



The Committee on Foreign Investment in the United States (CFIUS)

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Summary

The Committee on Foreign Investment in the United States (CFIUS) is comprised of 9 members, two ex officio members, and other members as appointed by the President representing major departments and agencies within the federal Executive Branch. While the group generally has operated in relative obscurity, the proposed acquisition of commercial operations at six U.S. ports by Dubai Ports World in 2006 placed the group's operations under intense scrutiny by Members of Congress and the public. Prompted by this case, some Members of the 109th and 110th Congresses questioned the ability of Congress to exercise its oversight responsibilities given the general view that CFIUS's operations lack transparency. Other Members revisited concerns about the linkage between national security and the role of foreign investment in the U.S. economy. Some Members of Congress and others argued that the nation's security and economic concerns have changed since the September 11, 2001, terrorist attacks and that these concerns were not being reflected sufficiently in the Committee's deliberations. In addition, anecdotal evidence seemed to indicate that the CFIUS process was not market neutral. Instead, a CFIUS investigation of an investment transaction may have been perceived by some firms and by some in the financial markets as a negative factor that added to uncertainty and may have spurred firms to engage in behavior that may not have been optimal for the economy as a whole. In the 112th Congress, some Members expressed their concerns to the Obama Administration over the national security implications of a proposed acquisition of U.S. technology company by the Chinese-owned Huawei Technologies.

In the first session of the 110th Congress, the House and Senate adopted S. 1610, the Foreign Investment and National Security Act of 2007. On July 11, 2007, the measure was sent to President Bush, who signed it on July 26, 2007. It is designated as P.L. 110-49. On January 23, 2008, President Bush issued Executive Order 13456 implementing the law. The Executive Order also established some caveats that may affect the way in which the law is implemented. These caveats stipulate that the President will provide information that is required under the law as long as it is "consistent" with the President's authority "to (i) conduct the foreign affairs of the United States; (ii) withhold information the disclosure of which could impair the foreign relations, the national security, the deliberative processes of the Executive, or the performance of the Executive's constitutional duties; (iii) recommend for congressional consideration such measures as the President may judge necessary and expedient; and (iv) supervise the unitary executive branch." Despite the relatively recent passage of the amendments, some Members of Congress and others have questioned the performance of CFIUS and the way the Committee reviews cases involving foreign governments, particularly with the emergence of direct investments through sovereign wealth funds (SWFs). There have been few policy statements by the Obama Administration in order to assess its approach to foreign direct investment, but the Administration seems supportive of a free flow of direct investment.

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Background

The Committee on Foreign Investment in the United States (CFIUS) is an interagency committee that serves the President in overseeing the national security implications of foreign investment in the economy. Originally established by an Executive Order of President Ford in 1975, the committee generally has operated in relative obscurity.¹ According to a Treasury Department memorandum, the Committee originally was established in order to placate Congress, which had grown concerned over the rapid increase in investments by Organization of the Petroleum Exporting Countries (OPEC) countries in American portfolio assets (Treasury securities, corporate stocks and bonds), and to respond to concerns of some that much of the OPEC investments were being driven by political, rather than by economic, motives.²

Thirty years later, public and congressional concerns about the proposed purchase of commercial port operations of the British-owned Peninsular and Oriental Steam Navigation Company (P&O)³ in six U.S. ports by Dubai Ports World (DP World)⁴ sparked a firestorm of criticism and congressional activity during the 109th Congress concerning CFIUS and the manner in which it operates. Some Members of Congress and the public argued that the nation's economic and national security concerns had fundamentally changed as a result of the September 11, 2001, terrorist attacks on the United States and that these changes required a reassessment of the role of foreign investment in the economy and in the nation's security. As a result of the attention by both the public and Congress, DP World officials announced that they would sell off the U.S. port operations to an American owner.⁵ On December 11, 2006, DP World officials announced that a unit of AIG Global Investment Group, a New York-based asset management company with large assets, but no experience in port operations, would acquire the U.S. port operations for an undisclosed amount.⁶

Members of Congress introduced more than 25 bills in the 2nd session of the 109th Congress that addressed various aspects of foreign investment since the proposed DP World transaction. In the 1st session of the 110th Congress, Members approved, and President Bush signed, a measure that was designated as P.L. 110-49 that alters the CFIUS process in order to provide greater oversight by Congress and increased reporting by the Committee on its decisions. In addition, P.L. 110-49 broadened the definition of national security and required greater scrutiny by CFIUS of certain types of foreign direct investments. The law demonstrated the concern some Members had with

¹ Executive Order 11858 (b), May 7, 1975, 40 F.R. 20263.

² U.S. Congress. House. Committee on Government Operations. Subcommittee on Commerce, Consumer, and Monetary Affairs. *The Operations of Federal Agencies in Monitoring, Reporting on, and Analyzing Foreign Investments in the United States*. Hearings. 96th Cong., 1st sess., Part 3, July 30, 1979. Washington, U.S. Govt. Print. Off., 1979. p. 334-335. (Hereafter cited as, *The Operations of Federal Agencies*, part 3.)

³ Peninsular and Oriental Steam Company is a leading ports operator and transport company with operations in ports, ferries, and property development. It operates container terminals and logistics operations in over 100 ports and has a presence in 18 countries.

⁴ Dubai Ports World was created in November 2005 by integrating Dubai Ports Authority and Dubai Ports International. It is one of the largest commercial port operators in the world with operations in the Middle East, India, Europe, Asia, Latin America, the Caribbean, and North America.

⁵ Weisman, Jonathan, and Bradley Graham, "Dubai Firm to Sell U.S. Port Operations," *The Washington Post*, March 10, 2006. p. A1.

⁶ King, Neil Jr., and Greg Hitt, Dubai Ports World Sells U.S. Assets—AIG Buys Operations that Ignited Controversy As Democrats Plan Changes. *The Wall Street Journal*, December 12, 2006. P. A1.

the way CFIUS operated and with the lack of transparency in the CFIUS review process that some Members believed had hampered Congress's ability to exercise its oversight responsibilities. Not all Members were satisfied with the law. Some Members argued that the law remained deficient in reviewing investment by foreign governments through sovereign wealth funds (SWFs), an issue that was just beginning to attract attention when the law was adopted. In early 2011, some Members of Congress had requested that the Obama Administration support a recommendation by CFIUS that the President block a proposed acquisition of 3Leaf Systems by Huawei Technologies over national security concerns. Instead, Huawei discontinued its efforts to acquire the U.S. firm.

Establishment of CFIUS

President Ford's 1975 Executive Order established the basic structure of CFIUS, and directed that the "representative"⁷ of the Secretary of the Treasury be the chairman of the Committee. The Executive Order also stipulated that the Committee would have "the primary continuing responsibility within the Executive Branch for monitoring the impact of foreign investment in the United States, both direct and portfolio, and for coordinating the implementation of United States policy on such investment." In particular, CFIUS was directed to: (1) arrange for the preparation of analyses of trends and significant developments in foreign investments in the United States; (2) provide guidance on arrangements with foreign governments for advance consultations on prospective major foreign governmental investments in the United States; (3) review investments in the United States which, in the judgment of the Committee, might have major implications for United States national interests; and (4) consider proposals for new legislation or regulations relating to foreign investment as may appear necessary.⁸

President Ford's Executive Order also stipulated that information submitted "in confidence shall not be publicly disclosed" and that information submitted to CFIUS be used "only for the purpose of carrying out the functions and activities" of the order. In addition, the Secretary of Commerce was directed to perform a number of activities, including

- (1) obtaining, consolidating, and analyzing information on foreign investment in the United States;
- (2) improving the procedures for the collection and dissemination of information on such foreign investment;
- (3) the close observing of foreign investment in the United States;
- (4) preparing reports and analyses of trends and of significant developments in appropriate categories of such investment;
- (5) compiling data and preparing evaluation of significant transactions; and
- (6) submitting to the Committee on Foreign Investment in the United States appropriate reports, analyses, data, and recommendations as to how information on foreign investment can be kept current.

⁷ The term "representative" was dropped by Executive Order 12661, December 27, 1988, 54 FR 780.

⁸ Executive Order 11858 (b), May 7, 1975, 40 F.R. 20263.

The Executive Order, however, raised questions among various observers and government officials who doubted that federal agencies had the legal authority to collect the types of data that were required by the order. As a result, Congress and the President sought to clarify this issue, and in the following year President Ford signed the International Investment Survey Act of 1976.⁹ The act gave the President “clear and unambiguous authority” to collect information on “international investment.” In addition, the act authorized “the collection and use of information on direct investments owned or controlled directly or indirectly by foreign governments or persons, and to provide analyses of such information to the Congress, the executive agencies, and the general public.”¹⁰

By 1980, some Members of Congress had come to believe that CFIUS was not fulfilling its mandate. Between 1975 and 1980, for instance, the Committee had met only ten times and seemed unable to decide whether it should respond to the political or the economic aspects of foreign direct investment in the United States.¹¹ One critic of the Committee argued in a congressional hearing in 1979 that, “the Committee has been reduced over the last four years to a body that only responds to the political aspects or the political questions that foreign investment in the United States poses and not with what we really want to know about foreign investments in the United States, that is: Is it good for the economy?”¹²

From 1980 to 1987, CFIUS investigated a number of foreign investments, mostly at the request of the Department of Defense. In 1983, for instance, a Japanese firm sought to acquire a U.S. specialty steel producer. The Department of Defense subsequently classified the metals produced by the firm because they were used in the production of military aircraft, which caused the Japanese firm to withdraw its offer. Another Japanese company attempted to acquire a U.S. firm in 1985 that manufactured specialized ball bearings for the military. The acquisition was completed after the Japanese firm agreed that production would be maintained in the United States. In a similar case in 1987, the Defense Department objected to a proposed acquisition of the computer division of a U.S. multinational company by a French firm because of classified work engaged in by the computer division. The acquisition proceeded after the classified contracts were reassigned to the U.S. parent company.¹³

The “Exon-Florio” Provision

In 1988, amid concerns over foreign acquisition of certain types of U.S. firms, particularly by Japanese firms, Congress approved the Exon-Florio provision.¹⁴ This statute grants the President the authority to block proposed or pending foreign “mergers, acquisitions, or takeovers” of “persons engaged in interstate commerce in the United States” that threaten to impair the national

⁹ P.L. 94-472, Oct 11, 1976; 22 USC 3101.

¹⁰ P.L. 94-472, Oct 11, 1976; 22 USC Sec. 3101(b).

¹¹ U.S. Congress. House. Committee on Government Operations. *The Adequacy of the Federal Response to Foreign Investment in the United States*. Report by the Committee on Government Operations. H.Rept. 96-1216, 96th Cong., 2nd sess., Washington, U.S. Govt. Print. Off., 1980. 166-184.

¹² *The Operations of Federal Agencies*, part 3, p. 5.

¹³ U.S. Congress. House. Committee on Energy and Commerce. Subcommittee on Commerce, Consumer Protection, and Competitiveness. *Foreign Takeovers and National Security*. Hearings on Section 905 of H.R. 3. 100th Cong., 1st sess., October 20, 1987. Testimony of David C. Mulford. Washington, U.S. Govt., Print., Off., 1988. p. 21-22.

¹⁴ P.L. 100-418, title V, Sec. 5021, August 23, 1988; 50 USC Appendix sect. 2170.

security. Congress directed, however, that before this authority can be invoked the President must conclude that other U.S. laws are inadequate or inappropriate to protect the national security, and that he must have “credible evidence” that the foreign investment will impair the national security. This same standard was maintained in P.L. 110-49.

By the late 1980s, Congress and the public had grown increasingly concerned about the sharp increase in foreign investment in the United States and the potential impact such investment might have on the U.S. economy. In particular, the proposed sale in 1987 of Fairchild Semiconductor Co. by Schlumberger Ltd. of France to Fujitsu Ltd. of Japan touched off strong opposition in Congress and provided much of the impetus behind the passage of the Exon-Florio provision. The proposed Fairchild acquisition generated intense concern in Congress in part because of general difficulties in trade relations with Japan at that time and because some Americans felt that the United States was declining as an international economic power as well as a world power. The Defense Department opposed the acquisition because some officials believed that the deal would give Japan control over a major supplier of computer chips for the military and would make U.S. defense industries more dependent on foreign suppliers for sophisticated high-technology products.¹⁵

Although Commerce Secretary Malcolm Baldrige and Defense Secretary Caspar Weinberger failed in their attempt to have President Reagan block the Fujitsu acquisition, Fujitsu and Schlumberger called off the proposed sale of Fairchild.¹⁶ While Fairchild was acquired some months later by National Semiconductor Corp. for a discount,¹⁷ the Fujitsu-Fairchild incident marked an important shift in the Reagan Administration’s support for unlimited foreign direct investment in U.S. businesses and boosted support within the Administration for fixed guidelines for blocking foreign takeovers of companies in national security-sensitive industries.¹⁸

In 1988, after three years of often contentious negotiations between Congress and the Reagan Administration, Congress passed and President Reagan signed the Omnibus Trade and Competitiveness Act of 1988.¹⁹ The Exon-Florio provision, which was included as Section 5021 of that act, fundamentally transformed CFIUS. The provision originated in bills reported by the Commerce Committee in the Senate and the Energy and Commerce Committee in the House, but the measure was transferred to the Senate Banking Committee as a result of a dispute over jurisdictional responsibilities.²⁰

Part of Congress’s motivation in adopting the Exon-Florio provision apparently arose from concerns that foreign takeovers of U.S. firms could not be stopped unless the President declared a national emergency or regulators invoked federal antitrust, environmental, or securities laws. Through the Exon-Florio provision, Congress attempted to strengthen the President’s hand in conducting foreign investment policy, while limiting its own role as a means of emphasizing that, as much as possible, the commercial nature of investment transactions should be free from political considerations. Congress also attempted to balance public concerns about the economic

¹⁵ Auerbach, Stuart. Cabinet to Weigh Sale of Chip Firm. *The Washington Post*, March 12, 1987. p. E1.

¹⁶ Sanger, David E. Japanese Purchase of Chip Maker Canceled After Objections in U.S. *The New York Times*, March 17, 1987. p. 1.

¹⁷ Pollack, Andrew. Schlumberger Accepts Offer. *The New York Times*, September 1, 1987. p. D1.

¹⁸ Kilborn, Peter T. Curb Asked On Foreign Takeovers. *The New York Times*, March 18, 1987. p. D1.

¹⁹ P.L. 100-418.

²⁰ Testimony of Patrick A. Mulloy before the Committee on Banking, Housing, & Urban Affairs, October 20, 2005.

impact of certain types of foreign investment with the nation's long-standing international commitment to maintaining an open and receptive environment for foreign investment.

Furthermore, Congress did not intend to have the Exon-Florio provision alter the generally open foreign investment climate of the country or to have it inhibit foreign direct investments in industries that could not be considered to be of national security interest. At the time, some analysts believed the provision could potentially widen the scope of industries that fell under the national security rubric. CFIUS, however, is not free to establish an independent approach to reviewing foreign investment transactions, but operates under the authority of the President and reflects his attitudes and policies. As a result, the discretion CFIUS uses to review and to investigate foreign investment cases reflects policy guidance from the President. Foreign investors are also constrained by legislation that bars foreign direct investment in such industries as maritime, aircraft, banking, resources and power.²¹ Generally, these sectors were closed to foreign investors prior to passage of the Exon-Florio provision in order to prevent public services and public interest activities from falling under foreign control, primarily for national defense purposes.

Through Executive Order 12661, President Reagan implemented provisions of the Omnibus Trade Act. In the Executive Order, President Reagan delegated his authority to administer the Exon-Florio provision to CFIUS,²² particularly to conduct reviews, to undertake investigations, and to make recommendations, although the statute itself does not specifically mention CFIUS. As a result of President Reagan's action, CFIUS was transformed from a purely administrative body with limited authority to review and analyze data on foreign investment to one with a broad mandate and significant authority to advise the President on foreign investment transactions and to recommend that some transactions be blocked.

Treasury Department Regulations

After extensive public comment, the Treasury Department issued its final regulations in November 1991 implementing the Exon-Florio provision.²³ Although these procedures were amended through P.L. 110-49, they continued to serve as the basis for the Exon-Florio review and investigation until new regulations were released on November 21, 2008.²⁴ These regulations created an essentially voluntary system of notification by the parties to an acquisition and they allowed for notices of acquisitions by agencies that are members of CFIUS. Despite the voluntary nature of the notification, firms largely comply with the provision, because the regulations stipulate that foreign acquisitions that are governed by the Exon-Florio review process that do not notify the Committee remain subject indefinitely to divestment or other appropriate actions by the President. Under most circumstances, notice of a proposed acquisition that is given to the Committee by a third party, including shareholders, is not considered by the Committee to constitute an official notification. The regulations also indicated that notifications provided to the Committee would be considered to be confidential and the information would not be released by the Committee to the press or commented on publicly.

²¹ CRS Report RL33103, *Foreign Investment in the United States: Major Federal Statutory Restrictions*, by Michael V. Seitzinger.

²² Executive Order 12661 of December 27, 1988, 54 F.R. 779.

²³ Regulations Pertaining to Mergers, Acquisitions, and Takeovers by Foreign Persons. 31 C.F.R. Part 800.

²⁴ 31 CFR Part 800, November 21, 2008.

The “Byrd Amendment”

In 1992, Congress amended the Exon-Florio statute through Section 837(a) of the National Defense Authorization Act for Fiscal Year 1993 (P.L. 102-484). Known as the “Byrd” amendment after the amendment’s sponsor, the provision requires CFIUS to investigate proposed mergers, acquisitions, or takeovers in cases where two criterion are met:

- (1) the acquirer is controlled by or acting on behalf of a foreign government; and
- (2) the acquisition results in control of a person engaged in interstate commerce in the United States that could affect the national security of the United States.²⁵

This amendment came under intense scrutiny by the 109th Congress as a result of the DP World transaction. Many Members of Congress and others believed that this amendment required CFIUS to undertake a full 45-day investigation of the transaction because DP World was “controlled by or acting on behalf of a foreign government.” The DP World acquisition, however, exposed a sharp rift between what some Members apparently believed the amendment directed CFIUS to do and how the members of CFIUS were interpreting the amendment. In particular, some Members of Congress apparently interpreted the amendment to direct CFIUS to conduct a mandatory 45-day investigation if the foreign firm involved in a transaction is owned or controlled by a foreign government. Representatives of CFIUS argued that they interpreted the amendment to mean that a 45-day investigation was discretionary and not mandatory. In the case of the DP World acquisition, CFIUS representatives argued that they had concluded as a result of an extensive review of the proposed acquisition prior to the case being formally filed with CFIUS and during the 30-day review that the DP World case did not warrant a full 45-day investigation. They conceded that the case met the first criterion under the Byrd amendment, because DP World was controlled by a foreign government, but that it did not meet the second part of the requirement, because CFIUS had concluded during the 30-day review that the transaction “could not affect the national security.”²⁶

The intense public and congressional reaction that arose from the proposed Dubai Ports World acquisition spurred the Bush Administration in late 2006 to make an important administrative change in the way CFIUS reviewed foreign investment transactions. CFIUS and President Bush approved the acquisition of Lucent Technologies, Inc. by the French-based Alcatel SA, which was completed on December 1, 2006. Before the transaction was approved by CFIUS, however, Alcatel-Lucent was required to agree to a national security arrangement, known as a Special Security Arrangement, or SSA, that restricts Alcatel’s access to sensitive work done by Lucent’s research arm, Bell Labs, and the communications infrastructure in the United States.

The most controversial feature of this arrangement is that it allows CFIUS to reopen a review of the deal and to overturn its approval at any time if CFIUS believed the companies “materially fail to comply” with the terms of the arrangement. This marks a significant change in the CFIUS process. Prior to this transaction, CFIUS reviews and investigations had been portrayed, and had been considered, to be final. As a result, firms were willing to subject themselves voluntarily to a CFIUS review, because they believed that once an investment transaction was scrutinized and

²⁵ P.L. 102-484, October 23, 1992.

²⁶ Briefing on the Dubai Ports World Deal before the Senate Armed Services Committee, February 23, 2006.

approved by the members of CFIUS the firms could be assured that the investment transaction would be exempt from any future reviews or actions. This administrative change, however, meant that a CFIUS determination may no longer be a final decision and it added a new level of uncertainty to foreign investors seeking to acquire U.S. firms. A broad range of U.S. and international business groups objected to this change in the Bush Administration's policy.²⁷

The Amended CFIUS Process

In the first session of the 110th Congress, Congresswoman Maloney introduced H.R. 556, the National Security Foreign Investment Reform and Strengthened Transparency Act of 2007, on January 18, 2007. The measure was approved by the House Financial Services Committee on February 13, 2007, with amendments, and was approved with additional amendments by the full House on February 28, 2007, by a vote of 423 to 0. On June 13, 2007, Senator Dodd introduced S. 1610, the Foreign Investment and National Security Act of 2007. On June 29, 2007, the Senate adopted S. 1610 in lieu of H.R. 556 by unanimous consent. On July 11, 2007, the House accepted the Senate's version of H.R. 556 by a vote of 370-45 and sent the measure to the President, who signed it on July 26, 2007. It is designated as P.L. 110-49. On January 23, 2008, President Bush issued Executive Order 13456 implementing the law. The Executive Order makes a number of substantive changes to the law. This report incorporates the changes made by this statute and by the Executive Order.

P.L. 110-49 establishes CFIUS by statutory authority and has the Secretary of the Treasury serve as the Chairman of CFIUS. The measure follows the same pattern that was set by Executive Order by allotting the Committee 30 days to conduct a review, 45 days to conduct an investigation, and 15 days for the President to make his determination. The President retains his authority as the only officer with the authority to suspend or prohibit mergers, acquisitions, and takeovers, and the measure places additional requirements on firms that resubmitted a filing after previously withdrawing a filing before a full review is completed.

Over time, the three step Exon-Florio process apparently had evolved to include an informal stage of unspecified length of time that consists of an unofficial CFIUS determination prior to the formal filing with CFIUS. This type of informal review had developed because it likely served the interests of both CFIUS and the firms that were involved in an investment transaction. According to Treasury Department officials, this informal contact enabled "CFIUS staff to identify potential issues before the review process formally begins."²⁸ This informal process has continued under the provisions of P.L. 110-49.

Firms that are party to an investment transaction apparently have benefitted from this informal review in a number of ways. For one, it allowed firms additional time to work out any national security concerns privately with individual CFIUS members. Secondly, and perhaps more importantly, it provided a process for firms to avoid risking potential negative publicity that could arise if a transaction were to be blocked or otherwise labeled as impairing U.S. national security

²⁷ Kirchaessner, Stephanie, US Threat to Reopen Terms of Lucent and Alcatel Deal Mergers, *Financial Times*, December 1, 2006. P. 19; Pelofsky, Jeremy, Businesses Object to US move on foreign Investment, *Reuters News*, December 5, 2006.

²⁸ Testimony of Robert Kimmitt, Briefing on the Dubai Ports World Deal Before the Senate Armed Services Committee, February 23, 2006.

interests. For some firms, public knowledge of a CFIUS investigation has had a negative effect on the value of the firm's stock price.

After a lengthy review by CFIUS in 2000 of Verio, Inc., a U.S. firm that operates websites for businesses and provides internet services, was acquired by NTT Communications of Japan. Verio's stock price reportedly fell during the CFIUS investigation as a result of uncertainty in the market about prospects for the transaction. The CFIUS review was instigated by the FBI, which had expressed concerns during the initial review stage that the majority interest of the Japanese government in NTT could give it access to information regarding wiretaps that were being conducted on email and other Web-based traffic crossing Verio's computer system. After completing its investigation, however, CFIUS did not recommend that President Clinton block the transaction.

The potentially negative publicity that can be associated with a CFIUS investigation of a transaction apparently has had a major impact on the transactions CFIUS has investigated. Since 1990, nearly half of the transactions CFIUS investigated were terminated by the firms involved, because the firms decided to withdraw from the transactions rather than face a negative determination by CFIUS. In 2006, for instance, the prospects of a CFIUS investigation apparently was the major reason the Israeli firm Check Point Software Technologies decided to call off its proposed \$225 million acquisition of Sourcefire, a U.S. firm specializing in security appliances for protecting a corporation's internal computer networks. In addition, the decision by the China National Offshore Oil Company (CNOOC) to drop its proposed acquisition of Unocal oil company in 2005 was partly due to concerns by CNOOC about an impending CFIUS investigation of the transaction.

Between December 2009 and July 2010, two Chinese firms withdrew their proposed acquisitions of U.S. firms due to opposition from at least one CFIUS agency. In December 2009, the Chinese firm Northwest Nonferrous International Investment Corp., a subsidiary of China's largest aluminum producer attempted to acquire U.S.-based Firstgold due to objections by the U.S. Department of the Treasury that Firstgold had properties near sensitive military bases. In June 2010, China's Tangshan Caofedian Investment Corporation withdrew its proposed acquisition of Emcore, which makes components for fiber optics and solar panels due to "regulatory concerns."²⁹

For CFIUS members, the informal process has been beneficial because it has given them as much time as they have felt was necessary to review a transaction without facing the time constraints that arise under the formal CFIUS review process. This informal review likely has also given the CFIUS members added time to negotiate with the firms involved in a transaction to restructure the transaction in ways that have addressed any potential security concerns or to develop other types of conditions that members feel are appropriate in order to remove security concerns.

On January 23, 2008, President Bush issued Executive Order 13456, which implemented P.L. 110-49 and made various changes to the law. The Committee consists of nine members, including the Secretaries of State, the Treasury, Defense, Homeland Security, and Commerce; Energy; the Attorney General, the United States Trade Representative, and the Director of the Office of Science and Technology Policy.³⁰ The Secretary of Labor and the Director of National

²⁹ Kirchgaessner, Stephanie, US Blocks China Fibre Optics Deal Over Security, *Financial Times*, June 30, 2010.

³⁰ The United States Trade Representative and the Director of the Office of Science and Technology Policy were added (continued...)

Intelligence serve as ex officio members of the Committee.³¹ The Executive Order 13456 also added five more members to CFIUS in order to “observe and, as appropriate, participate in and report to the President.” The Director of the Office of Management and Budget, the Chairman of the Council of Economic Advisors, The Assistant to the President for National Security Affairs, the Assistant to the President for Economic Policy, and the Assistant to the President for Homeland Security and Counterterrorism. The President can also appoint temporary members to the Committee as he determines.

The law requires CFIUS to review all “covered” foreign investment transactions to determine whether a transaction threatens to impair the national security, or the foreign entity is controlled by a foreign government, or it would result in control of any “critical infrastructure that could impair the national security.” A covered foreign investment transaction is defined as any merger, acquisition, or takeover which results in “foreign control of any person engaged in interstate commerce in the United States.” According to Treasury Department regulations, investment transactions that are **not** considered to be covered transactions under the Exon-Florio provision and, therefore, not subject to a CFIUS review are those that are undertaken “solely for the purpose of investment, ” or an investment in which the foreign investor has “no intention of determining or directing the basic business decisions of the issuer.” In addition, investments that are solely for investment purposes are defined as those: (1) in which the transaction does not involve owning more than 10% of the voting securities of the firm; or (2) those investments that are undertaken directly by a bank, trust company, insurance company, investment company, pension fund, employee benefit plan, mutual fund, finance company, or brokerage company “in the ordinary course of business for its own account.”³² Other transactions that are not covered include: (1) stock splits or pro rata stock dividend that does not involve a change in control; (2) an acquisition of any part of an entity or of assets that do not constitute a U.S. business; (3) an acquisition of securities by a person acting as a securities underwriter, in the ordinary course of business and in the process of underwriting; and an acquisition pursuant to a condition in a contract of insurance relating to fidelity, surety, or casualty obligations if the contract was made by an insurer in the ordinary course of business. In addition, the Treasury regulations also stipulate that the extension of a loan or a similar financing arrangement by a foreign person to a U.S. business will not be considered a covered transaction and will not be investigated, unless the loan conveys a right to the profits of the U.S. business or involves a transfer of management decisions.

The statute itself does not provide a definition of the term “control,” but such a definition is included in the Treasury Department’s regulations. According to those regulations, control is not

(...continued)

through E.O. 13456, issued January 23, 2008.

³¹ Executive Order 11858 of May 7, 1975, 40 F.R. 20263 established the Committee with six members: the Secretaries of State, the Treasury, Defense, Commerce, and the Assistant to the President for Economic Affairs, and the Executive Director of the Council on International Economic Policy. Executive Order 12188, January 2, 1980, 45 F.R. 969, added the United States Trade Representative and substituted the Chairman of the Council of Economic Advisors for the Executive Director of the Council on International Economic Policy. Executive Order 12661, December 27, 1988, 54 F.R. 779, added the Attorney General and the Director of the Office of Management and Budget. Executive Order 12860, September 3, 1993, 58 F.R. 47201, added the Director of the Office of Science and Technology Policy, the Assistant to the President for National Security Affairs, and the Assistant to the President for Economic Policy. Executive Order 13286, Section 57, February 28, 2003, added the Secretary of Homeland Security. P.L. 110-49 reduced the membership of CFIUS to six Cabinet members and the Attorney General, it added the Secretary of Labor and the Director of National Security as ex officio members, and removed seven White House appointees.

³² 31 CFR 800.302.

defined as a numerical benchmark,³³ but instead focuses on a functional definition of control, or a definition that is governed by the influence the level of ownership permits the foreign entity to affect certain decisions by the firm. According to the Treasury Department's regulations:

The term control means the power, direct or indirect, whether or not exercised, and whether or not exercised or exercisable through the ownership of a majority or a dominant minority of the total outstanding voting securities of an issuer, or by proxy voting, contractual arrangements or other means, to determine, direct or decide matters affecting an entity; in particular, but without limitation, to determine, direct, take, reach or cause decisions regarding:

- (1) The sale, lease, mortgage, pledge or other transfer of any or all of the 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 alternation 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 this 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; or
- (10) The amendment of the Articles of Incorporation, constituent agreement, or other organizational documents of the entity with respect to the matters described at paragraph (a) (1) through (9) of this section.

The Treasury Department's regulations also provide some guidance to firms that are deciding whether they should notify CFIUS of a proposed or pending merger, acquisition, or takeover. The guidance states that proposed acquisitions that need to notify CFIUS are those that involve "products or key technologies essential to the U.S. defense industrial base." This notice is not intended for firms that produce goods or services with no special relation to national security,

³³ There are other statutes that do use numerical benchmarks. According to section 13(d) of the Securities Exchange Act of 1934 (15 U.S.C. Sec. 78m(d)) any person who acquires 5% or more of the publicly traded securities of a U.S. firm must report the acquisition of the shares to the Securities and Exchange Commission. For statistical purposes, the United States defines foreign direct investment as the ownership or control, directly or indirectly, by one foreign person (individual, branch, partnership, association, government, etc.) of 10% or more of the voting securities of an incorporated U.S. business enterprise or an equivalent interest in an unincorporated U.S. business enterprise 15 CFR § 806.15 (a)(1). This level of ownership requires foreign owners to file quarterly and longer annual reports with the Department of Commerce as part of the quarterly and annual reports on the balance of payments and gross domestic product (GDP).

especially toys and games, food products, hotels and restaurants, or legal services. CFIUS has indicated that in order to assure an unimpeded inflow of foreign investment it would implement the statute “only insofar as necessary to protect the national security,” and “in a manner fully consistent with the international obligations of the United States.”³⁴

Neither Congress nor the Administration have attempted to define the term national security. Treasury Department officials have indicated, however, that during a review or investigation each CFIUS member is expected to apply that definition of national security that is consistent with the representative agency’s specific legislative mandate.³⁵ The concept of national security was broadened by P.L. 110-49 to include, “those issues relating to ‘homeland security,’ including its application to critical infrastructure.”

Procedures

According to the amended Exon-Florio provision, the President or any member of CFIUS can initiate a review of an investment transaction in addition to a review that is initiated by the parties to a transaction providing a formal notification. As amended, CFIUS has 30 days to review a transaction to decide after it receives the initial formal notification by the parties to a merger, acquisition, or a takeover, whether to investigate a case as a result of its determination that the investment “threatens to impair the national security of the United States.” National security also includes, “those issues relating to ‘homeland security,’ including its application to critical infrastructure,” and “critical technologies.” In addition, CFIUS is required to conduct an investigation of a transaction if the Committee determines that the transaction would result in foreign control of any person engaged in interstate commerce in the United States. During such a review, the members of CFIUS are also required to consider the twelve factors that Congress has authored as a basis for assessing the impact of the investment. If during this 30 day period all of the members of CFIUS conclude that the investment does not threaten to impair the national security, the review is terminated. If, however, at least one member of the Committee determines that the investment does threaten to impair the national security CFIUS can proceed to a 45-day investigation.

During the 30-day review stage, the Director of National Intelligence, although not a member of CFIUS, is required to carry out a thorough analysis of “any threat to the national security of the United States” of any merger, acquisition, or takeover. This analysis is required to be completed “within 20 days” of the receipt of a notification by CFIUS, but the statute directs that the DNI must be given “adequate time,” presumably if this national security review cannot be completed within the 20 day requirement This analysis would include a request for information from the Department of the Treasury’s Director of the Office of Foreign Assets Control and the Director of the Financial Crimes Enforcement Network. In addition, the Director of National Intelligence is required to seek and to incorporate the views of “all affected or appropriate” intelligence agencies.

CFIUS is also required to review “covered” investment transactions in which the foreign entity is owned or controlled by a foreign government, but the law provides an exception to this requirement. A review is exempted if the Secretary of the Treasury and certain other specified

³⁴ Ibid.

³⁵ Senate Armed Services Committee, Briefing on the Dubai Ports World Ports Deal, February 23, 2006.

officials determine that the transaction in question will not impair the national security. It is somewhat unclear, however, how this requirement will mesh with the established process. The measure does not amend or alter the current statute in the area that has been the source of differences between CFIUS and Congress. In particular, the current statute states that the President, and through him CFIUS, can use the Exon-Florio process “only if” he finds that there is “credible evidence” that a foreign investment will impair national security. As a result, if CFIUS determines, as was the case in the Dubai Ports transaction, that it does not have credible evidence that an investment will impair the national security then it argues that it is not required to undertake a full 45-day investigation, even if the foreign entity is owned or controlled by a foreign government.

As a result of a CFIUS review, the President, acting through CFIUS, is also required to conduct a National Security investigation and to take any “necessary” actions as part of the 45-day investigation if the review indicates that at least one of three conditions exists. These three conditions are: (1) as a result of a review of the transaction, CFIUS determines that the transactions threaten to impair the national security of the United States and that the threat had not been mitigated during or prior to a review of the transaction; (2) the foreign person is controlled by a foreign government; or (3) the transactions would result in the control of any critical infrastructure by a foreign person, the transactions could impair the national security, and that such impairment had not been mitigated. At the conclusion of the investigation or the 45-day review period, whichever comes first, the Committee can decide to offer no recommendation or it can recommend that the President suspend or prohibit the investment. The President is under no obligation to follow the recommendation of the Committee to suspend or prohibit an investment.

During a review or an investigation, CFIUS and a designated lead agency have the authority to negotiate, impose, or enforce any agreement or condition with the parties to a transaction in order to mitigate any threat to the national security of the United States. Such agreements are to be based on a “risk-based analysis” of the threat posed by the transaction. Also, if a notification of a transaction is withdrawn before any review or investigation by CFIUS can be completed, the amended law grants the Committee the authority to take a number of actions. In particular, the Committee could develop (1) interim protections to address specific concerns about the transaction pending a re-submission of a notice by the parties; (2) specific time frames for re-submitting the notice; and (3) a process for tracking any actions taken by any parties to the transaction.

Factors for Consideration

The Exon-Florio provision includes a list of twelve factors the President must consider in deciding to block a foreign acquisition. These factors are also considered by the individual members of CFIUS as part of their own review process to determine if a particular transaction threatens to impair the national security. This list includes the following elements:

- (1) domestic production needed for projected national defense requirements;
- (2) the capability and capacity of domestic industries to meet national defense requirements, including the availability of human resources, products, technology, materials, and other supplies and services;
- (3) the control of domestic industries and commercial activity by foreign citizens as it affects the capability and capacity of the U.S. to meet the requirements of national security;

(4) the potential effects of the transactions on the sales of military goods, equipment, or technology to a country that supports terrorism or proliferates missile technology or chemical and biological weapons; and transactions identified by the Secretary of Defense as “posing a regional military threat” to the interests of the United States;

(5) the potential effects of the transaction on U.S. technological leadership in areas affecting U.S. national security;

(6) whether the transaction has a security-related impact on critical infrastructure in the United States;

(7) the potential effects on United States critical infrastructure, including major energy assets;

(8) the potential effects on United States critical technologies;

(9) whether the transaction is a foreign government-controlled transaction;

(10) in those cases involving a government-controlled transaction, a review of (A) the adherence of the foreign country to nonproliferation control regimes, (B) the foreign country’s record on cooperating in counter-terrorism efforts, (C) the potential for transshipment or diversion of technologies with military applications,;

(11) the long-term projection of the United States requirements for sources of energy and other critical resources and materials; and

(12) such other factors as the President or the Committee determine to be appropriate.³⁶

Factors 6-12 that were added through P.L.-110-49 potentially broaden significantly the scope of CFIUS’ reviews and investigations. Previously, CFIUS had been directed by Treasury Department regulations to focus its activities primarily on investments that had an impact on U.S. national defense security. The additional factors, however, incorporate economic considerations into the Exon-Florio process in a way that was specifically rejected when the measure initially was adopted and refocuses CFIUS’s reviews and investigations to consider the broader rubric of economic security. In particular, CFIUS is now required to consider the impact of an investment on critical infrastructure as a factor for considering recommending that the President block or postpone a transaction. Critical infrastructure is defined in broad terms within the measure as: “any systems and assets, whether physical or cyber-based, so vital to the United States that the degradation or destruction of such systems or assets would have a debilitating impact on national security, including national economic security and national public health or safety.”

As originally drafted, the Exon-Florio provision also would have applied to joint ventures and licensing agreements in addition to mergers, acquisitions, and takeovers. Joint ventures and licensing agreements subsequently were dropped from the proposal because the Reagan Administration and various industry groups argued at the time that such business practices were deemed to be beneficial arrangements for U.S. companies. In addition, they argued that any

³⁶ The last requirement under factor 4 and factors 6-12 were added by P.L. 110-49.

potential threat to national security could be addressed by the Export Administration Act³⁷ and the Arms Control Export Act.³⁸

Confidentiality Requirements

The Exon-Florio provision also codified confidentiality requirements that are similar to those that appeared in Executive Order 11858 by stating that any information or documentary material filed under the provision may not be made public “except as may be relevant to any administrative or judicial action or proceeding.”³⁹ The provision does state, however, that this confidentiality provision “shall not be construed to prevent disclosure to either House of Congress or to any duly authorized committee or subcommittee of the Congress.” The provision provides for the release of proprietary information “which can be associated with a particular party” to committees only with assurances that the information will remain confidential. Members of Congress and their staff members will be accountable under current provisions of law governing the release of certain types of information. The Exon-Florio provision requires the President to provide a written report to the Secretary of the Senate and the Clerk of the House detailing his decision and his actions relevant to any transaction that was subject to a 45-day investigation.⁴⁰

Mitigation and Tracking

Since the implementation of the Exon-Florio provision in the 1980s, CFIUS had developed several informal practices that likely were not envisioned when the statute was drafted. In particular, members of CFIUS on occasion had negotiated conditions with firms to mitigate or to remove business arrangement that raised national security concerns among the members of CFIUS. Such agreements often were informal arrangements that had an uncertain basis in statute and had not been tested in court. These arrangements often were negotiated during the formal 30-day review period, or even during an informal process prior to the formal filing of a notice of an investment transaction.

CFIUS must designate a lead agency to negotiate, modify, monitor, and enforce agreements in order to mitigate any threat to national security. Such agreements are required to be based on a “risk-based analysis” of the threat posed by the transaction. CFIUS is also required to develop a method for evaluating the compliance of firms that have entered into a mitigation agreement or condition that was imposed as a requirement for approval of the investment transaction. Such measures, however, are required to be developed in such a way that they allow CFIUS to determine that compliance is taking place without also: (1) “unnecessarily diverting” CFIUS resources from assessing any new covered transaction for which a written notice had been filed; and (2) placing “unnecessary” burdens on a party to a investment transaction.

On February 20, 2008, Bain Capital and Huawei Technologies withdrew their offer to acquire the network and software firm, 3Com for \$2.2 billion, due to an inability to successfully negotiate a mitigation agreement with members of CFIUS. Bain Capital is a privately-held asset management and investment firm, and Huawei Technologies is the largest networking and telecommunications

³⁷ 50 U.S.C. App. Sec. 2401, as amended.

³⁸ 22 U.S.C. App. 2778 et seq.

³⁹ 50 U.S.C. Appendix Sec. 2170(c)

⁴⁰ 50 U.S.C. Appendix Sec. 2170(g).

equipment supplier in China. 3Com is a publicly held company that specializes in networking equipment and in the Tipping Point network intrusion prevention software. Such software is used by various U.S. defense firms to prevent outside groups from accessing their confidential databases. Bain Capital and Huawei reportedly withdrew their proposal after they failed to agree to terms with CFIUS over a mitigation agreement and stated that they would restructure the deal and resubmit it at a later date in 2008.⁴¹

If a notification of a transaction is withdrawn before any review or investigation by CFIUS can be completed, CFIUS can take a number of actions, including (1) interim protections to address specific concerns about the transaction pending a re-submission of a notice by the parties; (2) specific time frames for re-submitting the notice; and (3) a process for tracking any actions taken by any party to the transaction. Also, any federal entity or entities that are involved in any mitigation agreement are to report to CFIUS if there is any modification that is made to any agreement or condition that had been imposed and to ensure that “any significant” modification is reported to the Director of National Intelligence and to any other federal department or agency that “may have a material interest in such modification.” Such reports are required to be filed with the Attorney General.

Congressional Oversight

P.L. 110-49 significantly increases the types and number of reports that CFIUS is required to send to certain specified Members of Congress. In particular, CFIUS is required to brief certain congressional leaders if they request such a briefing and to report annually to Congress on any reviews or investigations that it had conducted during the prior year. Each report must include a list of all reviews and investigations that had been conducted, information on the nature of the business activities of the parties involved in an investment transaction, information about the status of the review or investigation, and information on any withdrawal from the process, any roll call votes by the Committee, any extension of time for any investigation, and any presidential decision or action taken under the Exon-Florio provision. In addition, CFIUS is required to report on trend information on the number of filings, investigations, withdrawals, and presidential decisions or actions that were taken. The report must include cumulative information on the business sectors involved in filings and the countries from which the investments originated; information on the status of the investments of companies that withdrew notices and the types of security arrangements and conditions CFIUS used to mitigate national security concerns; the methods the Committee used to determine that firms were complying with mitigation agreements or conditions; and a detailed discussion of all perceived adverse effects of investment transactions on the national security or critical infrastructure of the United States.

The Secretary of the Treasury, in consultation with the Secretary of State and the Secretary of Commerce, is required to conduct a study on investment in the United States, particularly in critical infrastructure and industries affecting national security by: (1) foreign governments, entities controlled by or acting on behalf of a foreign government, or persons of foreign countries which comply with any boycott of Israel; or (2) foreign governments, entities controlled by or acting on behalf of a foreign government, or persons of foreign countries which do not ban organizations designated by the Secretary of State as foreign terrorist organizations. In addition, CFIUS is required to provide an annual evaluation of any credible evidence of a coordinated

⁴¹ US Insiders Point to Bain Errors Over 3Com, *The Financial Times Limited*, march 3, 2008.

strategy by one or more countries or companies to acquire U.S. companies involved in research, development, or production of critical technologies in which the United States is a leading producer. The report must include an evaluation of possible industrial espionage activities directed or directly assisted by foreign governments against private U.S. companies aimed at obtaining commercial secrets related to critical technologies.

The Inspector General of the Department of the Treasury is required to investigate any failure of CFIUS to comply with requirements for reporting that were imposed prior to the passage of P.L. 110-49 and to report the findings of this report to the Congress. In particular, the report must be sent to the chairman and ranking member of each committee of the House and the Senate with jurisdiction over any aspect of the report, including the Committee on Foreign Relations, the Committee on Foreign Affairs, the Committee on Financial Services, and the Committee on Energy and Commerce of the House.

The chief executive officer of any party to a merger, acquisition, or takeover is required to certify in writing that the information contained in the written notification to CFIUS fully complies with the requirements of the Exon-Florio provision and that the information is accurate and complete. This written notification would also include any mitigation agreement or condition that was part of a CFIUS approval.

CFIUS Since Exon-Florio

Recent information indicates that the number of cases reviewed by CFIUS declined between 1999 and 2006. In part, the decline reflects the slowdown in foreign investment activity in the United States generally that occurred between 1998 and 2003, and again in 2008, as indicated in **Table 1**. Based on the number of transactions per year, acquisitions of U.S. firms by other U.S. firms has accounted for the largest share of all merger and acquisition (M&A) transactions over the past ten years. This share fell from 76% of all U.S. M&A transactions in 1996 to 71.7% in 2006, but that was up from a low of 68% recorded in 2001. The share of M&A activity attributed to foreign firms acquiring U.S. firms in 2006 accounts for 14.6% of all such transactions, up from 9% in 1996. Reviews reportedly have increased since the Dubai Ports World case in 2006 as a result of greater uncertainty among foreign investors about U.S. policies and attitudes toward foreign investment.

Table 1. Merger and Acquisition Activity in the United States, 1996-2006

	Total Number of Mergers and Acquisitions	U.S. Firms Acquiring U.S. Firms	Non-U.S. Firms Acquiring U.S. Firms	U.S. Firms Acquiring Non-U.S. Firms
1996	7,347	5,585	628	1,134
1997	8,479	6,317	775	1,387
1998	10,193	7,575	971	1,647
1999	9,173	6,449	1,148	1,576
2000	8,853	6,032	1,264	1,557
2001	6,296	4,269	923	1,104
2002	5,497	3,989	700	808

	Total Number of Mergers and Acquisitions	U.S. Firms Acquiring U.S. Firms	Non-U.S. Firms Acquiring U.S. Firms	U.S. Firms Acquiring Non-U.S. Firms
2003	5,959	4,357	722	880
2004	7,031	5,084	813	1,134
2005	7,600	5,463	977	1,160
2006	8,621	6,105	1,142	1,374
2007	9,477	6,505	1,408	1,564
2008	7,626	5,172	1,127	1,327

Source: *Mergers & Acquisitions*, February 2009.

In addition to a lower overall level of investment activity, the lower case load experienced by CFIUS may reflect the impact of the informal CFIUS review process that developed over time. This process gave firms the opportunity to reconsider their investments if they believed they could face a difficult CFIUS review or if they believed the transaction could be subjected to a formal 45-day investigation with its potentially negative connotations regarding national security concerns. In addition, some observers argue that the case load diminished following the September 11, 2001, terrorists attacks on the United States due to the organization of the Department of Homeland Security (DHS), which has participated actively in the CFIUS process and has raised security concerns. These concerns may have caused some firms to reconsider their investment transactions before they had progressed very far in the formal CFIUS process in order to avoid a long and involved investigation by DHS.⁴²

As a consequence of the confidential nature of the CFIUS review of any proposed transaction, there are few official sources of information concerning the Committee's work to date. For the most part, information concerning individual transactions that have been reviewed by CFIUS or any final recommendations that have been issued by CFIUS have come from announcements released by the companies involved in a transaction and not by CFIUS. According to one source,⁴³ CFIUS has received more than 1,500 notifications since 1988, of which it conducted a full investigation of 25 cases. Of these 25 cases, thirteen transactions were withdrawn upon notice that CFIUS would conduct a full review and twelve of the remaining transactions cases were sent to the President. Of these twelve transactions, one was prohibited.⁴⁴

Impact of the Exon-Florio Process on CFIUS

The DP World case exposed a number of important aspects of CFIUS' operations that apparently were not well known or understood by the public in general. Many of these concerns were addressed in P.L. 110-49. As already indicated, the Exon-Florio provision stipulates a three-step process: the formal notification to CFIUS and a 30-day review; a 45-day investigation for those transactions that raised national security concerns during the 30-day review and for those in

⁴² Marchick, David. Testimony Before the House Financial Services Committee, March 1, 2006.

⁴³ CFIUS, *The Washington Post*, July 3, 2005. p. F3.

⁴⁴ Auerbach, Stuart. "President Tells China to Sell Seattle Firm." *The Washington Post*, February 3, 1990. p. A1; and Benham, Barbara. "Blocked Takeover Fuels Foreign Policy Flap." *Investor's Daily*, February 8, 1990. p. 1.

which the concerns were not resolved during the review period; and a 15-day Presidential determination stage for those transactions that were determined after the 45-day review to pose an impairment to national security. Over time, however, this process apparently evolved to include an informal fourth stage of unspecified length of time that consists of an unofficial CFIUS determination prior to the formal filing with CFIUS. This type of informal review developed because it likely has served the interests of both CFIUS and the firms involved in an investment transaction. According to Treasury Department officials, this informal contact enables “CFIUS staff to identify potential issues before the review process formally begins.”⁴⁵ This informal process is likely to continue under the provisions of P.L. 110-49. An important difference, however, is that CFIUS gained legislative authority under P.L. 110-49 to negotiate and enforce agreements with foreign investors to mitigate the effects of an investment transaction on national security.

Firms that are party to a transaction apparently have benefitted from this informal review in a number of ways. For one, it has allowed firms additional time to work out any national security concerns privately with individual CFIUS members. Secondly, and perhaps more importantly, it has provided a process for firms to avoid risking the potentially negative publicity that could arise if a transaction were to be blocked or otherwise labeled as impairing U.S. national security interests. For some firms, public knowledge of a CFIUS investigation has had a negative effect on the value of the firm’s stock price.

After a lengthy review by CFIUS in 2000 of Verio, Inc., a U.S. firm that operates websites for businesses and provides internet services, was acquired by NTT Communications of Japan. Verio’s stock price reportedly fell during the CFIUS investigation as a result of uncertainty in the market about prospects for the transaction. The CFIUS review was instigated by the FBI, which had expressed concerns during the initial review stage that the majority interest of the Japanese government in NTT could give it access to information regarding wiretaps that were being conducted on email and other Web-based traffic crossing Verio’s computer system. After completing its investigation, however, CFIUS did not recommend that President Clinton block the transaction.

The potentially negative publicity that can be associated with a CFIUS investigation of a transaction apparently has had a major impact on the transactions CFIUS has investigated. Since 1990, nearly half of the transactions CFIUS investigated were terminated by the firms involved, because the firms decided to withdraw from the transaction rather than face a negative determination by CFIUS. In 2006, for instance, the prospects of a CFIUS investigation apparently was the major reason the Israeli firm Check Point Software Technologies decided to call off its proposed \$225 million acquisition of Sourcefire, a U.S. firm specializing in security appliances for protecting a corporation’s internal computer networks. In addition, the decision by the China National Offshore Oil Company (CNOOC) to drop its proposed acquisition of Unocal oil company in 2005 was partly due to concerns by CNOOC about an impending CFIUS investigation of the transaction.

For CFIUS members, the informal process has been beneficial because it has given them as much time as they have felt was necessary to review a transaction without facing the time constraints that arise under the formal CFIUS review process. This informal review likely has also given the

⁴⁵ Testimony of Robert Kimmett, Briefing on the Dubai Ports World Deal before the Senate Armed Services Committee, February 23, 2006.

CFIUS members added time to negotiate with the firms involved in a transaction to restructure the transaction in ways that have addressed any potential security concerns or to develop other types of conditions that members of CFIUS feel are appropriate in order to remove security concerns.

The DP World acquisition demonstrated how this informal CFIUS process operates in reviewing a proposed foreign investment transaction. According to officials involved in the review, DP World officials contacted the Treasury Department in early October 2005 to informally discuss their proposed transaction. Treasury officials directed DP World to consult with the Department of Homeland Security and in November the Treasury officials requested an intelligence assessment from the Director of National Intelligence. Staff representatives from all of the CFIUS members met on December 6, 2005, to discuss the transaction, apparently to determine if there were any security concerns that had not been addressed and resolved during the two-month long informal review of the proposed transaction.

Ten days after that meeting, DP World filed its official notification with CFIUS, which distributed the notification to all of the CFIUS members and to the Departments of Energy and Transportation. During this process, the Department of Homeland Security apparently negotiated a letter of assurances with DP World that addressed some outstanding concerns about port security. On the basis of this letter and the lack of any remaining concerns expressed by any member of CFIUS or other agencies that were consulted, CFIUS completed its review of the transaction on January 17, 2006, and concluded that the transaction did not threaten to impair the national security and therefore that it did not warrant a 45-day investigation.⁴⁶

Conclusions

On July 26, 2007, President Bush signed **P.L. 110-49**, the Foreign Investment and National Security Act of 2007. The Treasury Department released its regulations implementing this law on November 21, 2008, as the global financial crisis was the focus of attention. In 2008, tight credit conditions associated with the global financial crisis and the slowdown in the rate of growth in the U.S. economy retarded merger and acquisition activities in the United States and abroad. There has been no particular foreign acquisition that has provoked a public backlash comparable to some acquisitions that occurred prior to the financial crisis. To date, the Obama Administration has not issued a formal statement on foreign investment that facilitates an assessment of areas of disagreement with the activities of the Bush Administration. Some in Congress and elsewhere are dissatisfied, however, that the legislation in its present form does not address a broad range of issues concerning foreign investment. For instance, when the measure was debated and approved, the extent and nature of sovereign wealth funds (SWFs) in which entities controlled by foreign governments invest in U.S. firms was relatively unknown. In addition, the sub-prime mortgage crisis was just emerging and foreign investors had not yet taken substantial stakes in prominent U.S. financial firms. These investments are challenging some established notions of the role of foreign investment in the economy and the concept of what role economic issues play within the rubric of national security.

These and other concerns about foreign investment underscore the significant differences that remained between Congress and the Bush Administration over the operations of CFIUS and over

⁴⁶ *Ibid.*

the economic and security objectives the Committee should pursue. The proposed acquisition of P&O by Dubai Ports World sparked a broader set of concerns and a wide-ranging discussion between Congress and the Bush Administration over a working set of parameters that establishes a functional definition of the national economic security implications of foreign direct investment. In part, this issue reflects differing assessments of the economic impact of foreign investment on the U.S. economy and differing political and philosophical convictions among Members and between the Congress and the Administration.

The incident also focused attention on the informal process firms use to have their investment transactions reviewed by CFIUS prior to a formal review. According to anecdotal evidence, some firms apparently believe that the CFIUS process is not market neutral, but that it adds to market uncertainty that can negatively affect a firm's stock price and lead to economic behavior by some firms that is not optimal for the economy as a whole. Such behavior might involve firms expending a considerable amount of resources to avoid a CFIUS investigation, or deciding to terminate a transaction that would improve the optimal performance of the economy in order to avoid a CFIUS investigation. While such anecdotal evidence does not provide enough evidence to serve as the basis for developing public policy, it does raise a number of concerns about the possible impact of the CFIUS process on the market and the potential costs of redefining the concept of national security relative to foreign investment.

The focus by Congress on the Committee has also shown that the DP World transaction, in combination with other recent unpopular foreign investment transactions, exacerbated dissatisfaction among some Members of Congress over the operations of CFIUS. In particular, some Members were displeased with the discretionary authority the Committee used under the Exon-Florio provision to investigate certain foreign investment transactions. As a result, Congress changed the process to require more frequent contacts between the Committee, which generally operates without much public or congressional attention, and the Congress. Congress also expanded its oversight role over the Committee.

The DP World transaction also revealed that the September 11, 2001, terrorist attacks fundamentally altered the viewpoint of some Members of Congress regarding the role of foreign investment in the economy and over the impact of such investment on the national security framework. These observers argued that this change in perspective required a reassessment of the role of foreign investment in the economy and of the implications of corporate ownership of activities that fall under the rubric of critical infrastructure. As a result, Congress amended the CFIUS process to enhance Congress's oversight role while it reduced somewhat the discretion of CFIUS to review and investigate foreign investment transactions in order to have CFIUS investigate a larger number of foreign investment cases. In addition, the DP World transaction focused attention on long-unresolved issues concerning the role of foreign investment in the nation's overall security framework and the methods that are being used to assess the impact of foreign investment on the nation's defense industrial base, critical infrastructure, and homeland security.

Most economists agree that there is little economic evidence to conclude that foreign ownership, whether by a private entity or by an entity that is owned or controlled by a foreign government, has a measurable impact on the U.S. economy. Others may argue that such firms pose a risk to national security or to homeland security, but such concerns are not within the purview of this report. Similar issues concerning corporate ownership were raised during the late 1980s and early 1990s when foreign investment in the U.S. economy increased rapidly. There are little new data, however, to alter the conclusion reached at that time that there is no definitive way to assess the

economic impact of foreign ownership or of foreign investment on the economy. Although some observers have expressed concerns about foreign investors who are owned or controlled by foreign governments acquiring U.S. firms, there is little confirmed evidence that such a distinction in corporate ownership has any effect on the economy as whole.

For most economists, the distinction between domestic- and foreign-owned firms, whether the foreign firms are privately owned or controlled by a foreign government, is sufficiently small that they would argue that it does not warrant placing restrictions on the inflow of foreign investment. Nevertheless, foreign direct investment does entail various economic costs and benefits. On the benefit side, such investments bring added capital into the economy and potentially could add to productivity growth and innovation. Such investment also represents one repercussion of the U.S. trade deficit. The deficit transfers dollar-denominated assets to foreign investors, who then decide how to hold those assets by choosing among various investment vehicles, including direct investment. Foreign investment also removes a stream of monetary benefits from the economy in the form of repatriated capital and profits that reduces the total amount of capital in the economy. Such costs and benefits likely occur whether the foreign owner is a private entity or a foreign government.

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