

INTERNATIONAL TRADE UPDATE

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House Passes Bill to Reform U.S. Government Review of Foreign Investments in the U.S.

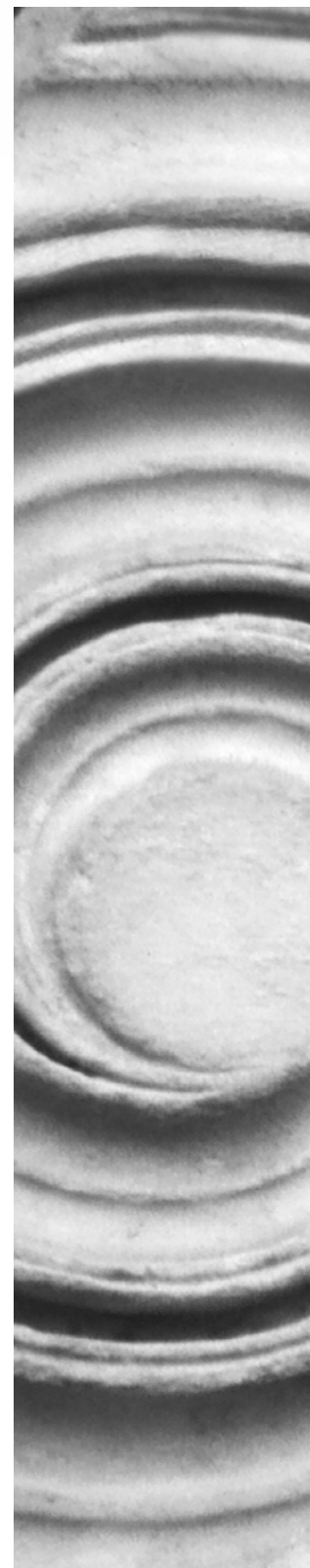
On February 28, 2007 the House passed a wide ranging Bill to reform the process by which the U.S. Government reviews foreign investments in the United States. If matched by similar action in the Senate, this legislation could have a significant impact on foreign direct investors in the United States.

Background

Through the Exon-Florio Amendment to the Defense Production Act of 1950 ("Exon-Florio"), the president has the authority to bar or impose significant restrictions on acquisitions by non-U.S. entities of U.S. companies involved in business activities that potentially implicate the national security. The president may suspend, prohibit, or restrict such a transaction if he finds that there is credible evidence that the foreign acquiring party might take action that threatens to impair U.S. national security and U.S. law does not provide adequate protection against such action.

The authority to review transactions under Exon-Florio has been delegated to the Committee on Foreign Investment in the United States ("CFIUS" or "Committee"), a 12-member interagency committee chaired by the U.S. Department of Treasury. Members of CFIUS include the Departments of Commerce, Defense, Justice, State, and Homeland Security, among others. Certain CFIUS agencies have as their mandate law enforcement, defense, and national security, while other agencies are oriented to promoting open trade and investment.

An Exon-Florio review process generally is initiated by the transaction parties, which submit a joint notification to CFIUS setting forth certain prescribed information regarding the transaction and the parties (CFIUS also may initiate a review). The review process is confidential, and the information submitted is exempt from disclosure under the Freedom of Information Act. The submission of a complete notification initiates a 30-day review period, in which CFIUS decides whether a subsequent 45-day investigation is warranted (to date, the vast majority of reviews have been concluded at the end of the initial 30-day review period). At the end of such investigation, CFIUS must submit a report and recommendation to the President, who then must decide within 15 days whether to take action to suspend, prohibit or restrict the transaction. Completion of the Exon-Florio review process (after either 30 or 90 days) without the President taking action to suspend, prohibit or otherwise restrict the transaction creates a "safe harbor" for the reviewed transaction; in other words, the foreign acquisition may not thereafter be suspended, prohibited or restricted.



The CFIUS review process has attracted substantial public and Congressional scrutiny in recent years, first when the China National Offshore Oil Corporation attempted to purchase Unocal in 2005, and again when Dubai Ports World (a company owned by the Government of Dubai) announced in 2006 its acquisition of a British company that operated the port facilities of a number of major U.S. cities. (Alcatel's late 2006 acquisition of Lucent also generated considerable attention.) In particular, CFIUS's approval of the Dubai Ports World transaction provoked significant criticism of current procedures and prompted Congressional efforts to fortify them. Although the U.S. House and Senate each passed Exon-Florio reform bills, they failed to reconcile the bills before the conclusion of the 109th session of Congress in late 2006.

House Bill 556

House leaders have acted quickly on the CFIUS issue in the new session of Congress. The House passed the National Security Foreign Investment Reform and Strengthened Transparency Act of 2007 (the Bill), H.R. 556, by 423 votes to 0, on February 28, 2007. The wide-ranging Bill has several features that are particularly noteworthy.

1. Extension of the Review/Investigation Period

The House Bill would create a number of mechanisms for extending the CFIUS review and investigation process. Under the Bill, the 45-day investigation would be triggered not only when the CFIUS believes that national security concerns warrant it, but also when (1) a transaction could result in the control of a U.S. entity by a foreign government or an entity controlled by or acting on behalf of a foreign government (subject to certain exceptions), (2) any member of the Committee votes against approving the transaction, or (3) the Director of National Intelligence (DNI) so recommends. Any 45-day investigation also could be extended for an additional 45-day period if the President or two-thirds of the Committee so requests.

Under the Bill's provisions, the results of a review or investigation generally would be final and complete only once approved by a majority of the Committee in a roll-call vote and signed by the Chair of the Committee (the Treasury Secretary) as well as the two newly-created Deputy Chairs (the Secretaries of Commerce and Homeland Security). If a transaction could result in the control of a U.S. entity by a foreign government or an entity controlled by or acting on behalf of a foreign government, and if at least one Committee member voted against approving the transaction, then the investigation would not be final or complete until signed by the President. In addition, the results of an investigation of a transaction involving a foreign party that is a national of a country whose government has been designated by the U.S. Government as a supporter of international terrorism, or a person controlled by such a government, also would require the signed assent of the President.

2. Expansion of Committee Powers and Scope of Review

The Bill would expand the scope of the CFIUS process. In reviewing transactions, the Committee now would consider not only the effects on U.S. national security, but also the consequences for U.S. efforts to curtail human trafficking and drug smuggling. Further, the Committee would be able to collect evidence by requiring the production of all relevant documents and taking sworn testimony. The Committee's membership also would be expanded to include the Secretary of Energy.

The Bill also calls for national security threat analysis to be provided to the Committee by the Director of National Intelligence, who is called upon to seek and incorporate the views of all affected or appropriate intelligence agencies as well as the Directors of the Treasury Department's Office of Foreign Assets Control and of the Financial Crimes Enforcement Network. At the same time, the Bill clearly states that the DNI shall not be a member of the Committee and shall serve no policy role other than to provide analysis to the Committee.

3. Expansion of CFIUS Monitoring

The Bill would strengthen monitoring by the CFIUS. The Committee would be required to track transactions where notices filed with CFIUS subsequently were withdrawn to ensure that appropriate interim protections were in place. The Committee, through a designated "lead agency," also would be required to monitor the implementation and fulfillment of any mitigation agreement (an agreement between the CFIUS (or certain CFIUS agencies) and the foreign party designed to mitigate national security risks). The Bill also would impose a so-called "evergreen" provision, authorizing the Committee to reopen a prior review under certain conditions, including a finding of an intentional, material breach of a mitigation agreement.

4. Increased Congressional Oversight

The House Bill would increase Congressional oversight. At the conclusion of an investigation the CFIUS would be required to report to Congressional leaders and to Representatives of the districts significantly affected, and to provide a classified briefing upon request. The Committee also would be required to submit an annual report to the relevant Congressional committees covering all the particulars and trends of CFIUS investigations.

Prospects for Final Legislation

The Administration has acknowledged its general support for legislation to reform the CFIUS review process. In a Statement of Administration Policy (SAP) released the day before the final passage of H.R. 556, the Administration welcomed the Bill but expressed its opposition to a number of measures. The business community, including the U.S. Chamber of Commerce, also has expressed support for the House Bill.

The Administration concerns set forth in the SAP focused primarily on the extended process contemplated by the Bill: the roll call voting mechanisms (such as that which might trigger the 45-day investigation); the DNI's ability to force a 45-day investigation; the option of a second 45-day

investigation period; the creation of Deputy Chairs of the Committee; and the requirement that the President specifically approve a transaction in circumstances other than those where the Committee has recommended that the President block a transaction or where the Committee has not reached a unanimous decision.

The Administration also expressed concern about the expanded scope of the process and, in particular, the ability of the CFIUS to compel document production and sworn testimony. (The requirement that CFIUS consider the effects of a transaction on U.S. efforts to curtail human trafficking and drug smuggling was included as a floor amendment subsequent to the issuance of the SAP but also may elicit concern.) On the other hand, the Administration expressed no objection to the strengthened monitoring requirements or increased Congressional oversight. In addition, the Administration requested a statutory grant of authority to impose civil penalties for breach of a mitigation agreement. (Recent press reports indicate that CFIUS already is making use of the threat of substantial financial penalties in this regard.)

The Senate has yet to take up an Exon-Florio reform bill in the current session, but it is expected to do so shortly. In the last session of Congress, the Senate bill was viewed as more restrictive to foreign investment than its House counterpart—imposing a scheme of country assessment and classification and mandating much more extensive Congressional oversight—and sustained criticism from business groups.

Enactment of CFIUS legislation in some form is likely this year. It remains difficult, however, to predict the final content of such legislation, which will result from negotiations between and among the House, Senate, and Administration in a politically-charged environment.

About the International Trade Update

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