIUS review and clearance, there is continuing uncertainty that the President might intervene and unwind the deal after closing. For example, in Huawei’s proposed acquisition of 3Leaf assets, neither Huawei nor 3Leaf had notified CFIUS. Huawei argued that it believed the \$2 million purchase of enterprise virtualization technology and intellectual property used in cloud computing and certain other assets did not require a review. Reportedly, the Pentagon raised Exon-Florio concerns after the close of the deal in May 2010, and the parties retroactively filed a notice with CFIUS. In mid-February 2011, CFIUS apparently determined that the asset acquisition, in essence, was the acquisition of a U.S. business and reportedly informed Huawei that it would have to divest the assets or CFIUS would recommend to the President that the acquisition be unwound. In late February, Huawei abandoned the deal.

Such post-closing requests are a clear reminder that parties should contemplate a CFIUS filing before the transaction is closed if there is any possibility that it could raise national security concerns, as CFIUS has the authority to challenge a transaction after its completion. By filing the notice, parties can seek formal clearance of a transaction and obtain certainty that the transaction is final.

Among other things, an Exon-Florio notice must include the following³³:

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- The basic information about the transaction, including the timelines and assets or businesses to be acquired and plans the acquiring party has for the target;
- Sensitive technologies or information that the target possesses and U.S. government contracts to which the target is a party;
- Detailed information about the ownership structure of the acquiring party, especially with respect to any ownership by a foreign government; and
- Biographical information concerning key management and other personnel so U.S. security officials can conduct background checks of the foreign individuals involved in the transaction.

In practice, an Exon-Florio notice should include additional information. Prior to filing notice, companies should provide information, as applicable, emphasizing that a transaction is not an acquisition of a business. Simple investments or asset purchases that do not involve a change in control should have accompanying arguments and substantive support to that effect. Overall, parties are encouraged by CFIUS to engage in consultations and negotiations before filing the formal notice. While these discussions are not part of the formal review process, they can help CFIUS understand the transaction and provide it an opportunity to request additional information be included in the actual notice. It is not uncommon for parties to modify their transaction after this informal pre-file consultation to expedite clearance. In some cases, parties have abandoned transactions after it became clear from informal discussions that they were unlikely to be accepted.

Step Two: 30-day Preliminary Review of the Transaction

The 30-day preliminary review period commences once CFIUS gives notice that the filing contains all of the required information. Within 30 days, CFIUS reviews the notice and makes a determination. During the 30 days, the parties may be required to answer additional questions from CFIUS, or the parties may be invited, or they may request, to meet with CFIUS staff to discuss the transaction. Most reviews are concluded within the preliminary 30-day period.

In making its determination, CFIUS has three options:

- If it determines the transaction is not a covered transaction, or if it is a covered transaction but does not threaten to impair the national security of the U.S., CFIUS can issue a letter concluding the review.
- If it determines the transaction is a covered transaction and poses a national security risk, but the risk can be adequately mitigated, CFIUS and the lead agency can enter into a mitigation agreement with the parties to address CFIUS' concerns and possibly modify the transaction.
- It is required to launch a 45-day full investigation if it determines that:
 1. The transaction threatens to impair U.S. national security and that threat has not been mitigated during the 30-day review;
 2. The acquirer is controlled by or acting on behalf of a foreign government;
 3. The transaction would result in foreign control over critical infrastructure, and could impair U.S. national security if not mitigated; or
 4. The lead agency recommends an investigation and CFIUS concurs that an investigation be undertaken.

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If CFIUS is unable to conclude its preliminary review after 30 days, or if the parties have not agreed to mitigation conditions requested by agencies, parties can also withdraw and re-file their application with CFIUS approval to give CFIUS more time to complete its review.

Step Three: Potential 45-day Full Investigation of the Transaction

Historically, the overwhelming majority of acquisitions have not been subject to further action by CFIUS after the 30-day preliminary review, although in some cases CFIUS requires more time to complete its examination of a transaction. Even though it is rare for CFIUS to launch the 45-day full investigation, parties can potentially avoid this extended examination period by modifying their transaction. CFIUS may condition clearance at the end of the 30-day period on mitigation steps. In 2001, for example, CFIUS required a Dutch firm to agree to divest itself of the target U.S. company's optics and semiconductor business as a condition for clearing its proposed acquisition.

If CFIUS proceeds with a full investigation, it must be concluded within 45 days and make either of the two available determinations. If it determines that there is no threat or that the threat posed to the national security interest can be mitigated to its satisfaction, CFIUS can advise the parties that the review ends. Otherwise, CFIUS will submit a recommendation to the President for a decision. In cases where there is no unanimous view among the members of CFIUS on a recommendation, CFIUS will submit a report and recommendation noting those disagreements to the President.

Step Four: 15-day Presidential Review Period

The President has 15 days to clear, block, condition, or impose conditions on the transaction after CFIUS submits its recommendation. Nearly all companies withdraw a transaction that is forwarded to Presidential review, rather than risk outright denial.³⁴

Mitigation Arrangements

Parties sometimes are able to clear the transaction during the preliminary 30-day review or 45-day investigation by agreeing with CFIUS to take mitigation steps in binding agreements. Here are some sample mitigation measures:

- Restriction on the access by non-U.S. citizens to critical infrastructure and classified or export controlled information.
- Requirement that a subsidiary with sensitive technology or classified contracts have a separate and independent board of directors composed of U.S. citizens.
- Requirement that several approved outside directors be appointed along with inside/foreign directors, and to establish procedures to regulate communications and visits between the target and the investor.

Some transactions pose national security concerns that cannot be mitigated successfully. Those transactions are usually abandoned before the completion of the CFIUS process.

U.S. Export Controls

In addition to CFIUS issues, the transaction may require careful analysis of other U.S. laws. For example, U.S. export control laws restrict the disclosure and transfer of sensitive technology and technical information to other countries. The Bureau of Industry and Security (BIS) of the U.S. Department of Commerce regulates the export and re-export of "dual use" items and technologies in

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accordance with the Export Administration Regulations (EAR). Depending on the circumstances, the export of controlled items can require an export license from BIS. The U.S. business being acquired must provide CFIUS with information and a commodity classification for relevant EAR controlled items that it exports. In addition, through the International Traffic in Arms Regulations (ITAR), the Department of State's Directorate of Defense Trade Control (DDTC) requires registration and approval of all businesses engaged in the exports of military items, services and technology listed on the U.S. Munitions List (USML). CFIUS requires licensing of such ITAR-controlled defense articles and services and carefully reviews foreign acquisitions of U.S. entities that are registered with DDTC or that export items listed on the USML.

These laws will apply even when no acquisition is involved. For example, a non-exclusive license for manufacturing certain metal alloys to a Korean company may require an export license, or certain sublicense agreements by Korean licensees may be prohibited "retransfers" or "re-exports" under ITAR. Derivations, or products made by a foreign company that incorporate U.S. technology, are subject to export control laws as well. Foreign access to technology and technical information may be deemed an export requiring U.S. government approval. Digital information that is controlled by export laws must be strictly monitored; ability to access controlled digital information overseas can be a violation even if the information was not actually accessed. Companies and their counsel should review the Commerce Control List to ensure they are aware of applicable export licensing requirements and restrictions, if any.³⁵

Korea enjoys favorable treatment under U.S. export laws. The United States and the Republic of Korea are signatories to the major sensitive technology export control treaties, most notably the Wassenaar Arrangement which includes only 41 countries. Korea is one of only two Asian nations in the Wassenaar Arrangement. Korea otherwise enjoys broad license exception status under the EAR.³⁶ Nonetheless, export control requirements need to be reviewed to determine compliance obligations as part of due diligence on an investment or M&A transaction.

National Security and Jobs Impact

Job retention or losses are not part of CFIUS' consideration as its mission is limited to screening national security risks, but U.S. job impact should be considered as part of an acquisition strategy. Public support over job impact could influence CFIUS' decision. When, for example, Borse Dubai merged with NASDAQ in 2009, New York Mayor Michael Bloomberg voiced his support of this transaction, emphasizing its benefits in terms of job creation and U.S. competitiveness. CFIUS did not oppose the merger. Korean companies should likewise consider developing an outreach strategy that addresses Congress, potential critics, and the American public when a proposed transaction will have a positive U.S. job impact.

Korean owned subsidiaries operating in the U.S. employed 28,000 workers and created over \$10 billion in exports as of 2009. Korean Electric Power (KEPCO) is investing \$1 billion in Nevada for a facility to generate electricity for 80,500 homes; this project is expected to create approximately 300 construction jobs.³⁷ Telecommunications giant Samsung's new facility in Texas is expected to create 500 additional jobs in the area. Mando Corporation employs 400 workers in Georgia for auto parts manufacturing.³⁸ These examples can be very beneficial in garnering public support, demonstrating the benefits Korean government-owned companies can provide, and providing guidance for how potential acquisitions can be framed to defuse opponents of foreign investment.

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Conclusion

The economic ties between Korea and the United States are growing stronger. Increased investment and M&A activity can be expected in the future. Korean companies should try to anticipate CFIUS issues early in an acquisition process to fully address concerns that may be raised in a CFIUS review or investigation.

Familiarity with the types of transactions that CFIUS reviews, and the degree of foreign government ownership in those transactions, and analysis of past successful transactions can assist companies and counsel to structure transactions in a particular way to avoid CFIUS complications and still meet economic objectives. Since 2007, energy transactions are carefully reviewed. Thus, Korea's energy appetite and particular investment behavior in this industry may bring more transactions within CFIUS' purview in the future. Korean companies should not be deterred, however, by potential CFIUS involvement. As a strong U.S. ally, Korea has a favorable status under certain laws, regulations, and national security treaties with the U.S. That said, the treatment of critical technologies and infrastructure under CFIUS rules, and the potential application of export controls or conflicts with Korean third party customers, should be reviewed early in transaction planning.

If a transaction might involve CFIUS, a Korean company should plan to supplement presentations to CFIUS by also addressing the full range of potential political criticisms from the beginning, and highlight beneficial employment aspects in particular. During the CFIUS process, should any security concerns persist, Korean companies should engage CFIUS in a cooperative and constructive dialogue to find solutions such as restructuring or proposing a mitigation agreement.

Endnotes:

¹ Office of the United States Trade Representative, <http://www.ustr.gov/trade-agreements/free-trade-agreements/korus-fta> (last visited June 19, 2013).

² Congressional Research Service, The U.S.-South Korea Free Trade Agreement (KORUS FTA): Provisions and Implications 5 (Mar. 7, 2013), <http://www.fas.org/sgp/crs/row/RL34330.pdf>.

³ Congressional Research Service, The U.S.-South Korea Free Trade Agreement (KORUS FTA): Provisions and Implications 37-38 (Mar. 7, 2013), <http://www.fas.org/sgp/crs/row/RL34330.pdf> (granting South Korea "national treatment" and "Most Favored Nation" status).

⁴ Congressional Research Service, The U.S.-South Korea Free Trade Agreement (KORUS FTA): Provisions and Implications 7-8 (Mar. 7, 2013), <http://www.fas.org/sgp/crs/row/RL34330.pdf>.

⁵ See Congressional Research Service, The U.S.-South Korea Free Trade Agreement (KORUS FTA): Provisions and Implications 6-7 (Mar. 7, 2013), <http://www.fas.org/sgp/crs/row/RL34330.pdf>. See also Central Intelligence Agency, The World Factbook: South Korea (2012), available at <https://www.cia.gov/library/publications/the-world-factbook/geos/ks.html/>.

⁶ Calculation of Bureau of Economic Analysis (BEA) data, U.S. Department of Commerce, "Operations of Multinational Companies," www.bea.gov/international/index.htm#omc. See also BEA interactive data for Direct Investment and Multinational Companies (MNC), http://www.bea.gov/iTable/index_MNC.cfm (last visited June 19, 2013).

⁷ BEA interactive data for Direct Investment and Multinational Companies (MNC), http://www.bea.gov/iTable/index_MNC.cfm (last visited June 19, 2013). See also Kevin B.

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Barefoot and Marilyn Ibarra-Caton, *Direct Investments Positions for 2011: Country and Industry Detail*, Survey of Current Business, July 2012, at 34.

⁸ Kevin B. Barefoot and Marilyn Ibarra-Caton, *Direct Investments Positions for 2011: Country and Industry Detail*, Survey of Current Business, July 2012, at 34.

⁹ Sungwoo Park & Jim Polson, *KNOC to Buy Stake in Texas Shale-oil Block*, Bloomberg News (Mar. 21, 2011), www.bloomberg.com/news/2011-03-21/knoc-to-buy-stake-in-texas-shale-oil-block-kazakh-explorer-for-2-billion.html.

¹⁰ MarketWatch, *Hanwha Solar Launches Project Development Business in North America with Hanwha SolarEnergy America*, Wall Street Journal (Aug. 8, 2012), <http://www.marketwatch.com/story/hanwha-solar-launches-project-development-business-in-north-america-with-hanwha-solarenergy-america-2012-08-08>. See also Justin Doom, *Hanwha to Expand in North America After Solar Monkey Integration*, Bloomberg News (Aug. 8, 2012), www.bloomberg.com/news/2012-08-08/hanwha-to-expand-in-north-america-after-solar-monkey-integration.html.

¹¹ See U.S. Energy Information Administration country analysis (2013), available at <http://www.eia.gov/countries/cab.cfm?fips=KS> (“[South] Korea is one of the top energy importers in the world.”).

¹² Committee on Foreign Investment in the United States: Annual Report to Congress 18 (issued Dec. 2011). Committee on Foreign Investment in the United States: Annual Report to Congress 15 (issued Dec. 2012).

¹³ Regulations Pertaining to Mergers, Acquisitions, and Takeovers by Foreign Persons; Final Rule, 31 C.F.R. Part 800 (2008). See also Amendment to Defense Production Act of 1950, Authority to Review Certain Mergers, Acquisitions, and Takeovers, 50 U.S.C. App. § 2170 (2009).

¹⁴ But see 42 U.S.C. § 5195c(b) (2013). Certain types of assets, though not explicitly identified under FINSA, will be considered “critical infrastructure.” See also Congressional Research Service, *Foreign Investment, CFIUS, and Homeland Security: An Overview* 5 (Apr. 17, 2008).

¹⁵ Treasury Regulations Pertaining to Mergers, Acquisitions, and Takeovers by Foreign Persons, 31 C.F.R. § 800.301(c) example 2 (2012).

¹⁶ James K. Jackson & Congressional Research Service, *The Committee on Foreign Investment in the United States (CFIUS) 14* (June 12, 2013), <http://www.fas.org/sgp/crs/natsec/RL33388.pdf>.

¹⁷ 31 C.F.R. § 800.302(b).

¹⁸ 31 C.F.R. § 800.223. See also 31 C.F.R. § 800.302(b) example 3.

¹⁹ 31 C.F.R. § 800.301(c) example 3.

²⁰ 31 C.F.R. § 800.301(d).

²¹ 31 C.F.R. § 800.301(d) example 2.

²² 31 C.F.R. § 800.302(d), (e).

²³ 31 C.F.R. § 800.302(c).

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- ²⁴ Chris V. Nicholson, *The Big Chill: Huawei Imbroglia Puts Countries at Odds*, N.Y. Times (Feb. 18, 2011), <http://dealbook.nytimes.com/2011/02/18/the-big-chill-huawei-imbroglio-puts-countries-at-odds/>. See also 31 C.F.R. § 800.301(c) example 4.
- ²⁵ Note the difference with 31 C.F.R. § 800.302(c) example 4 (describing a covered transaction when the “entire” interest is acquired by the foreign person in addition to the license).
- ²⁶ 31 C.F.R. § 800.204(e).
- ²⁷ Congressional Research Service, Foreign Investment, CFIUS, and Homeland Security: An Overview 5 (Apr. 17, 2008). Kevin B. Barefoot and Marilyn Ibarra-Caton, *Direct Investments Positions for 2011: Country and Industry Detail*, Survey of Current Business, July 2012, at 34. The specific Korean investments involved with critical infrastructure relate to energy, agriculture and food, chemicals, finance, transportation, and telecommunications.
- ²⁸ Government Accounting Office report, Decisions On Foreign Government Control 4.2 (1995).
- ²⁹ Sungwoo Park & Jim Polson, *KNOC to Buy Stake in Texas Shale-oil Block*, Bloomberg News (Mar. 21, 2011), www.bloomberg.com/news/2011-03-21/knoc-to-buy-stake-in-texas-shale-oil-block-kazakh-explorer-for-2-billion.html.
- ³⁰ Government Accounting Office report, Decisions On Foreign Government Control 4.2 (1995).
- ³¹ 31 C.F.R. § 800.302(c) example 1.
- ³² 31 C.F.R. § 800.301(c) examples 6 and 7.
- ³³ 31 C.F.R. § 800.402(c).
- ³⁴ James K. Jackson & Congressional Research Service, The Committee on Foreign Investment in the United States (CFIUS) 8-9, 22 (June 12, 2013), <http://www.fas.org/sgp/crs/natsec/RL33388.pdf>.
- ³⁵ Commerce and Foreign Trade Regulations Relating to Export Administration Regulations, 15 C.F.R. § 774 (2011). See also Bureau of Industry and Security, FAQs on Export Licensing (2013), available at <http://www.bis.doc.gov/exportlicensingqanda.htm>.
- ³⁶ 15 C.F.R. §§ 740, 742, 744, 774. Restrictions on exports to South Korea mostly apply to nuclear technology only.
- ³⁷ Steve Tetreault, *Government OKs solar project near Boulder City*, Las Vegas Review-Journal (June 3, 2013), <http://www.reviewjournal.com/news/government-oks-solar-project-near-boulder-city>. SelectUSA in partnership with the U.S. Department of Commerce, FDI Between South Korea And The United States (2012). This transaction is mandatory for CFIUS review under FINSAs guidelines due to the 51% majority ownership the South Korean government holds in KEPCO. No public information is available, however, regarding the specifics of this transaction under CFIUS investigation. It is possible KEPCO layered their ownership of this transaction through several private companies to dilute the direct foreign government control. See generally Min-Jeong Lee, *Kepeco unit wins \$1 billion solar project in Nevada*, WALL STREET JOURNAL (Nov. 2, 2011), <http://www.marketwatch.com/story/kepeco-unit-wins-1-billion-solar-project-in-nevada-2011-11-02>.
- ³⁸ SelectUSA in partnership with the U.S. Department of Commerce, FDI Between South Korea and the United States (2012).

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