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The Exon-Florio National Security Test for Foreign Investment

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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 has 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 have introduced various measures during the 2nd Session of the 109th Congress that can be grouped into four major areas: those that deal specifically with the proposed Dubai Ports World acquisition; those that focus more generally on foreign ownership of U.S. ports, especially if the foreign entity is owned or controlled by a foreign government; those that would amend the CFIUS process; and those that would amend the Exon-Florio process. Such measures as H.J.Res. 79, S.J.Res. 32, H.R. 4807, S. 2333, and S. 2341 would block the now defunct proposed acquisition by Dubai Ports World. In the second area, such measures as H.R. 4817, H.R. 4842, H.R. 4880, H.R. 4885, and S. 2334 would prohibit or significantly reduce the ability of foreign persons to operate U.S. ports.

The third and fourth areas deal broadly with the operations of the Committee on Foreign Investment in the United States and the Exon-Florio provision. Such measures as H.R. 4813, H.R. 4917, S. 1797, S. 2380 and S. 2442 would amend the CFIUS process in various ways, including requiring the Committee to consider the impact of proposed or pending mergers, acquisition, or takeovers on "critical industries" in the United States or on "homeland security." H.R. 4929 and H.R. 5337 would establish CFIUS as a matter of statute. H.R. 5337 was approved unanimously in a markup session by the House Financial Services Committee on June 14, 2006. S. 2380 would amend the CFIUS process by adding the Director of National Intelligence and would require a review by a new Subcommittee on Intelligence within CFIUS. S. 2400 would replace the current CFIUS with a Committee for Secure Commerce, chaired by the Secretary of Homeland Security.

The fourth set of measures would amend the Exon-Florio process, in some cases, quite substantially. Such measures as H.R. 4814, H.R. 4820, H.R. 4881, S. 2335, S. 2374, and S. 2442 would amend the current process in a broad range of ways. H.R. 4915 would institute a national security review and a national security investigation of proposed transactions. H.R. 4959 would institute reciprocal treatment in investment as a condition for certain kinds of investment in the United States. S. 2410 would add new restrictions on foreign investment for the Department of Homeland Security. This report will be updated as warranted by events.

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Background

According to the Department of Commerce,[1] foreigners invested $113 billion in U.S. businesses and real estate in 2004, as indicated in **Figure 1**, which represents nearly a tripling in the amount invested in 2003. This amount, however, is about half as much as U.S. firms invested abroad and far 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 flows dropped by 41% in 2001 and 21% in 2002 due to slow economic growth in most of the parts of the world, falling stock market valuations, lower corporate profitability, a slowdown in corporate restructuring, and a slowdown in privatization efforts in some areas.[2]

The cumulative amount, or stock, of foreign direct investment in the United States on a historical cost basis[3] increased in 2004 to over $1.5 trillion, still below the $2 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 world-wide resurgence in cross-border merger and acquisition activity, and investment in the U.S. financial and insurance industries.[4]

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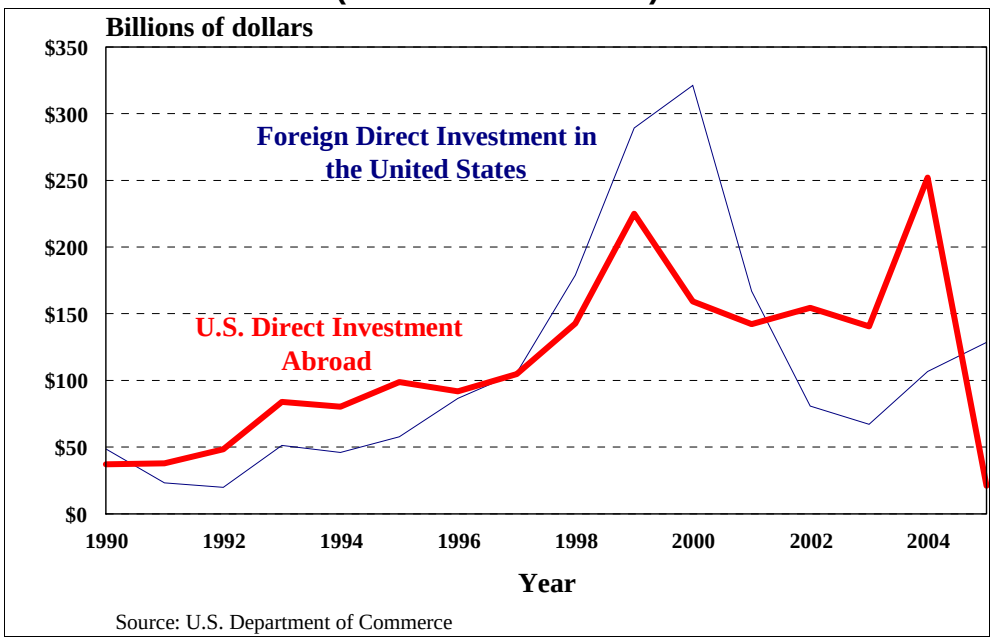
[1] Bach, Christopher L., "U.S. International Transactions, 2004." *Survey of Current Business*, April 2005, p. 46.

[2] *World Investment Report 2004: The Shift Towards Services.* New York, United Nations, 2004, 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 $123 billion and $230 billion in 2003 and 2004, respectively, to $1.7 and $2.7 trillion.

[4] Anderson, Thomas W., "Foreign Direct Investment in the United States: New Investment in 2004," *Survey of Current Business*, June 2005. pp. 30-31.

Figure 1. U.S. Direct Investment Abroad and Foreign Direct Investment in the United States, Annual Flows, 1990-2005 (in billions of dollars)



Source: U.S. Department of Commerce

With over $252 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 $177 billion in investments. Following the Japanese are the Dutch ($167 billion), the Germans ($163 billion), with the French close behind ($148 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 a national emergency or regulators invoked federal antitrust, environmental, or securities laws.

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

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]

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:

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[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.

(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 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

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

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

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.

Congressional Activity

The proposed acquisition of port terminals operated by the British-owned Peninsular and Oriental Steam Navigation Company (P&O)[15] by Dubai Ports World[16] has sparked a firestorm of activity in the 2nd Session of the 109th Congress. **House Joint Resolution 79** (H.J.Res. 79) and **Senate Joint Resolution 32** (S.J.Res. 32) would express congressional disapproval of the proposed acquisition and direct CFIUS to conduct a full 45-day review of the transaction and to brief Members of Congress on the results of the investigation.

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

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[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 Carribean, and North America.

"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 will 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]

Since the beginning of March 2006, seven hearings have been held by various committees representing both the House and the Senate that touched on the Dubai Ports World transaction either directly or indirectly. These hearings include:

- House Appropriations Subcommittee on Homeland Security held a hearing on March 9, 2006, on FY2007 appropriations for the U.S. Coast Guard that also included a discussion of the Dubai Ports World acquisition and port security issues affecting the Coast Guard.

- House Armed Services held a hearing on March 2, 2006, that focused on the Dubai Ports World acquisition.

- House Financial Services Subcommittee on Domestic and International Monetary Policy, Trade, and Technology held a hearing on March 1, 2006, on the Dubai Ports World purchase of U.S. port facilities.

- House Homeland Security Subcommittee on Economic Security, Infrastructure Protection, and Cybersecurity held a hearing on March 16, 2006, on port security and accountability that focused on the impact of foreign ownership of U.S. port facilities.

- House Transportation and Infrastructure Subcommittee on Coast Guard and Maritime Transportation held a hearing on March 1, 2006, on the budget for the Coast Guard and the Maritime transportation system that focused on the role of the Coast Guard in carrying out its responsibility for port security and the impact of foreign ownership of port facilities.

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[17] Hulse, Carl, "In Break with While 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.

- House Transportation and Infrastructure Subcommittee on Coast Guard and Maritime Transportation held a hearing on March 9, 2006, on the impact of foreign ownership of U.S. ports.

- Senate Committee on Banking, Housing, and Urban Affairs held a hearing on March 2, 2006, on the Exon-Florio process and the Dubai Ports World acquisition of U.S. port facilities.

Dubai Ports World Acquisition

H.R. 4807 (King) and **S. 2333 (Schumer)** would direct 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 include various factors that must be considered during the investigation, they require the Secretary of Homeland Security to provide CFIUS with intelligence and other information collected by the Department, and they require CFIUS to report its findings to Congress.

S. 2333 would have the President or his designee conduct a 45-day investigation under the Exon-Florio provision of the proposed acquisition of P&O by Dubai Ports World. The investigation would include (a) a review of foreign port assessments of ports at which Dubai Ports World carries out operations; (2) background checks of appropriate officers and security personnel of Dubai Ports World; (3) an evaluation of the impact on port security in the United States by the acquisition of ports by Dubai Ports World; and (4) an evaluation of the impact on the national security of the United States by the control of the operations at ports by Dubai Ports World. After completion of an investigation of the Dubai Ports World transaction, the President shall submit to Congress a report that contains an analysis of the national security concerns reviewed under the investigation and a description of any assurances that were provided to the Federal government by Dubai Ports World. In addition, the report provided by the President is to contain the determination by the President under the Exon-Florio provision and provide a briefing to specified Members of Congress. If the President determines after his investigation of the proposed transaction that he will not block or suspend the acquisition, the transaction can be blocked by Congress if it passes a joint resolution within 30 days of receiving a report on the transaction by the President.

S. 2341 (Dorgan) would require 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 prohibit 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 amend 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 require 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. The measure would also require the President to notify various leaders and committee Chairmen in the Senate and the House within one day after beginning a 45-day investigation mandated by the Byrd Amendment. The President would also be required to notify Governors and heads of relevant state agencies regarding any proposed investment by an entity that is owned or controlled by a foreign government that would involve leasing, operating, managing, or owning property or facilities at a U.S. port.

H.R. 4880 (Lobiondo) would require 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 amend the Exon-Florio process (Section 271(d) of the Defense Production Act of 1950 (50 U.S.C. App. 2170(d) 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 amend the Exon-Florio process to prohibit any merger, acquisition, or takeover that will result 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. The President would be required to prepare a report for Congress that lists all entities that are owned or controlled by foreign governments that are leasing, operating, managing, or owning real property; an assessment of the national security threat posed by such activities; and recommendation for any legislation in response to such a threat. After beginning a 45-day review, the President has one day to provide congressional leaders with a notice of the investigation and relevant information regarding the proposed merger, acquisitions, or takeover.

Committee on Foreign Investment in the United States

H.R. 4813 (Foley) would amend the Exon-Florio provision to require the President or his designee to notify Congress within five days after CFIUS initiates a 45-day investigation mandated by the Byrd amendment.

H.R. 4917 (Barrow) would amend 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. In addition, the measure would require the President to notify Congress within one day after a 45-day investigation had begun and the President would be required to provide relevant information regarding the transaction, including "timely" responses to inquiries from certain Members of Congress and the decision of the president upon the completion of the investigation. The measure also expresses 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 amend the Exon-Florio process to make mandatory an investigation of any proposed or pending merger, acquisition, or takeover by any foreign person that could result in foreign control of any person engaged in interstate commerce in the United States. This measure would establish the Committee on Foreign Investment in the United States in statute and formally make it responsible for conducting the investigation within 75 days of receipt of a written notification of a proposed or pending merger, acquisition, or takeover. The Committee would remain as presently constituted with 12 members and with the Secretary of the Treasury as the Chairperson of the Committee. The Director of National Intelligence would provide appropriate intelligence analysis and briefings to the Committee.

The measure would require that no proposed or pending merger, acquisition, or takeover of a person engage in interstate commerce in the United States by a foreign person may occur unless the President finds that the transaction "will not threaten" to impair the national security of the United States. The measure would change the existing statute, which states that "the President may exercise the authority ...only if he finds that" to indicate that the President's ability to act is based on findings that "shall be based on credible evidence" that leads the President to believe that a) the foreign interest "might" take action that threatens to impair the national security, and b) other provisions of law are appropriate to protect the national security. During an investigation, the measure would require that those factors that the President is required to consider in investigating a proposed or pending transactions would be the same as those that currently are specified in the Exon-Florio provision.

The measure would require the President to transmit immediately a written notification to the Secretary of the Senate and the Clerk of the House of Representatives a detailed explanation of any determination by the President to approve or disapprove of any merger, acquisition, or takeover by or with any foreign person which could result in foreign control of any person engaged in interstate commerce in the United States. Congress would have 30 days to enact a joint resolution of disapproval of a transaction, which, if adopted, would then have the President " take such action...as is necessary to prohibit the merger, acquisition, or takeover." The measure would also require the President to provide a report to the Congress that evaluates whether there is "credible evidence of a coordinated strategy by 1 or more countries or companies to acquire U.S. companies that are involved in research, development, or production of critical technologies for which the United states is a leading producer." The report would also be 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, with amendment, by the House Financial Services Committee on June 14, 2006. An amendment offered by Subcommittee Chairman Pryce and agreed to by voice vote made technical corrections to the measure and clarified that the Director of National Intelligence would provide analysis to CFIUS while serving in no formal role on CFIUS. The measure would establish the Committee on Foreign Investment in the United States as a matter of statute and would amend the current procedures for a CFIUS review and investigation. The measure would strike out the first two sections of the current statute that deal with investigations and replace them with provisions that would provide for the same 30-day review and 45-day investigation stages that exist under the current provision, but would alter the provision in a number of ways. First, the measure would explicitly indicate that the investigation would be conducted by the Committee on Foreign Investment in the United States, which is referred to only as the President's designee in the current statute. Next, the measure would amend and broaden the language in the current statute regarding national security by indicating that national security for this provision would be construed "so as to include those issues relating to 'homeland security,' including its application to critical infrastructure."

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

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

The measure also would require the President, acting through CFIUS, to conduct a National Security investigation of the effects of a transaction on the national security of the United States and to take any "necessary" actions in connection with the transaction to protect the national security of the United States under certain conditions. These conditions would be: (1) as a result of a review of the transaction, CFIUS determined that the transactions threatened to impair the national security of the United States and that the threat had not been mitigated during or prior to a

review of the transaction; (2) the foreign person was controlled by a foreign government; (3) the Director of National Intelligence had identified "particularly complex national security or intelligence issues" that threatened to impair the national security of the United States. The investigation would be required to be completed within 45 days, but the measure would provide for an extension of the deadline of up to an additional 45 days if the extension had been requested by the President or by a roll call vote of two-thirds of the CFIUS members.

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

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

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

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

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

The measure would also address one concern about CFIUS's actions by granting CFIUS the authority to negotiate, impose, or enforce any agreement or condition with the parties to a transaction in order to mitigate any threat to the national security of the United States. Such agreements would be required to be based on a "risk-based analysis" of the threat posed by the transaction. Also, if a notification of a transaction is withdrawn before any review or investigation by CFIUS can be completed, the measure would grant the Committee the authority to take a number of actions. In particular, the Committee would be able to develop (1) interim protections to address specific concerns about the transaction pending a re-submission of a notice by the parties; (2) a time frame for re-submitting the notice; and (3) a process for tracking any actions taken by any party to the transaction.

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

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

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

Relative to critical technologies, the semi-annual CFIUS report would be required to include an evaluation of any credible evidence of a coordinated strategy by one or more countries or companies to acquire U.S. companies involved in research, development, or production of critical technologies in which the United States is a leading producer. The report would also include an evaluation of possible industrial espionage activities directed or directly assisted by foreign governments against private U.S. companies aimed at obtaining commercial secrets related to critical technologies.

The measure would require the Inspector General of the Department of the Treasury to investigate any failure of CFIUS to comply with requirements for reporting that were imposed prior to the passage of this measure and to report the findings of this report to the Congress. The measure would also require the chief executive officer of any party to a merger, acquisition, or takeover to certify in writing that the information contained in the written notification to CFIUS fully complied with the requirements of the Exon-Florio provision and that the information was accurate and complete.

S. 1797 (Inhofe) would amend 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. In addition, the findings and recommendations of any such investigation shall be sent immediately to the President and to the Committee on Banking, Housing, and Urban Affairs of the Senate and the Committee on Financial Services of the House. The measure would allow the Chairman and Ranking Member of the Senate Banking Committee and the House Financial Services Committee to request a full 45-day investigation of investments that fall under the Byrd Amendment and provide that the results of any such investigation be sent to the President and the Senate Banking Committee and the House Financial Services Committee.

Under this measure, the listed factors that CFIUS considers to determine if a transaction threatens to impair national security would change from being optional (may) to mandatory (shall) and it would add 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." The measure also would require the Secretary of the Treasury to provide a report quarterly to the Senate Banking Committee and the House Financial Services Committee that contains a detailed summary and analysis of each transaction that is being reviewed or was reviewed during the quarter. If the President chooses not to suspend or prohibit a transaction, the transaction may not be finalized for 10 legislative days after the President notifies Congress. If a joint resolution disapproving of the transaction is introduced in either House of Congress, the transaction cannot be completed for 30 legislative days. If such a joint resolution is enacted into law, the transaction cannot be completed.

S. 2380 (Dodd) would increase the membership of CFIUS by adding the Directors of National Intelligence and Central Intelligence and would have the Secretary of Homeland Security and the Secretary of Defense server as vice chairs of the Committee. The measure would have the President establish a Subcommittee on Intelligence within the CFIUS structure that would be chaired by the Director of National Intelligence and include the head of each member of the intelligence community. The measure would amend the Exon-Florio process to provide for a pre-investigation review by the Subcommittee on Intelligence of CFIUS during a 15-day period that would begin following the receipt by the Committee of any proposed merger, acquisitions, or takeover and before the commencement of any 45-day investigation and provide written comments on that review.

The measure would also amend the Exon-Florio process to require that only the President for himself or the Secretary of the Treasury, with the concurrence of the Secretary of Homeland Security and the Secretary of Defense acting on the President's behalf, can determine that a proposed merger, acquisition, or takeover does not threaten to impair the national security and, therefore, would not require a 45-day investigation. In such cases, either the President acting for himself or members of CFIUS acting on his behalf would be required to certify this conclusion in writing. In addition, any person controlled by or acting on behalf of a foreign government that is a party to a proposed merger, acquisition, or takeover of any U.S. critical infrastructure (as defined in 42 U.S.C. 5195c(e)) would be required to notify the President or his designee. The Exon-Florio provision would also be amended to require the President or his designee to notify Congress not later than 15 days after he receives a written notification of a proposed merger, acquisition, or takeover that could proceed to the 45-day investigation. The measure would amend the Exon-Florio statute to indicate that the President's designee under the Exon-Florio provision is the Committee on Foreign Investment in the United States.

S. 2400 (Collins) would repeal that section of the Defense Production Act that is known as the Exon-Florio provision and transfer the function for reviewing mergers, acquisitions and takeovers to the Secretary of Homeland Security. The measure would establish the Committee for Secure Commerce, which would be comprised of the heads of those executive departments, agencies, and offices that the President determines to be appropriate and would include the Director of National Intelligence. The chairperson of the Committee would be able to seek information and assistance from any other department, agency, or office of the Federal

Government as the chairperson determines is necessary or appropriate to carry out the duties of the Committee.

The Committee would be 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 need to be completed within 45 days of its commencement. Any investigation would require the Director of National Intelligence to create a report that consolidates the intelligence findings, assessments, and concerns of each of the relevant members of the intelligence community. The intelligence report would be provided to all members of the Committee and would be included as part of any recommendation by the President. An investigation would be mandated in any instance in which an entity that is controlled by or acting on behalf of a foreign government seeks to engage in any merger, acquisition, or takeover which would result in the control of a person engaged in interstate commerce in the United States.

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

Under the measure, the President would have the authority to "take such action for such time as the President considers appropriate to suspend or prohibit any acquisition, merger, or takeover." The President would be required to announce his decision within 15 days after the completion of the investigation by the Committee. The President would be allowed to exercise his authority under this provision "only of the President finds:" that there is credible evidence that leads the President to believe that the foreign interest exercising control might take action that threatens to impair the national security or homeland security; or that other provisions of law do not provide adequate and appropriate authority for the President to protect the national security or homeland security. In making his decision, the President would be required (shall) to take into account the requirements of national security and homeland security and consider among other factors the same set of factors that currently exist under the Exon-Florio provision.

The measure would require the President or his designee to report immediately upon completion of an investigation to the Congress. This reporting would be comprised of a written report of the results of the investigation and would include a detailed explanation of the findings that were made; details of any legally binding assurances that were provided by the foreign entity that were negotiated as a condition for approval; and the factors that were considered in reaching the determination. The President would also be required to transmit to certain Members of Congress a report in both classified and unclassified form on a quarterly basis that provides a detailed summary and analysis of each merger, acquisition, or takeover

that would be under review or investigation at the time of the report. In addition, the measure would require the President to furnish to Congress on a quadrennial basis a report that a) evaluates whether there is credible evidence of a coordinated strategy by 1 or more countries or companies to acquire critical infrastructure within the United States or U.S. companies involved in research, development, or production of critical technologies for which the United States is a leading producer; and b) evaluates whether there are industrial espionage activities directed or directly assisted by foreign governments against private U.S. companies aimed at obtaining commercial secrets related to critical technologies or critical infrastructure.

Exon-Florio Provision

H.R. 4814 (Garrett) would amend the Exon-Florio provision to require that the President or his designee must approve of any proposed mergers, acquisitions, or takeovers that are determined to be subject to a 45-day investigation under the purview of the Exon-Florio provision and that before the President can approve such a 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 requires the President to report quarterly to Congress on actions taken under the Exon-Florio provision.

H.R. 4820 (Markey) would amend 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 would also require 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 prohibit any corporation from owning, operating, or managing any system or asset included on the "national defense critical infrastructure list" unless the corporation meets the "critical infrastructure national security management requirements." The Secretary of Defense and the Secretary of Homeland Security are required to prepare and maintain a list of critical infrastructure that includes military and civilian installations. The Secretary of Defense would be required to submit a notice to Congress if the critical infrastructure list is changed. Critical infrastructure national security management requirements are 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 is 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 amend the Exon-Florio provision to require the President to review any proposed or pending merger, acquisition, or takeover by or with any foreign person which could result in foreign control of any person engaged in interstate commerce in the United States to determine if the transaction "may possibly have an effect on the national security of the United States." The review would include 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 require 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 require a national security investigation. The measure would provide that any review that establishes conditions or requirements by any person involved in a transaction would not be treated as final until the conditions or requirements would have been approved by the President, the Secretary of the Treasury, or the Deputy Secretary of the Treasury.

The measure would institute a national security investigation if a national security review indicates that the transaction "may possibly have an effect on the national security of the United States." Such an investigation would have no more than 45 days to be completed and would include the factors that currently exist in the Exon-Florio provision, but the measure would require a response prepared respective to any concerns expressed during the investigation relative to the applicability of the factors and any possible actions that were raised to address such concerns. If a transaction is withdrawn before the investigation phase of the Exon-Florio provision, the President would be required to establish a) "interim protection" to address specific concerns that may have been raised in connection with any national security review or a national security investigation; b) specific time frames for resubmitting any notice of a proposed or pending merger, acquisition, or takeover; and c) a process for tracking any actions that may be taken prior to resubmitting a written notice.

The measure would also shift the list of factors to be considered in an Exon-Florio review from being arbitrary (may) to being required (shall), and would include additional factors: 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." The measure also would amend the Exon-Florio provision to require the President to report annually to the Congress on any investigations conducted under a national security investigation during the preceding year to include a) the national security concerns, if any, that were raised by any agency involved in any aspect of a national security review and investigation; b) the manner in which any such concerns were mitigated; and c) whether the merger, acquisition, or takeover was consummated, abandoned, or remained pending at the end of the year. The

measure would require the President to report to the Congress on a quarterly basis all transactions that were under review or under investigation.

The measure would also amend the Exon-Florio provision to make the Committee on foreign Investment in the United States a statutory entity with the membership of the Committee as presently constituted except that the measure would not include the President's Assistant for National Security Affairs as member of CFIUS, but would provide for the President to designate any other person from the Executive Office of the President that he chooses and it would add the Director of National Intelligence. The Committee is given the authority to hold hearings and gather evidence and testimony, including the authority to issue subpoenas under the direction of the President or the chairperson of the Committee.

H.R. 4959 (Turner) would limit 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 allow 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.

H.R. 5337 (Blunt). See this measure under the previous section on the Committee on Foreign Investment in the United States.

S. 2335 (Bayh) would amend 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 are required to notify the President under the Exon-Florio provision 60 days in advance before a proposed merger, acquisition, or takeover occurs if the entity is controlled by or is acting on behalf of a foreign government, has energy assets valued at $1 billion or more, or that operates a critical infrastructure if the transaction could affect the national security of the United States. In addition, the President shall hold public hearings and provide written notification to the Secretary of the Senate and the Clerk of the House of any proposed transaction involving such firms.

S. 2374 (Coleman) would amend 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 amend 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 amend the Exon-Florio provision to require the President or his designee to notify Congress by providing a draft report within seven days of the completion of any investigation of a proposed merger, acquisition, or takeover and before any final determination becomes effective. For each investigation, the members of CFIUS would be required to certify in writing their recommendations or any dissent to the President and to Congress at the conclusion of the investigation. In addition, the measure would require an investigation of any proposed merger, acquisition, or takeover if the entity is controlled by or acting on behalf of a foreign person other than a foreign government only in those cases in which the proposed merger, acquisition, or takeover involves a U.S. entity engaged in interstate commerce in the United States, or critical infrastructure or if it could affect the national security of the United States.

In addition, the measure would amend the Exon-Florio provision to broaden somewhat the ability of the President to exercise his authority to block or suspend any proposed merger, acquisition, or takeover. The measure would grant the President such authority 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." The measure would also establish as a matter of statute that the President's designee under the Exon-Florio provision is the Committee on Foreign Investment in the United States.