

# CRS Report for Congress

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

Updated January 25, 2007

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

## Summary

The Committee on Foreign Investment in the United States (CFIUS) is comprised of 12 members representing major departments and agencies within the federal Executive Branch. While the group generally operates 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 109<sup>th</sup> Congress 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 is not market neutral, instead a CFIUS investigation of an investment transaction may be perceived by some firms and by some in the financial markets as a negative factor that adds to uncertainty and may spur firms to engage in behavior that is not optimal for the economy as a whole.

As a result of the attention focused on the Dubai Ports World transaction, Members of Congress introduced more than two dozen measures on foreign investment in the 109<sup>th</sup> Congress. These measures reflected various levels of unease with the broad discretionary authority Congress has granted CFIUS. As a result, most measures would have placed new reporting requirements on CFIUS and strengthen Congress's ability to exercise oversight over CFIUS through the federal agencies that comprise the Committee. Such measures as **H.R. 4813** and **H.R. 4917** would have placed new reporting requirements on CFIUS to inform Congress when it initiated an investigation of a proposed acquisition, merger, or takeover. Other measures would have reduced CFIUS's discretion in deciding whether to investigate a foreign investment transaction. **H.R. 4929** would have limited CFIUS's discretion by mandating that an investigation must occur for any proposed or pending merger, acquisition, or takeover. **H.R. 5337** would have made substantial changes to CFIUS and to the Exon-Florio process. H.R. 5337 was approved unanimously, without amendment by the full House, on July 26, 2006. **S. 1797** would have increased requirements for reporting to Congress, and would have required CFIUS to consider the long-term projections of the United States requirements for sources of energy and other critical resources and materials and for economic security. **S. 2380** would have added a new national security review to the CFIUS process and the Secretary of Homeland Security and the Secretary of Defense as vice chairs of the Committee. **S. 3549** would have added to the list of factors CFIUS and the President would consider in taking action against an investment and it would have provided for a system of assessing countries as a factor in review or investigating investments. The measure was passed, with amendments, by the full Senate on July 26, 2006. The 109<sup>th</sup> Congress ended before a Conference Committee could be convened on H.R. 5337 or S. 3549 and both measures lapsed. The 110<sup>th</sup> Congress is expected to consider similar measures. This report will be updated as events warrant.

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

## 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. Since it was established by an Executive Order of President Ford in 1975, the committee has operated in relative obscurity.<sup>1</sup> 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 Organization of the Petroleum Exporting Countries (OPEC) investments 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.<sup>2</sup>

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)<sup>3</sup> in six U.S. ports by Dubai Ports World (DP World)<sup>4</sup> sparked a firestorm of criticism and congressional activity during the 109<sup>th</sup> 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 have been fundamentally altered as a result of the September 11, 2001 terrorist attacks on the United States and that these changes require 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

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

<sup>2</sup> 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.)

<sup>3</sup> 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.

<sup>4</sup> 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.

announced that they would sell off the U.S. port operations to an American owner.<sup>5</sup> On December 11, 2006, DP World officials announced that a unit of AIG Global Investment Group, a New York-based asset management company with \$683 billion in assets, but no experience in port operations, would acquire the U.S. port operations for an undisclosed amount.<sup>6</sup>

Members of Congress introduced more than 25 bills in the 2<sup>nd</sup> Session of the 109<sup>th</sup> Congress that would have addressed various aspects of foreign investment since the proposed DP World transaction. The Congressional session ended before a Conference Committee could be convened to work out differences between the measures. Similar measures likely will be introduced in the First Session of the 110<sup>th</sup> Congress. The measures can be grouped into four major areas: those that deal specifically with the proposed DP World acquisition; those that focus more generally on foreign ownership of U.S. ports, especially if the foreign entity is owned or controlled by a foreign government; those that would amend the CFIUS process; and those that would amend the Exon-Florio process (explained below). Six bills focus primarily on CFIUS and display a range of responses by some Members of Congress. These bills are examined in more depth later in this report. The measures seem to indicate that some Members are concerned over the way in which CFIUS operates and the lack of transparency in the process that some Members believe has hampered Congress's ability to exercise its oversight responsibilities.

## Establishment of CFIUS

President Ford's 1975 Executive Order established the basic structure of CFIUS, and directed that the "representative"<sup>7</sup> 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 judgement of the Committee, might have major implications for United States national interests; and

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

<sup>6</sup> 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.

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

(4) consider proposals for new legislation or regulations relating to foreign investment as may appear necessary.<sup>8</sup>

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.

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.<sup>9</sup> 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."<sup>10</sup>

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.<sup>11</sup> One

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

<sup>9</sup> P.L. 94-472, Oct 11, 1976; 22 USC 3101.

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

<sup>11</sup> 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 (continued...)

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?”<sup>12</sup>

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.<sup>13</sup>

## 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. This statute grants the President the authority to block proposed or pending foreign acquisitions of “persons engaged in interstate commerce in the United States” that threaten to impair the national security. Congress directed, however, that before this authority can be invoked the President is expected to believe 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.

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

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<sup>11</sup> (...continued)

Government Operations. H.Rept. 96-1216, 96th Cong., 2d Sess. Washington, U.S. Govt. Print. Off., 1980. 166-184.

<sup>12</sup> *The Operations of Federal Agencies*, part 3, p. 5.

<sup>13</sup> 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.

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.<sup>14</sup>

Although Commerce Secretary Malcolm Baldrige and Defense Secretary Casper Weinberger failed in their attempt to have President Reagan block the Fujitsu acquisition, Fujitsu and Schlumberger called off the proposed sale of Fairchild.<sup>15</sup> While Fairchild was acquired some months later by National Semiconductor Corp. for a discount,<sup>16</sup> 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.<sup>17</sup>

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.<sup>18</sup> 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 Banking Committee as a result of a dispute over jurisdictional responsibilities.<sup>19</sup>

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 providing a cursory role for itself 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 impact of certain types of foreign investment with the nation's long-standing international commitment to maintain an open and receptive environment for foreign investment

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<sup>14</sup> Auerbach, Stuart. Cabinet to Weigh Sale of Chip Firm. *The Washington Post*, March 12, 1987. p. E1.

<sup>15</sup> Sanger, David E. Japanese Purchase of Chip Maker Canceled After Objections in U.S. *The New York Times*, March 17, 1987. p. 1.

<sup>16</sup> Pollack, Andrew. Schlumberger Accepts Offer. *The New York Times*, September 1, 1987. p. D1.

<sup>17</sup> Kilborn, Peter T. Curb Asked On Foreign Takeovers. *The New York Times*, March 18, 1987. p. D1.

<sup>18</sup> P.L. 100-418.

<sup>19</sup> Testimony of Patrick A. Mulloy before the Committee on Banking, Housing, & Urban Affairs, October 20, 2005.



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.<sup>20</sup> 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,<sup>21</sup> 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. Presently, the Committee consists of twelve members, including the Secretaries of State, the Treasury, Defense, Homeland Security, and Commerce; the United States Trade Representative; the Chairman of the Council of Economic Advisers; the Attorney General; the Director of the Office of Management and Budget; 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.<sup>22</sup>

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<sup>20</sup> CRS Report RL33103, *Foreign Investment in the United States: Major Federal Restrictions*, by Michael V. Seitzinger.

<sup>21</sup> Executive Order 12661 of December 27, 1988, 54 F.R. 779.

<sup>22</sup> 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 Advisers 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.

## Procedures

According to the Exon-Florio provision, CFIUS has 30 days 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.” 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. 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.

## Factors for Consideration

The Exon-Florio provision includes a short list of factors the President *may* 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
- (5) the potential effects of the transaction on U.S. technological leadership in areas affecting U.S. national security.

The first two factors emphasize the national defense aspects of foreign acquisitions, while the other three factors highlight national security implications of such investment. No clear definition is provided in the legislation for what constitutes “national security” or foreign “control,” but CFIUS’ regulations state that control is, “the power, whether or not exercised, to formulate, determine, direct, or

decide important matters relating to the entity.”<sup>23</sup> While national security might be interpreted broadly to include a range of economic issues, neither Congress nor the Administration attempted to define the term. Treasury Department officials have indicated that during an Exon-Florio 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.<sup>24</sup>

The Treasury Department has provided some guidance to firms 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, 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.”<sup>25</sup>

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 Administration and various industry groups argued that such business practices are generally beneficial arrangements for U.S. companies. In addition, they argued that any potential threat to national security could be addressed by the Export Administration Act<sup>26</sup> and the Arms Control Export Act.<sup>27</sup>

## 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.”<sup>28</sup> 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 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

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<sup>23</sup> Regulations Pertaining to Mergers, Acquisitions, and Takeover by Foreign Persons. 31 CFR Sec. 800.

<sup>24</sup> Senate Armed Services Committee, Briefing on the Dubai Ports World Ports Deal, February 23, 2006.

<sup>25</sup> Ibid.

<sup>26</sup> 50 U.S.C. App. Sec. 2401, as amended.

<sup>27</sup> 22 U.S.C. App. 2778 et seq.

<sup>28</sup> 50 U.S.C. Appendix Sec. 2170(c)

any transaction that was subject to a 45-day investigation.<sup>29</sup> As presently written, there is no requirement for CFIUS or the President to notify or otherwise inform Congress of cases it reviews or of the outcome of any investigation.

## Treasury Department Regulations

After extensive public comment, the Treasury Department issued its final regulations in November 1991 implementing the Exon-Florio provision.<sup>30</sup> These regulations created an essentially voluntary system of notification by the parties to an acquisition and they allow 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 indicate that notifications provided to the Committee are considered to be confidential and the information is not released by the Committee to the press or commented on publicly.

## 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.<sup>31</sup>

This amendment came under intense scrutiny by the 109<sup>th</sup> 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

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<sup>29</sup> 50 U.S.C. Appendix Sec. 2170(g).

<sup>30</sup> Regulations Pertaining to Mergers, Acquisitions, and Takeovers by Foreign Persons. 31 C.F.R. Part 800.

<sup>31</sup> P.L. 102-484, Oct. 23, 1992.

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 interpret the amendment to mean that a 45-day investigation is 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.”<sup>32</sup>

## CFIUS Since Exon-Florio

Recent information indicates that the number of cases reviewed by CFIUS has declined since the late 1990s. In part, the decline reflects the slowdown in foreign investment activity in the United States generally that occurred between 1998 and 2003, 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 72% in 2005, 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 2005 accounts for 13% of all such transactions, up from 9% in 1996.

In addition to a lower overall level of investment activity, the lower case load experienced by CFIUS may reflect the impact of an informal CFIUS review process that has developed over time. This process gives firms the opportunity to reconsider their investments if they believe they could face a difficult CFIUS review or if they believe 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<sup>th</sup>, 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.<sup>33</sup>

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<sup>32</sup> Briefing on the Dubai Ports World Deal before the Senate Armed Services Committee, February 23, 2006.

<sup>33</sup> Marchick, David. Testimony Before the House Financial Services Committee, March 1, 2006.

**Table 1. Merger and Acquisition Activity in the United States, 1996-2005**

|      | <b>Total Number<br/>of Mergers and<br/>Acquisitions</b> | <b>U.S. Firms<br/>Acquiring<br/>U.S. Firms</b> | <b>Non-U.S. Firms<br/>Acquiring<br/>U.S. Firms</b> | <b>U.S. Firms<br/>Acquiring<br/>Non-U.S. Firms</b> |
|------|---------------------------------------------------------|------------------------------------------------|----------------------------------------------------|----------------------------------------------------|
| 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                                                |
| 2003 | 5,959                                                   | 4,357                                          | 722                                                | 880                                                |
| 2004 | 7,031                                                   | 5,084                                          | 813                                                | 1,134                                              |
| 2005 | 7,298                                                   | 5,274                                          | 936                                                | 1,088                                              |

**Source:** *Mergers & Acquisitions*, February 2006.

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,<sup>34</sup> 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.<sup>35</sup>

## **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. 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 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 has evolved to include an informal fourth stage of unspecified length of time that consists of an unofficial

<sup>34</sup> CFIUS, *The Washington Post*, July 3, 2005. p. F3.

<sup>35</sup> 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.

CFIUS determination prior to the formal filing with CFIUS. This type of informal review has developed because it likely serves 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.”<sup>36</sup>

Firms that are party to a transaction apparently benefit from this informal review in a number of ways. For one, it allows firms additional time to work out any national security concerns privately with individual CFIUS members. Secondly, and perhaps more importantly, it provides 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 is beneficial because it gives them as much time as they feel is necessary to review a transaction without facing the time constraints that arise under the formal CFIUS review process. This informal review likely also gives the CFIUS members added time to negotiate with the firms involved in a transaction to restructure the transaction in ways that address any potential security concerns or to develop other types of conditions that members of CFIUS feel are appropriate in order to remove security concerns.

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<sup>36</sup> Testimony of Robert Kimmett, Briefing on the Dubai Ports World Deal before the Senate Armed Services Committee, February 23, 2006.

The DP World acquisition demonstrated how this informal CFIUS process can operate 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.<sup>37</sup>

## Actions in the 109<sup>th</sup> Congress

Following the public attention that focused on the DP World transaction in mid-February 2006, Members of Congress introduced more than two dozen bills that related directly or closely to the proposed transaction. The bills range in focus from blocking the DP World transaction to revamping the CFIUS process. These measures can be grouped into four major areas: those that deal specifically with the proposed Dubai Ports World acquisition; those that focus more generally on foreign ownership of U.S. ports, especially if the foreign entity is owned or controlled by a foreign government; those that would amend the CFIUS process; and those that would amend the Exon-Florio process. On the whole, a broad range of measures would increase reporting requirements on CFIUS to keep key congressional leaders apprised of the Committee's actions. In some measures, Congress would have the authority to intercede in a transaction that had been approved by CFIUS, to override the CFIUS action, and to block a transaction.

The first measures that were introduced were directed at stopping the DP World acquisition from occurring and at requesting CFIUS to undertake a full 45-day investigation of the transaction. For instance, **S.J.Res. 32**, introduced February 27, 2006 and **H.J.Res. 79**, introduced February 28, 2006 express congressional disapproval of the proposed acquisition and direct CFIUS to conduct a full 45-day review of the transaction and to brief Members of Congress on the results of the investigation.

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<sup>37</sup> Ibid.



On March 8, 2006, the House Appropriations Committee attached an amendment (**H.Amdt. 702**) to a supplemental appropriations bill for defense activities in Afghanistan and Iraq and emergency relief for the victims of hurricane Katrina (**H.R. 4939**) that effectively would have nullified the actions of CFIUS regarding the DP World transaction. The amendment would have withheld the use of any funds to approve or “otherwise allow the acquisition of leases, contracts, rights, or other obligations of P&O Ports by Dubai Ports World.” In addition, the amendment would have prohibited Dubai Ports World from acquiring any leases, contracts, rights, or other obligations in the United States of P&O Ports by Dubai Ports World or “any other legal entity affiliated with or controlled by Dubai Ports World.” The measure passed by a vote of 62 to 2 in the Committee.<sup>38</sup> The following day, DP World officials announced that they would sell off the newly-acquired U.S. port operations to an American owner.<sup>39</sup>

On March 16, 2006, the measure passed the full House by a margin of 348 to 71 after an attempt the previous day failed by a vote of 377 to 38 to remove the ban on Dubai Ports World from the measure.<sup>40</sup>

Such other measures as **H.R. 4813** and **H.R. 4917** would place new reporting requirements on CFIUS to inform Congress when it initiates a 45-day investigation of a proposed acquisition, merger, or takeover. **H.R. 4917** also would express a sense of Congress that CFIUS be moved from operating out of the Treasury Department to the Department of Homeland Security. Since CFIUS is entirely a creation of Executive Order and operates exclusively for and on behalf of the President, it is unclear how much of an impact this measure would have on the President.

Other measures addressed various concerns some Members of Congress expressed relative to the current CFIUS process. In particular, some Members voiced their dissatisfaction with the broad discretion CFIUS has to determine which transactions it will subject to a 45-day investigation. Also, some Members apparently were dissatisfied with the discretion CFIUS uses to interpret the Byrd Amendment. Other Members introduced measures to shift the leadership of CFIUS from the Treasury Department to the Department of Homeland Security and to limit CFIUS’s discretion in investigating certain kinds of transactions, because some Members argued that the Treasury Department acted to limit the number of transactions CFIUS investigates in order to promote the Department’s traditional position of supporting an open and unobstructed investment process. Other measures would have left unchanged the basic structure of CFIUS, but would have instituted CFIUS as a matter of statute to strengthen Congressional oversight of the Committee’s operations.

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<sup>38</sup> Hulse, Carl, “In Break with White House, House Panel Rejects Port Deal,” *The New York Times*, March 9, 2006. p. A1.

<sup>39</sup> Weisman, Jonathan, and Bradley Graham, “Dubai Firm to Sell U.S. Port Operations,” *The Washington Post*, March 10, 2006. p. A1.

<sup>40</sup> *Washington Trade Daily*, March 17, 2006. p. 3.

The following measures focused most specifically on the Committee on Foreign Investment in the United States and the proposed changes to the existing CFIUS process.

**H.R. 4929.** H.R. 4929 was introduced by Representative Sabo on March 9, 2006. This measure would have amended the Exon-Florio process to limit CFIUS' discretion to investigate foreign investment transactions by mandating that an investigation must occur for any proposed or pending merger, acquisition, or takeover by any foreign person that could result in foreign control of any person engaged in interstate commerce in the United States. This measure would have established the Committee on Foreign Investment in the United States in statute and would have formally made it responsible for conducting an investigation within 75 days of receipt of a written notification of a proposed or pending merger, acquisition, or takeover. The Committee would have remained as presently constituted with 12 members and with the Secretary of the Treasury as the Chairperson of the Committee. The Director of National Intelligence would have provided appropriate intelligence analysis and briefings to the Committee.

The measure also attempted to prod the administration into investigating more investment cases by requiring that the President must find that a transaction "will not threaten" to impair the national security of the United States in order for any proposed or pending merger, acquisition, or takeover of a person engage in interstate commerce in the United States by a foreign person to occur. The measure would have limited somewhat the President's discretion by amending the existing Exon-Florio statute. Presently, the statute states that "the President may exercise the authority ...only if he finds that..." The measure would have changed the statute to indicate that the President's ability to act is based on findings that "shall be based on credible evidence" that leads the President to believe that a) the foreign interest "might" take action that threatens to impair the national security, and b) other provisions of law are appropriate to protect the national security. During an investigation, the measure would have required that those factors that the President is required to consider in investigating a proposed or pending transactions would be the same as those that currently are specified in the Exon-Florio provision.

The measure also would have increased reporting requirements on the CFIUS process by requiring the President to transmit immediately a written notification to the Secretary of the Senate and the Clerk of the House of Representatives containing a detailed explanation of any determination by the President to approve or disapprove of any merger, acquisition, or takeover by or with any foreign person which could result in foreign control of any person engaged in interstate commerce in the United States. Congress would have 30 days to enact a joint resolution of disapproval of a transaction, which, if adopted, would then have the President "take such action...as is necessary to prohibit the merger, acquisition, or takeover." The measure would have also required the President to provide a report to the Congress that evaluates whether there is "credible evidence of a coordinated strategy by one or more countries or companies to acquire U.S. companies that are involved in research, development, or production of critical technologies for which the United states is a leading producer." The report would also have been required to evaluate whether there are industrial espionage activities that are directed or directly assisted by foreign governments against private U.S. companies.

**H.R. 5337.** H.R. 5337 was introduced by Representative Blunt on May 10, 2006. The measure was approved unanimously by the full House without amendment on July 26, 2006. The measure would have established the Committee on Foreign Investment in the United States as a matter of statute and would have amended the current procedures for a CFIUS review and investigation. The measure would have struck out the first two sections of the current statute that deal with investigations and replace them with provisions that would have provided for the same 30-day review and 45-day investigation stages that exist under the current provision, but would have altered the provision in a number of ways. First, the measure would have explicitly indicated that the investigation would be conducted by the Committee on Foreign Investment in the United States, which is referred to only as the President's designee in the current statute. Next, the measure would have amended and broadened the language in the current statute regarding national security by indicating that national security for this provision would have been construed "so as to include those issues relating to 'homeland security,' including its application to critical infrastructure."

The measure also would have provided for a "National Security Review and Investigation." In those cases in which the Committee determined that the foreign entity involved in a merger, acquisition, or takeover of any person engaged in interstate commerce in the United States threatens to impair the national security of the United States, the Committee would have been required to (shall) review the transaction. In addition, if the Committee determined that an entity was controlled by a foreign government (with the term "control" to be defined by the Committee), the Committee would have been required to (shall) conduct an investigation of the transaction, without also being required to determine during a 30-day review that the transaction threatens to impair the national security. Any party to the transaction would be able to submit a written notice to the Committee to initiate a review of a transaction. In a change, however, a notification would not be able to be withdrawn unless a request had been submitted by a party to the transaction and the request had been approved in writing by the Chairperson of CFIUS in consultation with the Vice Chairperson.

In addition to any entity that is a party to a merger, acquisition, or takeover being able to initiate a review, the President, the Committee, or any member of the Committee would be able to require that a transaction be reviewed. These individuals would also be able to initiate a review of a transaction that had been reviewed but in which false or misleading information had been submitted to CFIUS, or any transaction that had been reviewed in which it later was determined that any party to the transaction had failed to adhere to any mitigating agreements or conditions upon which the original approval had been granted.

The measure also would have required the President, acting through CFIUS, to conduct a National Security investigation of the effects of a transaction on the national security of the United States and to take any "necessary" actions in connection with the transaction to protect the national security of the United States under certain conditions. These conditions would be: (1) as a result of a review of the transaction, CFIUS determined that the transactions threatened 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 was controlled

by a foreign government; (3) the Director of National Intelligence had identified “particularly complex national security or intelligence issues” that threaten to impair the national security of the United States. The investigation would be required to be completed within 45 days, but the measure would provide for an extension of the deadline of up to an additional 45 days if the extension had been requested by the President or by a roll call vote of two-thirds of the CFIUS members.

The measure also would have required that both the Secretary of the Treasury and the Secretary of Homeland Security approve and sign a determination on any review or investigation for the CFIUS process to be considered final or complete. For those cases in which the foreign entity was being controlled by a foreign government, the CFIUS process would not have been considered to be completed until a majority of the members of CFIUS had voted their approval. In those instances in which at least one member of CFIUS did not vote in favor of approval, the President, in addition to the Chairperson and the Vice Chairperson of the Committee, would have been required to sign the Committee report to indicate his approval.

The bill would also have required the Director of National Intelligence to carry out “expeditiously” a thorough analysis of “any threat to the national security of the United States” of any merger, acquisition, or takeover. This analysis specifically would have included a request for information be made from the Department of the Treasury’s Director of the Office of Foreign Assets Control and the Director of the Financial Crimes Enforcement Network. The Director of National Intelligence, however, would not have been included as a member of CFIUS and would have been prohibited from serving in a policy role within CFIUS other than to provide analysis in connection with an investment transaction.

Firms would not have been prohibited under this measure from submitting additional information or modifying any agreement in connection with a transaction while the transaction was being reviewed or investigated. Firms also would have been able to request a review or investigation after a review had been finalized if the firms believed that they had additional information that would be material to the review that had not been submitted to CFIUS, or if there had been material changes in circumstances that would affect a review or investigation.

The measure would have established the members of CFIUS as a matter of statute, compared with the present situation in which CFIUS is a creation of various presidential orders. CFIUS would have been composed of the same twelve members that currently constitute the Committee, but they could be joined by “any other designee of the President from the Executive Office of the President.” The Secretary of the Treasury would have served as the Chairperson of the Committee, but a new Vice Chairperson position would have been created and held by the Secretary of Homeland Security and the Secretary of Commerce. The Committee would have been empowered to “take such testimony, receive such evidence, administer such oaths,” in order to carry out a review or investigation. The Committee also would have been able to require the attendance and testimony of “such witnesses and production of such books, records, correspondence memoranda, papers, and documents” as the Chairperson of the Committee determines to be “advisable.”

The bill also would have amended the current factors the President and the Committee use to evaluate mergers, acquisitions, or takeovers. In particular, the statute would have changed the status of the factors to be considered from being discretionary (may) to being required (shall) in evaluating a transaction. Also, this measure would have added three more factors to the five that currently exist. These factors are: security-related impact on critical infrastructure of an investment transaction; the entity involved was being controlled by a foreign government; and such other factors as the President or his designee “may determine to be appropriate, generally or in connection with a specific review or transaction.” The bill would have made the United States immune from any liability for any losses or expenses incurred by the parties to an investment transaction as a result of actions taken by CFIUS if the entities did not submit a written notification to CFIUS or if the transaction was completed prior to the completion of a CFIUS review.

The measure also would have addressed one concern about CFIUS’s actions by granting CFIUS 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 would have been required 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 measure would have granted the Committee the authority to take a number of actions. In particular, the Committee would have been able to develop (1) interim protections to address specific concerns about the transaction pending a re-submission of a notice by the parties; (2) a time frame for re-submitting the notice; and (3) a process for tracking any actions taken by any party to the transaction.

CFIUS also would have been granted the authority to designate an appropriate federal department or agency to negotiate, modify, monitor, and enforce agreements in order to mitigate any threat to national security. The agency or department would have been required to provide periodic reports to CFIUS and the parties to an agreement would have been required to report on the implementation of any material change in circumstances. Furthermore, the federal entity would have been required to report to CFIUS on any modification to any agreement or condition that had been imposed and to ensure that “any significant” modification was reported to the Director of National Intelligence and to any other federal department or agency that “may have a material interest in such modification.”

The measure also would have increased oversight by the Congress. Not later than five days after CFIUS completed an investigation, or 15 days after the end of an investigation if the President had determined to take actions under the Exon-Florio provision, the Committee would have been required to provide a written report to leaders in both Houses of Congress and to the Chairman and Ranking Member of committees in both houses with jurisdiction over any aspect of the transaction and its possible effects on national security. CFIUS also would have been required to brief certain congressional leaders if they requested such a briefing. Members of Congress and their staff would have been subject to disclosure limitations and proprietary information would be shared with congressional committees only under conditions that would assure the confidentiality of the information.

CFIUS would have been required to report semi-annually to Congress on any reviews or investigations that CFIUS had conducted during the prior six-month period. Each report would have included 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 would have been required to report on trend information on the number of filings, investigations, withdrawals, and presidential decisions or actions that were taken. The report also would have included 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, and a detailed discussion of all perceived adverse effects of investment transactions on the national security or critical infrastructure of the United States.

Relative to critical technologies, the semi-annual CFIUS report would have been required to include an evaluation of any credible evidence of a coordinated 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 also would have included 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 measure would have required the Inspector General of the Department of the Treasury to investigate any failure of CFIUS to comply with requirements for reporting that were imposed prior to the passage of this measure and to report the findings of this report to the Congress. The measure also would have required the chief executive officer of any party to a merger, acquisition, or takeover to certify in writing that the information contained in the written notification to CFIUS fully complied with the requirements of the Exon-Florio provision and that the information was accurate and complete.

**S. 1797.** S. 1797 was introduced by Senator Inhofe on September 29, 2005. This measure reflects long-standing displeasure with CFIUS that pre-dates the Dubai Ports World transactions. The measure would have amended the Exon-Florio process by giving CFIUS 60 days instead of the present 30 days to decide if a pending investment requires a mandatory 45-day investigation. In addition, the measure would have increased reporting requirements by directing that the findings and recommendations from any 45-day investigation would be sent immediately to the President and to the Committee on Banking, Housing, and Urban Affairs of the Senate and the Committee on Financial Services of the House. This measure would have provided for a congressional role in the CFIUS process by allowing the Chairman and Ranking Member of the Senate Banking Committee and the House Financial Services Committee to request a full 45-day investigation of investments that fall under the Byrd Amendment and would provide that the results of any such

investigation be sent to the President and the Senate Banking Committee and the House Financial Services Committee.

This measure also would have limited CFIUS' discretion by changing from optional (may) to mandatory (shall) the factors that CFIUS considers in determining if a transaction threatens to impair national security. It would also add a new factor by requiring that CFIUS consider "the long-term projections of the United States requirements for sources of energy and other critical resources and materials and for economic security." The measure also would have required the Secretary of the Treasury to provide a report quarterly to the Senate Banking Committee and the House Financial Services Committee that contains a detailed summary and analysis of each transaction that is being reviewed or was reviewed during the quarter. In further broadening Congress' role in the CFIUS process, a transaction that the President had chosen not to suspend or prohibit would not be finalized for 10 legislative days after the President notified Congress during which if either House of Congress introduced a joint resolution of disapproval, the transaction would have been stopped for 30 legislative days. If such a joint resolution were to be enacted into law, the transaction would be blocked.

**S. 2380.** On March 7, 2006, Senator Dodd introduced S. 2380, which would have addressed concerns among some Members who argue that CFIUS has not been viewing national security concerns broadly enough when reviewing and investigating proposed investment transactions. As a result of these concerns, this measure would have restricted CFIUS' discretion in investigating proposed investment transactions by adding a new national security review. The measure would have replaced the present leadership model with the Secretary of the Treasury as the lead official with a troika leadership that would include the Secretary of Homeland Security and the Secretary of Defense as vice chairs of the Committee. In addition, CFIUS membership would expand to include the Directors of National Intelligence and Central Intelligence. The measure would have required the President to establish a Subcommittee on Intelligence within the CFIUS structure that would have been chaired by the Director of National Intelligence and would have included the head of each member of the intelligence community. The measure would have amended the Exon-Florio process to provide for a pre-investigation review by the Subcommittee on Intelligence of CFIUS during a 15-day period that would begin following the receipt by the Committee of any proposed merger, acquisitions, or takeover and before the commencement of any 45-day investigation and provide written comments on that review.

The measure also would have amended the Exon-Florio process to require that only the President or the Secretary of the Treasury, with the concurrence of the Secretary of Homeland Security and the Secretary of Defense acting on the President's behalf, could determine that a proposed merger, acquisition, or takeover did not threaten to impair the national security and, therefore, would not have required a 45-day investigation. In such cases, either the President or members of CFIUS acting on his behalf would have been required to certify this conclusion in writing. In addition, any person controlled by or acting on behalf of a foreign government that is a party to a proposed merger, acquisition, or takeover of any U.S. critical infrastructure (as defined in 42 U.S.C. 5195c(e)) would have been required to notify the President or his designee. The Exon-Florio provision also would have

been amended to require the President or his designee to notify Congress not later than 15 days after he received a written notification of a proposed merger, acquisition, or takeover that could proceed to the 45-day investigation. The measure would have amended the Exon-Florio provision to specify that the President's designee named under the provision is the Committee on Foreign Investment in the United States.

**S. 2400.** On March 13, 2006, Senator Collins introduced S. 2400 that would have altered appreciably the current Exon-Florio process and would have expanded the current national security review to include "homeland security." Most importantly, the measure would have repealed that section of the Defense Production Act that is known as the Exon-Florio provision and would have transferred the function for reviewing mergers, acquisitions and takeovers to the Secretary of Homeland Security. The measure would have established the Committee for Secure Commerce, which was to be comprised of the heads of those executive departments, agencies, and offices that the President determines to be appropriate and would include the Director of National Intelligence. The chairperson of the Committee would have been able to seek information and assistance from any other department, agency, or office of the federal government as the chairperson determines is necessary or appropriate to carry out the duties of the Committee.

The Committee would have been charged with conducting a review of proposed or pending mergers, acquisitions, or takeovers within 30 days of being notified of such a transaction, and could undertake an investigation of proposed or pending mergers, acquisitions, or takeovers "to determine the effects on national security and homeland security." Such an investigation would have needed to be completed within 45 days of its commencement. Any investigation would have required the Director of National Intelligence to create a report that consolidates the intelligence findings, assessments, and concerns of each of the relevant members of the intelligence community. The intelligence report was to be provided to all members of the Committee and would have been included as part of any recommendation by the President. An investigation would have been mandated in any instance in which an entity that is controlled by or acting on behalf of a foreign government seeks to engage in any merger, acquisition, or takeover which would have resulted in the control of a person (entity) engaged in interstate commerce in the United States.

The chairperson of the Committee would have been responsible for establishing written processes and procedures to be used by the Committee in conducting reviews and investigations. In addition, the chairperson would have been responsible for describing the role and responsibilities of each member of the departments, agencies, and offices that are involved in the investigation of foreign investment in the United States. The head of each department, agency, or office that serves as a member of the Committee would have been required to establish written internal processes and procedures in conducting reviews and investigations. Congress would have been able to review such written procedures as part of its oversight responsibilities.

Under the measure, the President would have had the authority to "take such action for such time as the President considers appropriate to suspend or prohibit any acquisition, merger, or takeover." The President would have been required to announce his decision within 15 days after the completion of the investigation by the



Committee. The President would have been allowed to exercise his authority under this provision “only if the President finds:” that there is credible evidence that leads the President to believe that the foreign interest exercising control might take action that threatens to impair the national security or homeland security; or that other provisions of law do not provide adequate and appropriate authority for the President to protect the national security or homeland security. In making his decision, the President would have been required (shall) to take into account the requirements of national security and homeland security and consider among other factors the same set of factors that currently exist under the Exon-Florio provision.

The measure also would have required the President or his designee to report immediately upon completion of an investigation to the Congress. This reporting would have comprised a written report of the results of the investigation and would have included a detailed explanation of the findings that were made; details of any legally binding assurances that were provided by the foreign entity that were negotiated as a condition for approval; and the factors that were considered in reaching the determination. The President also would have been required to transmit to certain Members of Congress a report in both classified and unclassified form on a quarterly basis that provides a detailed summary and analysis of each merger, acquisition, or takeover that would have been under review or investigation at the time of the report. In addition, the measure would have required the President to furnish to Congress on a quadrennial basis a report that a) evaluated whether there was credible evidence of a coordinated strategy by one or more countries or companies to acquire critical infrastructure within the United States or U.S. companies involved in research, development, or production of critical technologies for which the United States is a leading producer; and b) evaluated whether there were industrial espionage activities directed or directly assisted by foreign governments against private U.S. companies aimed at obtaining commercial secrets related to critical technologies or critical infrastructure.

**S. 3549.** On June 21, 2006, Senator Shelby introduced S. 3549; the measure was passed, with amendments, by the full Senate on July 26, 2006. This measure would have amended the Exon-Florio provision to provide for greater congressional oversight over the review process and to reduce the discretion of CFIUS to review certain types of investments. The measure would have required CFIUS to review any proposed or pending transaction that resulted in a) the control of a person (business) engaged in interstate commerce if the foreign person is a foreign government or is acting on behalf of a foreign government or b) if the transactions could have resulted in control of any “critical infrastructure” if CFIUS determined that there would have been “any possible impairment to national security.” For this measure, critical infrastructure would mean that provided by P.L. 107-56 (P.L. 107-56, USA PATRIOT Act; 42 U.S.C. 5195c) which means any system and assets, whether physical or cyber-based, that are 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.

CFIUS would have had the same 30 days and 45 days to complete a review and an investigation, respectively, as under the current process, but any member of CFIUS would have been able to ask for an extension of the deadline up to 30 days for a review and up to 45 days for an investigation. Once initiated, an investigation

would have had to proceed until it is completed, even if the parties involved in the transaction withdrew from the proposed investment.

The measure would have replaced the current system of voluntary notification with one that would have required certain entities to notify CFIUS. In particular, any entity that is owned by or operated on behalf of a foreign government would have been required to notify CFIUS of any proposed or pending transaction that involved a U.S. entity that was involved in “critical infrastructure” related to U.S. national security. The Secretary of the Treasury would have been required to promulgate regulations to implement this provision.

S. 3549 also would have established CFIUS as a matter of statute in a manner that closely resembles the current make-up of the Committee. The Secretary of the Treasury would have continued to serve as the chairman of the Committee with the Secretary of Defense serving as the vice-chairman. The other members would have included the Secretaries of State, Homeland Security, and Commerce; the Attorney General; the Director of the Office of Management and Budget; and the Director of National Intelligence. The Committee would not have expressly include 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 as exists under the current system, but the President could appoint the heads of other executive agencies or departments as he determines to be appropriate on a case-by-case basis to serve on CFIUS. The measure also would have directed staff members of CFIUS to report directly to the Deputy Secretary of the Treasury and to perform no other official functions other than as CFIUS staff.

The Director of National Intelligence (DNI) would have been required to direct the members of the intelligence community to collect and analyze information related to the transaction and to report the findings to the members of CFIUS within 15 days after beginning the review. After completing its initial report, The DNI would have been required to ensure that the intelligence community kept involved in the process by continuing to analyze and disseminate any additional information it collected during the remainder of the review.

The chairman and vice-chairman of CFIUS, in consultation with the Secretaries of State, Commerce, Energy, the Chairman of the Nuclear Regulatory Commission, and the DNI would have been required to develop and implement a system of assessing individual countries according to three standards: 1) adherence to nonproliferation control regimes, including treaties and multilateral supply guidelines; 2) record on cooperating in counter-terrorism efforts; and 3) potential for transshipment or diversion of technologies with military applications, including an analysis of national export control laws and regulations. The measure also would have directed that the assessments and any information developed under this provision be used solely by those agencies involved in reviewing and investigating investment transactions, not be made publicly available, and be exempt from disclosure from Title 5 Section 552 of the U.S. Code regarding the public disclosure of information by federal agencies.

Similar to the current statute, the measure would have granted the President the authority to take what action he deems to be appropriate to suspend or to prohibit any

transaction which would result in the control of any “critical infrastructure” of a person (entity) engaged in interstate commerce in the United States by or with a foreign person or government that threatens to impair the national security. The President would have been required to announce his decision within 15 days after CFIUS completed an investigation of a transaction. Similar to the current Exon-Florio provision, the President would have been prohibited from exercising the authority granted under this provision unless he determined: 1) that there “is credible evidence” that the transaction “threatens to impair the national security;” and 2) provisions of law other than the International Emergency Economic Powers Act do not provide “adequate and appropriate” authority for the President to protect the national security.

The members of CFIUS and the President would have been required (shall) to consider a list of factors in determining to take action under this provision. The list includes nine factors, including the five that exist under the current provision (listed on page 4). The four new factors that would have been added by this measure are: 1) potential effects on critical infrastructure, including major energy assets; 2) potential effects on “critical technologies;” 3) the long term projection of United States requirements for sources of energy and other critical resources and materials; and 4) the country ranking system developed under this provision.

This measure would have protected the confidentiality of the information by exempting it from federal statutes that govern the public disclosure of information by federal agencies. Nevertheless, CFIUS would have been required to notify the Governor of any state regarding a transaction that involved critical infrastructure in order to discuss any security concerns that arise or may arise from the transaction. Information provided to a Governor would not be made public, including under any law of a state that pertained to freedom of information. This provision, however, would not have prevented disclosure to either House of Congress or to any duly authorized committee or subcommittee of Congress.

The measure also would have required that any assurances or other commitments reached during a review or an investigation between CFIUS and the investing parties be included in a formal agreement. The measure would have regarded the continued observance of any such assurance or commitment as a necessary condition for the investment and would have been required to monitor the commitments to insure compliance. Presently, such assurances are kept confidential and are not monitored after the completion of the transaction. In addition, the measure would have specified that the U.S. District Court for the District of Columbia have jurisdiction to enforce any agreements and would have provided for such remedies as divestiture, injunctive relief, enforcing the terms of such agreement, and monetary damages.

This measure also would have required CFIUS to provide certain reports and notices to Congress. CFIUS would have been required to notify Congress within 10 days of the initiation of a review of a proposed or pending foreign investment, including the identities of all the parties involved and any foreign government ownership or control. CFIUS also would have been required to notify Congress when it initiates a full 45-day investigation and the final results of the investigation, unless the investment under investigation had been sent to the President. Each notice

would have been required to include information on whether an investigation had occurred and had been completed, a description of the actions that were taken by CFIUS, including details of any legally binding assurances or commitments that were negotiated as a condition for approval of the investment, and an identification of the factors specified in this provision that CFIUS considered in reviewing or investigating the investment. The notices and reports would have been required to be sent to the Majority Leader and Minority Leader of the Senate, the Speaker and the Minority Leader of the House, to the chair and ranking members of the Committee on Financial Services of the House and any other relevant committee. The notices and reports would also be required to be sent to the Senators and Representatives from the States where the investments involved critical infrastructures.

CFIUS would have been required to provide an annual report to Congress on the U.S. policy of preserving the nation's defense production and critical infrastructure, and the Secretary of the Treasury would have been required to appear before Congress to provide testimony on the report. Each annual report would have been required to include information on eight areas:

- (1) an analysis of each transaction that affects the national security, including the nature of the investment and the effect or potential impact of the investment on the U.S. defense industrial base and critical infrastructure;
- (2) an updated analysis of any transaction that occurred during the preceding four years, including an analysis of the impact of transactions involving foreign governments or persons acting on behalf of or in concert with foreign governments;
- (3) a detailed discussion of all the perceived risks to national security or critical infrastructure that CFIUS would intend to consider in its deliberations during the year;
- (4) a table showing on a cumulative basis, by sector, and country of foreign ownership, the number of investments reviewed or investigated by CFIUS to provide a census of production "potentially relevant" to the nation's defense industrial base that is owned or controlled by foreign persons or foreign governments;
- (5) an evaluation of whether there is credible evidence of a coordinated strategy by one or more countries or companies to acquire critical infrastructure of or within the United States or U.S. companies involved in research, development, or production of critical technologies in which the United States is a leading producer;
- (6) an evaluation of whether there are industrial espionage activities directed or directly assisted by foreign governments against private U.S. companies aimed at obtaining commercial secrets related to critical technologies or critical infrastructure; and

(7) such other matters as are necessary to give a complete disclosure and analysis of the work of CFIUS

The measure would have allowed for the evaluations provided in response to area 5 of the annual report to be classified, but it would have required an unclassified form of the report to be provided to the public. In addition, the measure would allow CFIUS to withhold any information from the public that it determines to be proprietary information. This provision, however, would not have applied to CFIUS in its requirements to provide information to Congress.

## Conclusions

The proposed DP World acquisition of P&O, while of arguably little economic impact on the U.S. economy, could affect public policy on foreign investment that relates to issues of corporate ownership, foreign investment, and national security in the U.S. economy. The transaction revealed significant differences between Congress and the Administration over the operations of CFIUS and over the objectives the Committee should be pursuing. In addition, the transaction demonstrated that neither Congress nor the Administration has been able so far to define clearly the national security implications of foreign direct investment. This issue likely 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 recent focus by Congress on the Committee has also shown that the DP World transaction, in combination with other recent unpopular foreign investment transactions, has exacerbated dissatisfaction among some Members of Congress over the operations of CFIUS. In particular, some Members are displeased with the way the Committee uses its discretionary authority under the Exon-Florio provision to investigate certain foreign investment transactions. As a result, Congress could make significant changes to the CFIUS process through legislation that has been proposed in the 2<sup>nd</sup> Session of the 109<sup>th</sup> Congress. The changes could mandate more frequent contact between the Committee, which generally operates without much public or congressional attention, and the Congress. Other measures would enhance

Congress's oversight role over the Committee. Other measures would give Congress some form of a veto over aspects of the Committee's investigations of foreign investment transactions.

The DP World transaction also revealed that the September 11, 2001 terrorist attacks may have 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 argue that this change requires 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, some Members of Congress are looking to amend the CFIUS process to enhance Congress's oversight role while reducing 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 has 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 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.