

CRS Report for Congress

The Exon-Florio National Security Test for Foreign Investment

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Prepared for Members and
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The Exon-Florio National Security Test for Foreign Investment

Summary

The proposed acquisitions of major operations in six major U.S. ports by Dubai Ports World and of Unocal by the China National Offshore Oil Corporation (CNOOC) sparked intense concerns among some Members of Congress and the public and reignited the debate over what role foreign acquisitions play in U.S. national security. The United States actively promotes internationally the national treatment of foreign firms. Some Members of Congress and others are concerned with this policy, however, particularly with how it applies to allowing government-owned companies unlimited access to the Nation's industrial base. Much of this debate focuses on the activities of a relatively obscure committee, the Committee on Foreign Investment in the United States (CFIUS) and the Exon-Florio provision, which gives the President broad powers to block certain types of foreign investment.

Several Members of Congress introduced various measures during the 2nd session of the 109th Congress that can be grouped into four major areas: those that dealt specifically with the proposed Dubai Ports World acquisition; those that focused more generally on foreign ownership of U.S. ports, especially if the foreign entity was owned or controlled by a foreign government; those that would have amended the CFIUS process; and those that would have amended the Exon-Florio process.

In the 1st session of the 110th Congress, Congresswoman Maloney introduced **H.R. 556**, the National Security Foreign Investment Reform and Strengthened Transparency Act of 2007, on January 18, 2007. The measure was approved by the House Financial Services Committee on February 13, 2007 with amendments, and was approved with amendments by the full House on February 28, 2007 by a vote of 423 to 0. On June 13, 2007, Senator Dodd introduced **S. 1610**, the Foreign Investment and National security Act of 2007. On June 29, 2007, the Senate adopted S. 1610 in lieu of H.R. 556 by unanimous consent. On July 11, 2007, the House accepted the Senate's version of H.R. 556 by a vote of 370-45 and sent the measure to the President.

This report will be updated as warranted by events.

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Background

According to the Department of Commerce,¹ foreigners invested \$184 billion in U.S. businesses and real estate in 2006, as indicated in **Figure 1**, which represents an increase over the amount invested in 2005. This amount, however, is lower than the \$249 billion U.S. firms invested abroad and below the record \$300 billion foreigners invested in 2000. The lower level of foreign direct investment flows, although particularly sharp for the United States, is not unique. According to the United Nation's *World Investment Report*, global foreign direct investment inflows increased by 29% in 2005 after a slight increase in 2004 and three years of declining flows prior to 2004 that arose from competitive international price pressures leading to greater internationalization of production, rising commodity prices, and increased international merger and acquisition activity in some areas.²

The cumulative amount, or stock, of foreign direct investment in the United States on a historical cost basis³ increased by \$115 billion in 2005 to over \$1.6 trillion, still below the more than \$2.1 trillion U.S. firms have invested abroad. The United States is both the largest recipient of foreign direct investment and the largest overseas direct investor. The rise in the value of foreign direct investment includes an upward valuation adjustment of existing investments and increased investment spending that was driven by the stronger growth rate of the U.S. economy, the worldwide resurgence in cross-border merger and acquisition activity, and investment in the U.S. financial and insurance industries.⁴

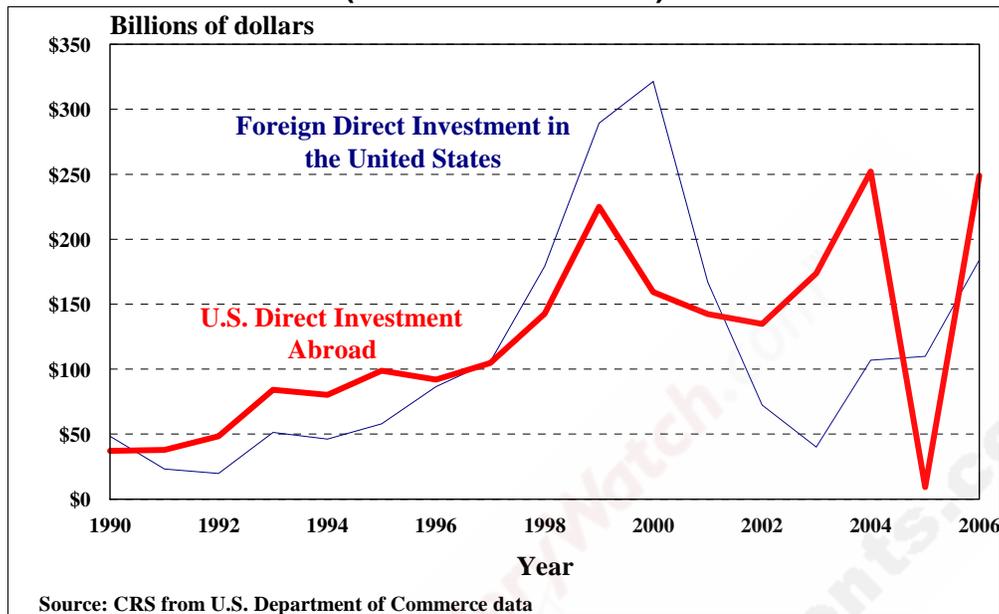
¹ Bach, Christopher L., U.S. International Transactions in 2006. *Survey of Current Business*, April 2007, p. 46.

² *World Investment Report 2006: FDI From Developing and Transition Economies: Implications for Development*. New York, United Nations, 2006, p. 5.

³ The stock, or position, is the net book value of foreign direct investors' equity in, and outstanding loans to, their affiliates in the United States. A change in the position in a given year consists of three components: equity and intercompany inflows, reinvested earnings of incorporated affiliates, and valuation adjustments to account for changes in the value of financial assets. The Commerce Department also publishes data on the foreign direct investment position valued on a current-cost and market value bases. These estimates indicate that foreign direct investment increased by \$147 billion and \$93 billion in 2005, respectively, to \$1.9 and \$2.8 trillion.

⁴ Koncz, Jennifer L., and Daniel R. Yorgason, Direct Investment Positions for 2005: Country and Industry Detail, *Survey of Current Business*, July 2006. pp. 20.

Figure 1. Foreign Direct Investment in the United States and U.S. Direct Investment Abroad, Annual Flows, 1990-2006 (in billions of dollars)



Note: the drop in U.S. direct investment abroad in 2005 reflects actions by U.S. parent companies to take advantage of a one-time tax provision.

With over \$282 billion invested in the United States, Great Britain is the largest foreign direct investor. Japan has moved into the position as the second largest foreign direct investor in the U.S. economy with over \$190 billion in investments. Following the Japanese are the Germans (\$184 billion), the Dutch (\$171 billion), and the French (\$143 billion).

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 of the Defense Production Act.⁵ 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. In subsequent legislation, Congress directed that this process be applied “in any instance in which an entity controlled by or acting on behalf of a foreign government seeks to engage in any merger, acquisition, or takeover which could result in control of a person engaged in interstate commerce in the United States that could affect the national security of the United States.” Many in Congress were concerned at the time that foreign takeovers of U.S. firms could not be stopped unless the President declared

⁵ P.L. 100-418, title V, Subtitle A, Part II, or 50 U.S.C. app 2170.

a national emergency or regulators invoked federal antitrust, environmental, or securities laws.

The Exon-Florio provision grants the President the authority to take what action he considers to be “appropriate” to suspend or prohibit proposed or pending foreign acquisitions, mergers, or takeovers of persons engaged in interstate commerce in the United States which 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. For the purposes of this legislation, Congress purposely did not define national security, but intended to have the term interpreted broadly without limitation to a particular industry.⁶

The authority to administer the Exon-Florio provision was delegated to the Committee on Foreign Investment in the United States (CFIUS),⁷ which is housed in the Department of the Treasury. The Committee had been established under a previous Executive Order with broad responsibilities, but few powers.⁸ It was originally established with six members, but has been expanded to twelve over time. The twelve members include 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.⁹ The Committee has 30 days to decide whether to investigate a case and an additional 45 days to make its recommendation. Once the recommendation is made, the President has 15 days to act.

In 1992, Congress amended the statute through Section 837(a) of the National Defense Authorization Act for Fiscal Year 1993. Known as the “Byrd Amendment” after the amendment’s sponsor, the provision requires CFIUS to investigate proposed mergers, acquisitions, or takeovers in cases where:

- (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.¹⁰

⁶ *Congressional Record*, Daily Edition, vol. 134, April 20, 1988. p. H2118.

⁷ Executive Order 12661 of December 27, 1988, 54 F.R. 779.

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

⁹ Executive Order 11858 of May 7, 1975, 40 F.R. 20263, as amended by Executive Order 12188, January 2, 1980, 45 F.R. 969; Executive Order 12661, December 27, 1988, 54 F.R. 779; Executive Order 12860, September 3, 1993, 58 F.R. 47201; and Executive Order 13286 of February 28, 2003.

¹⁰ P.L. 102-484, October 23, 1992.

Through the Exon-Florio provision, Congress directed that the President or his designee should consider a short list of factors in deciding whether to block a foreign acquisition, merger, or takeover. 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.

In November 1991, the Treasury Department issued final regulations, after extensive public comment, implementing the Exon-Florio provision.¹¹ These regulations created an essentially voluntary system of notification by the parties to an acquisition, but they also allow for notice by agencies that are members of CFIUS. Despite the voluntary nature of the notification, firms largely notify voluntarily 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.

Caseload

As a consequence of the confidential nature of the CFIUS review of any proposed transaction, there are few public 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 made by the companies involved in a transaction and not by CFIUS. Therefore public information concerning the outcome of CFIUS's reviews is incomplete. According to one

¹¹ Regulations Pertaining to Mergers, Acquisitions, and Takeovers by Foreign Persons. 31 C.F.R. Part 800.

source,¹² CFIUS has received more than 1,500 notifications, 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.¹³

The transaction that was prohibited by the President involved the acquisition in 1990 of Mamco Manufacturing Company by the China National Aero-Technology Import and Export Corporation (CATIC). Mamco was an aerospace parts manufacturer. CATIC, which is owned by the Government of the People's Republic of China, acted as the purchasing agent for the Chinese Ministry of Defense. President Reagan ordered CATIC to divest itself of Mamco under the authority of the Exon-Florio provision because of concerns that CATIC might gain access to technology through Mamco that it would otherwise have to obtain under an export license.¹⁴ One recent case that involved a Chinese firm that was reviewed by CFIUS and approved was the proposed acquisition of IBM's Personal Computing Division to Lenovo Group Limited, a Chinese manufacturing company. Apparently, CFIUS has approved any number of proposed transactions if the parties involved agreed to certain conditions.

Legislative Activity in the 109th Congress

The proposed acquisition of port terminals operated by the British-owned Peninsular and Oriental Steam Navigation Company (P&O)¹⁵ by Dubai Ports World¹⁶ sparked a firestorm of activity in the 2nd session of the 109th Congress. These measures can be grouped into four major areas: those that dealt specifically with the proposed Dubai Ports World acquisition; those that focused more generally on foreign ownership of U.S. ports, especially if the foreign entity was owned or controlled by a foreign government; those that would amend the CFIUS process; and those that would have amended the Exon-Florio process. **House Joint Resolution 79** (H.J.Res. 79) and **Senate Joint Resolution 32** (S.J.Res. 32)

¹² CFIUS, *The Washington Post*, July 3, 2005. p. F3.

¹³ 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.

¹⁴ Auerbach, Stuart. "President Tells China to Sell Seattle Firm." *The Washington Post*, February 8, 1990, p. A1; and Benham, Barbara. "Blocked Takeover Fuels Foreign Policy Flap." *Investor's Daily*, February 8, 1990. p. 1.

¹⁵ Peninsular and Oriental Steam Company is a leading ports operator and transport company with operations in ports, ferries, and property development. It operates 29 container terminals and logistics operations in over 100 ports and has a presence in 18 countries.

¹⁶ Dubai Ports World was created in November 2005 by integrating Dubai Ports Authority and Dubai Ports International. It is one of the largest port operators in the world and now operates facilities in the Middle East, India, Europe, Asia, Latin America, the Caribbean, and North America.

expressed congressional disapproval of the proposed acquisition and directed CFIUS to conduct a full 45-day review of the transaction and to brief Members of Congress on the results of the investigation.

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 would effectively nullify the actions of CFIUS regarding the DP World transaction. The amendment 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 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.¹⁷ The following day, DP World officials announced that they would sell off the newly-acquired U.S. port operations to an American owner.¹⁸ 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.¹⁹ The measure was dropped from the Senate version of the bill, however, and was not included in the final bill or the subsequent Public Law.

Dubai Ports World Acquisition

H.R. 4807 (King) and **S. 2333 (Schumer)** would have directed the President to suspend any existing decision by CFIUS regarding the acquisition by Dubai Ports World, and they would require a 45-day investigation of the transaction. The measures also included various factors that would have been required to be considered during the investigation, they would have required the Secretary of Homeland Security to provide CFIUS with intelligence and other information collected by the Department, and they would have required CFIUS to report its findings to Congress.

S. 2333 (Schumer) would have directed the President to conduct a 45-day investigation under the Exon-Florio provision of the proposed acquisition of P&O by Dubai Ports World. If the President had determined after his investigation of the proposed transaction that he would not block or suspend the acquisition, the transaction could have been blocked by Congress if it had passed a joint resolution within 30 days of receiving a report on the transaction by the President.

¹⁷ Hulse, Carl, “In Break with White House, House Panel Rejects Port Deal,” *The New York Times*, March 9, 2006. p. A1.

¹⁸ Weisman, Jonathan, and Bradley Graham, “Dubai Firm to Sell U.S. Port Operations,” *The Washington Post*, March 10, 2006. p. A1.

¹⁹ *Washington Trade Daily*, March 17, 2006. p. 3.

S. 2341 (Dorgan) would have required the President to exercise his authority under the Exon-Florio amendment to prohibit the merger, acquisition, or takeover of P&O Ports by Dubai Ports World.

Port Security

H.R. 4817 (Hayworth) would have prohibited any entity owned or controlled by a foreign government from conducting operations at any seaport in the United States or entering into any contract or other agreement to conduct such operations.

H.R. 4842 (Wasserman Schultz) would have amended the Exon-Florio provision to require the President to prohibit any entity that is owned or controlled by a foreign government from leasing, operating, managing, or owning real property or facilities at a U.S. port, and it would have required the President to submit a report to Congress that lists all entities that currently are owned or controlled by foreign governments that are leasing, operating, managing, or owning real property or facilities at U.S. ports, assesses the national security threat posed by such activities, and provides any recommendation for any legislation in response to such threats.

H.R. 4880 (Lobiondo) would have required the Commandant of the Coast Guard to require that a security plan for a maritime facility be resubmitted for approval when the operation of a facility changes ownership and that the individual responsible for implementing security actions be a U.S. citizen.

H.R. 4885 (Berkley) would have amended the Exon-Florio process to prohibit acquisitions, mergers, or takeovers of persons engaged in interstate commerce in the United States by entities controlled by or acting on behalf of foreign governments that (a) do not recognize countries that are member states of the United Nations, (b) participate in boycotts against countries that are friendly to the United States, or (c) provide support for international terrorism.

S. 2334 (Menendez) would have amended the Exon-Florio process to prohibit any merger, acquisition, or takeover that would have resulted in any entity that is owned by a foreign government from owning, controlling, or taking over leasing real property and facilities at U.S. ports.

Committee on Foreign Investment in the United States

H.R. 4813 (Foley) would have amended the Exon-Florio provision to require the President to notify Congress within five days after CFIUS had initiated a 45-day investigation mandated by the Byrd amendment.

H.R. 4917 (Barrow) would have amended the Exon-Florio provision to require a written notification to Congress within five days of receiving a notification of a proposed merger, acquisition, or takeover that is subject to a 45-day investigation under the Exon-Florio provision. The measure also expressed the sense of the Congress that the Committee on Foreign Investment in the United States be transferred from the Department of the Treasury to the Department of Homeland

Security and that the Secretary of Homeland Security should serve as the head of CFIUS.

H.R. 4929 (Sabo) would have mandated an investigation of any proposed or pending merger, acquisition, or takeover by any foreign person that could have resulted in foreign control of any person engaged in interstate commerce in the United States. The measure would have required that no proposed or pending merger, acquisition, or takeover by a foreign person would have occurred unless the President found that the transaction “will not threaten” to impair the national security of the United States. Also, the measure would have granted the President the authority to act if he had “credible evidence” that lead him to believe the foreign interest “might” take action that threatens to impair the national security. The President would 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 (Blunt) was approved unanimously without amendment by the full House on July 26, 2006. The measure would have established the Committee on Foreign Investment in the United States (CFIUS) as a matter of statute and would have provided for a “National Security Review and Investigation.” The President would have been required to take any “necessary” actions to protect the national security of the United States under certain conditions. The Director of National Intelligence would have been required to carry out “expeditiously” a thorough analysis of “any threat to the national security of the United States “ of any merger, acquisition, or takeover. The bill also would have required the President the impact of an investment transaction on: 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.” CFIUS would have been required to semi-annually on its 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.

S. 1797 (Inhofe) would have amended the Exon-Florio process by expanding to 60 days from 30 days the period in which CFIUS can decide if a pending investment requires a mandatory 45-day investigation. Under this measure, the factors that CFIUS considers to determine if a transaction threatens to impair national security would have been changed to require that CFIUS must consider “the long-term projections of the United States requirements for sources of energy and other critical resources and materials and for economic security.” Ten day after the President had decided not to suspend or prohibit a transaction, if a joint resolution disapproving of the transaction had been introduced in either House of Congress, the transaction would not have been able to be completed for 30 legislative days. If such a joint resolution had been enacted into law, the transaction would have been barred from completion.

S. 2380 (Dodd) would have increased the membership of CFIUS by adding the Directors of National Intelligence and Central Intelligence and would have had the Secretary of Homeland Security and the Secretary of Defense server as vice chairs

of the Committee. The measure would have directed 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 have begun 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.

S. 2400 (Collins) would have established the Committee for Secure Commerce in lieu of CFIUS. 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 been mandated in any instance in which an entity that is controlled by or acting on behalf of a foreign government seeks a merger, acquisition, or takeover. 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” if he believed there was credible evidence 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.

S. 3549 (Shelby) was introduced on June 21, 2006 and passed by the full Senate, with amendments, on July 26, 2006. It would have amended the Exon-Florio provision to provide for greater congressional oversight over the review process and 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) control by a person acting on behalf of a foreign government or (b) control of any “critical infrastructure” if CFIUS determined that there would be “any possible impairment to national security.” The chairman and vice-chairman of CFIUS 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 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.”

The President would have been required to consider four new factors in assessing the impact of an investment transaction: (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.

Exon-Florio Provision

H.R. 4814 (Garrett) would have amended the Exon-Florio provision to require that before the President can approve any foreign investment transaction he must determine that, “there is no credible evidence,” that the investment would threaten to impair the national security and that provisions of law other than the Exon-Florio provision and the International Emergency Powers Act “provide adequate and appropriate authority for the President to protect the national security.” The measure also would have required the President to report quarterly to Congress on actions taken under the Exon-Florio provision.

H.R. 4820 (Markey) would have amended the Exon-Florio process by expanding to 60 days from 30 days the period in which CFIUS can decide if a pending investment requires a mandatory 45-day investigation. The measure also would have required a mandatory investigation if a proposed investment, “could affect the critical infrastructure of the United States,” as defined by Section 2(4) of the Homeland Security Act of 2002 (6 U.S.C. 101(4) and to include U.S. seaports. The measure would also require the President to report his decision or actions he has taken to Congress within 30 days after completing an investigation required by the Byrd Amendment.

H.R. 4881 (Hunter) would have prohibited any corporation from owning, operating, or managing any system or asset included on the “national defense critical infrastructure list” unless the corporation met the “critical infrastructure national security management requirements.” Critical infrastructure national security management requirements were stated as: (1) the corporations would have to be organized under U.S. law; (2) a majority of the board of directors are U.S. citizens; (3) the chief executive officer and chairman of the board of directors are U.S. citizens; (4) a majority of the voting and non-voting shares are owned by U.S. citizens; (5) a majority of the members of the board of directors have been approved by the Secretary of Defense; (6) not less than 20 percent of the members of the board of directors are independent directors; (7) all of the independent directors are approved by the Secretary of Homeland Security; (8) the board of directors has a government security committee, the members of which are approved by the Secretary of Defense; the board of directors has a compensation committee that is comprised of U.S. citizens; and (10) the corporation allows annual inspections of the methods used by the firm in handling classified information. Critical infrastructure was defined as any system or asset, whether physical or virtual, that is so vital to the United States that the incapacity or destruction of such system or asset would have a debilitating effect on national security, on national public health or safety, or on any combination thereof.

H.R. 4915 (Maloney) would have amended the Exon-Florio provision to require the President to review any proposed or pending merger, acquisition, or takeover by or with any foreign person to determine if the transaction “may possibly have an effect on the national security of the United States.” The review would have included the factors that currently exist in the Exon-Florio provision, but would require a specific written response with respect to the applicability of each factor to the proposed or pending transaction. The measure also would have required that any transaction in which the foreign entity is controlled or acting on behalf of a foreign

government “shall be treated as possibly having an effect on the national security of the United States” and therefore would have required a national security investigation. The measure would have instituted a national security investigation of any foreign investment transaction under certain conditions. The measure also would have included additional factors for review of a transaction: (a) whether the acquisition affects the critical infrastructure of the United States; (b) the entity is controlled by or acting on behalf of a foreign government; and c) such other factors as the President or the President’s designee may determine to be appropriate, “generally or in connection with a specific investigation.”

H.R. 4959 (Turner) would have limited ownership in U.S. businesses and real estate by entities owned or controlled by a foreign government only to the same extent as the foreign country allows U.S. persons similar privileges. In addition, the measure would have allowed foreign persons to acquire or hold an interest in, control the operations, management, or security operations of critical infrastructure in the United States to the extent that U.S. person are accorded similar treatment by the country of the foreign person. Critical infrastructure would include such areas as airport, air navigation facility, or facility that is part of an air traffic control system; any bridge, any highway, and any railroad track facilities; any port facilities; any pipeline that transports oil, natural gas, or gasoline or other petroleum products; and any electricity generation, transmission, or distribution facilities.

S. 2335 (Bayh) would have amended the National Security Act of 1947 to add the Director of National Intelligence (DNI) to the list of CFIUS members and to have the DNI certify to the other members of CFIUS that there are no national security implications of any proposed merger, acquisition, or takeover reviewed by CFIUS. Firms would have been required to notify the President under the Exon-Florio provision 60 days in advance before a proposed merger, acquisition, or takeover occurred if the entity was controlled by or was acting on behalf of a foreign government, had energy assets valued at \$1 billion or more, or that operated a critical infrastructure if the transaction could have affected the national security of the United States.

S. 2374 (Coleman) would have amended the Homeland Security Act of 2002 to require entities controlled by a foreign government that acquire, own, or otherwise control or manage any critical infrastructure in the United States to do so only through the establishment or operation of a corporation that has a majority of the board of directors who are U.S. citizens and that the chief security officer is a U.S. citizen.

S. 2410 (Coleman) would have amended the Homeland Security Act of 2002 to place certain requirements on entities that are owned or controlled by a foreign government in order for such entities to own, acquire, or otherwise control or manage any critical infrastructure in the United States. These entities must: (1) have a board of directors, the majority of which is comprised of U.S. citizens; (2) have a chief security officer who is a U.S. citizen, responsible for safety and security issues related to the critical infrastructure; and (3) maintain all records related to operations, personnel, and security of the U.S. general business corporation in the United States. Entities operating in the United States that are owned or controlled by a foreign

government would have six months to comply with these requirements after they are adopted.

S. 2442 (Durbin) would have amended the Exon-Florio provision to require the President to notify Congress within seven days of the completion of any investigation of a proposed merger, acquisition, or takeover and before any final determination had become effective. The measure would have required an investigation of any transaction involving an entity that was controlled by or acting on behalf of a foreign government and other foreign persons only if the transaction involved a U.S. entity engaged in interstate commerce in the United States, or critical infrastructure, or if the transaction could affect the national security of the United States. In addition, the measure would have broadened somewhat the ability of the President to block or suspend any proposed transaction not only when a foreign interest might take action that threatens to impair the national security of the United States but also those that “might fail to prevent impairment of the national security of the country.”

Legislative Activity in the 110th Congress

Thus far in the 110th Congress, Congresswoman Maloney has introduced **H.R. 556**, the National Security Foreign Investment Reform and Strengthened Transparency Act of 2007, on January 18, 2007.²⁰ The measure was approved by the House Financial Services Committee on February 13, 2007 with amendments, and was approved with amendments by the full House on February 28, 2007 by a vote of 423 to 0. On June 13, 2007, Senator Dodd introduced **S. 1610**, the Foreign Investment and National Security Act of 2007. On June 29, 2007, the Senate adopted S. 1610 in lieu of H.R. 556 by unanimous consent. On July 11, 2007, the House accepted the Senate’s version of H.R. 556 by a vote of 370-45 and sent the measure to the President.

H.R. 556 attempted to address six perceived problems with the current statutes that Members identified during the 109th Congress: (1) that the principal members of the interagency Committee on Foreign Investment in the United States (CFIUS) at times seem not to be well informed of the outcomes of reviews and investigations regarding proposed or pending investment transactions; (2) that CFIUS has interpreted incorrectly the requirements under current statutes for investigations of transactions that involve firms that are owned or controlled by a foreign government; (3) that reporting requirements under current statutes do not provide Congress with enough information about the operations and actions of CFIUS for Members to fulfill their oversight responsibilities; (4) that CFIUS exercises too much discretion in its ability to choose which transactions it investigates; (5) that the definition of national security used by CFIUS is no longer adequate in a post-September 11 world; and (6) that deadlines placed on CFIUS to complete reviews and investigations of investment transactions do not provide adequate time in some instances for the Committee to complete its reviews and investigations.

²⁰ For a more detailed presentation of this measure, see CRS Report RL33856, *Exon-Florio Foreign Investment Provision: Overview of H.R. 556*, by James K. Jackson.

H.R. 556 attempted to address congressional concerns by establishing CFIUS by statutory authority, thereby giving Congress a direct role in determining the make-up and operations of the Committee. The measure would have had the Secretary of the Treasury continue to serve as the Chairman of CFIUS, despite the misgivings of some Members, and the Secretary of Homeland Security and the Secretary of Defense serve as Vice Chairmen. In other respects, the bill would have retained the basic structure of the Committee as it presently exists, except that it would have added the Secretary of Energy as a permanent member of CFIUS.

According to the measure, the Committee would have operated under the same time frame that currently exists with 30 days allotted for a review, 45 days for an investigation and 15 days for the President to make his determination. The President would have retained his authority as the only officer with the authority to suspend or prohibit certain types of foreign investments. The measure would have placed additional requirements on firms that resubmitted a filing after previously withdrawing a filing before a full review had been completed.

In H.R. 556, no review or investigation would have been considered to be complete until it had been approved by a majority of the members of CFIUS and signed by the Secretary of the Treasury and the Secretary of Homeland Security to ensure that principal members of CFIUS were aware of all reviews and investigations completed by CFIUS. The bill would have required CFIUS to review all "covered" foreign investment transactions to determine whether a transaction threatened to impair the national security. A covered foreign investment transaction is defined as any merger, acquisition, or takeover which results in "foreign control of any person engaged in interstate commerce in the United States."

The measure would have placed increased requirements on CFIUS to review investment transactions in which the foreign entity is owned or controlled by a foreign government. It is unclear, however, to what extent the bill would alter the current process. The measure would have explicitly required CFIUS to review all investment transactions in which the foreign entity is owned or controlled by a foreign government, but the measure does not amend or alter the current statute in the area that has been the source of recent differences between CFIUS and Congress. In particular, the current statute states that the President, and through him CFIUS, can use the Exon-Florio process "only if" he finds that there is "credible evidence" that a foreign investment will impair national security. As a result, CFIUS has determined, as was the case in the Dubai Ports transaction, that if the Committee does not have credible evidence that an investment will impair the national security that it is not required to undertake a full 45-day investigation. It is possible that CFIUS could have continued to operate in this manner, regardless of the passage of the measure.

In addition, if CFIUS had investigated all foreign investment transactions in which the foreign entity is owned or controlled by a foreign government, foreign investors may well have regarded it as an important policy change by the United States toward foreign investment. As previously stated, the current system presumes that foreign investment transactions are acceptable and provide a positive contribution to the economy. As a result, the burden is on the members of CFIUS to prove that a particular transaction is a threat to national security. H.R. 556, however,

might have been interpreted to presume that investment transactions in which the foreign entity is owned or controlled by a foreign government are a threat to the nation's security simply because of the relationship to the foreign government and, therefore, might have required the firms to prove that they are not a threat. Although the number of investment transactions a year in which the foreign investor is associated with a foreign government is small compared with the total number of foreign investment transactions, foreign investors and foreign governments likely will view this as a significant change in the traditional U.S. approach to foreign investment.

The bill attempted to increase the role of congressional oversight by requiring greater reporting by CFIUS on its actions either during or after it completed reviews and investigations and by increasing reporting requirements on CFIUS. H.R. 556 would have required the Secretary of the Treasury, the Secretary of Homeland Security, and the Secretary of Commerce to sign and approve any review or investigation. In those cases in which the foreign person involved in an investment transaction is owned or controlled by a foreign government, a majority of the members of CFIUS would have been required to approve the transaction and the President and the chair and vice chairs of CFIUS would have been required to sign off on investments in which at least one member of CFIUS did not agree with the decision of the majority to approve the transaction.

The measure would have required CFIUS to provide Congress with a greater amount of detailed information about its operations. H.R. 556 would have required CFIUS to notify specified Members at the conclusion of any investment investigation and to report annually to Congress. H.R. 556 also would have provided for greater reporting on and increased authority for CFIUS to negotiate provisions with the foreign firms involved in investment transactions to mitigate the impact of the transaction. Under current statutes, CFIUS has no authority to negotiate such agreements with firms and it is not clear that it has any authority to enforce such agreements. H.R. 556 would have provided for a process to track the agreements and to report the progress of such agreements and any changes to the agreements to the members of CFIUS and to the President.

The measure also would have amended the current statute regarding the meaning of national security and would place additional requirements on CFIUS regarding national security reviews. The bill would have explicitly required the Director of National Intelligence to conduct reviews of any investment that posed a threat to the national security. The bill also provides for additional factors the President and CFIUS would be required to use in assessing foreign investments. In particular, the bill would have added implications for the nation's critical infrastructure as a factor for reviewing or investigating an investment transaction.

During the markup session on the measure, the House Committee on Financial Services provided an important exception to the requirement that CFIUS conduct an investigation of a transaction if it determined during a review that a party to a transaction is owned or controlled by a foreign government. Instead, the measure would not have required such an investigation, even if CFIUS had determined during a review that the party to a transaction was controlled by a foreign government if: (1) it also determined that the transaction "will not affect" the national security of the

United States and (2) no agreement or condition was required, relative to the transaction, to mitigate any threat to the national security.

In an other important change during the markup session, the House Committee added the requirement that action by the President would have been required in certain cases. Specifically, the measure would have required the President to approve and sign his approval of investment transaction in which the party to a transaction is a person or a country that has been determined by the Secretary of State under the Export Administration Act or other provisions of law repeatedly to have provided support for acts of terrorism.

S. 1610 establishes CFIUS by statutory authority and has the Secretary of the Treasury continue to serve as the Chairman of CFIUS. The measure reduces the official number of members of CFIUS, but grants the President the authority to appoint temporary members on a case-by-case basis. The measure has the Committee operate under the same time frame that currently exists with 30 days allotted for a review, 45 days for an investigation and 15 days for the President to make his determination. The President retains his authority as the only officer with the authority to suspend or prohibit certain types of foreign investments, and the measure places additional requirements on firms that resubmitted a filing after previously withdrawing a filing before a full review is completed.

S. 1610 requires CFIUS to investigate all “covered” foreign investment transactions to determine whether a transaction threatens to impair the national security, or the foreign entity is controlled by a foreign government. A covered foreign investment transaction is defined as any merger, acquisition, or takeover which results in “foreign control of any person engaged in interstate commerce in the United States.” The measure also requires an investigation if the transaction results in control of any “critical infrastructure that could impair the national security.”

The Senate measure places increased requirements on CFIUS to review investment transactions in which the foreign entity is owned or controlled by a foreign government but it provides exceptions from the requirement to investigate transactions in which the foreign party is controlled by a foreign government. S. 1610, similar to H.R. 556, allows CFIUS to exclude a transaction from an investigation if the Secretary of the Treasury and certain other specified officials determine that the transaction will not impair the national security. It is somewhat unclear, however, how this change will mesh with the current process. This measure does not amend or alter the current statute in the area that has been the source of recent differences between CFIUS and Congress. In particular, the current statute states that the President, and through him CFIUS, can use the Exon-Florio process “only if” he finds that there is “credible evidence” that a foreign investment will impair national security. As a result, CFIUS has determined, as was the case in the Dubai Ports transaction, that if the Committee does not have credible evidence that an investment will impair the national security that it is not required to undertake a full 45-day investigation.

S. 1610 increases the role of congressional oversight by requiring greater reporting by CFIUS on its actions either during or after it completes reviews and

investigations and by increasing reporting requirements on CFIUS. The measure also requires CFIUS to provide Congress with a greater amount of detailed information about its operations. It also provides for greater reporting on and increased authority for CFIUS to negotiate provisions with the foreign firms involved in investment transactions to mitigate the impact of the transaction. S. 1610 provides for a process to track such mitigation agreements and to report the progress of such agreements and any changes to the agreements to the members of CFIUS and to the President.

S. 1610 amends the current statute regarding the meaning of national security and places additional requirements on CFIUS regarding national security reviews. The bill explicitly requires the Director of National Intelligence to conduct reviews of any investment that poses a threat to the national security and it provides for additional factors the President and CFIUS are required to use in assessing foreign investments. In particular, the bill adds implications for the nation's critical infrastructure as a factor for reviewing or investigating an investment transaction. S. 1610 amends the current factors the President and the Committee use to evaluate mergers, acquisitions, or takeovers. In particular, the measure changes the status of factors to be considered from being discretionary (may) to being required (shall) in evaluating a transaction. S. 1610 adds transactions identified currently under the fourth factor by the Secretary of Defense as "posing a regional military threat" to the interests of the United States.

In addition, S. 1610 adds seven new factors to the five that currently exist. These new factors are:

- (1) whether the transaction has a security-related impact on critical infrastructure in the United States;
- (2) the potential effects on United States critical infrastructure, including major energy assets;
- (3) the potential effects on United States critical technologies;
- (4) whether the transaction is a foreign government-controlled transaction;
- (5) in those cases involving a government-controlled transaction, a review of (A) the adherence of the foreign country to nonproliferation control regimes, (B) the foreign country's record on cooperating in counterterrorism efforts, (C) the potential for transshipment or diversion of technologies with military applications,;
- (6) the long-term projection of the United States requirements for sources of energy and other critical resources and materials; and
- (7) such other factors as the President or the Committee determine to be appropriate.

S. 1610 makes 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 or investigation.

S. 1610 grants CFIUS, and a designated lead agency, the authority to negotiate, impose, or enforce any agreement or condition with the parties to a transaction in order to mitigate any threat to the national security of the United States. Such agreements are to be based on a “risk-based analysis” of the threat posed by the transaction. Also, if a notification of a transaction is withdrawn before any review or investigation by CFIUS can be completed, the measure grants the Committee the authority to take a number of actions. In particular, the Committee could develop (1) interim protections to address specific concerns about the transaction pending a resubmission of a notice by the parties; (2) specific time frames for resubmitting the notice; and (3) a process for tracking any actions taken by any party to the transaction.

In S. 1610, CFIUS is required to designate a lead agency to negotiate, modify, monitor, and enforce agreements in order to mitigate any threat to national security. The measure requires the federal entity or entities involved in any mitigating agreement to report to CFIUS on any modification to any agreement or condition that had been imposed and to ensure that “any significant” modification is reported to the Director of National Intelligence and to any other federal department or agency that “may have a material interest in such modification.” S. 1610 also requires such reports to be filed with the Attorney General.

S. 1610 requires CFIUS to develop a method for evaluating the compliance of firms that had entered into a mitigation agreement or condition that was imposed as a requirement for approval of the investment transaction. Such measures, however, are required to be developed in such a way that they allow CFIUS to determine that compliance is taking place without also: (1) “unnecessarily diverting” CFIUS resources from assessing any new covered transaction for which a written notice had been filed; and (2) placing “unnecessary” burdens on a party to a investment transaction.

S. 1610 requires CFIUS to report annually to Congress on any reviews or investigations that it had conducted during the prior year. Each report is required to include a list of all reviews and investigations that had been conducted, information on the nature of the business activities of the parties involved in an investment transaction, information about the status of the review or investigation, and information on any withdrawal from the process, any roll call votes by the Committee, any extension of time for any investigation, and any presidential decision or action taken under the Exon-Florio provision. In addition, CFIUS is required to report on trend information on the number of filings, investigations, withdrawals, and presidential decisions or actions that were taken. The report also must include cumulative information on the business sectors involved in filings and the countries from which the investments originated; information on the status of the investments of companies that withdrew notices and the types of security arrangements and conditions CFIUS used to mitigate national security concerns; the methods the Committee used to determine that firms were complying with mitigation agreements or conditions; and a detailed discussion of all perceived adverse effects of investment transactions on the national security or critical infrastructure of the United States.

Relative to critical technologies, S. 1610 requires CFIUS to include in its annual report 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 must include an evaluation of possible industrial espionage activities directed or directly assisted by foreign governments against private U.S. companies aimed at obtaining commercial secrets related to critical technologies.

In addition, the Senate measure requires the Secretary of the Treasury, in consultation with the Secretary of State and the Secretary of Commerce to conduct a study on investment in the United States, particularly in critical infrastructure and industries affecting national security by: (1) foreign governments, entities controlled by or acting on behalf of a foreign government, or entities of foreign countries which comply with any boycott of Israel; (2) foreign governments, entities controlled by or acting on behalf of a foreign government, or entities of foreign countries which do not ban organizations designated by the Secretary of State as foreign terrorist organizations.

S. 1610 also requires 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. In particular, the report must be sent to the chairman and ranking member of each committee of the House and the Senate with jurisdiction over any aspect of the report, including the Committee on International Relations, the Committee on Financial Services, and the Committee on Energy and Commerce of the House. S. 1610 also requires 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. This written notification must also include any mitigation agreement or condition that was part of a CFIUS approval.

Conclusions

The proposed DP World acquisition of P&O, while arguably of 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 thus 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 may not 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 with the operations of CFIUS. In particular, some Members have been 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 is making a number of changes to the CFIUS process through legislation that has been adopted in the 1st session of the 110th Congress. The changes mandate more frequent contact between the Committee, which generally operates without much public or congressional attention, and the Congress and enhance Congress's oversight role over the Committee.

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, Congress amended the CFIUS process to enhance Congress's oversight role while it reduced somewhat the discretion of CFIUS to review and investigate foreign investment transactions in order to have CFIUS investigate a larger number of foreign investment cases. In addition, the DP World transaction focused attention on long-unresolved issues concerning the role of foreign investment in the nation's overall security framework and the methods that are being used to assess the impact of foreign investment on the nation's defense industrial base 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 as a whole. Others may argue on non-economic grounds that such firms pose a risk to national security or to homeland security.

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 measurable effect on the economy as whole.

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

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