

THE COMMITTEE ON FOREIGN INVESTMENT IN THE UNITED STATES
AND THE FOREIGN INVESTMENT AND NATIONAL SECURITIES ACT OF
2007: A DELICATE BALANCING ACT THAT NEEDS REVISION

*Kristy E. Young**

INTRODUCTION

In 2007, foreign direct investment in the United States totaled \$204.4 billion, an increase of 94-percent from 1997.¹ These foreign investments provide immeasurable benefits to the United States, including the employment of more than five million American workers² and, as of 2002, the contribution of approximately \$17.8 billion in taxes.³ Despite the benefits of foreign investment, the involvement of foreign entities in the American economy often raises concerns in the public and political realms. At the forefront of this unease are the potential national security ramifications, particularly in the aftermath of September 11th.⁴ As a result, Congress enacted a series of laws to monitor and regulate these investments. Most notably the Exon-Florio Amendments, enacted within a comprehensive trade bill in 1988, provided power to the President to take direct action in shaping or altogether preventing transactions between domestic corporations

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¹ See also ORGANIZATION FOR INTERNATIONAL INVESTMENT, FOREIGN DIRECT INVESTMENT IN THE UNITED STATES: KEY FINDINGS 1 (2007), http://www.ofii.org/docs/FDI_2007.doc (last visited Jan. 24, 2009).

² Press Release, International Trade Administration, Commerce Lauds Jump in Foreign Direct Investment to the United States (Mar. 14, 2007), http://trade.gov/press/press_releases/2007/fdi_031407.asp.

³ U.S. DEP'T OF STATE, OFFICE OF THE SPOKESMAN, FACT SHEET: HOW FOREIGN DIRECT INVESTMENT BENEFITS THE UNITED STATES (Mar. 13, 2006), available at <http://statelists.state.gov/scripts/wa.exe?A2=ind0603b&L=dosfacts&P=70> (noting that amount contributed by foreign affiliates represented 12 percent of U.S. corporate tax revenues).

⁴ See Shannon M. Haley, Note, *A Shot Across the Bow: Changing the Paradigm of Foreign Direct Investment Review in the United States*, 32 BROOK. J. INT'L L. 1157, 1161-62 (2007) (citing concerns that foreign companies "may be subject to influence by their home country governments or may suffer security breaches compromising sensitive U.S. information . . . [thus] operat[ing] under competing interests that may undermine their compliance with U.S. laws and security.").

and foreign entities.

In 2007, Congress enacted changes to Exon-Florio in light of several transactions that garnered intense media scrutiny and public uproar, including the attempted purchases of Unocal Oil and certain U.S. port operations. This paper will focus on these most recent amendments and will discuss the continued shortcomings in the evaluation of foreign investments. Part I of this paper will provide historical background on Exon-Florio, including an overview of the review process. Part II then discusses the transactions spurring the 2007 Amendments and a summary of the resulting regulation's provisions. Part III will analyze the continued weaknesses in the foreign investment review framework and will conclude with recommendations for further Congressional action.

I. BACKGROUND

A. *The Committee on Foreign Investment in the United States and the Origins of Exon-Florio*

Foreign investments that may implicate national security are regulated, in part, by the Committee on Foreign Investment in the United States (CFIUS), an interagency committee under the auspices of the Executive Branch. Created by Executive Order of President Ford in 1975, the Committee initially consisted of six members and operated under the Department of the Treasury. Over time, its membership expanded to twelve, to include the Secretaries of State, Treasury, Defense, Homeland Security, and Commerce; the United States Trade Representative; the Chairman of the Council of Economic Advisers; the Attorney General; the Directors of the Office of Management and Budget and the Office of Science and Technology Policy; and the Assistants to the President for National Security Affairs and for Economic Policy.⁵ However, Congressional action in 2007, and a subsequent Executive Order, discussed *infra*, shrank CFIUS

⁵ The original six members of the Committee included the Secretaries of State, Treasury, Defense, and Commerce, the Assistant to the President for Economic Affairs, and the Executive Director of the Council on International Economic Policy. Exec. Order No. 11,858, 40 Fed. Reg. 20263 (May 7, 1975). The United States Trade Representative was added and the Executive Director of the Council on International Economic Policy replaced the Chairman of the Council of Economic Advisors in 1980. Exec. Order No. 12,188, 45 Fed. Reg. 969 (Jan. 2, 1980). In 1988, the President added the Attorney General and the Director of the Office of Management and Budget to the Committee. Exec. Order No. 12,661, 54 Fed. Reg. 779 (Dec. 27, 1988). Then, in 1993, 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 were added to CFIUS. Exec. Order No. 12,860, 58 Fed. Reg. 47201 (Sept. 3, 1993). In 2003, the President added the Secretary of Homeland Security as the twelfth member of the Committee. Exec. Order No. 13,286, 68 Fed. Reg. 10629 (Feb. 28, 2003).

membership to nine members.⁶

At its inception, CFIUS had broad responsibilities but served primarily as an administrative body that reviewed and analyzed data on foreign investment, thus wielding little regulatory power.⁷ CFIUS's role eventually evolved during the Cold War, when public opinion became weary of the economic and political consequences of growing foreign investments.⁸ Specifically, two attempted transactions in 1986 sparked demands for increased government regulation of foreign investments – the attempted acquisition of Goodyear Tire and Rubber by a British financier, Sir James Goldsmith,⁹ and the attempted takeover of Fairchild Semiconductor by Fujitsu, a Japanese company.¹⁰ The complexity of these deals and the political controversies that arose ultimately doomed both transactions.¹¹ These attempts also exposed increasing concerns over the threat of foreign “invasions” into American economic strongholds and, in the case of semiconductor leader Fairchild, the potential for foreign influence in sensitive defense industries.¹²

Many observers perceived these transactions as uncontrolled threats to national security that could not be prevented, absent regulatory intervention due to antitrust concerns or a Presidential declaration of a national

⁶ See *infra* notes 113-14, 146 and accompanying text.

⁷ Exec. Order No. 11,858, 50 Fed. Reg. 20263 (May 7, 1975); see also JAMES K. JACKSON, CONGRESSIONAL RESEARCH SERVICE, EXON-FLORIO FOREIGN INVESTMENT PROVISION: COMPARISON OF H.R. 556 AND S. 1610 (July 13, 2007), available at <http://www.fas.org/sgp/crs/natsec/RL34082.pdf>; Deborah M. Mostaghel, *Dubai Ports World Under Exon-Florio: A Threat to National Security or a Tempest in a Seaport?*, 70 ALB. L. REV. 583, 589 (2007).

⁸ Mostaghel, *supra* note 7, at 589.

⁹ Sir James Goldsmith proposed a \$5 billion hostile bid which was only thwarted after a \$90 million payout and the abandonment of much of Goodyear's corporate strategy. *Id.* at 590; see also John Crudele, *Goldsmith in Bid for Goodyear*, N.Y. TIMES, Nov. 7, 1986, at D1 (citing bid as \$4.6 billion). Fairchild, a subsidiary of French company Schlumberger Ltd., was a leader in the Silicon Valley semiconductor industry and dominated the computer chip and high-tech weapons market. *Id.*

¹⁰ See Andrew Pollack, *Fujitsu in Deal on Chip Maker*, N.Y. TIMES, Oct. 24, 1986, at D1.

¹¹ See *id.*; Jonathan Hicks, *Goodyear's Uneasy Aftermath*, N.Y. TIMES, Dec. 5, 1986, at D1 (discussing cutbacks and changes to corporate strategy following successful avoidance of takeover by Goldsmith); Nathaniel C. Nash, *Takeover Inquiries by Congress Seen*, N.Y. TIMES, Nov. 18, 1986, at D1 (anticipating Congressional testimony by Sir James Goldsmith regarding his takeover bid for Goodyear Tire); Andrew Pollack, *Fujitsu Chip Deal Draws More Flak*, N.Y. TIMES, Jan. 12, 1987, at D1 (citing concerns by several U.S. Senators if Japanese company took over key chip supplier for military); David Sanger, *Japanese Purchase of Chip Maker Canceled After Objections in U.S.*, N.Y. TIMES, Mar. 17, 1987, at A1 (detailing Fairchild Semiconductor's attempted sale to Fujitsu Ltd.).

¹² See Mostaghel, *supra* note 7, at 589; Pollack, *supra* note 10.

emergency.¹³ As a result, Congress initiated an attempt to bolster the Trade Expansion Act of 1962, which it viewed as insufficient for protecting the national security from unwanted foreign investment and influence.¹⁴ Congress approved the resulting legislation in 1988 as the Exon-Florio Amendment to the Omnibus Trade and Competitiveness Act of 1988.¹⁵ Exon-Florio granted the President broad discretionary authority to take “appropriate” action to suspend or prohibit foreign investments that may “threaten to impair the national security.”¹⁶ Furthermore, it gave the President power to order divestment for any completed transaction with a similar effect.¹⁷ In implementing Exon-Florio, President Reagan delegated his authority under Exon-Florio to CFIUS, which was then empowered to conduct reviews of foreign investments and make recommendations to the President.¹⁸

B. *Post-Cold War Transactions and the Byrd Amendment*

Between 1988 and 1994, CFIUS conducted full investigations of fifteen transactions, of which the President took action on one.¹⁹ Critics of Exon-Florio believed that the law was insufficiently aggressive in protecting national security and sought broader guarantees against takeovers by foreign governments or state actors.²⁰ Two proposed transactions crystallized these concerns. First, in 1989, was the proposed purchase of MAMCO Manufacturing Inc. (“MAMCO”), an airplane parts manufacture, by China National Aero-Technology Import and Export Corporation (“CATIC”).²¹ CATIC was an agent of the Chinese Ministry of Aerospace Industry with a reputation for circumventing trade laws to obtain sensitive technologies.²² The transaction between MAMCO and CATIC closed before a full CFIUS

¹³ Jose E. Alvarez, *Political Protectionism and United States Investment Obligations in Conflict: The Hazards of Exon-Florio*, 30 VA. J. INT’L L. 1, 59 (1989).

¹⁴ *Id.* at 69.

¹⁵ Exon-Florio Amendment of 1988, Pub. L. No. 100-418, § 5021, 102 Stat. 1107, 1425; Alvarez, *supra* note 13, at 56.

¹⁶ Exon-Florio Amendment of 1988, Pub. L. No. 100-418, § 5021, 102 Stat. 1107, 1426 (codified at 50 U.S.C. app. §2170 (2000)); see JACKSON, *supra* note 7, at 3; Mostaghel, *supra* note 7, at 584.

¹⁷ See JACKSON, *supra* note 7, at 3.

¹⁸ Exec. Order No. 12,661, 54 Fed. Reg. 779 (Dec. 27, 1988).

¹⁹ U.S. GEN. ACCOUNTING OFFICE, REPORT TO CONGRESSIONAL REQUESTORS: FOREIGN INVESTMENT IMPLEMENTATION OF EXON-FLORIO AND RELATED AMENDMENTS 3 (1995).

²⁰ Mostaghel, *supra* note 7, at 600.

²¹ See Martin Tochin, *U.S. Will Scrutinize a Chinese Deal*, N.Y. TIMES, Dec. 5, 1989, at D4; see also Mostaghel, *supra* note 7, at 599.

²² Jim Mendenhall, *United States: Executive Authority to Divest Acquisitions Under the Exon-Florio Amendment – The MAMCO Divestiture*, 32 HARV. INT’L L.J. 286, 290 (1991).

investigation could take place.²³ Upon completion of its investigation, however, CFIUS recommended that the President require divestiture.²⁴ Although MAMCO did not design the actual airplane parts nor have any classified contracts with the federal government, President George H.W. Bush declared certain equipment used by MAMCO subject to U.S. export controls and required CATIC's divestiture of MAMCO within three months.²⁵

The second transaction, in 1992, was the attempted acquisition of LTV Corporation's Missile Division ("LTV") by Thomson C.S.F. of France ("Thomson"), an entity owned by the French Government.²⁶ Thomson sought LTV in hopes of producing a "complete missile system."²⁷ However, following intense political and public scrutiny of the transaction, Thomson eventually withdrew its offer.²⁸

The common thread in these two transactions was the involvement of foreign governmental agencies or actors perceived as posing an even greater threat to national security than private entities.²⁹ In response, Congress amended Exon-Florio in 1992 to augment the law against these fears. In the National Defense Authorization Act for Fiscal Year 1993, Congress enacted the "Byrd Amendment," which required CFIUS investigation when the acquiring company is "controlled by or acting on behalf of a foreign government" and the resulting acquisition "could affect the national security of the United States."³⁰

The Byrd Amendment also added additional factors considered in the review of proposed transactions.³¹ Originally, CFIUS would review the:

- (1) domestic production needed for projected national defense

²³ Alvarez, *supra* note 13, at 97.

²⁴ Andrew Rosenthal, *Bush Urged to Void Sale of Airplane-Parts Maker to Chinese*, N.Y. TIMES, Feb. 2, 1990, at A9.

²⁵ See Andrew Rosenthal, *Bush, Citing Security Law, Voids Sale of Aviation Concern to China*, N.Y. TIMES, Feb. 3, 1998, at A1; see also Mostaghel, *supra* note 7, at 599 (noting that CATIC sold MAMCO to DeCrane Aircraft Holdings Inc., a U.S. company, in August, 1990).

²⁶ See Reuters, *Thomson of France in Offer for LTV Units*, N.Y. TIMES, Apr. 2, 1992, at D5; see also Mostaghel, *supra* note 7, at 599.

²⁷ Christopher R. Fenton, Note, *U.S. Policy Towards Foreign Direct Investment Post-September 11: Exon-Florio in the Age of Transnational Security*, 41 COLUM. J. TRANSNAT'L L. 195, 207 (2002).

²⁸ See Associated Press, *French Drop Offer to LTV*, N.Y. TIMES, July 7, 1992, at D7; Reuters, *House Panel Votes to Block Sale of LTV's Missile Unit*, N.Y. TIMES, June 19, 1992, at D3 (citing House Defense Appropriations subcommittee vote in favor of blocking proposed sale of LTV to Thomson); see also Mostaghel, *supra* note 7, at 600 (noting that Thomson eventually acquired LTV in partnership with Loral Corporation, a U.S. company).

²⁹ Mostaghel, *supra* note 7, at 600.

³⁰ National Defense Authorization Act for Fiscal Year 1993, Pub. L. No. 102-484, § 837, 106 Stat. 2315, 2464 (1992) (prior to 2007 amendment).

³¹ *Id.*; see also Mostaghel, *supra* note 7, at 601.

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, [and] (3) the control of domestic industries and commercial activity by foreign citizens as it affects the capability and capacity of the United States to meet the requirements of national security.³²

The Amendment added a review of the transaction's "potential effect" on sales of military goods to foreign countries and on the United States' technological advantage in areas "affecting United States National Security."³³ Lastly, the Byrd Amendment required the President to notify Congress upon making any decision to halt a transaction or require divestiture.³⁴

Supporters of the Byrd Amendment believed its provisions would sufficiently address escalating concerns over foreign government acquisitions of U.S. interests, specifically in the national security realm.³⁵ The drafters of the amendment believed the language "could affect national security" because it granted broader authority to the President than the former "threatens to impair the national security" standard under Exon-Florio.³⁶ Congressional supporters further argued the notification requirements sent a strong signal to the President and CFIUS that Congress placed great importance on the issue of foreign investments and would monitor developments in this area closely.³⁷

Critics, however, viewed the Byrd Amendments as unnecessary or, on the opposite end of the spectrum, falling short of needed reforms. Since existing Exon-Florio standards already allowed the review of transactions impacting national security, many believed transactions involving foreign governments would automatically heighten suspicions, rendering the Byrd

³² 50 U.S.C. app. § 2170(f)(1)-(3) (1992).

³³ § 838, 106 Stat. 2315, 2464 (codified as amended at 50 U.S.C. app. § 2170(f)(4) (2006)).

³⁴ *Id.*

³⁵ See 138 CONG. REC. S14039 (daily ed. Sept. 18, 1992) (statement of Sen. Byrd) (stating that amendment addresses "the dilemma of how to prevent foreign companies, particularly those controlled by their governments, from raiding the U.S. economy and snatching up the prized jewels of America's industrial base without discouraging legitimate foreign investment"); see also Mostaghel, *supra* note 7, at 601.

³⁶ 138 CONG. REC. S14039 (daily ed. Sept. 18, 1992) (statement of Sen. Byrd) (providing that amendment "grants extremely broad authority to the President to take action to block an acquisition if he determines that a sale might damage U.S. national security."); see also Mostaghel, *supra* note 7, at 601.

³⁷ 138 CONG. REC. S14039 (daily ed. Sept. 18, 1992) (statement of Sen. Byrd) (hoping that amendment provides "signal to the administration of the importance that the Congress places on this issue"); see also Mostaghel, *supra* note 7, at 601.

Amendment superfluous.³⁸ Other critics did not believe the Byrd Amendment went far enough because it continued CFIUS's reliance on voluntary notification by parties involved in the transaction.³⁹ Thus, some transactions would escape CFIUS review because the Committee would remain unaware of the proposed transaction absent voluntary notification.⁴⁰

C. *The CFIUS Review Process Before the 2007 Amendment*

Under Exon-Florio, CFIUS relied primarily on voluntary notification by U.S. companies contemplating a merger, acquisition, or takeover with a foreign entity.⁴¹ Companies were incentivized to voluntarily report the proposed transaction because of the "safe harbor" extended to transactions reviewed by CFIUS. Once CFIUS determined a transaction posed no national security threat, there was little or no potential for future divestiture orders from the President.⁴² Moreover, failure by a company to report the transaction would not preclude future review since a CFIUS committee member could report the transaction to the full committee.⁴³ This post-closing review could occur at any time, imposing potential losses in time and money and creating severe frustration among the foreign investment community.⁴⁴ Finally, Presidential decisions requiring divestiture were not subject to judicial review.⁴⁵ Due to this uncertain possibility of future governmental action, voluntary Exon-Florio notification became part of the regulatory rubric for corporations contemplating transactions with foreign entities.

After notification, whether through voluntary or member reporting, CFIUS had thirty days to decide whether to conduct an investigation. Once CFIUS made a decision to investigate, or if the Byrd Amendment mandated an investigation, CFIUS had forty-five days to complete it.⁴⁶ Upon

³⁸ See Christopher F. Corr, *A Survey of United States Controls on Foreign Investment Operations: How Much is Enough?*, 9 AM. U.J. INT'L L. & POL'Y 417, 431 (1994); see also Mostaghel, *supra* note 7, at 602.

³⁹ See Corr, *supra* note 38, at 431; see also Mostaghel, *supra* note 7, at 602.

⁴⁰ See Corr, *supra* note 38, at 431; see also Mostaghel, *supra* note 7, at 602.

⁴¹ See JACKSON, *supra* note 7, at 3; Fenton, *supra* note 27, at 209.

⁴² DAVID E. COOPER, U. S. GEN. ACCOUNTING OFFICE, FOREIGN INVESTMENT – IMPLEMENTATION OF EXON-FLORIO AND RELATED AMENDMENTS 3 (1995).

⁴³ See Fenton, *supra* note 27, at 210. However, the General Accounting Office has criticized CFIUS committee members on overly-relying on self-notification and not having internal tracking systems in place to review foreign direct investments. U.S. GEN. ACCOUNTING OFFICE, DEFENSE TRADE: IDENTIFYING FOREIGN ACQUISITIONS AFFECTING NATIONAL SECURITY CAN BE IMPROVED 7-8 (2000).

⁴⁴ Mostaghel, *supra* note 7, at 623.

⁴⁵ Fenton, *supra* note 27, at 210.

⁴⁶ 50 U.S.C. app. § 2170(b)(2)(C) (2006).

completion, CFIUS made a recommendation to the President, who then had fifteen days to announce a decision.⁴⁷ Presidential actions to block a transaction may only occur if there is “credible evidence” a transaction involving a foreign entity may “impair the national security” and if no other legal avenues “provide adequate and appropriate authority for the President to protect the national security.”⁴⁸

Companies could also choose to enter into mitigation agreements in order to avoid a Presidential decision to block the transaction.⁴⁹ CFIUS members negotiated these agreements in order to address a member agency’s specific security concerns.⁵⁰ Provisions in the agreements varied, but included requirements for the company to adopt a visitation policy for government officials or appoint security officers to ensure compliance.⁵¹ Many companies opted to enter into these agreements in order to avoid both a 45-day investigation, which often bore a negative connotation in the investment community and drove down stock prices, and to prevent eventual abandonment of the transaction altogether.⁵² CFIUS agencies monitored the mitigation agreements, particularly the Department of Homeland Security, which utilized developed tracking methods to ensure compliance and informed all interested parties on the status of compliance efforts via periodic e-mail communications.⁵³ However, critics of mitigation agreements were skeptical of their utility – the agreements were “informal arrangements that have an uncertain basis in statute and have not been tested in court.”⁵⁴

D. Criticisms of the Review Process

Critics have leveled significant criticism over the review process, as discussed in detail within a 2005 report by the Government Accountability Office (GAO).⁵⁵ Among the GAO’s primary concerns was the Treasury’s narrow definition of “national security,” which limited the designation to

⁴⁷ 50 U.S.C. app. § 2170(d)(2) (2006).

⁴⁸ 50 U.S.C. app. § 2170(e) (2006).

⁴⁹ JACKSON, *supra* note 7, at 33.

⁵⁰ Matthew Byrne, Note, *Protecting National Security and Promoting Foreign Investment: Maintaining the Exon-Florio Balance*, 67 OHIO ST. L.J. 849, 890 (2006).

⁵¹ U.S. GEN. ACCOUNTING OFFICE, DEFENSE TRADE: ENHANCEMENTS TO THE IMPLEMENTATION OF EXON-FLORIO COULD STRENGTHEN THE LAW’S EFFECTIVENESS 18-19 (2005).

⁵² H.R. REP. NO. 110-24, at 11 (2007); JAMES K. JACKSON, CONGRESSIONAL RESEARCH SERVICE, THE COMMITTEE ON FOREIGN INVESTMENT IN THE UNITED STATES (CFIUS) 12 (2007).

⁵³ H.R. REP. NO. 110-24, at 19.

⁵⁴ JACKSON, *supra* note 7, at 33.

⁵⁵ See generally U.S. GEN. ACCOUNTING OFFICE, *supra* note 51.

companies involved with “export-controlled technologies or items, classified contracts, and critical technology.”⁵⁶ The GAO believed this limited definition restricted the types of transactions subject to review, particularly in light of the Treasury’s role as Chair of CFIUS.⁵⁷ On the other hand, the Departments of Justice and Defense wanted to adopt a broader view that encompassed vulnerabilities that could result from a suspect transaction, such as impact on critical infrastructure, reduction in inputs to defense systems, or a decrease of small businesses providing innovations in defense-related technologies.⁵⁸ Although Exon-Florio and its subsequent amendments identified factors for determining “national security,” the GAO cited consideration of these factors was not mandatory.⁵⁹ The GAO concluded the resistance to adopting the broader interpretation allowed too many transactions to go uninvestigated and resulted specifically in a weakened enforcement provision in one mitigation agreement.⁶⁰

The GAO also cited concern over CFIUS’s hesitation to initiate investigations for fear that conducting too many would discourage foreign investments.⁶¹ In fact, the GAO reported the Treasury was often so reluctant to enter into the investigation stage that they encouraged companies to withdraw their notification in order to have additional time to conduct the 30-day analysis rather than continue on to the 45-day investigation.⁶² The subsequent withdrawal process further thwarted transparency in the CFIUS review process because it prevented cases from requiring a Presidential decision, thus failing to trigger the reporting requirements to Congress.⁶³

II. THE 2007 AMENDMENTS

A. *Transactions Prompting Concerns*

Similar to the transactions that spurred the creation and first major overhaul of Exon-Florio, the most recent demands for revision came because of two attempted transactions. The first deal, announced in June 2005, involved the attempted cash purchase of Unocal Oil by CNOOC, a

⁵⁶ *Id.* at 12.

⁵⁷ *Id.* at 11-12.

⁵⁸ *Id.*

⁵⁹ *Id.* at 13.

⁶⁰ *Id.* at 13-15.

⁶¹ U.S. GEN. ACCOUNTING OFFICE, *supra* note 51, at 13-15.

⁶² *Id.* at 15. Withdrawing the notification and refiling at a later date restarts the 30-day review period, but may also heighten risks if the acquisition is completed before resubmitting the notification. *Id.*

⁶³ *Id.* at 17.

subsidiary of the state-owned China National Offshore Oil Corporation.⁶⁴ Five months later, in November 2005, a second transaction sparked national attention when a U.K. company attempted to sell port operations in six U.S. ports to DP World, a company owned by the United Arab Emirates.⁶⁵ Both of these deals sparked national outcry and led to a series of Congressional proposals.⁶⁶

CNOOC announced its bid to purchase Unocal Oil for \$18.5 billion in cash in the summer of 2005.⁶⁷ Chinese officials expected full CFIUS review of this transaction since it involved a government-owned entity.⁶⁸ However, they believed the deal could survive review because CNOOC held “billions of dollars in U.S. Treasury securities” which finance U.S. governmental operations.⁶⁹ Moreover, CNOOC’s interest in the transaction was likely escalated because “seventy percent of Unocal’s oil and natural gas reserves were in Asia or near the Caspian Sea – areas that China could more easily develop than Unocal.”⁷⁰

However, neither party anticipated the heightened regulatory sensitivity and public outcry over such a precious commodity.⁷¹ Although CNOOC was willing to cooperate and negotiate with CFIUS, they were not ready for a Congressional resolution, passed by an overwhelming 298 to 15 vote, urging President Bush to block the transaction as a threat to national security.⁷² Nor were they ready for a Congressional approval of an energy bill that included a provision requiring a four-month-long study of China’s energy needs prior to government approval of its bid for Unocal.⁷³ Congressional leaders cited concerns over control of a major energy supplier by the “Communist Chinese,” even though the majority of Unocal’s

⁶⁴ See Jonathan Weisman & Peter S. Goodman, *China’s Oil Bid Riles Congress*, WASH. POST, June 24, 2005, at A01.

⁶⁵ See, e.g., Patrick McGeehan, *Despite Fears, a Dubai Company Will Help Run Ports in New York*, N.Y. TIMES, Feb. 17, 2006, at B1.

⁶⁶ Mostaghel, *supra* note 7, at 604 (noting that bills proposed in Congress would have given Congress same power to veto foreign acquisitions that President had or “required majority American ownership of US critical infrastructure (including divestiture of critical infrastructure currently not majority American owned).”).

⁶⁷ *Id.* at 605; see also Weisman & Goodman, *supra* note 64.

⁶⁸ Mostaghel, *supra* note 7, at 605.

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ See, e.g., Steve Lohr, *Unocal Bid Denounced at Hearing*, N.Y. TIMES, July 14, 2005, at C1 (detailing Congressional committee hearing criticizing CNOOC and Unocal deal).

⁷² Peter S. Goodman, *China Tells Congress to Back Off Businesses; Tensions Heightened by Bid to Purchase Unocal*, WASH. POST, July 5, 2005, at A01.

⁷³ See David Barboza & Andrew Ross Sorkin, *Chinese Company Drops Bid to Buy U.S. Oil Concern*, N.Y. TIMES, Aug. 3, 2005, at A1.

outstanding contracts provide oil to Asian customers.⁷⁴ Amidst this overwhelming political opposition and a request from Unocal to raise the price of the bid as a result of the long delays, CNOOC withdrew its offer.⁷⁵ Unocal's shareholders subsequently approved its sale to Chevron at \$64 per share, as opposed to CNOOC's offered price of \$67.⁷⁶ Concerns lingered, however, on the possible effects of the soured deal on foreign investments generally and, specifically, on U.S. relations with China and in the free markets for energy supplies because of the Congressional meddling.⁷⁷

The second transaction was the attempted purchase of certain U.S. port operations by DP World, a company owned by the United Arab Emirates.⁷⁸ In the transaction, DP World would acquire the existing port operator, The Peninsular and Oriental Steam Navigation Company (P&O), a London-based company.⁷⁹ Recognizing the potential national security implications of the transaction, the parties voluntarily informed CFIUS of their intention to file a notification for review in mid-October 2005.⁸⁰ Prior to the formal notification filed with CFIUS in December 2005, CFIUS members conducted their own internal analysis of the transaction and requested an intelligence estimate of DP World.⁸¹ In addition, again before formal notification, the parties conducted two separate briefings for CFIUS agencies on the security, defense, and law enforcement aspects of the transaction.⁸²

The parties' formal notice to CFIUS on December 16, 2005 triggered the 30-day formal review period. During this time, the Department of Homeland Security, the CFIUS member charged with providing port security, negotiated an assurances letter with the companies.⁸³ The letter, finalized on January 6, provided guarantees for certain security standards to be met at the ports.⁸⁴ Shortly thereafter, CFIUS concluded their

⁷⁴ See Goodman, *supra* note 72.

⁷⁵ See Barboza & Sorkin, *supra* note 73; *CNOOC Withdraws Unocal Bid*, China Internet Info. Center, Aug. 3, 2005, <http://www.china.org.cn/english/2005/Aug/137165.htm>.

⁷⁶ See Barboza & Sorkin, *supra* note 73 (providing that CNOOC's board authorized an increase in its proposal to \$69 per share in cash but was not willing to raise price beyond \$67 because of political uncertainties).

⁷⁷ See Jad Mouawad, *Foiled Bid Stirs Worry for U.S. Oil*, N.Y. TIMES, Aug. 11, 2005, at C1.

⁷⁸ Press Release, Dep't of the Treasury, CFIUS and the Protection of the National Security in the Dubai Ports World Bid for Port Operations (Feb. 24, 2006), <http://www.treas.gov/press/releases/js4071.htm>.

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² *Id.*

⁸³ *Id.*

⁸⁴ *Id.*; see also D.P. World and U.S. Port Security, NTI, http://www.nti.org/e_research/

investigation, decided to forego the 45-day review, and determined the DP World/P&O deal should be allowed to proceed, pending any other regulatory objections.⁸⁵ Congressional anger over the decision not to proceed with a formal investigation soon erupted, with lawmakers such as Duncan Hunter (R-CA) expressing concerns that “Dubai cannot be trusted” because the United Arab Emirates is “a bazaar for terrorist nations.”⁸⁶ As a result of the ensuing uproar, DP World resubmitted the transaction to CFIUS for a formal forty-five day review.⁸⁷

Although cleared by CFIUS, another investigation began – in the court of public opinion. The deal was wrought with negative media attention, with headlines such as “Dubai Ports Company in ‘al-Qaida Heartland.’”⁸⁸ Critics cited the United Arab Emirates as an “operational and financial base for the hijackers who carried out the attacks of Sept. 11, 2001.”⁸⁹ However, Dubai Ports’ officials believed critics propounded undue fears because the U.S. Coast Guard and customs authorities, and not port operators, were ultimately responsible for port security.⁹⁰ Despite the Bush administration’s support of the deal, political opposition continued to mount.⁹¹ In fact, opposition became so vigorous that prominent Senators Clinton and Menendez, of New York and New Jersey, respectively, introduced legislation that would prohibit the sale of terminal operations to foreign governments.⁹² By mid-March, the public furor and political fray over the deal forced the United Arab Emirates to abandon the deal, even though the forty-five day investigation was still under way.⁹³ DP World would eventually sell its United States holdings to the American International

e3_75.html (last visited Jan. 24, 2009).

⁸⁵ Press Release, Dep’t of the Treasury, *supra* note 78.

⁸⁶ See Associated Press, *Key GOP Lawmaker Blasts Port Deal, Rep. Duncan Hunter Says He Will Try to Stop Ports Deal*, CBS NEWS, Mar. 3, 2006, available at <http://www.cbsnews.com/stories/2006/03/03/politics/main1365718.shtml>; see also Mostaghel, *supra* note 7, at 606.

⁸⁷ Mostaghel, *supra* note 7, at 606.

⁸⁸ Peter King: *Dubai Ports Company in ‘al-Qaida Heartland’*, NEWSMAX.COM, Feb. 20, 2006, <http://archive.newsmax.com/archives/ic/2006/2/20/120409.shtml> (quoting comment by Congressional Homeland Security Committee chairman, Peter King).

⁸⁹ Associated Press, *More Objections to Port Takeover By Arab Entity*, N.Y. TIMES, Feb. 20, 2006, at A9.

⁹⁰ David D. Kirkpatrick & Patrick McGeehan, *Pataki Joins Opposition to Takeover of Ports*, N.Y. TIMES, Feb. 21, 2006, at B3.

⁹¹ *Id.* (citing bi-partisan opposition of Senators Schumer, Clinton, and Menendez, and Governor Ehrlich of Maryland and Governor Pataki of New York).

⁹² *Id.*

⁹³ Mostaghel, *supra* note 7, at 607; David D. Kirkpatrick, *How the Clock Ran Out on the Dubai Ports Deal*, N.Y. TIMES, Mar. 10, 2006, at A18.

Group for an undisclosed sum.⁹⁴

Although neither CNOOC nor DP World's attempted purchases came to fruition, the public scrutiny and political controversy surrounding the transactions cast an indelible stain on foreign investments. With a renewed spotlight on these transactions, a legislative response would soon follow.

B. *Legislative History*

The failed CNOOC and DP World transactions underscored some of the existing concerns discussed in the GAO report, discussed *supra*, but revealed new flaws as well.⁹⁵ First, critics alleged the narrow definition of national security prevented the transactions from ever receiving a second-stage investigation, as mandated by the Byrd Amendment when government-owned foreign companies were involved.⁹⁶ Second, the DP World transaction specifically showed significant communication shortfalls in the CFIUS process. Within CFIUS, decisions were being made without senior level agency officials' participation, many of whom only learned of the transaction in the media uproar.⁹⁷ Third, Congress was not receiving timely reports from CFIUS, partially because existing CFIUS regulations only required formal reporting when a recommendation had gone to the President, and also because the Department of the Treasury failed to provide the mandated four-year report on foreign investment to Congress.⁹⁸

In light of this criticism, it appears CFIUS attempted to address some of these problems.⁹⁹ CFIUS conducted seven second-stage investigations in 2006, equaling the number of investigations during the previous five years combined.¹⁰⁰ CFIUS also increased the use of mitigation agreements and saw more companies withdraw their investigations, signaling a possible increase in the level of scrutiny applied to each transaction by the parties themselves, who were terminating or restructuring the transactions in order

⁹⁴ Heather Timmons, *Dubai Port Company Sells Its U.S. Holdings to A.I.G.*, N.Y. TIMES, Dec. 12, 2006, at C4.

⁹⁵ H.R. REP. NO. 110-24, at 12 (2007).

⁹⁶ *Id.* Under the Byrd Amendment, transactions involving foreign governments would automatically be subject to heightened scrutiny. See *supra* text accompanying note 30. Critics of the transaction believed that foreign government transactions required second stage investigations in order to satisfy the heightened scrutiny requirement. H.R. REP. NO. 110-24, at 12.

⁹⁷ H.R. REP. NO. 110-24, at 12 (explaining that Congressional hearings revealed that "senior level agency officials participating in the CFIUS process" learned of transaction through media reports).

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ *Id.* at 13.

to address CFIUS concerns.¹⁰¹ Most importantly, CFIUS voluntarily increased its communications with Congress, notifying Congressional leadership once CFIUS concluded its actions on a particular transaction and providing quarterly briefings to relevant committees.¹⁰²

However, dissatisfaction with the process remained and Congress embarked on a formal legislative response, with the introduction of two dozen bills regarding foreign investment in the 109th Congress.¹⁰³ Each chamber of Congress subsequently passed bipartisan legislation in July 2006, H.R. 5337 and S. 3549, but the two bills could not be reconciled before the completion of the Congressional session.¹⁰⁴

At the outset of the 110th Congress, Representative Carolyn Maloney (D-NY) introduced H.R. 556, the National Security Foreign Investment Reform and Strengthened Transparency (FIRST) Act of 2007.¹⁰⁵ The legislation mirrored the text of H.R. 5337, the House bill previously passed in 2006.¹⁰⁶ Specifically, the legislation aimed to address the lack of senior-level involvement in the review process, the lack of reporting to Congress, and the lingering ambiguity in investigatory procedures and mitigation enforcement. After incorporating recommendations from the Bush administration, national security experts, and other experts in foreign investments,¹⁰⁷ the House Committee on Financial Services approved the legislation and, shortly thereafter, the House approved the bill by a unanimous vote.¹⁰⁸ Then in June 2007, Senator Christopher Dodd (D-CT) introduced the Foreign Investment and National Security Act of 2007 (FINSA), S. 1610.¹⁰⁹ Two weeks later, the Senate adopted S. 1610 by unanimous consent as a substitute for H.R. 556.¹¹⁰ In July 2007, the House adopted the Senate's version of the bill by a vote of 370-45, after which the President signed the bill into law.¹¹¹

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ JACKSON, *supra* note 52, at 13 (including bills to block DP World transaction to revamping CFIUS process).

¹⁰⁴ *See* Foreign Investment and National Security Act of 2006, S. 3549, 109th Cong. (2006); National Security Foreign Investment Reform and Strengthened Transparency Act of 2006, H.R. 5337, 109th Cong. (2006).

¹⁰⁵ The National Security Foreign Investment Reform and Strengthened Transparency Act of 2007, H.R. 556, 110th Cong. (2007).

¹⁰⁶ H.R. REP. NO. 110-24, at 13 (2007).

¹⁰⁷ *Id.*

¹⁰⁸ *See* 153 CONG. REC. D231 (daily ed. Feb. 28, 2007).

¹⁰⁹ Foreign Investment and National Security Act of 2007, S. 1610, 110th Cong. (2007).

¹¹⁰ *See* JACKSON, *supra* note 52, at 8.

¹¹¹ 153 CONG. REC. D1088 (daily ed. July 30, 2007); JACKSON, *supra* note 52, at 8.

C. *The Foreign Investment and National Security Act of 2007 (FINSNA) – Key Provisions*

FINSNA codified significant changes to the foreign investment review process in four key areas: the composition of CFIUS and its process of review; the factors considered in evaluating a transaction; mitigation agreements and enforcement; and reports to Congress.

FINSNA made significant changes to the composition of CFIUS and its review process. Membership in CFIUS now consists of the Secretaries of Treasury, Homeland Security, Commerce, Energy, State and Defense; the Attorney General; and the head of any other department, agency, or office determined necessary by the President generally or on a case-by-case basis.¹¹² The Secretary of Labor and the Director of National Intelligence also participate on the Committee as nonvoting, *ex officio* members.¹¹³ FINSNA also mandates the designation of a lead agency for every covered transaction,¹¹⁴ which is responsible for negotiating and monitoring mitigation agreements alongside the Department of the Treasury.¹¹⁵

FINSNA also altered the CFIUS review process. To ensure the accuracy of voluntary notifications, FINSNA required each submission to be certified and signed by the CEO of the submitting entity stating the information complies with the relevant regulations and is accurate in all material respects.¹¹⁶ This provision is similar to the CEO and CFO certification requirements included in the Sarbanes-Oxley Act, absent the criminal penalties imposed for Sarbanes-Oxley violations.¹¹⁷ FINSNA also requires the Director of National Intelligence to conduct a thorough analysis of any national security threat within 20 days of the commencement of CFIUS review.¹¹⁸ Moreover, FINSNA goes beyond the Byrd Amendment in requiring an investigation of any transaction involving foreign governments, threatening national security, or resulting in foreign ownership of any critical infrastructure within the United States, unless the lead agency or Department of the Treasury determines the transaction poses no threat to national

¹¹² Foreign Investment and National Security Act of 2007, Pub. L. No. 110-49, § 3, 121 Stat. 247 (2007) (to be codified as amended at 50 U.S.C. app. § 2170 (2000)).

¹¹³ *Id.*

¹¹⁴ A covered transaction is any transaction proposed or pending after August 23, 1988, which would result in foreign control of any company engaged in interstate commerce within the United States. § 2, 121 Stat. at 247.

¹¹⁵ § 3, 121 Stat. at 252.

¹¹⁶ § 8, 121 Stat. at 259.

¹¹⁷ The Sarbanes-Oxley provisions aimed to ensure that corporate executives were taking responsibility for the accuracy of publicly disclosed financial statements. *See* Pub. L. No. 107-204, § 906, 116 Stat. 745 (2002)(codified at 18 U.S.C. § 1350 (2006)).

¹¹⁸ Foreign Investment and National Security Act of 2007, Pub. L. No. 110-49, § 3, 121 Stat. 251 (2007) (to be codified as amended at 50 U.S.C. app. § 2170 (2000)).

security.¹¹⁹ While remaining ambiguous, FINSA defined critical infrastructure as “systems or assets, whether physical or virtual, so vital to the United States that the incapacity or destruction of such systems or assets would have a debilitating impact on national security.”¹²⁰ For the first time, FINSA also made clear that findings of the President, such as blocking a transaction or requiring divestiture, are not subject to judicial review.¹²¹

The law also codified existing CFIUS processes that allow for the reopening of CFIUS investigations, even if previously cleared, should the Committee discover the submission of any false or misleading material information or the breach of a mitigation agreement.¹²² FINSA hopes to avoid future instances of public embarrassment, as exhibited by the lack of senior level involvement in the DP World transaction, by limiting delegation of various processes to individuals at the Deputy Secretary level or higher.¹²³

FINSA also added additional factors for determining a proposed transaction’s effect on national security. These six factors are: (1) the potential national security effects on critical infrastructure; (2) the potential national security effects on critical technologies; (3) whether the transaction involves a foreign government-controlled corporation; (4) in cases of a government controlled corporation, an assessment of the country’s non-proliferation control policy, its relationship with the United States, particularly its cooperation with counter-terrorism efforts, and its national export control laws which may potentially result in diversion of technologies with military applications; (5) the United States’ long term projection on energy and other critical resources; and (6) any other factors the President or CFIUS deems appropriate.¹²⁴

In addition, FINSA codified the use of mitigation agreements and their enforcement in the CFIUS review process.¹²⁵ It empowered CFIUS or its lead agency to negotiate and enter into an agreement to mitigate any perceived threats to national security.¹²⁶ In order to ensure compliance with mitigation agreements, CFIUS is required to develop methods of evaluation that will not divert necessary resources away from CFIUS nor place an undue burden on the parties to the transaction.¹²⁷ The lead agency charged with compliance monitoring is also required to provide periodic reports to

¹¹⁹ § 2, 121 Stat. at 249-50.

¹²⁰ *Id.* at 247.

¹²¹ § 6, 121 Stat. at 256.

¹²² § 2, 121 Stat. at 248.

¹²³ *Id.*

¹²⁴ Foreign Investment and National Security Act of 2007, Pub. L. No. 110-49, § 3, 121 Stat. 253-54 (2007) (to be codified as amended at 50 U.S.C. app. § 2170 (2000)).

¹²⁵ *See supra* notes 49-54 and accompanying text.

¹²⁶ § 5, 121 Stat. at 254.

¹²⁷ *Id.* at 255

the Committee if any material modifications have been made to the agreement, and to report these modifications to the Director of National Intelligence, the Attorney General and any other federal agency or department who may have interest in the matter.¹²⁸ If a party has breached a mitigation agreement, the transaction in question may be subject to additional review.¹²⁹ However, additional review is limited to circumstances in which the lead agency certifies the breach is intentional, as well as material, and the Committee determines there are no other remedies or enforcement mechanisms available to address the breach.¹³⁰

Lastly, FINSA enhances Congressional oversight of the CFIUS review process by mandating various reporting schedules while concurrently extending confidentiality provisions to ensure privacy of sensitive trade secrets.¹³¹ Upon completion of the CFIUS review process, the Secretary of the Treasury and the lead agency must provide Congress with a certified notice on the results of the investigation.¹³² The notice must describe the actions taken by CFIUS and the factors considered in making their decision.¹³³ FINSA also requires certain annual reports to Congress, including information on each covered transaction filed during the previous year and the results of those investigations.¹³⁴ Furthermore, the relevant agencies are required to provide an annual report to Congress evaluating whether there is “[C]redible evidence of a coordinated strategy by one or more countries or companies to acquire United States companies involved in research, development or production of critical technologies for which the United States is a leading producer” and whether there is any evidence of espionage being perpetrated against private companies in an effort to obtain “commercial secrets related to critical technologies.”¹³⁵

The Secretary of the Treasury, in consultation with the Secretaries of State and Commerce, must also conduct a study on foreign direct investments by government and private companies located in a country

¹²⁸ *Id.*

¹²⁹ § 2, 121 Stat. at 248.

¹³⁰ *Id.*

¹³¹ Foreign Investment and National Security Act of 2007, Pub. L. No. 110-49, § 3, 121 Stat. 256 (2007) (to be codified as amended at 50 U.S.C. app. § 2170 (2000)).

¹³² § 2, 121 Stat. at 249.

¹³³ *Id.* at 250.

¹³⁴ § 7, 121 Stat. at 257-58. The report must include basic information on each party to the transaction, the nature of the business, specific and trend information on the number of filings, investigations, withdrawals, and decisions by the President, cumulative and trend information on the business sectors involved in the transactions, the types of mitigation agreements filed, and detailed discussion on “all perceived adverse effects of covered transactions on the national security or critical infrastructure of the United States.” *Id.*

¹³⁵ *Id.* at 258.

which complies with any boycott of Israel or which does not ban organizations designated by the Secretary of State as a “foreign terrorist organization.”¹³⁶

Finally, in order to prevent the lack of Congressional reporting that previously occurred, the Inspector General of the Department of the Treasury bears the responsibility of conducting an independent investigation if CFIUS fails to provide any of these annual reports.¹³⁷ In order to preserve confidentiality, FINSA extends the limitations on information disclosure originally applied to CFIUS members to members of Congress and their staff.¹³⁸ Moreover, any proprietary information traceable to a specific corporation in a covered transaction is only released to a Congressional committee, absent written consent by the party.¹³⁹

D. Executive Order 11858

In January 2008, President Bush issued Executive Order 13,456 (“the Order”), which provides guidance for the implementation of the changes codified in FINSA.¹⁴⁰ The Order, amending Executive Order 11858, has the full “force and effect of law” and is binding on all CFIUS members.¹⁴¹

Speculation on the Administration’s reaction to FINSA flourished prior to the issuance of the Order.¹⁴² However, the Order made no material changes to the intended effect of FINSA. Rather, the Order reiterated the United States’ unequivocal support for international investment while maintaining a careful balance between economic growth and “protection of the national security.”¹⁴³ Without altering the purpose of FINSA, the administration provided clarifying directives with regard to the composition and process of CFIUS operations.

Specifically, the Order added the U.S. Trade Representative and the Office of Science and Technology Policy as members of CFIUS and added the Office of Management and Budget, the Council of Economic Advisors,

¹³⁶ *Id.*

¹³⁷ *Id.*

¹³⁸ Foreign Investment and National Security Act of 2007, Pub. L. No. 110-49, § 3, 121 Stat. 256 (2007) (to be codified as amended at 50 U.S.C. app. § 2170 (2000)).

¹³⁹ *Id.*

¹⁴⁰ Exec. Order No. 13,456, 73 Fed. Reg. 4677 (Jan. 23, 2008).

¹⁴¹ Email Alert from Reginald J. Brown, et. al., Wilmer Hale President Issues Executive Order Concerning Foreign Investment in the United States (Jan. 24, 2008), <http://www.wilmerhale.com/publications/whPubsDetail.aspx?publication=8260> (citing *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 583 (1952)) (noting Presidential authority under Article II of Constitution and under Defense Production Act of 1950).

¹⁴² *Id.*

¹⁴³ Exec. Order No. 13,456, *supra* note 140, § 1.

the Assistants to the President for Economic Policy, National Security Affairs, and Homeland Security and Counterterrorism as observers.¹⁴⁴ The Order also formalized the role of the Department of the Treasury as the overseer of CFIUS's activities.¹⁴⁵ In addition, the Order required the Department of Commerce to perform certain functions, including monitoring foreign investment activity and trends in the United States and reporting this analysis to the President, departments, and agencies, as appropriate.¹⁴⁶

Most significantly, in recognizing the potential infusion of political maneuvering within CFIUS members, the Order laid out additional rules for the review process.¹⁴⁷ The Order requires a 45-day investigation if even one member advises the chair the proposed transaction presents a potential national security threat that remains unmitigated.¹⁴⁸ Moreover, members are allowed to conduct their own inquiries on a transaction's potential national security risk, so long as communications with the parties to the transaction occur in the presence of the lead agency.¹⁴⁹ Lastly, prior to entering into a mitigation agreement, the lead agency must provide the Committee with the "national security risk posed by the transaction based on factors including the threat... vulnerabilities, and potential consequences" and outline the mitigation measures imposed to address these concerns.¹⁵⁰ Only upon agreement by the Committee that mitigation is appropriate can the lead agency continue negotiating the agreement with the parties to the transaction.¹⁵¹

III. CONTINUED ISSUES WITH AND POSSIBLE CORRECTIONS TO EXON-FLORIO AND THE CFIUS PROCESS

As the Executive Order amply articulates, the CFIUS review process attempts to strike a delicate balance between encouraging foreign investment and protecting the United States from the potential national security implications of foreign ownership. The importance of striking this balance

¹⁴⁴ *Id.* § 3(b).

¹⁴⁵ Specifically, the President delegated his power to the Treasury to initiate review of transactions either unilaterally or for those submitted to CFIUS; authorized Treasury to act on behalf of the Committee and to communicate with Congress and the public on the Committee's behalf; allowed Treasury to assign responsibility for conducting studies and preparing reports mandated by FINSAs; and granted Treasury with the power, following consultation with the Committee, to request the Director of National Intelligence to conduct a national security assessment of a proposed transaction. *Id.* § 4.

¹⁴⁶ *Id.* § 9.

¹⁴⁷ See Brown, *supra* note 141.

¹⁴⁸ Exec. Order No. 13,456, *supra* note 140, §6(b).

¹⁴⁹ *Id.* § 6(a).

¹⁵⁰ *Id.* § 7(b).

¹⁵¹ *Id.*

has far-reaching implications for the future economic success of this country.¹⁵²

Unfortunately, several aspects of CFIUS review cause concern that the process may discourage future direct investment in U.S. companies. FINSA continues to leave the definition of “national security” ambiguous. As a result, this may lead to arbitrary decisions by CFIUS reflecting political gamesmanship rather than preservation of security. In addition, the lack of transparency in the CFIUS review process provides little guidance for foreign companies hoping to engage in foreign direct investments in the future. These two shortcomings in the CFIUS review process present significant barriers to future foreign direct investments.

A. *Lack of Definition for National Security Leads to Arbitrary Decisions That May Have a Negative Impact on Future Economic Prosperity*

The call for a more exact definition of “national security” in the CFIUS process is not a new proposition.¹⁵³ Supporters of an elucidation of “national security” argue definitional standards are necessary to diffuse uncertainty among foreign investors when structuring acquisition transactions.¹⁵⁴ In addition, as recent foreign transactions reflect, fears of foreign involvement in key industries spark intense political pressures that spur CFIUS action, even when CFIUS previously declared those actions unnecessary.¹⁵⁵

The War on Terror has led CFIUS to adopt a broad view of national security, which has resulted in an unfortunate increase in the use of CFIUS review for seemingly political purposes. A review of recent CFIUS investigations underscores this problem. For example, in October 2006,

¹⁵² See ALAN P. LARSON & DAVID M. MARCHICK, FOREIGN INVESTMENT AND NATIONAL SECURITY, COUNCIL ON FOREIGN RELATIONS, COUNCIL SPECIAL REPORT No. 18 6—7 (2006) (citing role of foreign investments in “maintaining the vitality and vibrancy of the U.S. economy,” including employment of five percent of U.S. workforce, contributions to research and development, and shortfall of domestic savings in financing domestic investments).

¹⁵³ See 31 C.F.R. § 800 app. A, § II (2005) (discussing various proposals and public comments debating definition of national security); see also W. Robert Shearer, *The Exon-Florio Amendment: Protectionist Legislation Susceptible to Abuse*, 30 HOUS. L. REV. 1729, 1768 (1993) (arguing that vague definition of national security creates uncertainty for foreign investors and provides President and CFIUS too much control over flow of foreign investments).

¹⁵⁴ Joshua W. Casselman, Note, *China’s Latest Threat to the United States: The Failed CNOOC-UNOCAL Merger and Its Implications for Exon-Florio and CFIUS*, 17 IND. INT’L & COMP. L. REV. 155, 177 (2007).

¹⁵⁵ See *supra* notes 78-94 and accompanying text (discussing Dubai Ports deal and initiation of formal 45-day review following initial CFIUS clearance because of political and public pressure).

Smartmatic, a Venezuelan manufacturer of voting machines, voluntarily submitted their ownership of Sequoia Voting Systems for CFIUS review.¹⁵⁶ The submission was spurred only after Congresswoman Carolyn Maloney (D-NY) wrote to Treasury Secretary John Snow expressing “any potential foreign influence on our elections system is vital to our national security and deserves at least a look . . . It doesn’t seem that the deal for Sequoia was vetted by our government, and I want to know why.”¹⁵⁷ Initially, Smartmatic vehemently denied involvement of any foreign government in its business operations, but eventually succumbed to lingering concerns regarding ownership and influence by submitting a voluntary notice for CFIUS investigation.¹⁵⁸

Smartmatic, with 91-percent ownership by three Venezuelan entrepreneurs, became the parent company of Sequoia Voting Machines in a March 2005 transaction.¹⁵⁹ Even though Smartmatic is not a government owned entity,¹⁶⁰ foreign ownership attracted attention because Smartmatic owed much of its success to contracts with the Venezuelan government.¹⁶¹ Primarily, their involvement with the Venezuelan government centered around its partnership with Bizta, a wholly separate Venezuelan software consulting firm, in providing electronic voting machines to Venezuela.¹⁶² Smartmatic’s partnership with Bizta sparked concern because Bizta was partially owned by the Venezuelan government and had a Venezuelan senior official on its board of Directors.¹⁶³

Although Smartmatic’s links to the Venezuelan government seemed attenuated at best, critics of this foreign ownership suspected the Venezuelan government might have been able to wield influence over American elections, particularly in light of Venezuelan President Hugo Chavez’s vocal disdain of President Bush and U.S. policies.¹⁶⁴ Shortly after Smartmatic’s

¹⁵⁶ Press Release, Sequoia Voting Systems, Smartmatic and Sequoia Voting Systems Announce Voluntary CFIUS Filing (Oct. 29, 2006), <http://www.sequoiavote.com/press.php?ID=24>.

¹⁵⁷ Press Release, Rep. Carolyn Maloney, U.S. Voting Machine Company’s Possible Ties to Foreign Government Draws Congressional Inquiry (May 5, 2006), <http://maloney.house.gov/index.php?option=content&task=view&id=1095&Itemid=61>.

¹⁵⁸ See Press Release, Sequoia Voting Systems, Sequoia Voting Systems Responds to Venezuela Related Rumors and Misinformation (May 11, 2006), <http://www.sequoiavote.com/press.php?ID=20>; Press Release, *supra* note 156.

¹⁵⁹ Press Release, *supra* note 156.

¹⁶⁰ *Id.*

¹⁶¹ See Tim Golden, *U.S. Investigates Voting Machines’ Venezuela Ties*, N.Y. TIMES, Oct. 29, 2006, at A11.

¹⁶² *Id.*; see also Press Release, *supra* note 158.

¹⁶³ See Golden, *supra* note 161.

¹⁶⁴ *Id.*; see also Warren Hoge, *Venezuelan’s Diatribe Seen as Fatal to U.N. Council Bid*,

voluntary notification to CFIUS, Smartmatic received approval from CFIUS to withdraw from the review process and announced its intention to sell Sequoia Voting Systems.¹⁶⁵ In its announcement, Smartmatic Chief Executive Officer, Antonio Mugica stated, “[the] current climate of the United States marketplace with so much public debate over foreign ownership of firms in an area that is viewed as critical U.S. infrastructure” prompted him to decide separate ownership would be best for the company’s financial future.¹⁶⁶

In February of this year, an attempted acquisition of 3Com by Bain Capital and Huawei Technologies was cancelled in light of fears that it could not survive CFIUS scrutiny.¹⁶⁷ The deal, announced in September 2007, involved a \$2.2 billion cash acquisition of 3Com by affiliates of Bain Capital Partners, LLC, a private equity firm ranked 7th in the world by Private Equity International.¹⁶⁸ As part of the deal, Huawei Technologies, a private networking and telecommunications company from China with no ties to the Chinese government, would acquire a minority interest in 3Com and become a commercial and strategic partner.¹⁶⁹ Concerns soon surfaced, however, because of 3Com’s Tipping Point unit, which makes “intrusion prevention” systems that protect networks of large businesses and government agencies.¹⁷⁰ Similar to the other deals, discussed *supra*, Congress publicly announced its disapproval for the deal, with the eight members of the House introducing House Resolution 730, stating the transaction “threaten[ed] the national security of the United States and should not be approved.”¹⁷¹

N.Y. TIMES, Oct. 25, 2006, at A12 (citing President Chavez calling President Bush “the devil”).

¹⁶⁵ Bob Davis, *Smartmatic to Shed U.S. Unit, End Probe Into Venezuelan Links*, WALL ST. J., Dec. 22, 2006, at A6; Press Release, Sequoia Voting Systems, Smartmatic Corporation and Sequoia Voting Systems Move to Align Corporate Structures with Future Business Goals (Dec. 22, 2006), <http://www.sequoiavote.com/press.php?ID=27>.

¹⁶⁶ See Press Release, *supra* note 165.

¹⁶⁷ See Steven Davidoff, *3Com: A Failure to Communicate*, N.Y. Times Deal Book Blog (Feb. 20, 2008), <http://dealbook.blogs.nytimes.com/2008/02/20/3com-a-failure-to-communicate/>.

¹⁶⁸ See Press Release, 3Com Corporation, *3Com Announces Agreement to Be Acquired by Bain Capital Partners for \$5.30 Per Share in Cash* (Sept. 28, 2007), http://www.3com.com/corpinfo/en_US/pressbox/press_release.jsp?INFO_ID=267061. The Private Equity International ranking compares the world’s largest private equity firms based on “the amount of private equity direct-investment capital raised by each firm over the past five years.” PEI Media Online, Private Equity International magazine’s ranking of the world’s largest private equity firms, <http://www.peimedia.com/pei50/> (last visited Jan. 24, 2009).

¹⁶⁹ *Id.*; see also Laurie Flynn and Keith Bradsher, *3Com Agrees to a Private Buyout for \$2.2 Billion*, N.Y. TIMES, Sept. 29, 2007, at C2.

¹⁷⁰ See Reuters News, *Huawei Role Stalls Bain’s 3Com Acquisition*, RED HERRING, Feb. 20, 2008, available at <http://www.redherring.com/Home/23788>.

¹⁷¹ H.R.J. Res. 730, 110th Cong. (2008).

Fourteen Senators, led by Senator John Kyl (R-AZ) also wrote a letter urging rigorous review of the 3Com deal.¹⁷² Even though 3Com announced Huawei would not have any operational control or decision-making control over the company, 3Com was willing to divest its Tipping Point division in order to obtain CFIUS approval, thereby decreasing the proposed selling price by \$2 billion.¹⁷³ However, the parties soon recognized the involvement of Huawei, which could potentially own a 21.5 percent interest in 3Com, created an insurmountable intrusion of a foreign corporation in a key U.S. industry and withdrew its application for CFIUS approval.¹⁷⁴ One month later, Bain Capital Partners announced its intent to terminate the merger agreement.¹⁷⁵

The outcomes of these transactions sparked great concern for the future of foreign direct investment, particularly because domestic companies have not fully developed foreign direct investment opportunities in all countries.¹⁷⁶ The largest investors in the United States are already allies, such as the United Kingdom, Japan, Germany, and France.¹⁷⁷ Investments by companies from these countries are less likely to spark significant national security concerns.¹⁷⁸ Meanwhile, countries that have been most recently targeted by intense CFIUS inquiry, such as Middle Eastern countries and Venezuela, represent only a small percentage of foreign direct

¹⁷² See Alice Lipowicz, *Storm Clouds Gather Over International Acquisitions*, WASH. TECH., Nov. 12, 2007, available at http://www.washingtontechnology.com/print/22_20/31783-1.html.

¹⁷³ See *id.*; Posting of The M&A Researcher to Seeking Alpha (Feb. 21, 2008), <http://seekingalpha.com/article/65457-status-report-3com-bain-capital>.

¹⁷⁴ Press Release, 3Com Corporation, *3Com and Bain Capital Partners Announce Mutual Withdrawal of CFIUS Application* (Feb. 20, 2008), http://www.3com.com/corpinfo/en_US/pressbox/press_release.jsp?INFO_ID=281478.

¹⁷⁵ See Business Wire, *Bain Capital Terminates Merger Agreement with 3Com*, http://www.businesswire.com/portal/site/home/news/sections/?ndmViewId=news_view&newsLang=en&newsId=20080320005798 (last visited Jan. 24, 2009).

¹⁷⁶ See Eben Kaplan, *Foreign Ownership of U.S. Infrastructure*, COUNCIL ON FOREIGN RELATIONS, Feb. 13, 2007, http://www.cfr.org/publication/10092/foreign_ownership_of_us_infrastructure.html; see also Haley, *supra* note 4, at 1162-63.

¹⁷⁷ See Kaplan, *supra* note 176 (citing that these countries had foreign assets in United States with estimated market value of \$2.7 trillion); see also UNCTAD, WORLD INVESTMENT REPORT 2005 and WORLD INVESTMENT REPORT 2006, available at www.unctad.org/fdistatistics.

¹⁷⁸ Note that the Dubai ports deal actually involved a Dubai company purchasing port operations from a British company. Bill Spindle, et al., *In ports Furor, a Clash over Dubai*, WALL ST. J., Feb. 23, 2006, at A1; see also Eben Kaplan, *The UAE Purchase of American Port Facilities*, COUNCIL ON FOREIGN RELATIONS, Feb. 21, 2006, http://www.cfr.org/publication/10092/foreign_ownership_of_us_infrastructure.html (noting lack of objection to British company operating U.S. ports, even though "Shoe-Bomber" Richard Reid was a British citizen).

investment in the United States.¹⁷⁹ Venezuela's foreign direct investment in the United States is only \$5.5 billion,¹⁸⁰ while Middle Eastern countries, not including Israel, invested a mere \$192 million in hard U.S. assets.¹⁸¹ Therefore, the perception of U.S. hostility to private investments in the United States by individuals from countries considered "averse" to U.S. policies or the War on Terror may result in a huge untapped resource of foreign direct investment.

The Congressional reaction to the 3Com transaction also elevates concerns over technologies considered to impact national security, specifically in the way these technologies are defined, evaluated, and protected.¹⁸² As technology continues to advance, more and more items are subject to export prohibitions, including various electronics, computers, telecommunications, sensors, lasers, and navigation instruments.¹⁸³ Yet, many of these items are available in the open market. For example, the Department of Commerce placed a commercially available software application used at U.S. airports on the export control list after the Chinese military airport authority proposed to purchase the software company.¹⁸⁴ As we saw in the MAMCO transaction, discussed *supra*, a company's involvement in the production of goods subject to export control laws may lead to required divestiture.¹⁸⁵ Therefore, the unpredictability of what technologies may be placed on these lists creates an uncertain climate for investment.¹⁸⁶

In order to constrain CFIUS involvement to transactions that truly present national security implications, suggestions have been made to create a list of products or services considered to affect national security.¹⁸⁷ Unfortunately, creating such an exhaustive list would be next to impossible

¹⁷⁹ MARY JANE BOLLE, CONGRESSIONAL RESEARCH SERV. MIDDLE EAST FREE TRADE AREA: PROGRESS REPORT, 5-7 (2006), available at <http://www.usembassy.it/pdf/other/RL32638.pdf>; U.S. DEP'T OF STATE, FOREIGN DIRECT INVESTMENT IN THE UNITED STATES, <http://www.state.gov/r/pa/prs/ps/2006/63553.htm> (last visited Jan. 24, 2009); Haley, *supra* note 4, at 1163.

¹⁸⁰ U.S. DEP'T OF STATE, *supra* note 179.

¹⁸¹ Bernard Wysocki, Jr. et al., *Port Debate Exposes Conflicts Between Security Needs and Foreign Investment*, WALL ST. J., Feb. 23, 2006, at A1.

¹⁸² See Lipowicz, *supra* note 172.

¹⁸³ *Id.*

¹⁸⁴ *Id.*

¹⁸⁵ See *supra* text accompanying notes 21-25.

¹⁸⁶ See Lipowicz, *supra* note 172 (quoting Stan Soloway, president of Professional services Council, who stated that "it is a very difficult challenge in separating out the issue of what should be under export controls and what should not. Sometimes it is a political reaction. There is always a need to balance the security risks against the need for legitimate commercial activity.").

¹⁸⁷ See Shearer, *supra* note 153, at 177.

and could bind CFIUS from the obvious necessity of adapting to ever-changing national security concerns.

Rather, Congress should adopt factors to determine whether national security concerns are implicated. This test should articulate the various industries included in national security consideration, e.g. transportation, elections, defense. The test would continue by ranking the level of concern based on the involvement of the company at various stages of production, like research and development or manufacturing. Clearly, the national security concerns implicated in a company that manages research and development in defense products would likely bear greater concern than a company whose sole responsibility is to manufacture parts for these products. Lastly, such a test could articulate the level of foreign government involvement triggering mandatory CFIUS review or presenting heightened CFIUS inquiry. As the Smartmatic deal exemplified, even an attenuated involvement with a foreign government could pique legislative or CFIUS interests given the industries involved. Notice of increased scrutiny for these types of transactions would be more transparent for foreign investors if, for example, foreign public ownership reached a certain percentage threshold or sales contracts to a foreign government totaled a particular level.

B. Lack of Transparency Undermines the Process and Provides Little Guidance for Corporations Attempting to Navigate the CFIUS Process

The lack of transparency in the CFIUS process further generates confusion and, oftentimes, unnecessary concern.¹⁸⁸ Greater public disclosure, not just Congressional reporting, would ease public concern over foreign direct investments and would provide much needed guidance to companies wishing to acquire U.S. companies in the future. The U.S. securities market already requires a plethora of mandatory reporting, from quarterly and annual reports to detailed disclosures on proposed transactions or changes in ownership.¹⁸⁹ These disclosures, rooted in the 1934 Securities Act, instill public confidence in the securities marketplace and provide guidance to companies who seek to enter into similar transactions in the future.¹⁹⁰ A similar system in the CFIUS review process would provide similar benefits.

¹⁸⁸ See *supra* notes 64-94 and accompanying text (chronicling the CNOOC and DP World transactions).

¹⁸⁹ For an exhaustive listing of various Securities and Exchange Commission forms, see SECURITIES AND EXCHANGE COMMISSION, ELECTRONIC FORM TYPES BY ACT, <http://www.sec.gov/info/edgar/forms/edgform.pdf> (last visited Jan. 24, 2009).

¹⁹⁰ Joan MacLeod Heminway, *Materiality Guidance in the Context of Insider Trading: A Call for Action*, 52 AM. U.L. REV. 1131, 1171 (2003).

As Justice Brandeis once said, “Sunlight is said to be the best of disinfectants; electric light the most efficient policeman.”¹⁹¹ Problems arise when transactions are shrouded in darkness, as evidenced by the recent unraveling of the 3Com acquisition.¹⁹² The SEC documents filed by 3Com in anticipation of the acquisition contained a vague condition for “Requisite Regulatory Approvals... set forth in Schedule 7.1(b),”¹⁹³ but 3Com never filed the aforementioned schedule.¹⁹⁴ Therefore, investors never knew whether the transaction would be subject to Exon-Florio review.¹⁹⁵ Of course, 3Com soon became aware that the transaction raised serious Exon-Florio concerns based upon the Congressional uproar over the deal.¹⁹⁶ In responding to these concerns, 3Com disclosed its plan to divest the Tipping Point division and announced the initial bid to acquire 3Com contained an “alternate valuation methodology.”¹⁹⁷ This unexpected announcement, coupled with the eventual withdrawal of the transaction from CFIUS review, caused 3Com stock prices to plummet from \$4.94 on September 28, 2007 (the day the deal was announced) to \$2.87 on February 20, 2008 (the day the deal was withdrawn from CFIUS consideration).¹⁹⁸ Without proper disclosure of the anticipated trajectory of a transaction, investors encounter a great deal of uncertainty that may lead to significant devaluation of their investments.

Of course, the national security implications inherent in these transactions warrant great concern for confidentiality of sensitive information.¹⁹⁹ CFIUS investigations depend upon full disclosure of various business documents, which could be damaging to a company’s future financial success if made available to competitors in the public.²⁰⁰ These considerations, however, do not make public disclosures entirely impossible. In fact, CFIUS can model its treatment of sensitive business information based upon already established measures adopted by the Securities and Exchange Commission (“SEC”).

The SEC utilizes an effective system that allows companies to request

¹⁹¹ See *Buckley v. Valeo*, 424 U.S. 1, 67 (1976).

¹⁹² See *supra* note 175 and accompanying text.

¹⁹³ 3Com Corporation, Proxy Statement (Form 14A), at 53 (Jan. 25, 2008).

¹⁹⁴ See Davidoff, *supra* note 167.

¹⁹⁵ *Id.*

¹⁹⁶ See *supra* notes 171-72 and accompanying text.

¹⁹⁷ 3Com Corporation, Proxy Statement (Form Def 14A), at 2 (Feb. 19, 2008).

¹⁹⁸ COMS Stock Quote, WALL ST. J., <http://online.wsj.com/public/quotes/main.html?symbol=COMS> (last visited Jan. 24, 2009) (enter designated dates under “Historical Quotes” to determine closing prices).

¹⁹⁹ See EDWARD M. GRAHAM & DAVID M. MARCHICK, INSTITUTE FOR INTERNATIONAL ECONOMICS, U.S. NATIONAL SECURITY AND FOREIGN DIRECT INVESTMENT 154 (2006).

²⁰⁰ *Id.*

confidential treatment of certain information contained in public filings.²⁰¹ The procedure requires the company to submit public disclosure documents, but allows the company to redact the information it wants to keep undisclosed.²⁰² The company then files an application with the SEC detailing the reasons for seeking confidential treatment and provides the contents of the confidential portion itself.²⁰³ Confidential treatment may be granted to documents having an “adverse effect on the business’ competitive position”²⁰⁴ or that “disclose trade secrets and commercial or financial information.”²⁰⁵ The SEC reviews each application and provides opportunities to appeal the denial of an application.²⁰⁶

CFIUS could create a similar system of required public disclosures that would maintain the confidentiality of sensitive business information and/or national security data. Furthermore, this concept could be extended to disclosures of mitigation agreements. These mechanisms would allay public fears and provide guidance to other companies who may engage in foreign transactions in the future, while adding a public “policing” mechanism to ensure accountability.

CONCLUSION

The United States depends on foreign direct investments to fuel and strengthen our economy. However, foreign involvement in our marketplace, particularly in sensitive national security industries, often engenders fears of negative repercussions, whether warranted or not. The transactions involving CNOOC and the DP World highlighted these concerns and led to eventual Congressional enactment of the Foreign Investment and National Security Act of 2007. FINSA codified several changes to the review process conducted by CFIUS of foreign corporations attempting to acquire interests in U.S. companies.

Despite these changes, the CFIUS review process continues to raise concerns. Preserving national security and encouraging foreign investment creates a difficult balance to maintain. However, realization of marked improvements to the current CFIUS process could occur by creating a more exact definition of national security and requiring increased transparency to

²⁰¹ 17 C.F.R. § 230.406 (2008).

²⁰² 17 C.F.R. § 230.406(b) (2008). The undisclosed portions of the filing are marked as “Confidential Treatment.” *Id.*

²⁰³ *Id.*

²⁰⁴ 17 C.F.R. § 200.83 (d)(2)(iv) (2008).

²⁰⁵ 17 C.F.R. § 200.80 (b)(4) (2008).

²⁰⁶ 17 C.F.R. § 230.406 (d)-(e) (2008). Note that the SEC requires written consent to provide the confidential portion of the filing to other government agencies, offices, or bodies and to Congress. 17 C.F.R. § 230.406 (b)(2)(iv) (2008).

the American public. These two improvements would ensure public confidence that our national security is being sustained while at the same time providing needed guidance to foreign companies. This guidance would also ensure the fair and equitable treatment of corporations from other countries and allow these countries to knowledgably negotiate future transactions. Currently, foreign direct investment in the United States totals nearly \$200 billion. However, as our economy continues to struggle and our domestic resources for investing continue to wane, we will increasingly rely on foreign investments to ensure U.S. prosperity. The CFIUS review process must do all it can to encourage these investments, not create fear which will turn these investments away.