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

James K. Jackson

Specialist in International Trade and Finance

February 19, 2016

Congressional Research Service

7-5700

www.crs.gov

RL33388

Summary

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

In the first session of the 110th Congress, the House and Senate adopted S. 1610, the Foreign Investment and National Security Act (FISIA) of 2007. On July 11, 2007, the measure was sent to President Bush, who signed it on July 26, 2007. It is designated as P.L. 110-49. On January 23, 2008, President Bush issued Executive Order 13456 implementing the law. The Executive Order also established some caveats that may affect the way in which the law is implemented. These caveats stipulate that the President will provide information that is required under the law as long as it is "consistent" with the President's authority "to (i) conduct the foreign affairs of the United States; (ii) withhold information the disclosure of which could impair the foreign relations, the national security, the deliberative processes of the Executive, or the performance of the Executive's constitutional duties; (iii) recommend for congressional consideration such measures as the President may judge necessary and expedient; and (iv) supervise the unitary executive branch." Despite the relatively recent passage of the amendments, some Members of Congress and others have questioned the performance of CFIUS and the way the Committee reviews cases involving foreign governments, particularly with the emergence of direct investments through sovereign wealth funds (SWFs). The Obama Administration issued a statement on June 30, 2011, supporting an open investment policy, a commitment to treat all investors in a fair and equitable manner, and support for business investment from sources both home and abroad in the economy. On September 28, 2012, President Obama used the authority granted to him under FISIA to block an American firm, Ralls Corporation, owned by Chinese nationals, from acquiring a U.S. wind farm energy firm. On October 31, 2013, the Obama Administration launched a new initiative, known as Select USA, to attract more foreign direct investment to the United States. According to the Administration, the aim of the program is to make attracting foreign investment as important a component of U.S. foreign policy as promoting exports.

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Background

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

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

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

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

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

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

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

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

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

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

Establishment of CFIUS

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

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

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

The Executive Order, however, raised questions among various observers and government officials who doubted that federal agencies had the legal authority to collect the types of data that were required by the order. As a result, Congress and the President sought to clarify this issue, and in the following year President Ford signed the International Investment Survey Act of 1976.⁹ The act gave the President "clear and unambiguous authority" to collect information on

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

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

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

“international investment.” In addition, the act authorized “the collection and use of information on direct investments owned or controlled directly or indirectly by foreign governments or persons, and to provide analyses of such information to the Congress, the executive agencies, and the general public.”¹⁰

By 1980, some Members of Congress had come to believe that CFIUS was not fulfilling its mandate. Between 1975 and 1980, for instance, the Committee had met only 10 times and seemed unable to decide whether it should respond to the political or the economic aspects of foreign direct investment in the United States.¹¹ One critic of the Committee argued in a congressional hearing in 1979 that, “the Committee has been reduced over the last four years to a body that only responds to the political aspects or the political questions that foreign investment in the United States poses and not with what we really want to know about foreign investments in the United States, that is: Is it good for the economy?”¹²

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

The “Exon-Florio” Provision

In 1988, amid concerns over foreign acquisition of certain types of U.S. firms, particularly by Japanese firms, Congress approved the Exon-Florio provision, which specifies the process by which foreign investments are reviewed.¹⁴ This statute grants the President the authority to block proposed or pending foreign “mergers, acquisitions, or takeovers” of “persons engaged in interstate commerce in the United States” that threaten to impair the national security. Congress directed, however, that before this authority can be invoked the President must conclude that: (1) other U.S. laws are inadequate or inappropriate to protect the national security; and (2) he must have “credible evidence” that the foreign investment will impair the national security. This same standard was maintained in P.L. 110-49.

By the late 1980s, Congress and the public had grown increasingly concerned about the sharp increase in foreign investment in the United States and the potential impact such investment

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

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

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

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

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

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

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

In 1988, after three years of often contentious negotiations between Congress and the Reagan Administration, Congress passed and President Reagan signed the Omnibus Trade and Competitiveness Act of 1988.¹⁹ The Exon-Florio provision, which was included as Section 5021 of that act, fundamentally transformed CFIUS from an obscure committee to an important component of U.S. foreign investment policy. The provision originated in bills reported by the Commerce Committee in the Senate and the Energy and Commerce Committee in the House, but the measure was transferred to the Senate Banking Committee as a result of a dispute over jurisdictional responsibilities.²⁰ In 1990, President Bush, using the authority granted under the Exon-Florio provision, directed the China National Aero-Technology Import and Export Corporation (CATIC) to divest its acquisition of MAMCO Manufacturing, a Seattle-based firm producing metal parts and assemblies for aircraft, because of concerns that CATIC might gain access to technology through MAMCO that it would otherwise have to obtain under an export license.²¹

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

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

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

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

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

¹⁹ P.L. 100-418.

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

²¹ 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.

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

Furthermore, Congress did not intend to have the Exon-Florio provision alter the generally open foreign investment climate of the country or to have it inhibit foreign direct investments in industries that could not be considered to be of national security interest. At the time, some analysts believed the provision could potentially widen the scope of industries that fell under the national security rubric. CFIUS, however, is not free to establish an independent approach to reviewing foreign investment transactions, but operates under the authority of the President and reflects his attitudes and policies. As a result, the discretion CFIUS uses to review and to investigate foreign investment cases reflects policy guidance from the President. Foreign investors also are constrained by legislation that bars foreign direct investment in such industries as maritime, aircraft, banking, resources, and power.²² Generally, these sectors were closed to foreign investors prior to passage of the Exon-Florio provision in order to prevent public services and public interest activities from falling under foreign control, primarily for national defense purposes.

Through Executive Order 12661, President Reagan implemented provisions of the Omnibus Trade Act. In the Executive Order, President Reagan delegated his authority to administer the Exon-Florio provision to CFIUS,²³ particularly to conduct reviews, to undertake investigations, and to make recommendations, although the statute itself does not specifically mention CFIUS. As a result of President Reagan's action, CFIUS was transformed from a purely administrative body with limited authority to review and analyze data on foreign investment to one with a broad mandate and significant authority to advise the President on foreign investment transactions and to recommend that some transactions be blocked.

Treasury Department Regulations

After extensive public comment, the Treasury Department issued its final regulations in November 1991 implementing the Exon-Florio provision.²⁴ Although these procedures were amended through P.L. 110-49, they continued to serve as the basis for the Exon-Florio review and investigation until new regulations were released on November 21, 2008.²⁵ These regulations created an essentially voluntary system of notification by the parties to an acquisition and they allowed for notices of acquisitions by agencies that are members of CFIUS. Despite the voluntary nature of the notification, firms largely comply with the provision, because the regulations stipulate that foreign acquisitions that are governed by the Exon-Florio review process that do not notify the Committee remain subject indefinitely to divestment or other appropriate actions by the President. Under most circumstances, notice of a proposed acquisition that is given to the Committee by a third party, including shareholders, is not considered by the Committee to constitute an official notification. The regulations also indicated that notifications provided to the Committee would be considered to be confidential and the information would not be released by the Committee to the press or commented on publicly.

²² CRS Report RL33103, *Foreign Investment in the United States: Major Federal Statutory Restrictions*, by Michael V. Seitzinger.

²³ Executive Order 12661 of December 27, 1988, 54 F.R. 779.

²⁴ Regulations Pertaining to Mergers, Acquisitions, and Takeovers by Foreign Persons. 31 C.F.R. Part 800.

²⁵ 31 CFR Part 800, November 21, 2008.

The “Byrd Amendment”

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

- (1) the acquirer is controlled by or acting on behalf of a foreign government; and
- (2) the acquisition results in control of a person engaged in interstate commerce in the United States that could affect the national security of the United States.²⁶

This amendment came under intense scrutiny by the 109th Congress as a result of the DP World transaction. Many Members of Congress and others believed that this amendment required CFIUS to undertake a full 45-day investigation of the transaction because DP World was “controlled by or acting on behalf of a foreign government.” The DP World acquisition, however, exposed a sharp rift between what some Members apparently believed the amendment directed CFIUS to do and how the members of CFIUS were interpreting the amendment. In particular, some Members of Congress apparently interpreted the amendment to direct CFIUS to conduct a mandatory 45-day investigation if the foreign firm involved in a transaction is owned or controlled by a foreign government. Representatives of CFIUS argued that they interpreted the amendment to mean that a 45-day investigation was discretionary and not mandatory. In the case of the DP World acquisition, CFIUS representatives argued that they had concluded as a result of an extensive review of the proposed acquisition prior to the case being formally filed with CFIUS and during the 30-day review that the DP World case did not warrant a full 45-day investigation. They conceded that the case met the first criterion under the Byrd amendment, because DP World was controlled by a foreign government, but that it did not meet the second part of the requirement, because CFIUS had concluded during the 30-day review that the transaction “could not affect the national security.”²⁷

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

The most controversial feature of this arrangement is that it allows CFIUS to reopen a review of the deal and to overturn its approval at any time if CFIUS believed the companies “materially fail to comply” with the terms of the arrangement. This marks a significant change in the CFIUS process. Prior to this transaction, CFIUS reviews and investigations had been portrayed, and had been considered, to be final. As a result, firms were willing to subject themselves voluntarily to a CFIUS review, because they believed that once an investment transaction was scrutinized and approved by the members of CFIUS the firms could be assured that the investment transaction would be exempt from any future reviews or actions. This administrative change, however, meant that a CFIUS determination may no longer be a final decision and it added a new level of

²⁶ P.L. 102-484, October 23, 1992.

²⁷ Briefing on the Dubai Ports World Deal before the Senate Armed Services Committee, February 23, 2006.

uncertainty to foreign investors seeking to acquire U.S. firms. A broad range of U.S. and international business groups objected to this change in the Bush Administration's policy.²⁸

The Amended CFIUS Process

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

Formal Actions

P.L. 110-49 established CFIUS by statutory authority and designated the Secretary of the Treasury to serve as the Chairman of CFIUS. The measure followed the same pattern that had been set by Executive Order by allotting the Committee:

- 30 days to conduct a review;
- 45 days to conduct an investigation; and
- 15 days for the President to make his determination.

The President retained his authority as the only officer with the authority to suspend or prohibit mergers, acquisitions, and takeovers, and the measure placed additional requirements on firms that resubmitted a filing after previously withdrawing a filing before a full review was completed.

Informal Actions

Over time, the three step Exon-Florio process apparently had evolved to include an informal stage of unspecified length of time that consists of an unofficial CFIUS determination prior to the formal filing with CFIUS. This type of informal review had developed because it likely served the interests of both CFIUS and the firms that were involved in an investment transaction. According to Treasury Department officials, this informal contact enabled "CFIUS staff to identify potential issues before the review process formally begins."²⁹ This informal process continued under the provisions of P.L. 110-49.

²⁸ Kirchgaessner, Stephanie, US Threat to Reopen Terms of Lucent and Alcatel Deal Mergers, *Financial Times*, December 1, 2006. P. 19; Pelofsky, Jeremy, Businesses Object to US move on foreign Investment, *Reuters News*, December 5, 2006.

²⁹ Testimony of Robert Kimmitt, Briefing on the Dubai Ports World Deal Before the Senate Armed Services Committee, February 23, 2006.

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

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

Committee Membership

President Bush's January 23, 2008 Executive Order 13456 implementing P.L. 110-49 made various changes to the law. The Committee consists of nine members, including the Secretaries of State, the Treasury, Defense, Homeland Security, Commerce, and Energy; the Attorney General; the United States Trade Representative; and the Director of the Office of Science and Technology Policy.³⁰ The Secretary of Labor and the Director of National Intelligence serve as ex officio members of the Committee.³¹ The Executive Order added five executive office members to CFIUS in order to "observe and, as appropriate, participate in and report to the President": the Director of the Office of Management and Budget; the Chairman of the Council of Economic Advisors; the Assistant to the President for National Security Affairs; the Assistant to the President for Economic Policy; and the Assistant to the President for Homeland Security and Counterterrorism. The President can also appoint members on a temporary basis to the Committee as he determines.

Cases

In addition to the Dubai Ports cases, a number of investment transactions have attracted public and congressional attention. After a lengthy review by CFIUS in 2000, Verio, Inc., a U.S. firm that operates websites for businesses and provides internet services, was acquired by NTT Communications of Japan. Verio's stock price reportedly fell during the CFIUS investigation as a result of uncertainty in the market about prospects for the transaction. The CFIUS review was

³⁰ The United States Trade Representative and the Director of the Office of Science and Technology Policy were added through E.O. 13456, issued January 23, 2008.

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

instigated by the FBI, which had expressed concerns during the initial review stage that the majority interest of the Japanese government in NTT could give it access to information regarding wiretaps that were being conducted on email and other web-based traffic crossing Verio's computer system. After completing its investigation, however, CFIUS did not recommend that President Clinton block the transaction.

The potentially negative publicity that can be associated with a CFIUS investigation of a transaction apparently has had a major impact on the transactions CFIUS has investigated. Since 1990, nearly half of the transactions CFIUS investigated were terminated by the firms involved, because the firms decided to withdraw from the transactions rather than face a negative determination by CFIUS. In 2006, for instance, the prospect of a CFIUS investigation apparently was the major reason the Israeli firm Check Point Software Technologies decided to call off its proposed \$225 million acquisition of Sourcefire, a U.S. firm specializing in security appliances for protecting a corporation's internal computer networks. In addition, the decision by the China National Offshore Oil Company (CNOOC) to drop its proposed \$18 billion acquisition of Unocal oil company in 2005 was partly due to concerns by CNOOC about an impending CFIUS investigation of the transaction.

In 2009, Brazilian food producer JBS agreed to pay \$800 million to acquire a majority stake in Texas chicken company Pilgrim's Pride Corp., which was undergoing a bankruptcy reorganization plan. The Brazilian firm is among the world's largest meat producers; it is a major beef producer and distributor with dairy and leather industries. In a separate case, CFIUS reportedly agreed in 2013 to the pending acquisition of Sprint Nextel for \$20 billion by the Japanese firm SoftBank. One complication with the transaction was that Sprint had agreed to acquire Clearwire for \$2.2 billion. Clearwire, however, relied on the Chinese firm Huawei for equipment and for cell tower base stations. SoftBank agreed to remove Huawei as a supplier when the acquisition of Sprint is finalized. DISH Network reportedly made a counter offer of \$25.5 billion that Sprint was considering.

Between December 2009 and July 2010, two Chinese firms withdrew their proposed acquisitions of U.S. firms due to opposition from at least one CFIUS agency. In December 2009, the Chinese firm Northwest Nonferrous International Investment Corp., a subsidiary of China's largest aluminum producer, attempted to acquire U.S.-based Firstgold. The transaction was withdrawn by the Chinese firm due to objections by the U.S. Department of the Treasury that Firstgold had properties near sensitive military bases. In June 2010, China's Tangshan Caofedian Investment Corporation withdrew its proposed acquisition of Emcore, which makes components for fiber optics and solar panels, due to "regulatory concerns."³² In September 2012, the Chinese firm Dalian Wanda Group acquired AMC Entertainment for \$2.6 billion. AMC is the owner and operator of over 338 movie theaters in the United States. With the purchase, the Chinese firm became the largest theater owner in the world.

In 2012, two investments by Chinese firms attracted public and congressional attention: an investment by the American firm Ralls Corp., owned by Chinese nationals who also owned Sany Electric Company, a Chinese electric company, in a wind farm project in Oregon, known as the Butter Creek Projects; and Wanxiang's acquisition of battery-maker A123 Systems Inc. The Ralls transaction, and the associated legal case, likely will affect CFIUS's procedures.

³² Kirchaessner, Stephanie, US Blocks China Fibre Optics Deal Over Security, *Financial Times*, June 30, 2010.

Ralls Wind Farm Acquisition

In March 2012, Ralls acquired wind farm assets from Terna Energy SA, an Athens, Greece-based company, without reporting the transaction to CFIUS. In June, 2012, CFIUS contacted Ralls and requested that the firm file a voluntary notification to have its investment retroactively reviewed. During its initial review, CFIUS determined that Ralls's acquisition of the wind farm companies posed a national security threat as a result of objections by the U.S. Navy over the placement of wind turbines by Ralls near or within restricted Naval Weapons Systems Training Facility airspace where drones (unmanned aerial vehicles) are tested.

On July 25, 2013, CFIUS issued an Order Establishing Interim Mitigation Measures to mitigate the threat posed by the acquisition and required Ralls to: (1) cease all construction and operations at the Butter Creek project sites; (2) remove all stockpiled or stored items from the sites and not deposit, stockpile, or store any new items at the sites; and (3) cease all access to the sites. On July 30, 2012, CFIUS began its national security investigation of the transaction and on August 2, 2012, it issued an Amended Order Establishing Interim Mitigation Measures. In addition to the July Order restrictions, the second CFIUS Order: (1) prohibited Ralls from completing any sale of the acquired wind farm sites or their assets without first removing all items (including concrete foundations) from the Butter Creek project sites; (2) required Ralls to notify CFIUS of any sale; and (3) and required Ralls to give CFIUS ten business days to object to any sale. Neither of these orders disclosed the nature of the national security threat the transaction posed nor the evidence on which CFIUS relied in issuing the orders.

Upon the recommendation of CFIUS, President Obama issued an executive order³³ on September 28, 2012, that argued that there was credible evidence that the Ralls acquisition threatened to impair U.S. national security and ordered Ralls to divest itself of the Oregon wind farm project. In response, the Ralls Corporation filed a suit on October 1, 2012, with the United States District Court for the District of Columbia challenging the Obama Administration's authority to block the investment. The Ralls complaint included five counts: Counts I and II challenged the CFIUS Order under the Administrative Procedures Act; Count III attacked CFIUS as having exceeded its authority; and Counts IV and V challenged the constitutionality of both orders, under the Fifth Amendment Due Process Clause (Count IV) and the Equal Protection Clause of the Fourteenth Amendment (Count V).

On February 22, 2013, the District Court dismissed all but the fourth complaint about Due Process in the Ralls suit, which it indicated Ralls could pursue through the Appeals Court. The court ruled that it lacked jurisdiction in the other complaints, since the CFIUS statute states that the President's decisions are not subject to judicial review, known as a finality provision.³⁴ Ralls argued that the President was authorized only to "suspend or prohibit" a transaction, not to order a removal of equipment or a divestiture.

The District Court ruled, however, that the CFIUS statute grants the President broad authority by authorizing him to take "such action for such time" as he considers appropriate. The suit also argued that Ralls was treated unfairly under the Due Process Clause of the Fifth Amendment, but the court ruled that it lacked jurisdiction on this motion as well by the CFIUS statute. Nevertheless, the court indicated that its ruling would not prohibit Ralls' due process claim to

³³ Order Signed by the President Regarding the Acquisition of Four U.S. Wind Farm Project Companies by Ralls Corporation, The White House, September 28, 2012. Available at <http://www.whitehouse.gov/the-press-office/2012/09/28/order-signed-president-regarding-acquisition-four-us-wind-farm-project-c>.

³⁴ Ralls Corporation vs. Committee on Foreign Investment in the United States, et al., Civil Action Number 12-1513; available at https://ecf.dcd.uscourts.gov/cgi-bin/show_public_doc?2012cv1513-46.

proceed to the Appellate court. The Ralls' due process claim apparently focused on whether the President and/or CFIUS should be required to provide companies that proceed through the CFIUS review and investigation process with an opportunity to review, respond to, and rebut any unclassified evidence used to make a Presidential Determination.

Ralls appealed the decision³⁵ and the case was argued before the Appeals Court for the District of Columbia on May 5, 2014 and decided on July 15, 2014. In its written decision, the Appeals Court concluded that the statutory provision establishing CFIUS that bars a judicial review of a CFIUS determination did not meet the legal test of providing "clear and convincing" evidence that Congress intended to preclude a judicial review of due process challenges to a Presidential Order. The court concluded that the provision bars a judicial review of the final determination of the President to suspend or prohibit a transaction that threatens to impair the national security of the United States, but it also argued that it does not prohibit a judicial review of a constitutional claim challenging the process that precedes a presidential action. The court determined that the Ralls complaint did not challenge the President's determination that the acquisition threatened the national security or the President's determination to prohibit the transaction in order to mitigate the national security threat. Instead, the court argued that the Due Process Clause entitled Ralls to have notice of, and access to, the unclassified evidence on which the President relied and an opportunity to rebut the evidence before the President reached his determination.

The Appeals Court also concluded that the Presidential Order requiring Ralls to divest itself of the wind farm sites deprived Ralls of its constitutionally protected property interests without due process of law, because Ralls never had the "opportunity to tailor its submission to the Appellees' concerns or rebut the factual premises underlying the President's action." The Court argued that this lack of process constituted a "clear constitutional violation," notwithstanding the "Appellees' substantial interest in national security and despite the court's uncertainty that more process would have led to a different presidential decision." The Court also concluded that although it had determined that the procedure followed in issuing the Presidential Order violated due process, it did not mean that the President would be required, in the future, to disclose his thinking on sensitive questions related to national security in reviewing an investment transaction.

Following the Ralls case, the House Armed Services Committee directed the Government Accountability Office (GAO) to conduct an investigation of foreign investments in mines, energy projects, or other business transactions in close proximity to Department of Defense (DOD) testing and training ranges and facilities.³⁶ The GAO investigation reported that DOD had:

- 533 test and training ranges throughout the United States and overseas;³⁷
- Not conducted a risk assessment of these facilities that included prioritizing the facilities based on the critical nature of their operations; and
- Not assessed the degree to which foreign acquisitions could pose a threat to the mission of the facility.

The GAO concluded that DOD had not attempted to prioritize its facilities to assess potential threats posed by foreign investments because DOD had not developed clear guidance on how to conduct such as assessment. Without such guidance for the various military services to follow, the GAO concluded, it may not be possible for DOD to determine "what, if any," negative impact

³⁵ *Ralls Corporation v. Committee on Foreign Investment in the United States, et. al.*

³⁶ *Defense Infrastructure: Risk Assessment Needed to Identify if Foreign Encroachment Threatens Test and Training Ranges*, GAO-15-149, United States Government Accountability Office, December 2014.

³⁷ *Ibid*, p. 4.

foreign investment may be having on DOD test or training ranges. GAO also concluded that DOD interacted with a number of different agencies that are involved in identifying and approving potential business activities near to DOD facilities. In addition to CFIUS, these agencies include: The Bureau of Land Management; The Bureau of Ocean Energy Management; The Bureau of Safety and Environmental Enforcement; The Federal Aviation Administration; The National Environmental Policy Act of 1969; and Community Planning and Liaison Officers at Marine Corp. and Naval installations. Of these entities, only CFIUS is directed to consider security concerns. The GAO concluded that:

DOD has not obtained sufficient information on commercial activity being conducted near test and training ranges in the level of detail officials say they need—such as if a U.S.-based entity is owned or controlled by a foreign entity—to determine if specific transactions on federally owned or managed land in proximity to ranges pose a threat to the range. Such information is generally not collected by other agencies with responsibilities for these transactions because, in some cases, legal, regulatory, or resource challenges may prevent them from collecting information that is unrelated to their agencies' missions.³⁸

A123 Systems

In another case, China's Wanxiang Group received approval in January 2013 from CFIUS to acquire electric car battery maker A123 Systems. Wanxiang outbid other potential buyers by offering to pay \$257 million for the U.S. company. Some Members of Congress and the Strategic Materials Advisory Council argued against the acquisition on the grounds that it could jeopardize the nation's energy security. Others opposed the acquisition because A123 Systems had received nearly \$250 million in a federal grant to support clean energy, although half of the grant was never released. A123 Systems manufactures lithium-ion batteries for Fisker Automotive, BMW hybrid 3- and 5-series cars, and the all-electric Chevrolet Spark.

Smithfield Foods

The proposed 2013 acquisition of Smithfield Food Inc., for \$4.7 billion by China's Shuanghui International Holdings Ltd., potentially the largest acquisition of a U.S. firm by a Chinese company, sparked intense congressional and public interest about the issue of food security as a component of the critical infrastructure/key resources rubric. Smithfield Foods was the world's leading vertically integrated pork processor and pork producer. It was the leading U.S. pork packer and producer, capturing about 26% share of the domestic U.S. hog market, and produced around 20 million-22 million hogs per year, compared with the Chinese market that slaughtered nearly 694 million hogs in 2012. The Smithfield operation spanned facilities including hog farms, pork processing and packing, and pork distribution facilities in more than a dozen states, including North Carolina, Virginia, Maryland, South Dakota, Ohio, Iowa, Illinois, Nebraska, Indiana, Kansas, Minnesota, Missouri, Kentucky, and Wisconsin.

Opposition to the proposed acquisition was expressed by the National Farmers Union and the Center for Rural Affairs due to concerns over the impact on market concentration. In addition, the proposed acquisition of Smithfield Foods potentially challenged state laws that barred foreign ownership of farmland in Iowa, Missouri, and other Midwest states, given Smithfield's widespread operations. Some observers called for CFIUS to appoint the Secretary of Agriculture as a temporary member of CFIUS to review the proposed transaction. Another issue involved in the

³⁸ Ibid, p. i.

transaction was that Smithfield had developed and used advanced genetic research to produce especially lean pigs that may have been desired by Shuanghui and potentially raised questions about the protection of Smithfield's intellectual property and future competition. Smithfield Foods announced on September 6, 2012, that CFIUS had decided not to oppose the proposed acquisition by Shuanghui International. Smithfield's shareholders voted overwhelmingly on September 25, 2013, to approve the transaction.

The Smithfield-Shuanghui acquisition raised questions about the implications for U.S. critical infrastructure/key resources associated with this particular investment transaction, but also about U.S. food security over the long term and whether such concerns are being addressed sufficiently during a CFIUS review or investigation. According to this argument, since Smithfield Foods was a vertically integrated company, its acquisition potentially affected a number of different markets and different parts of the food production infrastructure. In addition, the acquisition potentially provided a future competitor with the necessary resources to mount a competitive challenge in the future to other U.S. food producers. The National Strategy for Critical Infrastructures and Key Assets, adopted in the wake of the 2001 terrorist attacks, identified the critical infrastructure nature of the food and agriculture sector as, "the fundamental need for food, as well as great public sensitivity to food safety makes assuring the security of food production and processing a high priority."³⁹ The strategy defined the food and agriculture sector as (1) the supply chains for feed, animals, and animal products; (2) crop production and the supply chains of seed, fertilizer, and other necessary related materials; and (3) the post-harvesting components of the food supply chain, from processing, production, and packaging through storage and distribution to retail sales, institutional food services, and restaurant or home consumption.

Other Cases

Another transaction reflected efforts by the Russian space agency Roscosmos in 2013 to build six Global Positioning System (GPS) monitor stations in the United States. This case sparked interest in amending CFIUS's mandate that currently does not provide for it to review greenfield investments, or new start-up ventures that are built from the ground up. The transaction was opposed by CFIUS due to concerns raised by the CIA and DOD. In retaliation, Russia shut down U.S. GPS stations operating on Russian soil. In December 2015, Roscosmos was dissolved after a series of budget cuts and charges of corruption and mismanagement.

In 2016, Dutch electronics firm Phillips terminated a \$2.9 billion sale of controlling interest in its Lumileds unit, with over 600 patents and operations in the United States, to a consortium of Chinese investors due to its inability to mitigate concerns raised by CFIUS. Also in 2016, China state-owned ChemChina was expected to notify CFIUS of its proposed acquisition of the Swiss seed and chemical company Syngenta for \$43 billion in cash, which would make it the largest acquisition by a Chinese firm.

In 2016, Members of Congress also were expected to ask the Obama administration to review the proposed acquisition of the Chicago Stock Exchange (CHX) by the Chinese-led consortium Chongqing Casin Enterprise Group for a value less than \$100 million. In a letter to the administration, the Members expressed concerns that ties between the company and Chinese government officials could give the Chinese government influence over U.S. equity markets and potentially provide it with the ability to manipulate the markets to the advantage of Chinese companies or the Chinese economy.⁴⁰ The CHX handles an estimated 0.5% of U.S. \$22 trillion

³⁹ *The National Strategy for the Physical Protection of Critical Infrastructure and Key Assets*, February 2003, p. 36.

⁴⁰ Rogin, Josh, Congress Wary of National Security Implications of Chinese Deal for Chicago Stock Exchange, (continued...)

U.S. equities market and would need the approval of the Securities and Exchange Commission. CHX reportedly intends to use the cash infusion to revamp its listing program. The acquisition reportedly will be used to help develop financial markets in China and to bring Chinese companies to U.S. investors.

Government-Sponsored Firms and National Security

The growing presence of firms that are owned by or controlled by foreign governments, sometimes referred to as state capitalism, is sparking concerns over the economic and security implications of these firms. In general, some analysts question whether firms that are owned or controlled by a national government compete on the same basis as firms that do not have such a close connection with a national government. Such an association, for instance, may offer firms greater market protection at home from which they arguably can develop a strong competitive position, or that access to below market financing terms through other government-controlled entities provides firms with a competitive advantage over firms that are subject to market conditions. Conversely, others argue that firms that are not subjected to the crucible of market competition due to protection by their governments may lack the incentives that are necessary to become competitive over the long run.

Others argue that firms that are owned or controlled by a foreign government face a potential conflict between engaging in economic activities that serve the competitive interests of the firm versus activities that benefit the goals and ambitions of a foreign government. For instance, corporate espionage is not an uncommon activity, but such activities by foreign firms that are owned or controlled by a foreign government often are viewed differently from such activities by firms that are engaging in corporate espionage for their own competitive interests, since the activities of the firms are viewed as not being motivated primarily for competitive commercial gains, but are directed primarily at achieving the national security interests of a foreign government.⁴¹ The presence of such firms as active players in the area of foreign investment where there is the potential for economic espionage that benefits a foreign government significantly complicates the interaction between economic activities and national security and increases the challenges CFIUS faces in determining the potential threat that any single investment transaction might hold for the U.S. economy or for U.S. national security. In addition, differences in national laws, particularly in criminal law, and practices concerning the treatment of economic espionage potentially create friction between national governments.⁴²

Investments by Chinese firms, in particular, are raising concerns. For instance, on October 8, 2012, the House Permanent Select Committee on Intelligence published a report⁴³ on “the

(...continued)

Chicago Tribune, February 17, 2016.

⁴¹ Economic espionage for the benefit of a foreign government is treated differently in U.S. statutes from the theft of trade secrets for the benefit of an individual. U.S. Code title 18, section 1831 provides for a fine of not more than \$5 million or a prison term of no more than 15 years, or both for economic espionage for the benefit of a foreign government, while U.S. Code title 18, section 1832 on the theft of trade secrets for the benefit of an individual provides for a penalty of no more than \$5 million or a prison term of no more than 10 years, or both. For a detailed discussion, see: Lewis, Margaret K., When Foreign is Criminal, *Virginia Journal of International Law*, vol. 55-3, p. 657-663.

⁴² Differences in criminal law systems and how criminal laws are applied are particularly notable between the United States and China. See Lewis, Margaret K., Criminal Law Pays: Penal Law’s Contribution to China’s Economic Development, *Vanderbilt Journal of Transnational Law*, March 2014 for a review of recent developments in China’s criminal law framework and the role that criminal law is playing in China’s economic development.

⁴³ Investigative Report on the U.S. National Security Issues Posed by Chinese Telecommunications Companies Huawei and ZTE: A Report by Chairman Mike Rogers and Ranking Member C.A. Dutch Ruppersberger of the Permanent (continued...)

counterintelligence and security threat posed by Chinese telecommunications companies doing business in the United States.” The report offered a number of policy recommendations affecting CFIUS, including

- The Committee on Foreign Investment in the United States (CFIUS) must block acquisitions, takeovers, or mergers involving Huawei and ZTE given the threat to U.S. national security interests. Legislative proposals seeking to expand CFIUS to include purchasing agreements should receive thorough consideration by relevant congressional committees.
- Committees of jurisdiction in the U.S. Congress should consider potential legislation to better address the risk posed by telecommunications companies with nation-state ties or otherwise not clearly trusted to build critical infrastructure. Such legislation could include increasing information sharing among private sector entities, and an expanded role for the CFIUS process to include purchasing agreements.

In addition, in November 2012, the U.S.-China Economic and Security Review Commission⁴⁴ issued a report that detailed concerns over Chinese investments by U.S. industries, lawmakers, and government officials about the “potential economic distortions and national security concerns arising from China’s system of state-supported and state-led economic growth.” In particular, some observers argued that economic concerns focused on the possibility that state-backed Chinese companies choose to invest “based on strategic rather than market-based considerations,” and are free from the constraints of market forces because of generous state subsidies. The report proffered a number of recommendations for amending the CFIUS statute:

- Congress examine foreign direct investment from China to the United States and assess whether there is a need to amend the underlying statute (50 U.S.C. app 2170) for the Committee on Foreign Investment in the United States (CFIUS) to (1) require a mandatory review of all controlling transactions by Chinese state-owned and state-controlled companies investing in the United States; (2) add a net economic benefit test to the existing national security test that CFIUS administers; and (3) prohibit investment in a U.S. industry by a foreign company whose government prohibits foreign investment in that same industry.
- Legislation creating the Committee on Foreign Investment in the United States (CFIUS) could be amended to add a test of “economic benefit” of a Chinese investment in the United States.
- CFIUS’s jurisdiction be extended to include “greenfield” investments, or investments in new industrial plants and facilities.

Concerns over greenfield investments were sparked in 2013 by efforts of the Russian space agency Roscosmos to build about half a dozen Global Positioning System (GPS) monitor stations in the United States. This proposed investment raised interest about amending CFIUS’s provisions that currently do not provide for it to review greenfield investments. The Russian transaction was supported by the U.S. State Department as one way of improving U.S.-Russian relations. The Central Intelligence Agency and the Defense Department, however, opposed the

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Select Committee on Intelligence, U.S. House of Representatives, October 8, 2012.

⁴⁴ 2012 Report to Congress of the U.S.-China Economic and Security Review Commission, U.S. China Economic and Security Review Commission, November 2012.

transaction. They argued that the monitoring stations would significantly improve the accuracy and reliability of Moscow's version of the GPS that could help Russia spy on the United States and improve the precision of Russian weaponry.⁴⁵

Covered Transactions

The law requires CFIUS to review all “covered” foreign investment transactions to determine whether a transaction threatens to impair the national security, or the foreign entity is controlled by a foreign government, or it would result in control of any “critical infrastructure that could impair the national security.” A covered foreign investment transaction is defined as any merger, acquisition, or takeover which results in “foreign control of any person engaged in interstate commerce in the United States.” According to Treasury Department regulations, investment transactions that are *not* considered to be covered transactions under the Exon-Florio provision and, therefore, not subject to a CFIUS review are those that are undertaken “solely for the purpose of investment,” or an investment in which the foreign investor has “no intention of determining or directing the basic business decisions of the issuer.” In addition, investments that are solely for investment purposes are defined as those (1) in which the transaction does not involve owning more than 10% of the voting securities of the firm; or (2) those investments that are undertaken directly by a bank, trust company, insurance company, investment company, pension fund, employee benefit plan, mutual fund, finance company, or brokerage company “in the ordinary course of business for its own account.”⁴⁶

Other transactions that are not covered include (1) stock splits or a pro rata stock dividend that does not involve a change in control; (2) an acquisition of any part of an entity or of assets that do not constitute a U.S. business; (3) an acquisition of securities by a person acting as a securities underwriter, in the ordinary course of business and in the process of underwriting; and an acquisition pursuant to a condition in a contract of insurance relating to fidelity, surety, or casualty obligations if the contract was made by an insurer in the ordinary course of business. In addition, the Treasury regulations also stipulate that the extension of a loan or a similar financing arrangement by a foreign person to a U.S. business will not be considered a covered transaction and will not be investigated, unless the loan conveys a right to the profits of the U.S. business or involves a transfer of management decisions.

Critical Infrastructure

A new element to the CFIUS process that was added by P.L. 110-49 is the addition of “critical industries” and “homeland security” as broad categories of economic activity that could be subject to a CFIUS national security review. After the September 11th terrorist attacks Congress passed and President Bush signed the USA PATRIOT Act of 2001 (Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism).⁴⁷ In this act, Congress provided for special support for “critical industries,” which it defined as:

systems and assets, whether physical or virtual, so vital to the United States that the incapacity or destruction of such systems and assets would have a debilitating impact on

⁴⁵ Schmidt, Michael S., and Eric Schmitt, A Russian GPS Using U.S. Soil Stirs Spy Fears, *The New York Times*, November 16, 2013.

⁴⁶ 31 CFR 800.302.

⁴⁷ P.L. 107-56, Title X, §1014, October 26, 2001; 42 U.S.C. §5195c(e).

security, national economic security, national public health or safety, or any combination of those matters.⁴⁸

This broad definition is enhanced to some degree by other provisions of the act, which identify certain sectors of the economy that are likely candidates for consideration as components of the national critical infrastructure. These sectors include telecommunications, energy, financial services, water, transportation sectors,⁴⁹ and the “cyber and physical infrastructure services critical to maintaining the national defense, continuity of government, economic prosperity, and quality of life in the United States.”⁵⁰ The following year, Congress adopted the language in the Patriot Act on critical infrastructure into The Homeland Security Act of 2002.⁵¹

In addition, the Homeland Security Act added key resources to the list of critical infrastructure (CI/KR) and defined those resources as: “publicly or privately controlled resources essential to the minimal operations of the economy and government.”⁵² Through a series of Directives, the Department of Homeland Security identified 17 sectors⁵³ of the economy as falling within the definition of critical infrastructure/key resources and assigned primary responsibility for those sectors to various federal departments and agencies, which are designated as Sector-Specific Agencies (SSAs).⁵⁴ On March 3, 2008, Homeland Security Secretary Chertoff signed an internal DHS memo designating Critical Manufacturing as the 18th sector on the CI/KR list.

In 2013, the list of critical industries was altered through a Presidential Policy Directive (PPD-21).⁵⁵ The Directive listed three “strategic imperatives” as drivers of the Federal approach to strengthening “critical infrastructure security and resilience”:

1. Refine and clarify functional relationships across the Federal Government to advance the national unity of effort to strengthen critical infrastructure security and resilience;
2. Enable effective information exchange by identifying baseline data and systems requirements for the Federal Government; and
3. Implement an integration and analysis function to inform planning and operations decisions regarding critical infrastructure.

The Directive assigns the main responsibility to the Department of Homeland Security for identifying critical industries and coordinating efforts among the various government agencies, among a number of responsibilities. The Directive also assigns roles to other agencies and designated 16 sectors as critical to the U.S. infrastructure. The sectors are: (1) chemical; (2) commercial facilities; (3) communications; (4) critical manufacturing; (5) dams; (6) defense industrial base; (7) emergency services; (8) energy; (9) financial services; (10) food and

⁴⁸ Ibid.

⁴⁹ 42 U.S.C. §5195c(b)(2).

⁵⁰ 42 U.S.C. §5195c(b)(3).

⁵¹ 6 U.S.C. §101(4).

⁵² 6 U.S.C. §101(9).

⁵³ The sectors include (1) Agriculture and Food; (2) Defense Industrial Base; (3) Energy; (4) Public Health and Healthcare; (5) National Monuments and Icons; (6) Banking and Finance; (7) Drinking Water and Water Treatment Systems; (8) Chemical; (9) Commercial Facilities; (10) Dams; (11) Emergency Services; (12) Commercial Nuclear Reactors, Materials, and Waste; (13) Information Technology; (14) Telecommunications; (15) Postal and Shipping; (16) Transportation Systems; and (17) Government Facilities.

⁵⁴ Sector-Specific Agencies include the Departments of: Agriculture, Defense, Energy, Health and Human Services, Homeland Security, Interior, Treasury, and the Environmental Protection Agency.

⁵⁵ Presidential Policy Directive—Critical Infrastructure Security and Resilience, The White House, February 12, 2013.

agriculture; (11) government facilities; (12) healthcare and public health; (13) information technology; (14) nuclear reactors, materials, and waste; (15) transportation systems; (16) water and wastewater systems.⁵⁶

Control

The CFIUS statute itself does not provide a definition of the term “control,” but such a definition is included in the Treasury Department’s regulations. According to those regulations, control is not defined as a numerical benchmark,⁵⁷ but instead focuses on a functional definition of control, or a definition that is governed by the influence the level of ownership permits the foreign entity to affect certain decisions by the firm. According to the Treasury Department’s regulations:

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

- (1) The sale, lease, mortgage, pledge or other transfer of any or all of the principal assets of the entity, whether or not in the ordinary course of business;
- (2) The reorganization, merger, or dissolution of the entity;
- (3) The closing, relocation, or substantial alternation of the production operational, or research and development facilities of the entity;
- (4) Major expenditures or investments, issuances of equity or debt, or dividend payments by this entity, or approval of the operating budget of the entity;
- (5) The selection of new business lines or ventures that the entity will pursue;
- (6) The entry into termination or non-fulfillment by the entity of significant contracts;
- (7) The policies or procedures of the entity governing the treatment of non-public technical, financial, or other proprietary information of the entity;
- (8) The appointment or dismissal of officers or senior managers;
- (9) The appointment or dismissal of employees with access to sensitive technology or classified U.S. Government information; or
- (10) The amendment of the Articles of Incorporation, constituent agreement, or other organizational documents of the entity with respect to the matters described at paragraph (a) (1) through (9) of this section.

The Treasury Department’s regulations also provide some guidance to firms that are deciding whether they should notify CFIUS of a proposed or pending merger, acquisition, or takeover. The

⁵⁶ See: <http://www.dhs.gov/critical-infrastructure-sectors>.

⁵⁷ There are other statutes that do use numerical benchmarks. According to Section 13(d) of the Securities Exchange Act of 1934 (15 U.S.C. Section 78m(d)) any person who acquires 5% or more of the publicly traded securities of a U.S. firm must report the acquisition of the shares to the Securities and Exchange Commission. For statistical purposes, the United States defines foreign direct investment as the ownership or control, directly or indirectly, by one foreign person (individual, branch, partnership, association, government, etc.) of 10% or more of the voting securities of an incorporated U.S. business enterprise or an equivalent interest in an unincorporated U.S. business enterprise 15 CFR §806.15 (a)(1). This level of ownership requires foreign owners to file quarterly and longer annual reports with the Department of Commerce as part of the quarterly and annual reports on the balance of payments and gross domestic product (GDP).

guidance states that proposed acquisitions that need to notify CFIUS are those that involve “products or key technologies essential to the U.S. defense industrial base.” This notice is not intended for firms that produce goods or services with no special relation to national security, especially toys and games, food products, hotels and restaurants, or legal services. CFIUS has indicated that in order to assure an unimpeded inflow of foreign investment it would implement the statute “only insofar as necessary to protect the national security,” and “in a manner fully consistent with the international obligations of the United States.”⁵⁸

Neither Congress nor the Administration has attempted to define the term national security. Treasury Department officials have indicated, however, that during a review or investigation each CFIUS member is expected to apply that definition of national security that is consistent with the representative agency’s specific legislative mandate.⁵⁹ The concept of national security was broadened by P.L. 110-49 to include, “those issues relating to ‘homeland security,’ including its application to critical infrastructure.”

Procedures

According to the amended Exon-Florio provision, the President or any member of CFIUS can initiate a review of an investment transaction in addition to a review that is initiated by the parties to a transaction providing a formal notification. As amended, CFIUS has 30 days to review a transaction to decide after it receives the initial formal notification by the parties to a merger, acquisition, or a takeover, whether to investigate a case as a result of its determination that the investment “threatens to impair the national security of the United States.” National security also includes “those issues relating to ‘homeland security,’ including its application to critical infrastructure,” and “critical technologies.” In addition, CFIUS is required to conduct an investigation of a transaction if the Committee determines that the transaction would result in foreign control of any person engaged in interstate commerce in the United States. During such a review, the members of CFIUS are also required to consider the 12 factors that Congress has authored as a basis for assessing the impact of the investment. If during this 30-day period all of the members of CFIUS conclude that the investment does not threaten to impair the national security, the review is terminated. If, however, at least one member of the Committee determines that the investment does threaten to impair the national security CFIUS can proceed to a 45-day investigation.

National Security Review

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

⁵⁸ Ibid.

⁵⁹ Senate Armed Services Committee, Briefing on the Dubai Ports World Ports Deal, February 23, 2006.

CFIUS is also required to review “covered” investment transactions in which the foreign entity is owned or controlled by a foreign government, but the law provides an exception to this requirement. A review is exempted if the Secretary of the Treasury and certain other specified officials determine that the transaction in question will not impair the national security. It is somewhat unclear, however, how this requirement will mesh with the established process. The measure does not amend or alter the current statute in the area that has been the source of differences between CFIUS and Congress.

National Security Investigation

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

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

Presidential Determination

As previously indicated, P.L. 110-49 grants the President the authority to block proposed or pending foreign “mergers, acquisitions, or takeovers” of “persons engaged in interstate commerce in the United States” that threaten to impair the national security. Congress directed that before this authority can be invoked the President must conclude that (1) other U.S. laws are inadequate or inappropriate to protect the national security; and (2) that he must have “credible evidence” that the foreign investment will impair the national security. As a result, if CFIUS determines, as was the case in the Dubai Ports transaction, that it does not have credible evidence that an investment will impair the national security, then it argues that it is not required to undertake a full 45-day investigation, even if the foreign entity is owned or controlled by a foreign government. After considering the two conditions listed above (other laws are inadequate or inappropriate, and he has credible evidence that a foreign transaction will impair national security), the President is granted almost unlimited authority to take “*such action for such time as the President considers appropriate to suspend or prohibit any covered transaction that threatens to impair the national security of the United States.*” In addition, such determinations by the President are not subject to judicial review, as was emphasized in the ruling by the U.S. District

Court for the District of Columbia in the case of *Ralls vs. the Committee on Foreign Investment in the United States*.

Factors for Consideration

The CFIUS statute includes a list of 12 factors the President must consider in deciding to block a foreign acquisition. These factors are also considered by the individual members of CFIUS as part of their own review process to determine if a particular transaction threatens to impair the national security. This list includes the following elements:

- (1) domestic production needed for projected national defense requirements;
- (2) the capability and capacity of domestic industries to meet national defense requirements, including the availability of human resources, products, technology, materials, and other supplies and services;
- (3) the control of domestic industries and commercial activity by foreign citizens as it affects the capability and capacity of the U.S. to meet the requirements of national security;
- (4) the potential effects of the transactions on the sales of military goods, equipment, or technology to a country that supports terrorism or proliferates missile technology or chemical and biological weapons; and transactions identified by the Secretary of Defense as “posing a regional military threat” to the interests of the United States;
- (5) the potential effects of the transaction on U.S. technological leadership in areas affecting U.S. national security;
- (6) whether the transaction has a security-related impact on critical infrastructure in the United States;
- (7) the potential effects on United States critical infrastructure, including major energy assets;
- (8) the potential effects on United States critical technologies;
- (9) whether the transaction is a foreign government-controlled transaction;
- (10) in those cases involving a government-controlled transaction, a review of (A) the adherence of the foreign country to nonproliferation control regimes, (B) the foreign country’s record on cooperating in counter-terrorism efforts, (C) the potential for transshipment or diversion of technologies with military applications,;
- (11) the long-term projection of the United States requirements for sources of energy and other critical resources and materials; and
- (12) such other factors as the President or the Committee determine to be appropriate.⁶⁰

Factors 6-12, which were added through P.L. 110-49, potentially broaden significantly the scope of CFIUS’s reviews and investigations. Previously, CFIUS had been directed by Treasury Department regulations to focus its activities primarily on investments that had an impact on U.S. national defense security. The additional factors, however, incorporate economic considerations into the Exon-Florio process in a way that was specifically rejected when the measure initially was adopted and refocuses CFIUS’s reviews and investigations to consider the broader rubric of economic security. In particular, CFIUS is now required to consider the impact of an investment on critical infrastructure as a factor for considering recommending that the President block or

⁶⁰ The last requirement under factor 4 and factors 6-12 were added by P.L. 110-49.

postpone a transaction. Critical infrastructure is defined in broad terms within the measure as “any systems and assets, whether physical or cyber-based, so vital to the United States that the degradation or destruction of such systems or assets would have a debilitating impact on national security, including national economic security and national public health or safety.”

As originally drafted, the Exon-Florio provision also would have applied to joint ventures and licensing agreements in addition to mergers, acquisitions, and takeovers. Joint ventures and licensing agreements subsequently were dropped from the proposal because the Reagan Administration and various industry groups argued at the time that such business practices were deemed to be beneficial arrangements for U.S. companies. In addition, they argued that any potential threat to national security could be addressed by the Export Administration Act⁶¹ and the Arms Control Export Act.⁶²

Confidentiality Requirements

The Exon-Florio provision also codified confidentiality requirements that are similar to those that appeared in Executive Order 11858 by stating that any information or documentary material filed under the provision may not be made public “except as may be relevant to any administrative or judicial action or proceeding.”⁶³ The provision does state, however, that this confidentiality provision “shall not be construed to prevent disclosure to either House of Congress or to any duly authorized committee or subcommittee of the Congress.” The provision provides for the release of proprietary information “which can be associated with a particular party” to committees only with assurances that the information will remain confidential. Members of Congress and their staff members will be accountable under current provisions of law governing the release of certain types of information. The Exon-Florio provision requires the President to provide a written report to the Secretary of the Senate and the Clerk of the House detailing his decision and his actions relevant to any transaction that was subject to a 45-day investigation.⁶⁴

Mitigation and Tracking

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

According to P.L. 110-49, CFIUS must designate a lead agency to negotiate, modify, monitor, and enforce agreements in order to mitigate any threat to national security. Such agreements are required to be based on a “risk-based analysis” of the threat posed by the transaction. CFIUS is also required to develop a method for evaluating the compliance of firms that have entered into a mitigation agreement or condition that was imposed as a requirement for approval of the investment transaction. Such measures, however, are required to be developed in such a way that

⁶¹ 50 U.S.C. App. Section 2401, as amended.

⁶² 22 U.S.C. App. 2778 et seq.

⁶³ 50 U.S.C. Appendix Section 2170(c)

⁶⁴ 50 U.S.C. Appendix Section 2170(g).

they allow CFIUS to determine that compliance is taking place without also (1) “unnecessarily diverting” CFIUS resources from assessing any new covered transaction for which a written notice had been filed; and (2) placing “unnecessary” burdens on a party to a investment transaction.

On February 20, 2008, Bain Capital and Huawei Technologies withdrew their offer to acquire the network and software firm 3Com for \$2.2 billion, due to an inability to successfully negotiate a mitigation agreement with members of CFIUS. Bain Capital is a privately held asset management and investment firm, and Huawei Technologies is the largest networking and telecommunications equipment supplier in China. 3Com was a publicly held company that specialized in networking equipment and in the Tipping Point network intrusion prevention software. Such software is used by various U.S. defense firms to prevent outside groups from accessing their confidential databases. Bain Capital and Huawei reportedly withdrew their proposal after they failed to agree to terms with CFIUS over a mitigation agreement and stated that they would restructure the deal and resubmit it at a later date in 2008.⁶⁵ Eventually, 3Com was acquired by Hewlett-Packard.

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

Congressional Oversight

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

⁶⁵ US Insiders Point to Bain Errors Over 3Com, *The Financial Times Limited*, March 3, 2008.

The Secretary of the Treasury, in consultation with the Secretary of State and the Secretary of Commerce, was directed to conduct a study on investment in the United States, particularly in critical infrastructure and industries affecting national security by (1) foreign governments, entities controlled by or acting on behalf of a foreign government, or persons of foreign countries which comply with any boycott of Israel; or (2) foreign governments, entities controlled by or acting on behalf of a foreign government, or persons of foreign countries which do not ban organizations designated by the Secretary of State as foreign terrorist organizations. In addition, CFIUS is required to provide an annual evaluation of any credible evidence of a coordinated strategy by one or more countries or companies to acquire U.S. companies involved in research, development, or production of critical technologies in which the United States is a leading producer. The report must include an evaluation of possible industrial espionage activities directed or directly assisted by foreign governments against private U.S. companies aimed at obtaining commercial secrets related to critical technologies.

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

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

CFIUS Since Exon-Florio

Information on international investment and production collected and published by the United Nations indicates that foreign direct investment peaked in 2007 prior to the global financial crisis and has not fully recovered, as indicated in **Table 1**. Similarly, since 2011, international flows of foreign direct investment have fallen, with such flows in 2014 outpacing only such flows in 2009 at the depth of the financial crisis. Cross-border merger and acquisition activity (M&As) continues at a pace that is less than half the amount of activity recorded in 2007, although global nominal gross domestic product (GDP) has risen steadily since 2009. Globally, at 75 million, employment of the foreign affiliates of international firms has nearly reached the 77 million recorded in 2007. Other measures of international production, sales, assets, value-added production, and exports all indicate higher nominal values in 2014, which provides further that the global economic growth has not stalled, but is growing at a slow pace.

Table 1. Selected Indicators of International Investment and Production, 2007-2014

	2007	2008	2009	2010	2011	2012	2013	2014
FDI inflows	\$1,979.0	\$1,744.0	\$1,198.0	\$1,409.0	\$1,700.0	\$1,403.0	\$1,467.0	\$1,228.0
FDI outflows	2,147.0	1,911.0	1,175.0	1,505.0	1,712.0	1,284.0	1,306.0	1,354.0
FDI inward stock	15,660.0	15,295.0	18,041.0	20,380.0	21,117.0	22,073.0	26,035.0	26,039.0
FDI outward stock	16,227.0	15,988.0	19,326.0	21,130.0	21,913.0	22,527.0	25,975.0	25,875.0

	2007	2008	2009	2010	2011	2012	2013	2014
Cross-border M&As	1,031.0	707.0	250.0	344.0	556.0	328.0	313.0	399.0
Sales of foreign affiliates	31,764.0	33,300.0	23,866.0	22,574.0	28,516.0	31,687.0	33,775.0	36,356.0
Value-added (product) of foreign affiliates	6,295.0	6,216.0	6,392.0	5,735.0	6,262.0	7,105.0	7,562.0	7,882.0
Total assets of foreign affiliates	73,457.0	64,423.0	74,910.0	78,631.0	83,754.0	88,536.0	95,230.0	102,040.0
Exports of foreign affiliates	5,775.0	6,599.0	5,060.0	6,320.0	7,463.0	7,469.0	7,688.0	7,803.0
GDP	55,114.0	61,147.0	57,920.0	63,468.0	71,314.0	73,457.0	75,453.0	77,283.0
Employment by foreign affiliates (thousands)	77,386.0	64,484.0	59,877.0	63,043.0	63,416.0	69,359.0	71,297.0	75,075.0

Source: *World Investment Report*, United Nations Conference on Trade and Development, June 2015.

Recent Transactions

According to the annual report filed by CFIUS under the requirements of P.L. 110-49,⁶⁶ CFIUS activity dropped sharply in 2009 as a result of tight credit markets and hesitation by banks to fund acquisitions and takeovers during the global financial crisis, but rebounded in 2010, as indicated in **Table 2**. During the six-year period 2008-2013, foreign investors sent 635 notices to CFIUS of plans to acquire, takeover, or merge with a U.S. firm. Of the investment transactions that were notified, about 6% were withdrawn during the initial 30-day review; about 31% of the total transactions that were notified were determined to require a 45-day investigation. Also, of the transactions that were investigated, about 7% were withdrawn before a final determination could be reached. As a result, of the 782 proposed investment transactions that were notified to CFIUS, 700 transactions, or 90% of the transactions were completed. The CFIUS report also indicates that a presidential decision was made in one of the transactions, the Ralls Corp acquisition of wind farm assets from Terna Energy SA, as discussed in a previous section of this report.

Table 2. Foreign Investment Transactions Reviewed by CFIUS, 2008-2014

Year	Number of Notices	Notices Withdrawn During Review	Number of Investigations	Notices Withdrawn During Investigation	Presidential Decisions
2008	155	18	23	5	0
2009	65	5	25	2	0
2010	93	6	35	6	0
2011	111	1	40	5	0
2012	114	2	45	20	1

⁶⁶ *Annual Report to Congress*, Committee on Foreign Investment in the United States, February 2016.

2013	97	3	48	5	0
2014	147	3	51	9	0
Total	782	38	267	43	1

Source: *Annual Report to Congress, Committee on Foreign Investment in the United States, February 2016.*

The CFIUS report also indicates that 42% of the foreign investment transactions that were notified to CFIUS from 2008-2014 were in the manufacturing sector. Investments in finance, information, and services sectors accounted for another 31% of the total notified transactions, as indicated in **Table 3**. Within the manufacturing sector, more than 40% of all the investment transactions notified to CFIUS were in the computer and electronic products sectors. The next two sectors with the highest number of transactions were the transportation equipment sector and the machinery sector. Investment transactions in the services sector accounted for about half of the total number of investment transactions in the finance, information, and services category.

Table 3. Industry Composition of Foreign Investment Transactions Reviewed by CFIUS, 2008-2014

Year	Manufacturing	Finance, Information, and Services	Mining, Utilities, and Construction	Wholesale and Retail Trade	Total
2008	72	42	25	16	155
2009	21	22	19	3	65
2010	36	35	13	9	93
2011	49	38	16	8	111
2012	47	36	23	8	114
2013	35	32	20	10	97
2014	69	38	25	15	147
Total	329	243	141	69	782

Source: *Annual Report to Congress, Committee on Foreign Investment in the United States, February 2016.*

Table 4 shows foreign investment transactions by the home country of the foreign investor and the industry composition of the investment transactions. According to data based on notices provided to CFIUS by foreign investors, Chinese investors were the most active in acquisitions, takeovers, or mergers during the 2012-2014 period, accounting for 19% of the total number of transactions. The United Kingdom and Canada join China as the top three countries of origin for investors providing notifications to CFIUS. In China and the UK, investments were concentrated in the manufacturing and finance, information, and services sectors, although nearly one-third of Chinese transactions were in the mining, construction and utilities sectors. The ranking of countries in **Table 4** differs in a number of important ways from data published by the Bureau of Economic Analysis on the cumulative amount, or the total book value, of foreign direct investment in the United States, which places the United Kingdom, Japan, Netherlands, Germany, Canada, and Switzerland as the most active countries of origin for foreign investment in the United States.

Table 4. Country of Foreign Investor and Industry Reviewed by CFIUS, 2012-2014

Country	Manufacturing	Finance, Information, and Services	Mining, Utilities, and Construction	Wholesale Trade and Retail Trade	Total
China	33	13	19	3	68
United Kingdom	20	16	5	4	45
Canada	4	6	20	10	40
Japan	18	10	5	4	37
France	12	8	0	3	21
Germany	10	7	0	0	17
Switzerland	13	2	0	0	15
Netherlands	4	9	2	0	15
Singapore	2	3	3	3	11
Israel	8	2	0	0	10
South Korea	4	4	2	0	10
Total	151	106	68	33	356

Source: *Annual Report to Congress, Committee on Foreign Investment in the United States, February 2016.*

The CFIUS annual report also provides some general information on the total number of cases in which it applied legally binding mitigation measures. The report did not list any specific cases or measures, but it did indicate that CFIUS applied mitigation measures to 27 cases in the 2011-2013 period. According to the report, in 2013 CFIUS agencies negotiated, and parties adopted, mitigation measures for 11 covered transactions.⁶⁷ These mitigation measures have included a number of different approaches, including

- Ensuring that only authorized persons have access to certain technologies and information.
- Establishing a Corporate Security Committee and other mechanisms to ensure compliance with all required actions, including the appointment of a U.S. government-approved security officer or member of the board of directors and requirements for security policies, annual reports, and independent audits.
- Establishing guidelines and terms for handling existing or future U.S. government contracts, U.S. government customer information and other sensitive information.
- Ensuring only U.S. citizens handle certain products and services, and ensuring that certain activities and products are located only in the United States.
- Notifying security officers or relevant U.S. government parties in advance of foreign national visits to the U.S. business for approval.

⁶⁷ *Annual Report to Congress, Committee on Foreign Investment in the United States, February 2016*

- Notifying relevant U.S. government parties of any awareness of any vulnerability or security incidents.
- Providing the U.S. government with the right to review certain business decisions and object if they raise national security concerns.

CFIUS also implemented procedures to evaluate and ensure that parties to an investment transaction remain in compliance with any risk mitigation measures that were adopted to gain approval of the investment. These procedures include:

- Assigning staff responsibilities to monitor compliance;
- Designating tracking systems to monitor required reports;
- Instituting internal instructions and procedures to ensure that in-house expertise is drawn upon to analyze compliance with measures.⁶⁸

As a consequence of the confidential nature of the CFIUS review of any proposed transaction, there are few official sources of information other than the congressionally mandated annual report concerning the Committee's work. For the most part, information concerning individual transactions that have been reviewed by CFIUS or any final recommendations that have been issued by CFIUS have come from announcements released by the companies involved in a transaction and not by CFIUS. According to one source,⁶⁹ CFIUS had received more than 1,500 notifications between 1988 and 2006, of which it conducted a full investigation of 25 cases. Of these 25 cases, 13 transactions were withdrawn upon notice that CFIUS would conduct a full review and 12 of the remaining transactions cases were sent to the President. Of these 12 transactions, 1 was prohibited.⁷⁰

Impact of the Exon-Florio Process on CFIUS

The DP World case exposed a number of important aspects of CFIUS's operations that apparently were not well known or understood by the public in general. Many of these concerns were addressed in P.L. 110-49. As already indicated, the Exon-Florio provision stipulated a three-step process: the formal notification to CFIUS and a 30-day review; a 45-day investigation for those transactions that raised national security concerns during the 30-day review and for those in which the concerns were not resolved during the review period; and a 15-day presidential determination stage for those transactions that were determined after the 45-day review to pose an impairment to national security. Over time, however, this process apparently evolved to include an informal fourth stage of unspecified length of time that consists of an unofficial CFIUS determination prior to the formal filing with CFIUS. This type of informal review developed because it likely served the interests of both CFIUS and the firms involved in an investment transaction. According to Treasury Department officials, this informal contact enables "CFIUS staff to identify potential issues before the review process formally begins."⁷¹ This informal process is likely to continue under the provisions of P.L. 110-49. An important difference, however, is that CFIUS gained legislative authority under P.L. 110-49 to negotiate and enforce

⁶⁸ Ibid, p. 24.

⁶⁹ CFIUS, *The Washington Post*, July 3, 2005. p. F3.

⁷⁰ 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.

⁷¹ Testimony of Robert Kimmett, Briefing on the Dubai Ports World Deal before the Senate Armed Services Committee, February 23, 2006.

agreements with foreign investors to mitigate the effects of an investment transaction on national security.

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

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

Ten days after that meeting, DP World filed its official notification with CFIUS, which distributed the notification to all of the CFIUS members and to the Departments of Energy and Transportation. During this process, the Department of Homeland Security apparently negotiated a letter of assurances with DP World that addressed some outstanding concerns about port security. On the basis of this letter and the lack of any remaining concerns expressed by any member of CFIUS or other agencies that were consulted, CFIUS completed its review of the transaction on January 17, 2006, and concluded that the transaction did not threaten to impair the national security and therefore that it did not warrant a 45-day investigation.⁷²

Conclusions

On July 26, 2007, President Bush signed P.L. 110-49, the Foreign Investment and National Security Act of 2007. The Treasury Department released its regulations implementing this law on November 21, 2008, as the global financial crisis was the focus of attention. In 2008, tight credit conditions associated with the global financial crisis and the slowdown in the rate of growth in the U.S. economy retarded merger and acquisition activities in the United States and abroad. There has been no particular foreign acquisition that has provoked a public backlash comparable to some acquisitions that occurred prior to the financial crisis. On June 20, 2011, the Obama Administration issued a formal statement on foreign investment declaring the countries' commitment to an open investment policy.⁷³ Some in Congress and elsewhere are dissatisfied, however, that the legislation in its present form does not address a broad range of issues concerning foreign investment. For instance, when the measure was debated and approved, the extent and nature of sovereign wealth funds (SWFs) in which entities controlled by foreign governments invest in U.S. firms was relatively unknown. In addition, the sub-prime mortgage crisis was just emerging and foreign investors had not yet taken substantial stakes in prominent U.S. financial firms. These investments are challenging some established notions of the role of

⁷² Ibid.

⁷³ Statement by the President on United States Commitment to Open Investment Policy, the White House, June 20, 2011.

foreign investment in the economy and the concept of what role economic issues play within the rubric of national security.

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

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

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

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

The growing number of investments by Chinese firms continue to raise concerns by a number of groups over the economic and security impact of the investments, similar to concerns about

Japanese investment in the United States in the 1980s. In particular, on October 8, 2012, the House Permanent Select Committee on Intelligence published a report⁷⁴ on the “the counterintelligence and security threat posed by Chinese telecommunications companies doing business in the United States.” The report offered a number of policy recommendations affecting CFIUS, including

- The Committee on Foreign Investment in the United States (CFIUS) must block acquisitions, takeovers, or mergers involving Huawei and ZTE given the threat to U.S. national security interests. Legislative proposals seeking to expand CFIUS to include purchasing agreements should receive thorough consideration by relevant congressional committees.
- Committees of jurisdiction in the U.S. Congress should consider potential legislation to better address the risk posed by telecommunications companies with nation-state ties or otherwise not clearly trusted to build critical infrastructure. Such legislation could include increasing information sharing among private sector entities, and an expanded role for the CFIUS process to include purchasing agreements.

In addition, in November 2012, the U.S.-China Economic and Security Review Commission⁷⁵ issued a report that detailed concerns over Chinese investments by U.S. industries, lawmakers, and government officials about the “potential economic distortions and national security concerns arising from China’s system of state-supported and state-led economic growth.” In particular, some observers argued that economic concerns focused on the possibility that state-backed Chinese companies choose to invest “based on strategic rather than market-based considerations,” and are free from the constraints of market forces because of generous state subsidies. The report proffered a number of recommendations for amending the CFIUS statute:

- Congress examine foreign direct investment from China to the United States and assess whether there is a need to amend the underlying statute (50 U.S.C. app 2170) for the Committee on Foreign Investment in the United States (CFIUS) to (1) require a mandatory review of all controlling transactions by Chinese state-owned and state-controlled companies investing in the United States; (2) add a net economic benefit test to the existing national security test that CFIUS administers; and (3) prohibit investment in a U.S. industry by a foreign company whose government prohibits foreign investment in that same industry.
- Legislation creating the Committee on Foreign Investment in the United States (CFIUS) could be amended to add a test of “economic benefit” of a Chinese investment in the United States.
- CFIUS’s jurisdiction be extended to include “greenfield” investments, or investments in new industrial plants and facilities.

Economists generally agree that there is little economic evidence to date to conclude that the nationality of a foreign investor or whether the foreign investor is a private entity or an entity that is owned or controlled by a foreign government has a measurable impact on the market

⁷⁴ Investigative Report on the U.S. National Security Issues Posed by Chinese Telecommunications Companies Huawei and ZTE: A Report by Chairman Mike Rogers and Ranking Member C.A. Dutch Ruppersberger of the Permanent Select Committee on Intelligence, U.S. House of Representatives, October 8, 2012.

⁷⁵ 2012 Report to Congress of the U.S.-China Economic and Security Review Commission, U.S. China Economic and Security Review Commission, November 2012.

performance of the firm or on the U.S. economy. This conclusion does not attempt to assess the differences in economic performance or national security concerns that potentially may arise between privately owned foreign firms and those that are owned or controlled by a foreign government that engage in such illegal activities as corporate espionage. Others may argue that firms that are owned or controlled by a foreign government pose a risk to national security or to homeland security, but such concerns are not within the purview of this report. Similar issues concerning corporate ownership were raised during the late 1980s and early 1990s when foreign investment in the U.S. economy increased rapidly. There are little new data, however, to alter the conclusion reached at that time that there is no definitive way to assess the economic impact of foreign ownership or of foreign investment on the economy. Although some observers have expressed concerns about foreign investors who are owned or controlled by foreign governments acquiring U.S. firms, there is little confirmed evidence that such a distinction in corporate ownership has any effect on the economy as whole.

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

Author Contact Information

James K. Jackson
Specialist in International Trade and Finance
jjackson@crs.loc.gov, 7-7751