

**INTERNATIONAL TRADE & REGULATORY /  
GLOBAL SECURITY & ENFORCEMENT ADVISORY**

February 7, 2007

**Congress Takes Up Foreign Direct  
Investment Legislation Anew**

On January 18, 2007, House Financial Services Committee Chairman Barney Frank (D-MA) and 45 bipartisan co-sponsors introduced legislation to reform the review process for foreign direct investment. The bill, entitled the “National Security Foreign Investment Reform and Strengthened Transparency Act of 2007” (H.R. 556) (“the Act”), is almost identical to H.R. 5337 passed by the House of Representatives in the last Congress.<sup>1</sup>

The Act is significant in that it would require full 45-day investigations by the interagency Committee on Foreign Investment in the United States (“CFIUS”) in the case of acquisitions by foreign government-controlled entities. It also would require post-review reports by CFIUS to Congress and enhance the oversight role of Congress in the CFIUS process. However, importantly, it would not insert Congress directly into pending reviews, as would have a competing bill introduced by Senator Richard Shelby (R-AL) in the Senate in the last Congress. Both industry and the Bush administration view the Act as preferable to its Senate counterpart from the prior Congress. A number of prominent business groups, including the U.S. Chamber of Commerce and the Business Roundtable, have already endorsed the Act.

Chairman Frank has indicated his intent to fast-track the Act. Hearings are set for February 7 and Financial Services Committee mark-up the week following (the Act also was referred to the Energy and Commerce Committee and the Foreign Affairs Committee). Chances of enactment of the measure by the full House appear to be excellent. However, it is unclear what action will occur in the Senate, where legislation is currently being drafted but has yet to be introduced.

A summary of recent developments in the United States for foreign direct investment, which will likely mark Congress’s consideration of the Act, as well as a summary of the Act, follow.

<sup>1</sup> See June 16, 2006, *Alston & Bird Advisory: Congress Moves Forward With Foreign Investment Legislation*, <http://www.alston.com/articles/Global%20Security%20CFIUS160606124501.pdf>

This advisory is published by Alston & Bird LLP to provide a summary of significant developments to our clients and friends. It is intended to be informational and does not constitute legal advice regarding any specific situation. This material may also be considered attorney advertising under court rules of certain jurisdictions.

## Recent Foreign Direct Investment Developments

Introduction of H.R. 556 comes at a time of steeply increased notifications to CFIUS, many of which are defensive in nature. In 2006 there were 113 notifications to CFIUS, versus 65 in 2005 and 56 the year before, thus representing a more than doubling of the volume of notifications in two years. Moreover, there has been a sharp increase in full 45-day investigations (seven in 2006 or a 250 percent increase over the prior year), as well as withdrawals of notifications during the 45-day investigation period. Although CFIUS and its member agencies have increased staffing to handle the higher workload, the increased volume of notifications has been accompanied by closer scrutiny of those notifications that have been filed. As a result, investors appear to be having an increasingly difficult task in achieving timely closings. This fact was illustrated by the recent Lucent/Alcatel merger that received final presidential approval more than seven months after the merger was announced.

The trend of more and longer reviews of notifications has also been accompanied by an increased tendency of transactional parties to vet their acquisitions with key congressional leaders outside the CFIUS process in order to avoid the type of after-the-fact congressional objections that unwound the DP World transaction. Thus, one of the casualties of that incident has been the “finality” of CFIUS approvals. Without at least tacit consent by individual members of Congress who are likely to be concerned about an acquisition, CFIUS’s approval as a practical matter may not be worth as much as it used to be.

Another trend has been the increased insistence by CFIUS member agencies on so-called mitigation measures, which are side agreements for future cooperation with the U.S. government as a price for CFIUS approval. This trend has been particularly pronounced in the context of the Department of Homeland Security’s (“DHS”) approval of “critical infrastructure” acquisitions (DHS entered into some 15 mitigation measures in 2006, which was more than the 13 such measures it entered into in the preceding three years). The legal finality of CFIUS approvals has also been called into question by the emerging trend of “evergreen” conditions in these agreements under which CFIUS can reopen reviews and ultimately require divestiture if the parties fail to comply with the terms of mitigation measures or similar security or cooperation agreements. This type of provision figured prominently in CFIUS’s review of the recent Lucent/Alcatel merger and stimulated critical comments by industry on the effect of evergreen conditions on the finality of CFIUS decisions.

Against this background, a number of industry and other interest groups are weighing in to support “balanced” legislation that does not chill foreign investment. Examples include recent reports issued by the National Foundation for American Policy<sup>2</sup> and the American Bar Association’s Section of International Law.<sup>3</sup> The latter report, without

<sup>2</sup> See <http://www.nfap.net/researchactivities/studies/NFAPPolicyBriefCFIUS0107.pdf>

<sup>3</sup> See <http://www.abanet.org/leadership/2007/midyear/docs/SUMMARYOFRECOMMENDATIONS/SUMOFRECS.doc>

endorsing specific legislation, called for a CFIUS process that is “expeditious, confidential and final” and recommended avoiding direct congressional involvement in deciding individual cases.

Finally, Congress’s consideration of CFIUS reform legislation may also be influenced by a rising trend of economic protectionism abroad. For example, on January 31, 2007, the Russian government tentatively approved two laws that would further restrict foreign ownership of oil and natural gas fields, as well as foreign majority ownership of companies in the aerospace, military and nuclear power industries. China also has begun to retreat from its open foreign investment policy by enacting new restrictions on foreign investment in real estate, retailing, ship building, banking and insurance. Thus, DP World was in a certain sense a “shot heard ‘round the world,” and other countries are increasingly restricting foreign investment due to mixed motives of national security and economic protectionism. Whether this trend will pull Congress away from a more restrained approach to CFIUS reform, as arguably exemplified by H.R. 556, remains to be seen.

## Summary of the Act

Highlights of H.R. 556 include the following points:

- The Act would retain the current scope of CFIUS reviews, namely to determine whether covered transactions “threaten to impair the national security of the United States.”
- It would clarify that the term “national security” should be construed to include issues relating to “homeland security,” including its application to “critical infrastructure” as defined in the Homeland Security Act of 2002.
- The Act requires a mandatory full 45-day investigation if (1) the transaction threatens to impair national security and that threat has not been mitigated, (2) the transaction is an acquisition by a foreign government or a foreign government-controlled entity, or (3) the Director of National Intelligence (“DNI”) identifies “particularly complex national security or intelligence issues” that “could” threaten to impair U.S. national security that were not resolved during the initial review period.
- The mandatory 45-day investigation period may be extended for an additional 45 days by the president or by a roll call vote of at least two-thirds of the members of CFIUS, thereby extending the CFIUS review period to 135 days.
- In the case of an investigation of a foreign government-controlled transaction the investigation cannot be treated as final or complete until the findings or report are approved by a majority of the CFIUS members in a roll call vote. In the case of any roll call vote in which there is at least one vote by a CFIUS member against approving the transaction, the findings of the report must be signed by the president in addition to the secretaries of the Treasury and Homeland Security.

- The Act requires that both the secretary of the Treasury (who would continue to chair CFIUS under the Act) and the secretaries of Commerce and Homeland Security (who would be installed as joint vice chairs of CFIUS under the Act) sign any review or investigation by CFIUS for it to be final and complete. This authority could be delegated only to their deputy secretaries. The motive behind this requirement is to ensure that decisions receive top political-level attention, the lack of which was one of the concerns Congress expressed in relation to the DP World acquisition of Peninsular and Oriental Steam Navigation Company last year.
- The DNI is directed to “expeditiously carry out a thorough analysis” of any threats to the national security of the United States of any covered transaction within a 30-day minimum period. However, the DNI is not a member of CFIUS and there is no policy role for the DNI other than to provide analysis.
- Consistent with existing practice, the chair of CFIUS is authorized to involve heads of other federal departments and agencies in any review or investigation.
- Also consistent with existing practice, confidentiality provisions will continue to govern CFIUS deliberations.
- The Act establishes authority for CFIUS to track withdrawn notifications, including implementation of interim protections to address specific concerns, specific timeframes for resubmitting the notification, etc.
- Consistent with current CFIUS practice, the president, CFIUS or any member agency of CFIUS would be authorized to initiate a new review of any covered transaction that had been previously reviewed or investigated if any party to the transaction submitted false or misleading material information or omitted material information in its submissions to CFIUS. Initiation of a new review would also be authorized if any party materially breaches a mitigation agreement or condition if that breach is intentional and material and the department or agency certifies there is no other remedy available.
- To enhance congressional oversight, the Act establishes an after-the-fact congressional notification procedure. Under this procedure, not later than five days after the completion of a CFIUS investigation or after the end of the 15-day presidential review period, if applicable, CFIUS is required to submit a written report on its findings or actions to the congressional leadership and relevant committees of jurisdiction. Any senator or member of Congress who receives such a report may request a classified briefing by CFIUS to each house of the Congress on the transaction. The briefing would be open only to the leadership and relevant committee chairman and the ranking member, as well as staff members with security clearances. Proprietary information associated with a particular party to a covered transaction would be furnished only to a committee of the Congress and only when that committee provides assurances of confidentiality, unless the party otherwise consents to disclosure.

- The Act requires a semi-annual report to Congress on all reviews and investigations conducted during the six-month period covered by the report. The report is to contain a list of all notices filed and reviews conducted during the period with “basic information” on the parties, nature of business activities, etc. (There is an apparent technical problem with this provision because it would require disclosure of information on pending reviews and investigations that have not been completed.)
- The semi-annual report would include an evaluation of whether there is 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” for which the United States is a leading producer. It also would include an evaluation of whether there are industrial espionage activities directed or directly assisted by foreign governments against private U.S. companies aimed at obtaining commercial secrets related to “critical technologies.”
- Finally, the Act requires the Inspector General of the Department of the Treasury to investigate why Treasury failed to make reports to Congress previously required under the Defense Production Act.

If you have any questions or would like additional information please contact your Alston & Bird attorney or any of the following:

Thomas E. Crocker  
202.756.3318  
thomas.crocker@alston.com

Kenneth G. Weigel  
202.756.3431  
ken.weigel@alston.com

Joe D. Whitley  
202.756.3189  
joe.whitley@alston.com

George A. Koenig  
202.756.3469  
george.koenig@alston.com

*If you would like to receive future International Trade and Regulatory Advisories electronically, please forward your contact information including e-mail address to [trade.advisory@alston.com](mailto:trade.advisory@alston.com). Be sure to put "subscribe" in the subject line.*

ALSTON+BIRD<sub>LLP</sub>

[www.alston.com](http://www.alston.com)

**ATLANTA**

One Atlantic Center  
1201 West Peachtree Street  
Atlanta, GA 30309-3424  
404.881.7000

**CHARLOTTE**

Bank of America Plaza  
101 South Tryon Street  
Suite 4000  
Charlotte, NC 28280-4000  
704.444.1000

**NEW YORK**

90 Park Avenue  
New York, NY 10016-1387  
212.210.9400

**RESEARCH TRIANGLE**

3201 Beechleaf Court  
Suite 600  
Raleigh, NC 27604-1062  
919.862.2200

**WASHINGTON, DC**

The Atlantic Building  
950 F Street, NW  
Washington, DC 20004-1404  
202.756.3300

[www.alston.com](http://www.alston.com)