

Congressional Research Service

Report RL34082

# *Exon-Florio Foreign Investment Provision: Comparison of H.R. 556 and S. 1610*


James K. Jackson, Foreign Affairs, Defense, and Trade Division


August 7, 2007


**Abstract.** This report provides background information on the Committee on Foreign Investment in the United States and on the Exon-Florio provision. In addition, the report provides an overview of H.R. 556 and S. 1610 and a side-by-side comparison of the two measures.


# Exon-Florio Foreign Investment Provision: Comparison of H.R. 556 and S. 1610

**James K. Jackson**
Specialist in International Trade and Finance

August 7, 2007



**Congressional Research Service**
7-5700
www.crs.gov
RL34082

**CRS Report for Congress**
*Prepared for Members and Committees of Congress*

# Summary

During the First Session of the 110th Congress, several Members of Congress have introduced measures in the House and the Senate to address various concerns with foreign investment, especially the proposed purchase of the British-owned P&O Ports by Dubai Ports World in early 2006. Congresswoman 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 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.

Both the House bill and the Senate bill attempt to address six perceived problems with the current statutes that many Members identified during the 109th Congress: 1) that the principal members of the interagency Committee on Foreign Investment in the United States (CFIUS) at times seem not to be well informed of the outcomes of reviews and investigations regarding proposed or pending investment transactions; 2) that CFIUS has interpreted incorrectly the requirements under current statutes for investigations of transactions that involve firms that are owned or controlled by a foreign government; 3) that reporting requirements under current statutes do not provide Congress with enough information about the operations and actions of CFIUS for Members to fulfill their oversight responsibilities; 4) that CFIUS exercises too much discretion in its ability to choose which transactions it investigates; 5) that the definition of national security used by CFIUS is no longer adequate in a post-September 11th world; and 6) that deadlines placed on CFIUS to complete reviews and investigations of investment transactions do not provide adequate time in some instances for the Committee to complete its reviews and investigations.

This report provides background information on the Committee on Foreign Investment in the United States and on the Exon-Florio provision. In addition, the report provides an overview of H.R. 556 and S. 1610 and a side-by-side comparison of the two measures. This report will be updated as warranted by events.

# Contents



## Contacts

# Overview

During the 109th Congress, numerous Members of Congress introduced over two dozen measures to address various concerns with foreign investment that arose from the proposed purchase of the British-owned P&O Ports[1] by Dubai Ports World[2] in early 2006.[3] In particular, the transaction spurred some Members to question the effectiveness of the relatively obscure interagency group, the Committee on Foreign Investment in the United States (CFIUS). The group has been charged with developing and implementing the Administration's policy on foreign investment and with conducting national security reviews under the Exon-Florio provision of the Defense Production Act (50 U.S.C. Sec. 2170). Of the measures that were introduced, H.R. 5337 and S. 3549 from the House and Senate, respectively, garnered significant support and passed their respective bodies on July 26, 2006. The 109th Congress ended before a Conference Committee was convened on H.R. 5337 or S. 3549 and both measures lapsed. In the 110th Congress, Congresswoman Maloney introduced H.R. 556 (H.Rept. 110-24), the National Security Foreign Investment Reform and Strengthened Transparency Act of 2007, which was adopted by the full House on February 28, 2007. On June 13, 2007, Senator Dodd introduced S. 1610 (S.Rept. 110-80), the Foreign Investment and National Security Act of 2007. On June 29, 2007, the Senate substituted S. 1610 for H.R. 556 and adopted the revised measure 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.

H.R. 556 and S. 1610 represent efforts to correct perceived problems with the current process that arose during consideration of the Dubai Ports World transaction. In particular, many Members generally expressed concerns about six areas. First, some Members were concerned that the principal members of CFIUS at times seem not to be well informed of the outcomes of reviews and investigations made by CFIUS regarding proposed or pending investment transactions, because the duty for reviewing such transactions has been delegated in most agencies to lower-level personnel. Second, some Members argued that CFIUS was interpreting incorrectly the requirements under current statutes for investigations of transactions that involve firms that are owned or controlled by a foreign government. Third, some Members argued that the current statutes do not provide Congress with enough information about the operations and actions of CFIUS for them to fulfill their oversight responsibilities. Fourth, some Members argued that CFIUS exercises too much discretion in its ability to choose which transactions it investigates and that it needs to be held more accountable to Congress for its decisions regarding reviews and investigations of investment transactions. Fifth, some Members questioned the definition of national security used by the Committee as being too narrowly interpreted and out of sync with the post September 11th view of national security. Last, some Members expressed their concerns that the time constraints placed on CFIUS to complete reviews and investigations of investment

[1] 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.

[2] 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 Carribean, and North America.

[3] For additional information, see CRS Report RL33614, *Exon-Florio Foreign Investment Provision: Comparison of H.R. 5337 and S. 3549*, by James K. Jackson; and CRS Report RL33388, *The Committee on Foreign Investment in the United States (CFIUS)*, by James K. Jackson.

transactions does not provide adequate time in some instances for the Committee to complete its reviews and investigations.

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

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. CFIUS was established by an Executive Order of President Ford in 1975 with broad responsibilities and few specific powers.[4] P.L. 110-49 established the Committee as a matter of statute, rather than as a creation of various Executive Orders. The Committee is housed in the Department of the Treasury and until recently generally has operated in relative obscurity. Initially, CFIUS was established with six members, but the membership was expanded to twelve through various Executive Orders. Under P.L. 110-49, the Committee membership was reduced to seven members, including the Secretaries of State, the Treasury, Defense, Homeland Security, and Commerce; Energy; and the Attorney General. The Secretary of Labor and the Director of National Intelligence serve as ex officio members of the Committee. The President can appoint temporary members as he determines. Prior to passage of P.L. 110-49, seven other individuals were permanent members of CFIUS: the United States Trade Representative; the Chairman of the Council of Economic Advisers; the Attorney General; the Director of the Office of Management and Budget; the Director of the Office of Science and Technology Policy; the Assistant to the President for National Security Affairs; and the Assistant to the President for Economic Policy.[5]

## The Exon-Florio Provision

The Exon-Florio provision (Section 2170 of the 1988 Defense Production Act), as amended by P.L. 110-49, grants the President broad discretionary authority to take what action he considers to be "appropriate" to suspend or prohibit proposed or pending foreign acquisitions, mergers, or takeovers "of persons engaged in interstate commerce in the United States" which "threaten to impair the national security." The statute indicates that the President must make an investigation to determine the effects on national security of such investments. Most importantly, however, Congress directed that the President can exercise this discretionary authority "only if" he determines that two conditions exist: 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. For the purposes of this legislation, Congress purposely did not

[4] Executive Order 11858 (b), May 7, 1975, 40 F.R. 20263.

[5] 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.

define national security, but intended to have the term interpreted broadly without limitation to a particular industry.[6]

In 1988, Congress approved the Exon-Florio provision as part of the Omnibus Trade Act.[7] Through Executive Order 12661, President Reagan implemented provisions of the Omnibus Trade Act, and he delegated his authority to administer the Exon-Florio provision to CFIUS,[8] particularly to conduct reviews of foreign investment, 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 suspended or prohibited. The Committee has 30 days to decide whether to investigate a case and an additional 45 days to make its recommendation. Once the recommendation is made, the President has 15 days to act.

Regulations developed by the Treasury Department in November 1991 implemented the Exon-Florio provision.[9] These regulations created a system of voluntary notification by the parties to an investment transaction and they allow for notices of acquisitions by agencies that are members of CFIUS. Despite the voluntary nature of the notification, firms largely comply with these provisions because the regulations stipulate that foreign acquisitions that are governed by the Exon-Florio review process, but that do not notify the Committee, remain subject indefinitely to divestment or other appropriate actions by the President. This process has become one in a number of regulatory steps that firms consider as they undertake a merger, acquisition, or takeover.



According to the Exon-Florio provision, as amended by P.L. 110-49, CFIUS has 30 days 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.

The President, acting through CFIUS, is also required to conduct a National Security investigation of the effects of a transaction on the national security of the United States and to take any "necessary" actions in connection with the transaction to protect the national security of the United States under certain conditions. These conditions would be: 1) as a result of a review of the transaction, CFIUS determined that the transactions threatened to impair the national security of the United States and that the threat had not been mitigated during or prior to a review of the transaction, or 2) the foreign person was controlled by a foreign government. 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

[6] *Congressional Record*, Daily Edition, vol. 134, April 20, 1988. p. H2118.

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

[8] Executive Order 12661 of December 27, 1988, 54 F.R. 779.

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

can proceed to a 45-day investigation. 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.

The Director of National Intelligence, although not a member of CFIUS, must be given "adequate time" 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 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.

## 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. Known as the "Byrd Amendment" after the amendment's sponsor, the provision requires CFIUS to investigate proposed mergers, acquisitions, or takeovers in cases where:

> (1) the acquirer is controlled by or acting on behalf of a foreign government; **and**
>
> (2) the acquisition results in control of a person engaged in interstate commerce in the United States that could affect the national security of the United States.[10]

Under P.L. 110-49, these investigative requirements were strengthened. The definition of national security was broadened by P.L. 110-49 to include, "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 an entity engaged in interstate commerce in the United States. The President, acting through CFIUS, is required to conduct a National Security investigation of the effects of a transaction on the national security of the United States and to take any "necessary" actions in connection with the transaction to protect the national security of the United States if the foreign party to an investment transaction is controlled by a foreign government. CFIUS is not required to conduct an investigation, even if it had determined during a review that the party to a transaction was controlled by a foreign government, if: it also determines that the transaction "will not affect" the national security of the United States.

This amendment came under particularly 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 require CFIUS to conduct a mandatory 45-day investigation without exception if the foreign firm involved in a transaction is owned or controlled by a foreign government.

[10] P.L. 102-484, October 23, 1992.

Representatives of CFIUS, however, argued that there were two factors that controlled their decision not to conduct a 45-day investigation of the transaction. First, they argued that the requirements of the Exon-Florio provision itself precluded them from engaging in a 45-day investigation, because their initial review did not find "credible evidence" that the transaction would impair national security, a basic threshold for CFIUS to meet in order to invoke the Exon-Florio provision. Secondly, representatives indicated that they interpret the amendment to mean that a 45-day investigation is discretionary and not mandatory, again because of the requirement that a transaction must be found to cause an impairment to national security before the Exon-Florio provision can be invoked.

CFIUS representatives also argued that their decision not to launch a full 45-day investigation of the DP World was the result of an extensive informal review of the transaction prior to the case being officially filed with CFIUS and as a result of a formal 30-day review. During these two reviews, CFIUS members believed that all concerns that had been expressed by members of CFIUS had been adequately resolved so that by the time of the review no member of CFIUS had any unresolved concerns about the impact of the transaction on national security. 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."[11]

As a result of the attention by both the public and Congress, DP World officials indicated that they would sell off the U.S. port operations to an American owner.[12] On December 11, 2006, DP World officials announced that a unit of AIG Global Investment Group, a New York-based asset management company with $683 billion in assets, but no experience in port operations, would acquire the U.S. port operations for an undisclosed amount.[13]

Through the Exon-Florio provision, Congress directed that the President or his designee must consider a short list of factors in deciding whether to block a foreign acquisition, merger, or takeover. Again, the President has broad discretion under the current statute to decide the basis on which he determines whether a transaction might impair the national security. This list includes the following factors:

> (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

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

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

[13] 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.

> and biological weapons; 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 counter0terrorism 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.[14]

CFIUS and a designated lead agency are authorized 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 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, 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 re-submitting the notice; and 3) a process for tracking any actions taken by any party to the transaction.

In addition, CFIUS is 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 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.

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 providing a cursory role for itself as a means of emphasizing that, as much as possible, the commercial nature of investment transactions should

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

be free from political considerations. Congress also attempted to balance public concerns about the economic impact of certain types of foreign investment with the nation's long-standing international commitment to maintain 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. The basic approach of the provision, therefore, was to presume that foreign investment generally has a positive effect on the economy and that it should be encouraged and restricted only in those cases in which a specific transaction had met a burden of proof that the proposed investor "might take action that threatens to impair the national security."

At the time the Exon-Florio provision was adopted, 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. In addition, Congress did not adopt a specific definition of national security when it approved the Exon-Florio provision. Instead, during a review or investigation of a foreign investment, each member of CFIUS is expected to apply that definition of national security that is consistent with the legislative mandate of the CFIUS member. As a result, the CFIUS process relies on each member applying their own particular definition of national security and making any concerns that arise from such a review known to the other members of CFIUS.

Foreign investors are also constrained by legislation that bars foreign direct investment in such industries as maritime operations, aircraft, banking, resources and power.[15] Generally, these sectors were closed to foreign investors, primarily for national defense purposes, prior to passage of the Exon-Florio provision to prevent these areas from being subject to foreign control.



## Exon-Florio Provision After September 11, 2001

Arguably, the events of September 11, 2001, reshaped Congressional attitudes toward the Exon-Florio provision and the manner in which it should be used. During discussion about the Exon-Florio provision prior to its passage in 1988, the Reagan Administration opposed a definition of national security that included "essential commerce and national security," because the administration argued that the definition was too broad. Ultimately, the Reagan Administration succeeded in getting the term "essential commerce" dropped from the provision. After the September 11th terrorist attacks, however, 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).[16] 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

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

[16] P.L. 107-56, title X, Sec. 1014, October 26, 2001; 42 U.S.C. Sec. 5195c(e).

> security, national economic security, national public health or safety, or any combination of those matters.[17]

This broad definition is enhanced to some degree by other provisions of the act, which specifically identify certain sectors of the economy, therefore, as likely candidates for consideration as critical infrastructure, including telecommunications, energy, financial services, water, transportation sectors,[18] 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."[19] The following year, Congress adopted the language in the USA PATRIOT Act on critical infrastructure into The Homeland Security Act of 2002.[20]

By adopting the terms "critical infrastructure" and "homeland security," following the events of September 11, 2001, Congress demonstrated that the attacks fundamentally altered the way many Members of Congress and many in the public view the concept of national security. As a result, many in Congress and in the public have come to believe that economic activities are a separately identifiable component of national security. In addition, many in Congress and elsewhere apparently perceive greater risks to the economy arising from foreign investments in which the foreign investor is owned or controlled by foreign governments as a result of the terrorist attacks. The Dubai Ports World case, in particular, demonstrated that there was a difference between the post-September 11 expectations held by many in Congress about the role of foreign investment in the economy and of economic infrastructure issues as a component of national security and the operations of CFIUS. For some Members of Congress, CFIUS seemed to be out of touch with the post-September 11, 2001 view of national security, because it remains founded in the late 1980s orientation of the Exon-Florio provision, which views national security primarily in terms of national defense and downplays or even excludes a broader notion of economic national security.

Activity within Congress and 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 reviews 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 believes 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, means

[17] Ibid.

[18] 42 U.S.C. Sec. 5195c(b)(2).

[19] 42 U.S.C. Sec. 5195c(b)(3).

[20] 6 U.S.C. Sec. 101(4).

that a CFIUS determination may no longer be a final decision and it adds a new level of uncertainty to foreign investors seeking to acquire U.S. firms. A broad range of U.S. and international business groups are objecting to this change in the Administration's policy.[21]

# Overview of H.R. 556 and S. 1610

H.R. 556 was approved by the House Financial Services Committee on February 13, 2007, with amendments. The amendment offered by Committee Chairman Frank and Representative Price included six changes to the bill as it was introduced on January 18, 2007. These changes responded to concerns that were expressed by the Bush Administration that some of the procedures that would have been established under H.R. 556 would have created new levels of bureaucracy and administrative bottlenecks that potentially could have delayed and discouraged foreign investment. The changes would 1) allow a Deputy Secretary or an Under Secretary of an agency to approve an investment transaction on behalf of the respective agency instead of requiring the Secretary to approve the transaction; 2) require the Deputy Secretary of an agency to certify investment transactions by companies that are owned by a foreign government; 3) give the Director of National Intelligence "adequate time" to consider national security implications instead of requiring a minimum of 30 days to examine security implications; 4) clarify that agencies act on behalf of CFIUS in administering agreements to mitigate security concerns that are raised about a foreign investor during a CFIUS review; 5) strike a provision that would have allowed CFIUS to reopen approvals; and would have required the Attorney General to report to Congress.[22]

On February 28, 2007, H.R. 556 was approved with amendments by the full House. The three amendments that were adopted clarified the language of the measure in some cases and added a number of new sections. In particular, the measure added a new factor that requires CFIUS and the President to consider the impact of an investment transaction on U.S. efforts to curtail human smuggling in approving a transaction. Another change would require CFIUS to notify Senators and Members of Congress if the Committee determines that the areas represented by the Senator or Member would be "significantly" affected by an investment transaction.

On June 13, 2007, Senator Dodd introduced S. 1610, which was referred to the Senate Committee on Banking, Housing, and Urban affairs. On June 29, 2007, the full Senate considered S. 1610 and adopted the measure by unanimous consent as a substitute for H.R. 556. 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.

Both H.R. 556 and S. 1610 (P.L. 110-49) attempt to address congressional concerns by establishing CFIUS by statutory authority, thereby giving Congress a direct role in determining the make-up and operations of the Committee. The measures would have the Secretary of the Treasury continue to serve as the Chairman of CFIUS, despite the misgivings of some Members. The House measure would have had the Secretary of Homeland Security and the Secretary of

[21] 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.

[22] House Financial Services Committee Clears Amended CFIUS Reform Bill by Voice Vote, *International Trade Daily*, February 14, 2007.

Defense serve as Vice Chairmen. In other respects, the House bill retained the basic structure of the Committee as it presently exists, except that it would add the Secretary of Energy as a permanent member of CFIUS. The Senate measure reduced the official number of members of CFIUS, but grants the President the authority to appoint temporary members on a case-by-case basis.

According to the two measures, the Committee operates under the same time frame that currently exists with 30 days allotted for a review, 45 days for an investigation and 15 days for the President to make his determination. The President retains his authority as the only officer with the authority to suspend or prohibit certain types of foreign investments. The measures place additional requirements on firms that resubmitted a filing after previously withdrawing a filing before a full review is completed.

In H.R. 556, no review or investigation would have been considered to be complete until it had been approved by a majority of the members of CFIUS and signed by the Secretary of the Treasury and the Secretary of Homeland Security to insure that principal members of CFIUS were aware of all reviews and investigations completed by CFIUS. Both measures require CFIUS to investigate 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. 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." S. 1610 requires an investigation if the transaction would result in control of any "critical infrastructure that could impair the national security."

Both measures place increased requirements on CFIUS to review investment transactions in which the foreign person is owned or controlled by a foreign government. Both measures provide for exceptions from the requirement to investigate transactions in which the foreign party is controlled by a foreign government. The measures would allow CFIUS to exclude a transaction from an investigation if the Secretary of the Treasury and certain other specified officials determine that the transaction will not impair the national security. It is somewhat unclear, however, how this change will mesh with the current process. The measures seem to strengthen the role of CFIUS in determining which transactions it will investigate. The measures also do not amend or alter the current statute in the area that has been the source of recent differences between CFIUS and Congress. In particular, the current statute states that the President, and through him CFIUS, can use the Exon-Florio process "only if" he finds that there is "credible evidence" that a foreign investment will impair national security. As a result, CFIUS has determined, as was the case in the Dubai Ports transaction, that if the Committee does not have credible evidence that an investment will impair the national security that it is not required to undertake a full 45-day investigation.

The extent to which CFIUS increases its investigations of transactions that involve a foreign government may cause foreign investors to regard this as an important policy change by the United States toward foreign investment. As previously stated, the current system presumes that foreign investment transactions are acceptable and that they provide a positive contribution to the economy. As a result, the burden is on the members of CFIUS to prove that a particular transaction is a threat to national security. The measures, however, might be interpreted to presume that investment transactions in which the foreign person is owned or controlled by a foreign government are a threat to the nation's security simply because of the relationship to the foreign government and, therefore, might require the firms to prove that they are not a threat. Although the number of investment transactions a year in which the foreign investor is associated

with a foreign government is small compared with the total number of foreign investment transactions, foreign investors and foreign governments likely will view this as a significant change in the traditional U.S. approach to foreign investment.

Both bills increase the role of congressional oversight by requiring greater reporting by CFIUS on its actions either during or after it completes reviews and investigations and by increasing reporting requirements on CFIUS. H.R. 556 would have required the Secretary of the Treasury, the Secretary of Homeland Security, and the Secretary of Commerce to sign and approve any review or investigation. In those cases in which the foreign person involved in an investment transaction is owned or controlled by a foreign government, a majority of the members of CFIUS would have been required to approve the transaction and the President and the chair and vice chairs of CFIUS would have been required to sign off on investments in which at least one member of CFIUS did not agree with the decision of the majority to approve the transaction. H.R. 556 also would have required the President to approve of any review or investigation in which a foreign entity is from a country that has been determined to support acts of international terrorism.

Both measures require CFIUS to provide Congress with a greater amount of detailed information about its operations. H.R. 556 would have required CFIUS to notify specified Members at the conclusion of any investment investigation and to report annually to Congress. Both measures provide for greater reporting on and increased authority for CFIUS to negotiate provisions with the foreign firms involved in investment transactions to mitigate the impact of the transaction. Under current statutes, CFIUS has no authority to negotiate such agreements with firms and it is not clear that it has any authority to enforce such agreements. H.R. 556 and S. 1610 provide for a process to track the agreements and to report the progress of such agreements and any changes to the agreements to the members of CFIUS and to the President.

The measures also amend the current statute regarding the meaning of national security and place additional requirements on CFIUS regarding national security reviews. The bills explicitly require the Director of National Intelligence to conduct reviews of any investment that posed a threat to the national security. The bills also provide for additional factors the President and CFIUS are required to use in assessing foreign investments. In particular, the bills add implications for the nation's critical infrastructure as a factor for reviewing or investigating an investment transaction.



# Side-by-Side Comparison of H.R. 556 and S. 1610

The following section provides a more detailed comparison of the two bills as they passed their respective bodies and the current provisions.

## CFIUS National Security Investigations

According to the Exon-Florio provision and subsequent regulations issued by the Treasury Department, CFIUS has 30 days after it receives the initial formal notification by the parties to a merger, acquisition, or a takeover, to decide whether to investigate a case as a result of its determination that the investment "threatens to impair the national security of the United States." If during this 30-day period all the members of CFIUS conclude that the investment does not threaten to impair the national security or if the concerns of any member are resolved, the review is terminated. If, however, at least one member of the Committee determines that the investment

does threaten to impair the national security and if those concerns are not resolved, CFIUS can proceed to a 45-day investigation. 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.

A subsequent amendment, the Byrd Amendment, requires CFIUS to conduct a 45-day investigation of a transaction in any instance in which the foreign entity is controlled by or acting on behalf of a foreign government which could result in the foreign entity gaining control of the U.S. entity *and* that could affect the national security of the United States. Such an investigation is required to begin no later than 30 days after CFIUS receives written notice of the proposed or pending merger, acquisition, or takeover and be completed in no more than 45 days.

H.R. 556 and S. 1610 establish the Committee on Foreign Investment in the United States as a matter of statute and would amend the current procedures for a CFIUS review and investigation. The measures strike out the first two sections of the current statute that deal with investigations and replace them with provisions that would provide for the same 30-day review and 45-day investigation stages that exist under the current provision, but would alter the provision in a number of ways. First, the measures explicitly indicate that the investigation will be conducted by the Committee on Foreign Investment in the United States, which was referred to only as the President's designee prior to passage of P.L. 110-49. Next, the measures amend and broaden the language in the current statute regarding national security by indicating that national security for this provision is construed "so as to include those issues relating to 'homeland security,' including its application to critical infrastructure," and "critical technologies."

The measures provide for "National Security Reviews and Investigations," which are not a part of the current CFIUS process, although the Director of National Intelligence often is asked to participate in CFIUS reviews and investigations. In an important departure from the current procedure, CFIUS is required ("shall") to review any merger, acquisition, or takeover to determine the effects of the transaction on the national security of the United States. In addition, CFIUS is required (shall) 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. Once a review has been initiated, a firm cannot withdraw its notice unless it provides a written request for such a withdrawal and the request is approved in writing by the Chairperson, in consultation with the Vice Chairpersons of the Committee. The term "control" for this section is defined in the Code of Federal Regulation (31CFR800.204) as the power to affect the principal assets of the entity, the power to dissolve the entity, to close and/or relocate the production or research and development facilities, to terminate contracts, or to amend the Articles of Incorporation.

In addition to any entity that is a party to a merger, acquisition, or takeover being able to initiate a review, the measures would provide that the President, the Committee can request that CFIUS review a transaction. This authority could not be delegated by any member of CFIUS to any person other than to an appropriate Deputy Secretary or Under Secretary. These individuals would be able to review a transaction that previously had been reviewed and approved under certain circumstances: 1) a transaction in which it was later discovered that false or misleading material information had been submitted to CFIUS; 2) or material information, including documents, had been omitted from information submitted to CFIUS; 3) or if a party to a transaction had intentionally failed to adhere to any mitigating agreements or conditions upon

which the original approval had been granted and no other remedy or enforcement tool was available to address such a breach of the mitigating agreement.

The measures require the President, acting through CFIUS, to conduct a National Security investigation of the effects of a transaction on the national security of the United States and to take any "necessary" actions in connection with the transaction to protect the national security of the United States under certain conditions. These conditions would be: (1) as a result of a review of the transaction, CFIUS determined that the transactions threatened to impair the national security of the United States and that the threat had not been mitigated during or prior to a review of the transaction, or the foreign person was controlled by a foreign government. H.R. 556 would have required an investigation if: during a roll call vote of the members of CFIUS at least one member had voted against approving the transaction; the Director of National Intelligence had identified "particularly complex national security or intelligence issues" that threaten to impair the national security of the United States and CFIUS members had not been able to develop and agree on measures to mitigate the threat during a review. S. 1610 requires an investigation if the transaction results in the control of "any critical infrastructure" that would impair the national security. The investigation is required to be completed within 45 days, but the House measure would have provided for an extension of the deadline of up to an additional 45 days if the extension had been requested by the President or by a roll call vote of two-thirds of the CFIUS members.

Both measures provide an important exception to the requirement that CFIUS conduct an investigation of any transaction if it determines during a review that a party to a transaction is owned or controlled by a foreign government. Instead, the measures would not require such an investigation, even if CFIUS had determined during a review that the party to a transaction was controlled by a foreign government if: it also determined that the transaction "will not affect" the national security of the United States. The House measure also would have waived the requirement for an investigation if no agreement or condition was required, relative to the transaction, to mitigate any threat to the national security.

The House measure would have required the approval of a majority of the members of CFIUS and the approval of, and a signed determination by, the Secretary of the Treasury, the Secretary of Homeland Security, and the Secretary of Commerce on any review or investigation in order for the CFIUS process to be considered final or complete. In those cases in which the foreign entity was determined to be controlled by a foreign government and at least one member of CFIUS did not vote in favor of approval, the CFIUS investigation process would not be considered to be complete until the President and the Chairperson, and the Vice Chairperson of the Committee signed the Committee report to indicate their approval.

H.R. 556 would have required action by the President in certain cases. Specifically, the measure would have required the President to approve and to sign his approval of an investment transaction in which the party to a transaction is an entity or a country that has been determined by the Secretary of State under the Export Administration Act or other provisions of law repeatedly to have provided support for acts of terrorism. S. 1610, requires the Secretary of the Treasury to publish in the Federal Register guidance on the types of transactions that the Committee had reviewed and that had national security considerations. The Senate measure also requires the Committee to notify specified Members of Congress at the completion of a review or investigation of any foreign investment transaction.

Both bills grant the Director of National Intelligence "adequate time" 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 specifically includes a request for information be made from the Department of the Treasury's Director of the Office of Foreign Assets Control and the Director of the Financial Crimes Enforcement Network. In addition, the Director of National Intelligence is required to seek and to incorporate the views of "all affected or appropriate" intelligence agencies. The Director of National Intelligence, however, maintains a role that is independent from CFIUS by not serving as an official member of CFIUS and by not serving in a policy role other than to provide analysis in connection with an investment transaction. Firms are not be prohibited from submitting additional information or modifying any agreement in connection with a transaction while the transaction is being reviewed or investigated.

| **H.R. 556**<br>**National Security Foreign Investment Reform and Strengthened Transparency Act of 2007** | **S. 1610**<br>**Foreign Investment and National Security Act of 2007** |
|---|---|
| Section 721 of the Defense Production Act of 1950 (50 U.S.C. App. 2170) is amended by striking subsections (a) and (b) and inserting the following new subsections: | Same. |
| **National security reviews and investigations.** | **National security reviews and investigations.** |
| The President, acting through the CFIUS, would be required to review a "covered" transaction (any merger, acquisition, or takeover by or with any foreign person which could result in foreign control of any person engaged in interstate commerce in the United States) to determine the effects of the transaction on the national security of the United States. | Same. |
| **No comparable provision.** | Also specifically requires the President to consider the factors specified elsewhere in this measure in the review and investigation, as "appropriate." |
| **Control by a foreign government.** | **Control by a foreign government.** |
| CFIUS is required to conduct an investigation if the Committee determines that the investment transaction is a foreign government-controlled transaction. | Same. |
| **Written notice.** | **Written notice.** |
| Any party to any covered transaction may initiate a review of the transaction by submitting a written notice of the transaction to the Chairperson of the Committee. | Same. |
| **Withdrawal of notice.** | **Withdrawal of notice.** |
| Written request must be 1) submitted by any party to the transaction; and 2) the request is approved in writing by the Chairperson, in consultation with the Vice Chairpersons, of the Committee. | Withdrawal notice must be submitted to the Committee and approved by the Committee. |
| **Continuing discussions.**<br>Approval of a withdrawal request is not to be construed as precluding continuing informal discussions with the Committee or any Committee member regarding possible resubmission. | **Continuing discussions.**<br>Same. |

| **H.R. 556**<br>**National Security Foreign Investment Reform and Strengthened Transparency Act of 2007** | **S. 1610**<br>**Foreign Investment and National Security Act of 2007** |
|---|---|
| **Unilateral initiation of review.** | **Unilateral initiation of review.** |
| The President, the Committee, or any member of the Committee may move to initiate a review of: | The President or the Committee may initiate a review of: |
| (i) any covered transaction; | Same. |
| (ii) any covered transaction that has previously been reviewed or investigated under this section, if any party to the transaction submitted false or misleading material information to the Committee in connection with the review or investigation or omitted material information, including material documents, from information submitted to the Committee; or (iii) any covered transaction that has previously been reviewed or investigated under this section, if any party to the transaction or the entity resulting from consummation of the transaction intentionally materially breaches a mitigation agreement or condition described in subsection (l)(1)(A), and: | Same. |
| 1) such breach is certified by the lead department or agency monitoring and enforcing such agreement or condition as an intentional material breach; and | 1) such breach is certified to the Committee by the lead department or agency monitoring and enforcing such agreement or condition as an intentional material breach; and |
| 2) such department or agency certifies that there is no other remedy or enforcement tool available to address such breach. | 2) the Committee determines that there are no other remedies or enforcement tools available to address such breach. |
| **Timing.** | **Timing.** |
| Any review under this paragraph shall be completed before the end of the 30-day period beginning on the date of the receipt of written notice under subparagraph (C) by the Chairperson of the Committee, or the date of the initiation of the review in accordance with a motion under subparagraph (D). | Same. |
| **Limit on delegation of authority.**<br>Authority of the Committee or any member of the Committee to initiate a review may be delegated only to the Deputy Secretary or an appropriate Under Secretary of the department or agency represented on the committee or by such member (or by a person holding an equivalent position to a Deputy Secretary or Under Secretary). | **Limit on delegation of authority.**<br>Authority can be delegated only to the Deputy Secretary or an appropriate Under Secretary of the department or agency represented on the Committee. |

| H.R. 556<br>National Security Foreign Investment Reform and Strengthened Transparency Act of 2007 | S. 1610<br>Foreign Investment and National Security Act of 2007 |
|---|---|
| **National security investigation.** | **National security investigation.** |
| In each case in which a review of a covered transaction results in a determination that: | Same. |
| 1) the transaction threatens to impair the national security of the United States and that threat has not been mitigated during or prior to the review or | Same. |
| 2) the transaction is a foreign government-controlled transaction; | Same. |
| **No comparable provision.** | 3) the transaction would result in control of any critical infrastructure that could impair the national security, and that such impairment has not been mitigated by assurances provided or renewed during the review period, the lead agency recommends, and the Committee concurs, that an investigation be undertaken. |
| A roll call vote results in at least 1 vote by a Committee member against approving the transaction; or | **No comparable provision.** |
| The Director of National Intelligence identifies particularly complex intelligence concerns that could threaten to impair the national security of the United States and Committee members were not able to develop and agree upon measures to mitigate satisfactorily those threats during the initial review period, the President would be required to conduct an investigation of the effects of the transaction on the national security of the United States and take any necessary actions in connection with the transaction to protect the national security of the United States. | **No comparable provision.** |
| **Timing.** | **Timing.** |
| Any investigation must be completed before the end of the 45-day period beginning on the date of the investigation commenced. | Same. |
| **Extension of Time.** | **No comparable provision.** |
| The period for any investigation may be extended by the President or by a roll call vote of at least 2/3 of the members of the Committee by the amount of time specified by the President or the Committee at the time of the extension, not to exceed 45 days, in order to collect and fully evaluate information relating to the covered transaction or parties to the transaction; and any effect of the transaction that could threaten to impair the national security of the United States. | |

| H.R. 556<br>National Security Foreign Investment Reform and Strengthened Transparency Act of 2007 | S. 1610<br>Foreign Investment and National Security Act of 2007 |
|---|---|
| **Exception.**<br><br>An investigation of a foreign government-controlled transaction is not required if the Secretary of the Treasury, the Secretary of Homeland Security, and the Secretary of Commerce determine that the transaction will not affect the national security of the United States and no agreement or condition is required to mitigate any threat to the national security (and such authority of each such Secretary may not be delegated to any person other than the Deputy Secretary of the Treasury, of Homeland Security, or of Commerce, respectively). | **Exception.**<br><br>An investigation of a foreign government-controlled transaction or a transaction involving critical infrastructure is not required if the Secretary of the Treasury and the head of the lead agency jointly determine that the transaction will not impair the national security of the United States. |
| **No comparable provision.** | Non-delegation of authority. Authority would be delegated only to the Deputy Secretary of the Treasury or the deputy head (or the equivalent thereof) of the lead agency, respectively. |
| **Approval of Chairperson and Vice Chairpersons.**<br><br>A review or investigation can not be treated as final or complete until the results of the review or investigation are approved by a majority of the members of the Committee in a roll call vote and signed by the Secretary of the Treasury, the Secretary of Homeland Security, and the Secretary of Commerce. | **No comparable provision.** |
| **No comparable provision.** | **Guidance on certain transactions with national security implications.**<br><br>The Chairperson shall publish in the Federal Register guidance on the types of transactions that the Committee has reviewed and that have presented national security considerations, including transactions that may constitute covered transactions that would result in control of critical infrastructure relating to United States national security by a foreign government or an entity controlled by or acting on behalf of a foreign government. |
| **Additional action required in certain cases.**<br><br>In the case of any roll call vote in connection with an investigation of any foreign government-controlled transaction in which there is at least 1 vote by a Committee member against approving the transaction, the investigation shall not be treated as final or complete until the findings and report resulting from the investigation are signed by the President (in addition to the Chairperson and the Vice Chairpersons of the Committee). | **No comparable provision.** |

| H.R. 556<br>National Security Foreign Investment Reform and Strengthened Transparency Act of 2007 | S. 1610<br>Foreign Investment and National Security Act of 2007 |
|---|---|
| **Presidential action required in certain cases.**<br><br>The President would be required to approve and sign the results of a review or investigation in any case in which any party to the transaction is:<br>1) a person of a country the government of which the Secretary of State has determined is a government that has repeatedly provided support for acts of international terrorism;<br>2) a government or person controlled, directly or indirectly, by any such government. | **No comparable provision.** |
| **No comparable provision.** | **Certifications to Congress.**<br><br>Upon completion of a review the chairperson and the head of the lead agency would be required to transmit a certified notice to specified members of Congress. |
| **No comparable provision.** | **Certified report after investigation.**<br><br>As soon as is practicable after completion of an investigation the chairperson and the head of the lead agency would be required to transmit to specified members of Congress a certified written report on the results of the investigation, unless the matter under investigation has been sent to the President for decision. |
| **No comparable provision.** | **Certification procedures.**<br><br>Each certified notice and report would be required to include 1) a description of the actions taken by the Committee with respect to the transaction; and 2) identification of the determinative factors. |
| **No comparable provision.** | **Content of certification.**<br><br>Each certified notice and report would be required to be signed by the chairperson and the head of the lead agency, and shall state that, in the determination of the Committee, there are no unresolved national security concerns with the transaction that is the subject of the notice or report. |
| **No comparable provision.** | **Members of Congress.**<br><br>Each certified notice and report would be required to be transmitted to: 1) the Majority Leader and the Minority Leader of the Senate; 2) the chair and ranking member of the Committee on Banking, Housing, and Urban Affairs of the Senate and of any committee of the Senate having oversight over the lead agency; 3) the Speaker and the Minority Leader of the House of Representatives; and 4) the chair and ranking member of the Committee on Financial Services of the House of Representatives and of any committee of the House of Representatives having oversight over the lead agency. |

| H.R. 556<br>National Security Foreign Investment Reform and Strengthened Transparency Act of 2007 | S. 1610<br>Foreign Investment and National Security Act of 2007 |
|---|---|
| **No comparable provision.** | **Transmittal to other Members of Congress.**<br><br>The Majority Leader or the Minority Leader in the Senate, and the Speaker or the Minority Leader, in the House of Representatives, may provide the certified notices and reports regarding a transaction involving critical infrastructure: 1) in the case of the Senate, to members of the Senate from the State in which such critical infrastructure is located; and 2) in the case of the House of Representatives, to a member from a Congressional District in which the critical infrastructure is located. |
| **No comparable provision.** | **Signatures, limit on delegation.**<br><br>Each certified notice and report must be signed by the chairperson and the head of the lead agency, which may only be delegated to an employee of the Department of the Treasury (in the case of the Secretary of the Treasury) or to an employee of the lead agency (in the case of the lead agency) who was appointed by the President, by and with the advice and consent of the Senate, or only to a Deputy Secretary of the Treasury (in the case of the Secretary of the Treasury) or a person serving in the Deputy position or the equivalent thereof at the lead agency (in the case of the lead agency). |
| **Analysis by director of national intelligence.**<br><br>The Director of National Intelligence would be required to expeditiously carry out a thorough analysis of any threat to the national security of the United States of any covered transaction, including making requests for information to the Director of the Office of Foreign Assets Control within the Department of the Treasury and the Director of the Financial Crimes Enforcement Network. The Director of National Intelligence also would be required to seek and incorporate the views of all affected or appropriate intelligence agencies. | **Analysis by director of national intelligence.**<br><br>The Director of National Intelligence would be required to expeditiously carry out a thorough analysis of any threat to the national security of the United States posed by any covered transaction. The Director of National Intelligence would be required to seek and incorporate the views of all affected or appropriate intelligence agencies with respect to the transaction. |
| **Timing.**<br><br>The Director of National Intelligence would be required to provide adequate time to complete the analysis required under subparagraph (A). | **Timing.**<br><br>The analysis required under subparagraph (A) must be provided by the Director of National Intelligence to the Committee not later than 20 days after the date on which notice of the transaction is accepted by the Committee under paragraph (1)(C), but the Director may begin the analysis at any time prior to receipt of the notice. |
| **No comparable provision.** | **Interaction with intelligence community.**<br><br>The Director of National Intelligence would be required to ensure that the intelligence community remains engaged in the collection, analysis, and dissemination to the Committee of any additional relevant information that may become available during the course of any investigation. |

| H.R. 556<br>National Security Foreign Investment Reform and Strengthened Transparency Act of 2007 | S. 1610<br>Foreign Investment and National Security Act of 2007 |
|---|---|
| **Independent role of the director.** | **Independent role of the director.** |
| The Director of National Intelligence shall not be a **member** of the Committee and shall serve no policy role with the Committee other than to provide analysis in connection with a covered transaction. | The Director of National Intelligence shall be an **ex officio member** of the Committee, and shall be provided with all notices received by the Committee regarding covered transactions, but shall serve no policy role on the Committee, other than to provide analysis in connection with a covered transaction. |
| **Submission of additional information.** | **Submission of additional information.** |
| No provision of this subsection can be construed as prohibiting any party to a covered transaction from submitting additional information concerning the transaction, including any proposed restructuring of the transaction or any modifications to any agreements in connection with the transaction, while any review or investigation of the transaction is on-going. | Same. |
| **No comparable provision.** | **Notice of results.** |
| | The Committee would be required to notify the parties to a covered transaction of the results of a review or investigation, promptly upon completion of all action. |
| **Regulations.** | **Regulations.** |
| Regulations prescribed under this section shall include standard procedures for: | |
| A) submitting any notice of a proposed or pending covered transaction to the Committee; | Same. |
| B) submitting a request to withdraw a proposed or pending covered transaction from review; and | Same. |
| C) resubmitting a notice of proposed or pending covered transaction that was previously withdrawn from review. | Same. |
| **No comparable provision.** | D) providing notice of the results of a review or investigation to the parties to the covered transaction, upon completion of all action under this section. |



## Composition of CFIUS

The Committee on Foreign Investment in the United States (CFIUS) was created by Executive Order of President Ford in 1975[23] to serve the President in overseeing the national security implications of foreign investment in the economy. President Ford's 1975 Executive Order established the basic structure of CFIUS, and directed that the "representative"[24] 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."[25] Presently, the

[23] Executive Order 11858 (b), May 7, 1975, 40 F.R. 20263.

[24] The term "representative" was dropped by Executive Order 12661, December 27, 1988, 54 F.R. 780.

[25] Executive Order 11858 (b), May 7, 1975, 40 F.R. 20263.

Committee consists of twelve members, including the Secretaries of State, the Treasury, Defense, Homeland Security, and Commerce; the United States Trade Representative; the Chairman of the Council of Economic Advisers; the Attorney General; the Director of the Office of Management and Budget; the Director of the Office of Science and Technology Policy; the Assistant to the President for National Security Affairs; and the Assistant to the President for Economic Policy.[26]

Both H.R. 556 and S. 1610 establish the members of CFIUS as a matter of statute, compared with the present situation in which CFIUS is a creation of various presidential orders. Under the House measure, CFIUS would have included the same twelve members that currently constitute the Committee, and it would have added the Secretary of Energy to CFIUS. S. 1610, includes the same cabinet members as currently included as members of CFIUS, but it does not include the other seven members of the Administration. In addition, the Senate measure adds the Secretary of Labor and the Director of National Intelligence as ex officio members. In both measures, the Secretary of the Treasury would continue to serve as the Chairperson of the Committee, but the House measure would have created a new Vice Chairperson position that would have been held by the Secretary of Homeland Security and the Secretary of Commerce. The Senate measure requires that a particular member of CFIUS be designated as the lead agency in cases in which a mitigation agreement has been negotiated or in those cases in which CFIUS has determined to monitor the conditions agreed to as part of a mitigation agreement to ensure that the conditions are being met. The House measure would have empowered the Committee to "take such testimony, receive such evidence, administer such oaths," in order to carry out a review or investigation. The House measure also would have empowered the Committee to require the attendance and testimony of "such witnesses and production of such books, records, correspondence memoranda, papers, and documents" as the Chairperson of the Committee determined to be "advisable."

| **H.R. 556**<br>**National Security Foreign Investment Reform and Strengthened Transparency Act of 2007** | **S. 1610**<br>**Foreign Investment and National Security Act of 2007** |
|---|---|
| **Statutory establishment of the Committee on Foreign Investment in the United States.** | **Statutory establishment of the Committee on Foreign Investment in the United States.** |
| Section 721 of the Defense Production Act of 1950 (50 U.S.C. App. 2170) is amended | Same. |
| **Establishment.** | **Establishment.** |
| The Committee on Foreign Investment in the United States established pursuant to Executive Order No. 11858 shall be a multi-agency committee to carry out this section and such other assignments as the President may designate. | Same. |

[26] Executive Order 11858 of May 7, 1975, 40 F.R. 20263 established the Committee with six members: the Secretaries of State, the Treasury, Defense, and 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.

| H.R. 556<br>National Security Foreign Investment Reform and Strengthened Transparency Act of 2007 | S. 1610<br>Foreign Investment and National Security Act of 2007 |
|---|---|
| **Membership.** | **Membership.** |
| The Secretary of the Treasury.<br>The Secretary of Homeland Security.<br>The Secretary of Commerce.<br>The Secretary of Defense.<br>The Secretary of State.<br>The Attorney General.<br>The Secretary of Energy.<br>The Chairman of the Council of Economic Advisors.<br>The United States Trade Representative.<br>The Director of the Office of Management and Budget.<br>The Director of the National Economic Council.<br>The Director of the Office of Science and Technology Policy.<br>The President's Assistant for National Security Affairs.<br>Any other designee of the President from the Executive Office of the President. | Same.<br>Same.<br>Same.<br>Same.<br>Same.<br>Same.<br>Same.<br>The Secretary of Labor (ex officio).<br>The Director of National Intelligence (ex officio).<br>The heads of any other executive department, agency, or office, as the President determines appropriate, generally or on a case-by-case basis. |
| **Chairperson.** | **Chairperson.** |
| The Secretary of the Treasury shall be the Chairperson of the Committee. | Same. |
| The Secretary of Homeland Security and the Secretary of Commerce shall be the Vice Chairpersons of the Committee. | **No comparable provision.** |
| **No comparable provision.** | **Designation of lead agency.** |
| | The Secretary of the Treasury would be required to designate another member or members, as appropriate, of the Committee to be the lead agency or agencies on behalf of the Committee:<br>A) for each transaction, and for negotiating any mitigation agreements or other conditions necessary to protect national security; and<br>B) for all matters related to the monitoring of the completed transaction, to ensure compliance with such agreements or conditions. |
| **Other members.** | **Other members.** |
| The Chairperson of the Committee would be required to involve the heads of such other Federal departments, agencies, and independent establishments in any review or investigation under subsection (b) as the Chairperson, after consulting with the Vice Chairpersons, determines to be appropriate on the basis of the facts and circumstances of the transaction under investigation (or the designee of any such department or agency head). | The chairperson would be required to consult with the heads of such other Federal departments, agencies, and independent establishments in any review or investigation under subsection (a), as the chairperson determines to be appropriate, on the basis of the facts and circumstances of the transaction under review or investigation (or the designee of any such department or agency head). |
| **Meetings.** | **Meetings.** |
| The Committee shall meet upon the direction of the President or upon the call of the Chairperson of the Committee without regard to section 552b of title 5, United States Code (if otherwise applicable). | Same. |

| H.R. 556<br>National Security Foreign Investment Reform and Strengthened Transparency Act of 2007 | S. 1610<br>Foreign Investment and National Security Act of 2007 |
|---|---|
| **Collection of evidence.**<br><br>The Committee may, for the purpose of carrying out this section:<br>A) sit and act at such times and places, take such testimony, receive such evidence, administer such oaths; and<br>B) require the attendance and testimony of such witnesses and the production of such books, records, correspondence, memoranda, papers, and documents as the Chairperson of the Committee may determine advisable. | **No comparable provision.** |
| **Authorization of appropriations.**<br><br>There are authorized to be appropriated to the Secretary of the Treasury for each of fiscal years 2008, 2009, 2010, and 2011 expressly and solely for the operations of the Committee that are conducted by the Secretary, the sum of $10,000,000. | **No comparable provision.** |

## Presidential Actions

H.R. 556 would have left unaltered the current Exon-Florio provision, which granted the President the authority to "take such action for such time as the President considers appropriate to suspend or prohibit" any acquisition, merger, or takeover by a foreign entity of "persons engaged in interstate commerce in the United States" that threaten to impair the national security. The Senate measure empowers the President to take such action as the President considers appropriate concerning "any covered transaction by or with a foreign person or government" that threatens to impair the national security of the United States. Both measures follow the current procedure, which requires the President to announce his decision within 15 days after CFIUS completes its investigation of a proposed transaction. Both measures also follow current statute, which grants the President the authority to direct the Attorney General to seek appropriate relief, including divestment relief, in the district courts of the United States in order to implement and enforce this decision by the President.

| H.R. 556<br>National Security Foreign Investment Reform and Strengthened Transparency Act of 2007 | S. 1610<br>Foreign Investment and National Security Act of 2007 |
|---|---|
| **No comparable provision.** | **Action by the President.**<br><br>The President may take such action for such time as the President considers appropriate to suspend or prohibit any covered transaction by or with a foreign person or government that threatens to impair the national security of the United States. |
| **No comparable provision.** | **Announcement by the President.**<br><br>The President must announce the decision on whether or not to take action not later than 15 days after the date on which an investigation is completed. |

| H.R. 556<br>National Security Foreign Investment Reform and Strengthened Transparency Act of 2007 | S. 1610<br>Foreign Investment and National Security Act of 2007 |
|---|---|
| **No comparable provision.** | **Enforcement.**<br><br>The President may direct the Attorney General of the United States to seek appropriate relief, including divestment relief, in the district courts of the United States, in order to implement and enforce this subsection. |
| **No comparable provision.** | **Findings of the President.**<br><br>The President may exercise the authority conferred by paragraph (1), only if the President finds that:<br>A) there is credible evidence that leads the President to believe that the foreign interest exercising control might take action that threatens to impair the national security; and<br>B) provisions of law, other than this section and the International Emergency Economic Powers Act, do not, in the judgment of the President, provide adequate and appropriate authority for the President to protect the national security in the matter before the President. |
| **No comparable provision.** | **Factors to be considered.**<br><br>For purposes of determining whether to take action, the President shall consider, among other factors each of the factors described in this measure. |

## Findings

Both measures leave unchanged the current Exon-Florio provision, which grants the President the authority to block proposed or pending foreign acquisitions of "persons engaged in interstate commerce in the United States" that threaten to impair the national security. Congress directed, however, that before the President can invoke this authority he must believe that the case meets two tests, or findings. First, he must believe that other U.S. laws are inadequate or inappropriate to protect the national security. Secondly, he must have "credible evidence" that the foreign investment will impair the national security. S. 1610 also indicates that the findings of the President are not subject to any judicial review.

| H.R. 556<br>National Security Foreign Investment Reform and Strengthened Transparency Act of 2007 | S. 1610<br>Foreign Investment and National Security Act of 2007 |
|---|---|
| **No comparable provision.** | **Actions and findings nonreviewable.**<br><br>The actions of the President under this subsection and the findings of the President are not subject to judicial review. |

## Factors Used in Findings

As it was written, the Exon-Florio provision included a list of five factors the President ***may*** have considered in deciding to block a foreign investment. These factors were 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 included 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 as identified by the Secretary of States under the Export Administration Act that supports terrorism or under the Nuclear Non-Proliferation Act that proliferates missile technology or chemical and biological weapons; and
>
> (5) the potential effects of the transaction on U.S. technological leadership in areas affecting U.S. national security.

Both H.R. 556 and S. 1610 amend the current factors the President and the Committee use to evaluate mergers, acquisitions, or takeovers. In particular, the measures changed the status of the factors to be considered from being discretionary (may) to being required (shall) in evaluating a transaction. The Senate measure adds transactions identified under the fourth factor by the Secretary of Defense as "posing a regional military threat" to the interests of the United States. Also, H.R. 556 would have added four more factors to the five that currently exist. These new factors are:

> (1) whether the transaction has a security-related impact on critical infrastructure in the United States;
>
> (2) the potential effects of the transaction on the efforts of the United States to curtail human smuggling and to curtail drug smuggling.
>
> (3) whether the entity involved is being controlled by a foreign government;
>
> (4) and such other factors as the President or his designee "may determine to be appropriate, generally or in connection with a specific review or transaction."

S. 1610 adds seven new factors to the five that currently exist. These new factors are:

> (1) whether the transaction has a security-related impact on critical infrastructure in the United States;
>
> (2) the potential effects on United States critical infrastructure, including major energy assets;
>
> (3) the potential effects on United States critical technologies;
>
> (4) whether the transaction is a foreign government-controlled transaction;
>
> (5) 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;

(6) the long-term projection of the United States requirements for sources of energy and other critical resources and materials; and

(7) such other factors as the President or the Committee determine to be appropriate.

Both bills make the United States immune from any liability for any losses or expenses incurred by the parties to an investment transaction as a result of actions taken by CFIUS if the entities do not submit a written notification to CFIUS or if the transaction is completed prior to the completion of a CFIUS review or investigation.

| **H.R. 556**<br>**National Security Foreign Investment Reform and Strengthened Transparency Act of 2007** | **S. 1610**<br>**Foreign Investment and National Security Act of 2007** |
|---|---|
| **Additional factors required to be considered.** | **Additional factors required to be considered.** |
| Section 721(f) of the Defense Production Act of 1950 (50 U.S.C. App. 2170(f)) is amended by making the factors mandatory and by adding the following factors to be considered: | Section 721(f) of the Defense Production Act of 1950 (50 U.S.C. App. 2170(f)) is amended by adding |
| **No comparable provision.** | B) identified by the Secretary of Defense as posing a potential regional military threat to the interests of the United States; |
| 6) whether the covered transaction has a security-related impact on critical infrastructure in the United States; | Same. |
| 7) the potential effects of the covered transaction on the efforts of the United States to curtail human smuggling and to curtail drug smuggling with regard to any country which is not described in paragraphs (1) and (2) of section 1003(a) of the Controlled Substances Import and Export Act;<br>8) whether the covered transaction is a foreign government-controlled transaction; and<br>9) such other factors as the President or the President's designee may determine to be appropriate, generally or in connection with a specific review or investigation. | 7) the potential effects on United States critical infrastructure, including major energy assets;<br>8) the potential effects on United States critical technologies;<br>9) whether the covered transaction is a foreign government-controlled transaction, as determined under subsection (b)(1)(B);<br>10) with respect to transactions requiring an investigation under subsection (b)(1)(B) only, a review of the current assessment of:<br>A) the adherence of the subject country to nonproliferation control regimes, including treaties and multilateral supply guidelines, which shall draw on, but not be limited to, the annual report on 'Adherence to and Compliance with Arms Control, Nonproliferation and Disarmament Agreements and Commitments' required by section 403 of the Arms Control and Disarmament Act;<br>B) the relationship of such country with the United States, specifically on its record on cooperating in counter-terrorism efforts, which shall draw on, but not be limited to, the report of the President to Congress under section 7120 of the Intelligence Reform and Terrorism Prevention Act of 2004; and<br>C) the potential for transshipment or diversion of technologies with military applications, including an analysis of national export control laws and regulations;<br>11) the long-term projection of United States |

| H.R. 556<br>National Security Foreign Investment Reform and Strengthened Transparency Act of 2007 | S. 1610<br>Foreign Investment and National Security Act of 2007 |
|---|---|
| | requirements for sources of energy and other critical resources and material; and<br>12) such other factors as the President or the Committee may determine to be appropriate, generally or in connection with a specific review or investigation. |

## Confidentiality

The Exon-Florio provision 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."[27] 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 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.[28] As presently written, there is no requirement for CFIUS or the President to notify or otherwise inform Congress of cases it reviews or of the outcome of any investigation.

Both H.R. 556 and S. 1610 provide for the release of proprietary information "which can be associated with a particular party" to committees only with assurances that the information would remain confidential. Members of Congress and their staff members are accountable under current provisions of law governing the release of certain types of information.

| H.R. 556<br>National Security Foreign Investment Reform and Strengthened Transparency Act of 2007 | S. 1610<br>Foreign Investment and National Security Act of 2007 |
|---|---|
| **Confidentiality provisions.** | **Confidentiality provisions.** |
| The disclosure of information under this subsection shall be consistent with the requirements of subsection (c). Members of Congress and staff of either House or any committee of the Congress shall be subject to the same limitations on disclosure of information as are applicable under such subsection. | Same. |

## Mitigation and Tracking

Since the implementation of the Exon-Florio provision, CFIUS has developed several practices that likely were not envisioned when the statute was drafted. For instance, members of CFIUS negotiate conditions with firms at times either to mitigate or to remove matters that raise national security concerns among the members of CFIUS. Such agreements often are informal arrangements that have an uncertain basis in statute and have not been tested in court. These

[27] 50 U.S.C. Appendix Sec. 2170(c).

[28] 50 U.S.C. Appendix Sec. 2170(g).

arrangements have been 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.

H.R. 556 and S. 1610 address one concern about CFIUS's actions by granting CFIUS and a designated lead agency 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 Committee the authority to take a number of actions. In particular, the Committee can 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 party to the transaction. The federal entity or entities involved in any mitigating agreement must report to CFIUS on any modification to any agreement or condition that had been imposed and must 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 must also be filed with the Attorney General.

In addition, CFIUS is required to develop a method for evaluating the compliance of firms that had entered into a mitigation agreement or condition that was imposed as a requirement for approval of the investment transaction. Such measures, however, would be required to be developed in such a way that they would 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.

| **H.R. 556**<br>**National Security Foreign Investment Reform and Strengthened Transparency Act of 2007** | **S. 1610**<br>**Foreign Investment and National Security Act of 2007** |
|---|---|
| **Mitigation and tracking.** | **Mitigation and tracking.** |
| **Mitigation.** | **Mitigation.** |
| The Committee or any agency designated by the Chairperson and Vice Chairpersons may negotiate, enter into or impose, and enforce any agreement or condition with any party to a covered transaction in order to mitigate any threat to the national security of the United States that arises as a result of the transaction. | The Committee or a lead agency may negotiate, enter into or impose, and enforce any agreement or condition with any party to the covered transaction in order to mitigate any threat to the national security of the United States that arises as a result of the covered transaction. |
| **Risk-based analysis.** | **Risk-based analysis.** |
| Any agreement entered into or condition imposed under subparagraph (A) shall be based on a risk-based analysis, conducted by the Committee, of the threat to national security of the covered transaction. | Same. |
| **Tracking authority.** | **Tracking authority.** |
| If any written notice of a covered transaction that was submitted to the Committee is withdrawn before any review or investigation by the Committee is completed, the Committee would be required to establish, as appropriate- | Same. |
| 1) interim protections to address specific concerns with such transaction that have been raised in connection with any such review or investigation pending any | |

| H.R. 556<br>National Security Foreign Investment Reform and Strengthened Transparency Act of 2007 | S. 1610<br>Foreign Investment and National Security Act of 2007 |
|---|---|
| resubmission of any written notice under this section with respect to such transaction and further action by the President under this section;<br><br>2) specific time frames for resubmitting any such written notice; and<br><br>3) a process for tracking any actions that may be taken by any party to the transaction, in connection with the transaction, before the notice referred to in clause (2) is resubmitted. | |
| **Designation of agency.**<br><br>The Committee may designate 1 or more appropriate Federal departments or agencies, other than any entity of the intelligence community as a lead agency to carry out the requirements with respect to any covered transaction that is subject to subparagraph (A). | **Designation of agency.**<br><br>The lead agency, other than any entity of the intelligence community shall ensure that the requirements of subparagraph (A) with respect to any covered transaction that is subject to such subparagraph are met. |
| **Negotiation, modification, monitoring, and enforcement.**<br><br>The Committee shall designate 1 or more Federal departments or agencies as the lead agency to negotiate, modify, monitor, and enforce, on behalf of the Committee, any agreement entered into or condition imposed under paragraph (1) with respect to a covered transaction based on the expertise with and knowledge of the issues related to such transaction on the part of the designated department or agency. | **Negotiation, modification, monitoring, and enforcement.**<br><br>The lead agency shall negotiate, modify, monitor, and enforce, on behalf of the Committee, any agreement entered into or condition imposed under paragraph (1) with respect to a covered transaction, based on the expertise with and knowledge of the issues related to such transaction on the part of the designated department or agency. Nothing in this paragraph shall prohibit other departments or agencies in assisting the lead agency in carrying out the purposes of this paragraph. |
| **Reporting by designated agency.** | **Reporting by designated agency.** |
| **Implementation reports.**<br><br>Each Federal department or agency designated by the Committee as a lead agency in connection with any agreement entered into or condition imposed with respect to a covered transaction shall:<br>1) report, as appropriate but not less than once in each six-month period, to the Chairperson and Vice Chairpersons of the Committee on the implementation of such agreement or condition; and<br>2) require, as appropriate, any party to the covered transaction to report to the head of such department or agency (or the designee of such department or agency head) on the implementation or any material change in circumstances. | **No comparable provision.** |

| H.R. 556<br>National Security Foreign Investment Reform and Strengthened Transparency Act of 2007 | S. 1610<br>Foreign Investment and National Security Act of 2007 |
|---|---|
| **Modification reports.** | **Modification reports.** |
| Any Federal department or agency designated by the Committee as a lead agency in connection with any agreement entered into or condition imposed with respect to a covered transaction shall:<br>1) provide periodic reports to the Chairperson and Vice Chairpersons of the Committee on any modification to any such agreement or condition imposed with respect to the transaction; and | The lead agency in connection with any agreement entered into or condition imposed with respect to a covered transaction shall<br>1) provide periodic reports to the Committee on any material modification to any such agreement or condition imposed with respect to the transaction; and |
| 2) ensure that any significant modification to any such agreement or condition 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. | 2) ensure that any material modification to any such agreement or condition is reported to the Director of National Intelligence, the Attorney General of the United States, and any other Federal department or agency that may have a material interest in such modification. |
| **Compliance.** | **Compliance.** |
| The Committee shall develop and agree upon methods for evaluating compliance with any agreement entered into or condition imposed with respect to a covered transaction that will allow the Committee to adequately assure compliance without- | Same. |
| 1) unnecessarily diverting Committee resources from assessing any new covered transaction for which a written notice has been filed pursuant to subsection (b)(1)(C), and if necessary reaching a mitigation agreement with or imposing a condition on a party to such covered transaction or any covered transaction for which a review has been reopened for any reason; or | Same. |
| 2) placing unnecessary burdens on a party to a covered transaction. | Same. |



## Congressional Oversight

In hearings that were held during the 109th Congress after the Dubai Ports World transaction became public, various Members expressed concern that they were provided so little information under the current statutes that their ability to fulfill their oversight responsibilities was hampered. In addition, some Members apparently believed that the current requirements do not provide Members with enough information to address public concerns that occasionally arise concerning particular investment transactions, such as the Dubai Ports World transaction. Currently, the President is required to report to Congress on his determination to take action on a proposed investment transaction after CFIUS has completed a 30-day review and a 45-day investigation of the transaction. The President's report is required to contain a detailed explanation of the findings and of the factors the President used to make his determination.

The President also is required to provide an assessment of the risk of diversion of defense critical technology posed by an investment transaction if such an assessment is performed and that the assessment be provided to any other individual responsible for reviewing or investigating investment transactions under the Exon-Florio provision. In addition, the President is required to provide Congress with a quadrennial report which evaluates two issues: 1) 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; and 2) 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.

Both H.R. 556 and S. 1610 increase oversight by the Congress. H.R. 556 would have required that not later than five days after CFIUS completed an investigation, or 15 days after the end of an investigation if the President had determined to take actions under the Exon-Florio provision, the Committee would provide a written report to leaders in both Houses of Congress and to the Chairman and Ranking Member of committees in both houses with jurisdiction over any aspect of the transaction and its possible effects on national security, specifically, at a minimum, the Committee on Foreign Affairs, the Committee on Financial Services, and the Committee on Energy and Commerce in the House. Both measures require CFIUS to brief certain congressional leaders if they requested such a briefing. Members of Congress and their staff are subject to disclosure limitations and proprietary information would be shared with congressional committees only under conditions that would assure the confidentiality of the information.



H.R. 556 and S. 1610 require CFIUS to report annually to Congress on any reviews or investigations that it had conducted during the prior year. Each report must 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 must report on trend information on the number of filings, investigations, withdrawals, and presidential decisions or actions that were taken. The report also 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.

Relative to critical technologies, both H.R. 556 and S. 1610 require CFIUS to include in its annual report an evaluation of any credible evidence of a coordinated strategy by one or more countries or companies to acquire U.S. companies involved in research, development, or production of critical technologies in which the United States is a leading producer. The report 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. For the purposes of this section, the House measure would have defined critical technologies as technology defined in the National Science and Technology Policy Organization and Priorities Act of 1976[29], or "other critical technology, critical components, or critical technology items essential to national defense or national security."

[29] P.L. 94-282 (May 11, 1976) which states that the priority needs of the Nation relative to investment in science and technology are: (1) promoting conservation and efficient utilization of natural and human resources; (2) protecting the oceans and coastal zones; (3) strengthening the economy and promoting full employment; (4) assuring adequate supplies of food, materials, and energy; (5) improving the quality of health care; and (6) improving the nation's housing, transportation, and communication systems.

In addition, both measures require the Secretary of the Treasury, in consultation with the Secretary of State and the Secretary of Commerce 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; 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.

Both measures require the Inspector General of the Department of the Treasury to investigate any failure of CFIUS to comply with requirements for reporting that were imposed prior to the passage of this measure and to report the findings of this report to the Congress. 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 International Relations, the Committee on Financial Services, and the Committee on Energy and Commerce of the House.

H.R. 556 and S. 1610 also require the chief executive officer of any party to a merger, acquisition, or takeover to certify in writing that the information contained in the written notification to CFIUS fully complied with the requirements of the Exon-Florio provision and that the information is accurate and complete. This written notification includes any mitigation agreement or condition that was part of a CFIUS approval.

| **H.R. 556**<br>**National Security Foreign Investment Reform and Strengthened Transparency Act of 2007** | **S. 1610**<br>**Foreign Investment and National Security Act of 2007** |
|---|---|
| Increased oversight by the Congress. | Increased oversight by the Congress. |
| **Reports on completed investigations.** | **No comparable provision.** |
| Not later than five days after the completion of a Committee investigation or, if the President indicates an intent to take any action with respect to the transaction, after the end of 15-day period referred to in subsection (d), the Chairperson or a Vice Chairperson of the Committee would be required to submit a written report on the findings or actions of the Committee with respect to such investigation, the determination of whether or not to take action under subsection (d), an explanation of the findings under subsection (e), and the factors considered under subsection (f), with respect to such transaction, to: | **No comparable provision.** |
| 1) the Majority Leader and the Minority Leader of the Senate; 2) the Speaker and the Minority Leader of the House of Representatives; 3) the chairman and ranking member of each committee of the House of Representatives and the Senate with jurisdiction over any aspect of the covered transaction and its possible effects on national security, including, at a minimum, the Committee on Foreign Affairs, the Committee on Financial Services, and the Committee on Energy and Commerce of the House of Representatives; and 4) Senators representing States and Members of Congress representing congressional districts that would be significantly affected by the covered transaction. | |

| H.R. 556<br>National Security Foreign Investment Reform and Strengthened Transparency Act of 2007 | S. 1610<br>Foreign Investment and National Security Act of 2007 |
|---|---|
| **Notice and briefing requirement.** | **Notice and briefing requirement.** |
| If a written request for a briefing on a covered transaction, or on compliance with a mitigation agreement or condition imposed with respect to such transaction, is submitted to the Committee by any Senator or Member of Congress who receives a report on the transaction, the Chairperson or a Vice Chairperson (or such other person as the Chairperson or a Vice Chairperson may designate) shall provide 1 classified briefing to each House of the Congress from which any such briefing request originates in a secure facility of appropriate size and location that shall be open only to the Majority Leader and the Minority Leader of the Senate, the Speaker and the Minority Leader of the House of Representatives, (as the case may be) the chairman and ranking member of each committee of the House of Representatives or the Senate (as the case may be) with jurisdiction over any aspect of the covered transaction and its possible effects on national security, including, at a minimum, the Committee on Foreign Affairs, the Committee on Financial Services, and the Committee on Energy and Commerce of the House of Representatives, and appropriate staff members who have security clearance. | The Committee shall, upon request from any Member of Congress specified in subsection (b)(3)(C)(iii), promptly provide briefings on a covered transaction for which all action has concluded under this section, or on compliance with a mitigation agreement or condition imposed with respect to such transaction, on a classified basis, if deemed necessary by the sensitivity of the information. Briefings under this paragraph may be provided to the congressional staff of such a Member of Congress having appropriate security clearance. |
| **Annual report.** | **Annual report.** |
| The Chairperson of the Committee would be required to transmit a report to the chairman and ranking member of each committee of the House of Representatives and the Senate with jurisdiction over any aspect of the report, including, at a minimum, the Committee on Foreign Affairs, the Committee on Financial Services, and the Committee on Energy and Commerce of the House of Representatives, before July 31 of each year on all the reviews and investigations of covered transactions completed under subsection (b) during the 12-month period covered by the report. | The chairperson would be required to transmit a report to the chairman and ranking member of the committee of jurisdiction in the Senate and the House of Representatives, before July 31 of each year on all of the reviews and investigations of covered transactions completed under subsection (b) during the 12-month period covered by the report. |
| **Contents of report.** | **Contents of report.** |
| 1) A list of all notices filed and all reviews or investigations completed during the period with basic information on each party to the transaction, the nature of the business activities or products of all pertinent persons, along with information about the status of the review or investigation, information on any withdrawal from the process, any roll call votes by the Committee under this section, any extension of time for any investigation, and any presidential decision or action under this section. | 1) A list of all notices filed and all reviews or investigations completed during the period, with basic information on each party to the transaction, the nature of the business activities or products of all pertinent persons, along with information about any withdrawal from the process, and any decision or action by the President under this section. |
| 2) Specific, cumulative, and, as appropriate, trend information on the numbers of filings, investigations, withdrawals, and presidential decisions or actions under this section. | Same. |

| **H.R. 556**<br>**National Security Foreign Investment Reform and Strengthened Transparency Act of 2007** | **S. 1610**<br>**Foreign Investment and National Security Act of 2007** |
|---|---|
| 3) Cumulative and, as appropriate, trend information on the business sectors involved in the filings which have been made, and the countries from which the investments have originated. | Same. |
| 4) Information on whether companies that withdrew notices to the Committee in accordance with subsection (b)(1)(C)(ii) have later re-filed such notices, or, alternatively, abandoned the transaction. | Same. |
| 5) The types of security arrangements and conditions the Committee has used to mitigate national security concerns about a transaction, including a discussion of the methods the Committee and any lead departments or agencies designated under subsection (l) are using to determine compliance with such arrangements or conditions. | Same. |
| 6) A detailed discussion of all perceived adverse effects of covered transactions on the national security or critical infrastructure of the United States that the Committee will take into account in its deliberations during the period before delivery of the next such report, to the extent possible. | Same. |
| **Contents of report relating to critical technologies.** | **Contents of report relating to critical technologies.** |
| In order to assist the Congress in its oversight responsibilities with respect to this section, the President and such agencies as the President shall designate shall include in the annual report submitted under paragraph (1) the following: | Same. |
| 1) An evaluation of whether there is credible evidence of a coordinated strategy by 1 or more countries or companies to acquire United States companies involved in research, development, or production of critical technologies for which the United States is a leading producer. | Same. |
| 2) An evaluation of whether there are industrial espionage activities directed or directly assisted by foreign governments against private United States companies aimed at obtaining commercial secrets related to critical technologies. | Same. |
| **Critical technologies.** | **No comparable provision.** |
| Critical technologies means technologies identified under title VI of the National Science and Technology Policy, Organization, and Priorities Act of 1976 or other critical technology, critical components, or critical technology items essential to national defense or national security identified pursuant to this section. | |

| H.R. 556<br>National Security Foreign Investment Reform and Strengthened Transparency Act of 2007 | S. 1610<br>Foreign Investment and National Security Act of 2007 |
|---|---|
| **Release of unclassified study.** | **Release of unclassified study.** |
| That portion of the annual report under paragraph (1) that is required by this paragraph may be classified. An unclassified version of that portion of the report shall be made available to the public.'. | That portion of the annual report under paragraph (1) that is required by this paragraph may be classified. An unclassified version of the report, as appropriate, consistent with safeguarding national security and privacy, shall be made available to the public. |
| **Study and report.** | **Study and report.** |
| Before the end of the 120-day period beginning on the date of the enactment of this act and annually thereafter, the Secretary of the Treasury, in consultation with the Secretary of State and the Secretary of Commerce, shall conduct a study on investments in the United States, especially investments in critical infrastructure and industries affecting national security, by- | Same. |
| A) 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 | Same. |
| B) 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. | Same. |
| **Report.** | **Report.** |
| The Secretary of the Treasury shall submit a report to the Congress, for transmittal to all appropriate committees of the Senate and the House of Representatives, containing the findings and conclusions of the Secretary with respect to the study described in paragraph (1), together with an analysis of the effects of such investment on the national security of the United States and on any efforts to address those effects. | Same. |
| **Investigation by Inspector General.** | **Investigation by Inspector General.** |
| The Inspector General of the Department of the Treasury shall conduct an independent investigation to determine all of the facts and circumstances concerning each failure of the Department of the Treasury to make any report to the Congress that was required under section 721(k) of the Defense Production Act of 1950 (as in effect before the date of the enactment of this act). | Same. |
| **Report to the Congress.** | **Report to the Congress.** |
| Before the end of the 270-day period beginning on the date of the enactment of this act, the Inspector General of the Department of the Treasury shall submit a report to the chairman and ranking member of each committee of the House of Representatives and the Senate with jurisdiction over any aspect of the report, including, at a minimum, the Committee on Foreign Affairs, the Committee on Financial Services, and the Committee on Energy and Commerce of the House of Representatives, on the investigation under paragraph (1) containing the findings and conclusions of the Inspector General. | Same. |

| H.R. 556<br>National Security Foreign Investment Reform and Strengthened Transparency Act of 2007 | S. 1610<br>Foreign Investment and National Security Act of 2007 |
|---|---|
| **Certification of notices.** | **Certification of notices.** |
| **Certification of Notices and Assurances.** | **Certification of Notices and Assurances.** |
| Each notice required to be submitted, by a party to a covered transaction, to the President or the President's designee under this section and regulations prescribed under such section, and any information submitted by any such party in connection with any action for which a report is required pursuant to paragraph (3)(B)(ii) of subsection (l) with respect to the implementation of any mitigation agreement or condition described in paragraph (1)(A) of such subsection, or any material change in circumstances, shall be accompanied by a written statement by the chief executive officer or the designee of the person required to submit such notice or information certifying that, to the best of the person's knowledge and belief—<br>'(1) the notice or information submitted fully complies with the requirements of this section or such regulation, agreement, or condition; and<br>'(2) the notice or information is accurate and complete in all material respects.' | Same. |

# Conclusions

The proposed DP World acquisition of P&O, while arguably of little economic impact on the U.S. economy, could affect public policy on foreign investment that relates to issues of corporate ownership, foreign investment, and national security in the U.S. economy. The transaction revealed significant differences between Congress and the Administration over the operations of CFIUS and over the objectives the Committee should be pursuing. In addition, the transaction demonstrated that neither Congress nor the Administration has been able so far to define clearly the national security implications of foreign direct investment or the national security implications of foreign investment activity in the economy. These issues likely 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 the 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 may not 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 recent focus by Congress on the Committee has also shown that the DP World transaction, in combination with other recent unpopular foreign investment transactions, has exacerbated dissatisfaction among some Members of Congress over the operations of CFIUS. In particular, some Members are displeased with the way the Committee uses its discretionary authority under the Exon-Florio provision to investigate certain foreign investment transactions. As a result, some Members of Congress are proposing changes to the CFIUS process through legislation that is progressing through the 1st Session of the 110th Congress. The changes could mandate more frequent contact between the Committee, which generally operates without much public or congressional attention, and the Congress and enhance Congress's oversight role over the Committee.

The DP World transaction also revealed that the September 11, 2001 terrorist attacks may have 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. Some argue that this changed perspective requires 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, some Members of Congress are looking to amend the CFIUS process to enhance Congress's oversight role while reducing 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 has 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, homeland security, and national economic infrastructure.

Changes to the CFIUS process being proposed in the House and Senate bills would alter the current CFIUS process, but it remains to be seen how the changes would affect the outcome of the CFIUS process. In the final analysis, the President retains sole authority to apply the Exon-Florio provisions and he has complete discretion to accept or reject a CFIUS recommendation to block a proposed foreign investment transaction. As a result, CFIUS reflects the President's priorities and policies relative to foreign investment. To date, Presidents have been highly reluctant to use the authority of the Exon-Florio provision to block investment transactions, which has happened just once since the measure was adopted. In part, this reluctance may stem from the narrow range of policy options that are provided for in the provision, which seems at odds with the often highly complex nature of foreign investment transactions. As a result, CFIUS has slowly developed an informal process that essentially expands the policy options available to the President by allowing CFIUS members to review proposed investment transactions ahead of any formal review and, most importantly, to negotiate informal agreements that mitigate aspects of the investment that otherwise would spur CFIUS members to oppose the transaction. By formalizing this process through proposed legislation, Congress likely would expand the range of policy options available to the President and possibly broaden the scope of measures foreign firms may be asked to comply with in order to gain approval. Depending on how foreign firms view these changes, they may regard them as signaling a less tolerant attitude in the United States toward foreign investment and the changes potentially could add support to the renewed willingness of some foreign governments to impose additional restrictions on foreign investors.

Most economists agree that there is little economic evidence to conclude that foreign ownership, whether by a private entity or by an entity that is owned or controlled by a foreign government, has a measurable impact on the U.S. economy as a whole. Others may argue on non-economic grounds that such firms pose a risk to national security or to homeland security. 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 measurable 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