



JOINT ECONOMIC COMMITTEE

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COMMITTEE ON FOREIGN INVESTMENT IN THE UNITED STATES

Recent attempts by the China National Offshore Oil Corporation (CNOOC) to acquire Unocal and Dubai Ports World to acquire operations at six U.S. ports have caused policymakers to reexamine the Committee on Foreign Investment in the United States (CFIUS). CFIUS is an interagency committee that administers a law empowering the President to block or restrict foreign acquisitions of U.S. companies for national security reasons. This law is known as the Exon-Florio provision of the *Defense Production Act of 1950*.¹

CFIUS

President Gerald Ford established CFIUS in 1975, but gave it few responsibilities.² In 1988, President Ronald Reagan delegated the authority to administer the Exon-Florio provision to CFIUS.³

CFIUS, which originally had six members, now has twelve members:

1. Secretary of the Treasury, who serves as chair,
2. Attorney General,
3. Secretary of Commerce,
4. Secretary of Defense,
5. Secretary of Homeland Security,
6. Secretary of State,
7. United States Trade Representative,
8. Director of the Office of Management and Budget,
9. Chairman of the Council of Economic Advisers,
10. Director of the Office of Science and Technology Policy,
11. Assistant to the President for National Security Affairs, and
12. Assistant to the President for Economic Policy.

¹ Section 721 of Pub. L. 100-418, 102 Stat. 1107, made permanent law by section 8 of Pub. L. 102-99, 105 Stat. 487 (50 U.S.C. App. 2170).

² Executive Order 11858 (b), May 7, 1975, 40 F.R. 20263.

³ Executive Order 12661, December 27, 1988, 54 F.R. 779.

Exon-Florio Provision

During the 1980s, some policymakers became concerned that the proposed acquisitions of certain American manufacturers by Japanese firms might threaten national security. Policymakers were concerned that the President could block a threatening acquisition only by either (1) invoking a national emergency or (2) manipulating existing antitrust, securities, or other laws.

Responding to these concerns, Congress enacted Section 5021 of the *Omnibus Trade and Competitiveness Act of 1988* to amend Section 721 of the *Defense Production Act of 1950*. Referred to as the Exon-Florio provision, it authorizes the President to block proposed foreign acquisitions of or mergers with “persons engaged in interstate commerce in the United States” that threaten national security.

The Exon-Florio provision directs the President to consider the following factors when deciding whether to block a foreign acquisition:

1. Projected national defense production needs;
2. The capability and the capacity of domestic firms to meet national defense requirements, including the availability of personnel, products, technology, and necessary materials, supplies, and services;
3. The effect of the control of domestic firms by foreign persons on the capability and the capacity of the United States to meet national defense requirements;
4. The potential effects of the sale of military goods, equipment, or technology to a country that supports terrorism or that proliferates missile technology or weapons of mass destruction; and
5. The potential effects on U.S. technological leadership in areas affecting national security.

The Exon-Florio provision authorizes the President to take whatever actions he or she deems

appropriate to suspend or prohibit foreign acquisitions of U.S. firms or U.S. subsidiaries of foreign firms that threaten national security. Before exercising this authority:

1. The President must have “credible evidence” a proposed acquisition might threaten national security; and
2. The President must believe that other U.S. laws are inadequate or inappropriate to protect national security.

In 1992, Congress amended the Exon-Florio provision through section 837(a) of the *National Defense Authorization Act for Fiscal Year 1993*. Known as the Byrd Amendment, it requires CFIUS to initiate a full investigation when:

1. The acquirer is controlled by or acting on behalf of a foreign government, and
2. The acquisition would result in the control of a person engaged in interstate commerce in the United States that could affect the national security of the United States.⁴

CFIUS Administration of the Exon-Florio Provision

Notification of an acquisition that may fall under the Exon-Florio provision to the Department of the Treasury by the potential acquirer and its domestic target is voluntary.⁵ Nevertheless, compliance is very high because the President may order the divestment of a domestic acquisition at any time in the future if the foreign acquirer did not notify CFIUS about an acquisition that may be subject to the Exon-Florio provision.⁶

Once notified, CFIUS has 30 days to decide whether to initiate a full investigation of a proposed acquisition. If CFIUS opens a full investigation, CFIUS has 45 days to make its recommendations to the President. Then the President has 15 days to act on these recommendations.

⁴ P.L. 102-484, 106 Stat. 2315, 2463.

⁵ The Department of the Treasury acting through the Director of the Office of International Investment in the Office of the Assistant Secretary of International Affairs receives and circulates notices to CFIUS agencies and coordinates reviews. Any member of CFIUS may also initiate a notification.

⁶ Regulations Pertaining to Mergers, Acquisitions, and Takeovers by Foreign Persons (31 C.F.R. Part 800).

The information that parties submit to CFIUS is confidential. CFIUS members may not disclose this information or comment publicly on it.⁷ Confidentiality allows all parties to a proposed acquisition to reveal highly sensitive financial, personal, and technical information about the firms and their owners and managers to CFIUS.

Since CFIUS routinely approves many proposed acquisitions that do not pose a threat to national security, the disclosure of confidential information could severely harm the competitive positions of both the proposed foreign acquirer and its domestic target. Even when proposed acquisitions do potentially threaten national security, disclosure could harm the ability of the domestic target to survive and compete as an independent firm if the acquisition is blocked.

CFIUS Record

Because of the confidentiality requirement, there is little official information about the operations of CFIUS. On July 3, 2005, however, *The Washington Post* reported that CFIUS had received approximately 1,500 notifications since 1988. CFIUS initiated full investigations in twenty-five cases. Thirteen of these notifications were withdrawn and the acquisitions were terminated after CFIUS had initiated a full investigation. CFIUS completed full investigations on the remaining twelve notifications and sent recommendations to the President. Of these, the President prohibited one acquisition and approved eleven acquisitions with conditions.

In 1990, President George H. W. Bush prohibited the proposed acquisition of Mamco Manufacturing Company, an aerospace parts manufacturer, by China National Aero-Technology Import and Export Corporation (CATIC), a state-owned enterprise of the People’s Republic of China (PRC) that acted as purchasing agent for the Chinese Ministry of Defense. CFIUS feared that the PRC would gain access to aerospace technology through Mamco without having to obtain an export license.⁸

⁷ Section 721 does not prohibit the disclosure of information to relevant congressional committees.

⁸ “CFIUS,” *The Washington Post*, July 3, 2005, F-3.