

§ 800.701

31 CFR Ch. VIII (7–1–02 Edition)

(2) Is empowered to direct the Attorney General to seek appropriate relief, including divestment relief, in the district courts of the United States in order to implement and enforce section 721.

(d) All authority available to the President under section 721(d), including divestment authority, shall remain available at the discretion of the President in respect of acquisitions which have been concluded at any time on or after the effective date, but only if the purpose for which divestment or other appropriate relief is sought is based on facts, conditions, or circumstances existing at the time the transaction was concluded. Such authority shall not be exercised if:

(1) The Committee, through its Staff Chairman, has in writing advised a party (or the parties) that a particular transaction, with respect to which voluntary notice was attempted, was not subject to section 721;

(2) The Committee has previously determined under § 800.502 not to undertake an investigation of the acquisition when proposed, pending, or completed; or

(3) The President has previously determined not to exercise his authority under section 721 with respect to that acquisition.

(e) Notwithstanding any other provision in these regulations, in any case where the parties to an acquisition submitted false or misleading material information to the Committee, or omitted material information, including relevant information that was supplied in response to provisions of § 800.402; that was requested specifically by the Committee in the course of review, investigation, or Presidential determination; or that was actually provided by a party, in addition to such other penalties as may be provided by law,

(1) The Committee may reopen its review or investigation of the transaction, and revise any recommendation or recommendations submitted to the President;

(2) Any Committee member may submit or resubmit an agency notice under § 800.401, to begin anew the process of review and investigation; and/or

(3) The President may take such action for such time as the President deems appropriate in respect of the acquisition, and may revise actions earlier taken.

(f) The Committee will generally not consider as material minor inaccuracies, omissions, or changes relating to financial or commercial factors not having a bearing on national security.

Example 1. Corporation A, a foreign person, states in its joint filing with Corporation X, a U.S.-controlled person, that Corporation A will acquire all of the shares of Corporation X at \$100 per share on July 31, 1991. For commercial reasons, the acquisition in fact takes place on August 31 of the same year, and the actual price paid per share is \$150. The Committee would not regard these factors alone as reason to set aside a prior decision by the Committee not to investigate the proposed transaction.

Example 2. Same facts as stated in sentence one of Example 1, except that the joint filing of Corporations A and X also states, in responding to § 800.402(b)(3)(iv), that Corporation X has no contracts involving classified information. In fact, Corporation X has classified contracts with the Department of Defense. The statement would be considered false and could lead to action by the Committee under paragraph (e) of this section.

(g) Divestment or other relief under section 721 shall not be available with respect to transactions that were concluded prior to the effective date.

[56 FR 58780, Nov. 21, 1991, as amended at 59 FR 27180, May 25, 1994]

Subpart G—Provision and Handling of Information

§ 800.701 Obligation of parties to provide information.

(a) Parties to a transaction which is notified under subpart D shall provide information to the Staff Chairman of the Committee that will enable the Committee to conduct a full review and/or investigation of the proposed transaction, and shall promptly advise the Staff Chairman of any changes in plans or information pursuant to § 800.402(h). See, generally, 50 U.S.C. app. 2155(a) for authorities available to the Committee for obtaining information.

(b) Documentary materials or information required or requested to be submitted under this part shall be submitted in English. Supplementary materials, such as annual reports, written in a foreign language, shall be submitted in certified English translation, at the request of the Committee.

§ 800.702 Confidentiality.

(a) Section 721(c) provides that any information or documentary material filed with the Committee pursuant to these regulations shall be exempt from disclosure under section 552 of title 5, United States Code, and no such information or documentary material may be made public, except as may be relevant to any administrative or judicial action or proceeding. Nothing in section 721 shall be construed to prevent disclosure to either House of Congress or to any duly authorized committee or subcommittee of the Congress.

(b) The provisions of 50 U.S.C. app. 2155(e) relating to fines and imprisonment shall apply in respect of disclosure of information or documentary material filed with the Committee under these regulations.

[56 FR 58780, Nov. 21, 1991, as amended at 59 FR 27180, May 25, 1994]

APPENDIX A TO PART 800—PREAMBLE TO REGULATIONS ON MERGERS, ACQUISITIONS, AND TAKEOVERS BY FOREIGN PERSONS (PUBLISHED NOVEMBER 21, 1991)

NOTE: For the convenience of the reader, this appendix contains the text of the preamble to the final regulations on mergers, acquisitions and takeovers by foreign persons beginning at the heading "Discussion of Final Rule" and ending before "List of Subjects in 31 CFR Part 800" (56 FR 58780; November 21, 1991). Certain sections of the regulations were renumbered in a final rule published on May 25, 1994, and those number changes are reflected in the "Section-by-Section Discussion of Changes" in this appendix. (See appendix B of this part for the preamble of the May 25, 1994, final rule.)

DISCUSSION OF FINAL RULE

I. Introduction

On July 14, 1989, the Department of the Treasury published proposed Regulations Pertaining to Mergers, Acquisitions and Takeovers by Foreign Persons. The purpose of the proposed regulations was to imple-

ment section 721 (hereinafter referred to as "section 721") of title VII of the Defense Production Act of 1950, as added section 5021 of the Omnibus Trade and Competitiveness Act of 1988 (Pub. L. 100-418), relating to mergers, acquisitions, and takeovers of U.S. persons by or with foreign persons. Section 721, which was subject to the sunset provision of the DPA, lapsed on October 20, 1990, and was reinstated and made permanent law by Public Law 102-99 (signed August 17, 1991).

The period for receiving comments on the proposed regulations closed on September 14, 1989; during that time, over seventy parties—including private and public, as well as domestic and foreign entities—filed in total some 500 pages of comments. The changes that have been incorporated into the final version of the regulations reflect both suggestions made in those comments and the experience of the Committee on Foreign Investment in the United States ("the Committee") in reviewing transactions notified under section 721 since the proposed regulations were published. These changes are of a substantive nature as well as of a technical nature; examples of the latter include clarifications of terms and changes in format. The substantive issues will be discussed in the next section; the most significant technical changes will be discussed in the third section of this preamble.

II. General Discussion: Major Substantive Issues Raised by the Public Comments

Despite the wide range of interests represented by the public comments and the large volume of those comments, the comments generally focused on nine major issues: the meaning of "national security"; the scope of section 721's coverage, focusing largely on the size of a transaction or date of completion; the definition of "foreign control"; the application of section 721 to foreign lenders; the desirability of fast track treatment for certain types of transactions; the treatment of transactions involving hostile parties; the provisions of the regulations providing remedies for material omissions or errors; Committee procedures; and the possibility of a "sunset" on the President's power to act under section 721 on non-notified transactions. The suggested resolutions of these issues varied significantly in many cases. Each of these major issues, including some of the resolutions proposed by the public, will be discussed generally in this section of the preamble. A more detailed analysis, tied to the actual wording of the final regulations, follows in the next section. The final section reiterates certain information on international obligations of the United States that was set forth in the preamble to the proposed regulations.