NEW LAW HEIGHTENS SCRUTINY OF FOREIGN ACQUISITIONS OF U.S. COMPANIES

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The President last summer signed into law the Foreign Investment and National Security Act of 2007, which will heighten the U.S. government's scrutiny of proposed acquisitions of U.S. companies by foreign interests. The new law is the long awaited overhaul of the "Exon-Florio Amendment" to the Defense Production Act, which authorizes the President to review and, when appropriate, block acquisitions of and mergers with U.S. companies by foreign interests for national security reasons. It was signed into law following almost two years of congressional debate over how to strike a balance between open foreign investment and national security. The law, which is administered by the interagency Committee on Foreign Investment in the United States (CFIUS), also authorizes the President to undo completed mergers and acquisitions retroactively, as well as apply conditions to the approval of an acquisition.

Although the final version did not include the most draconian provisions of earlier proposals, as a result of the changes signed into law last summer, special scrutiny by both CFIUS and the U.S. Congress will be applied to two kinds of acquisitions: those that could result in the control of a U.S. company by foreign governments or entities controlled by foreign governments, such as a state-owned energy company; and those that could result in foreign control of any critical infrastructure in the United States. In both cases, it is now considerably more likely that CFIUS will conduct full national security investigations of the proposed transactions, and also more likely that the government will impose conditions to obtain their approval. The law also codifies procedures for negotiat-

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ing so-called "mitigation" agreements with the government that permit foreign acquisitions subject to certain conditions, and provides for continued government monitoring of deals once they have been approved.

The new law increases Congressional oversight of CFIUS, including Congressional briefings on actions taken by CFIUS and detailed reporting.[1] It also requires a sign-off on important decisions at very high levels within the federal agencies that comprise CFIUS, and gives an oversight role to the Director of National Intelligence.[2]

Although used sparingly until the last few years, Exon-Florio has become a serious issue facing any proposed merger or acquisition involving a foreign company.[3] With these new changes, it will be crucial for companies to consider strategies for Exon-Florio approval early in the process of negotiating such deals, or risk having the acquisition delayed, or even scuttled.

Fueled by the public outcry over several politically charged proposed acquisitions, most notably the Dubai World Ports deal in 2006, decision makers in the Exon-Florio approval process have become very sensitive to the political repercussions of approving any foreign acquisition that might give rise to national security concerns, a sensitivity that will only heighten with the new law.[4] In certain cases, even CFIUS approval cannot save a controversial acquisition from falling apart due to political opposition, especially from Congress. This happened in the Dubai World Ports case, where a company that was wholly owned by the government of Dubai acquired a British firm that ran terminal operations around the world, including at six U.S. ports.[5] Despite receiving a "no action" letter from CFIUS, Dubai World Ports was forced to

1. Foreign Investment and National Security Act of 2007, Pub. L. No. 110-49, § 7, 121 Stat. 246, 256-59.

2. *See id.* § 3.

3. *See, e.g.*, S. REP. NO. 110-80, at 4 (2007).

4. *Id.* at 4-5.

5. JAMES K. JACKSON, CONG. RESEARCH SERVS., THE COMMITTEE ON FOREIGN INVESTMENT IN THE UNITED STATES (CFIUS) 11 (2007), *available at* http://www.fas.org/sgp/crs/natsec/RL33388.pdf; Jonathan Weisman & Bradley Graham, *Dubai Firm to Sell U.S. Port Operations*, WASH. POST, Mar. 10, 2006, at A1.

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divest the U.S. ports operations of the company after a political firestorm.[6]

I.
EXON-FLORIO AMENDMENT

The Exon-Florio Amendment does not prohibit any mergers or acquisitions. Rather, it affords the President the opportunity to decide, on a case-by-case basis, whether an individual transaction should be blocked or unwound on the ground that it might harm U.S. national security.[7] Specifically, the President may block a transaction if he finds that there is "credible evidence" that leads him to believe that the "foreign interest" proposing to acquire a U.S. company "might" take action that "threatens to impair the national security."[8] The President is authorized not only to prohibit a proposed transaction, but also to order divestment of an acquisition that has already been completed.[9] The Exon-Florio Amendment does not contain a statute of limitations.

CFIUS is the interagency committee to which the President has delegated certain of his authorities under the Exon-Florio Amendment,[10] and which is now established by statute under the Foreign Investment and National Security Act of 2007.[11] The Secretary of the Treasury chairs CFIUS, which, under the new law, has eight other members including the Secretaries of Homeland Security, Commerce, Defense, State, Energy and Labor, the Attorney General, the Director of National Intelligence, as well as heads of any other executive department, agency, or office, as the President determines appropriate, generally, or on a case-by-case basis.[12] Exercising this authority, President Bush has designated that the United States Trade Representative and Director of the Office of Sci-

6. Weisman & Graham, *supra* note 5, at A1.
7. Foreign Investment and National Security Act § 6.
8. *Id.*
9. *Id.*
10. Exec. Order No. 11,858, 40 Fed. Reg. 20,263 (May 7, 1975), *as amended by* Exec. Order No. 12,188, 45 Fed. Reg. 989 (Jan. 2, 1980), Exec. Order No. 12,661, 54 Fed. Reg. 779 (Dec. 27, 1988), Exec. Order No. 12,860, 58 Fed. Reg. 47,201 (Sept. 3, 1993), and Exec. Order No. 13,286, 68 Fed. Reg. 10,619 (Feb. 28, 2003).
11. Foreign Investment and National Security Act §3.
12. *Id.*

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ence and Technology Policy shall be full members of the Committee. In addition, the President has further mandated that the Director of the Office of Management and Budget, the Chairman of the Council of Economic Advisers, the Assistant to the President for National Security Affairs, the Assistant to the President for Economic Policy, and the Assistant to the President for Homeland Security and Counterterrorism shall "observe and, as appropriate, participate in the report to the President on the Committee's activities[.]"[13]

CFIUS reviews can be initiated either by a voluntary notice submitted by one or more of the parties to a transaction or unilaterally by the President or the Committee itself, provided the decision is made at the upper levels of the relevant Department, as specified in the new legislation.[14] After receiving a notice from the parties, or deciding to begin its own investigation, CFIUS conducts a 30-day review of the transaction.[15] On Day 30, if there is consensus among the agencies that the transaction does not pose a credible threat to U.S. national security, CFIUS issues a "no action" letter to the parties.[16]

If the initial review reveals that "the transaction threatens to impair the national security of the United States and the threat has not been mitigated," CFIUS launches a full investigation lasting another 45 days—at the end of which CFIUS must present a report and recommendation to the President if the Committee (i) recommends that the President suspend or prohibit the transaction, (ii) is unable to reach a decision, or (iii) requests that the President make a determination regarding the transaction.[17] The President then has 15 days to decide whether to block the transaction, or in a case involving a transaction that has already closed, order divestment of the foreign ownership.[18] By the terms of the Exon-Florio Amendment, the President's decision is not subject to judicial review.[19]

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13. Executive Order 11858 (Jan. 23, 2008).

14. *Id.* § 2.

15. *Id.*

16. 31 C.F.R. §§ 800.404, .502.

17. Executive Order 11858 § 6 (Jan. 23, 2008); *cf.* 31 C.F.R. § 800.504(a); FINSA § 6.

18. *Id.* § 6.

19. *Id.*

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II.
HISTORICAL TRENDS INDICATE HEIGHTENED POLITICAL SENSITIVITY

Since 1988, CFIUS has reviewed over 1700 notifications[20] leading to only 25 full investigations through the end of 2006.[21] Twelve of these investigations resulted in recommendations to the President[22], and one transaction has been formally blocked by the President—a 1990 investment by a Chinese company in a U.S. manufacturer of aircraft parts.[23] These numbers, however, underestimate the impact of Exon-Florio and obscure the significant upward trend in CFIUS activity. The number of transactions reviewed by CFIUS more than doubled from 2004 to 2006[24] and seven of the 25 full investigations took place in 2006 – more than in any other year, and more than in the previous five years combined.[25]

In more than half of the 25 full investigations the parties eventually withdrew their CFIUS notices, electing instead to change or cancel their planned deals.[26] Most notably, several transactions publicly collapsed in 2006 under the weight of CFIUS review, increasingly heightened Congressional interest in the CFIUS review process, and the related controversy. First, the mid-2005 bid by China National Offshore Oil Company ("CNOOC"), a Chinese state-owned company, to purchase Unocal, a large U.S. oil company, met with such

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20. *Committee on Foreign Investment in the United States (CFIUS), One Year After Dubai Ports World: Hearing Before the H. Comm. on Fin. Servs.*, 110th Cong. 89 (2007) (statement of Clay Lowery, Assistant U.S. Sec'y of the Treasury).

21. *See* Office of the Deputy Under Secretary of Defense for Industrial Policy Frequently Asked Questions, http://www.acq.osd.milk/ip/faq.html (last visited Jan. 14, 2008).

22. JACKSON, *supra* note 5, at 11.

23. *Id.*; Eric Schmitt, *Administration Must Decide On LTV Unit's Sale to French*, N.Y. TIMES, May 20, 1992, at D1.

24. *See* DEP'T OF THE TREASURY, FY 2004 PERFORMANCE AND ACCOUNTABILITY REPORT 47 (2005); *H.R. 5337, The Reform of National Security Reviews of Foreign Direct Investments Act: Hearing Before the Subcomm. on Domestic & Int'l Monetary Policy, Trade, and Tech. of the H. Comm. on Fin. Servs.*, 110th Cong. 49 (2006) (statement of Clay Lowery, Assistant U.S. Sec'y of the Treasury); *Committee on Foreign Investment in the United States (CFIUS), One Year After Dubai Ports* World, *supra* note 20, at 89.

25. *Committee on Foreign Investment in the United States (CFIUS), One Year After Dubai Ports World*, *supra* note 20, at 89.

26. JACKSON, *supra* note 5, at 11.

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strong opposition in Congress that CNOOC withdrew its offer to seek CFIUS review.[27] This case evidenced Congressional concerns about the rigor of the CFIUS review process. This concern was also reflected in a report by the Government Accountability Office, the investigative arm of Congress, which suggested that Congress revise the Exon-Florio Amendment.[28]

Next, Dubai Ports World ("DP World"), which is wholly owned by the government of Dubai, acquired Peninsular and Oriental Steam Navigation Company, a British firm that ran terminal operations around the world, including at six U.S. ports. DP World sought CFIUS review of the proposed transaction and received a "no action" letter in January 2006. Far from ending the matter, however, the CFIUS approval launched an intense political controversy, which could not be quelled. In the end, DP World agreed to divest the U.S. port operations to a U.S. company.[29]

In the wake of this controversy, CFIUS conducted a full investigation of the proposed acquisition of Sourcefire, a U.S. computer security company, by Check Point Software Technologies, an Israeli company. In March 2006, Check Point canceled the proposed deal, apparently concluding that it could not obtain CFIUS approval.[30] Similarly, in December 2006, Smartmatic, a Venezuelan manufacturer of voting machines, announced its intent to sell Sequoia Voting Systems, a U.S. company, which it had acquired in March 2005. In an effort to quell political controversy over the acquisition, Smartmatic had filed a notice with CFIUS about the completed deal but subsequently withdrew from the review.[31]

Beyond this, there has also been a trend toward CFIUS requiring more companies, especially in telecommunications,

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27. *See id.* at 12.

28. U.S. GEN. ACCOUNTABILITY OFFICE, DEFENSE TRADE: ENHANCEMENTS TO THE IMPLEMENTATION OF EXON-FLORIO COULD STRENGTHEN THE LAW'S EFFECTIVENESS (2005).

29. Bill Gertz, *Treasury Gets New CFIUS Authority Order Targets Foreign Investment*, WA. TIMES, Jan. 24, 2008, at A03.

30. Jamie Smith Hopkins et al., *Security Fears Scuttle Deals*, BALT. SUN, Mar. 25, 2006, at 12C.

31. Rep. Carolyn B. Maloney, *Smartmatic Announces Sale of Sequoia Voting Systems* (2008) *available at* http://maloney.house.gov/index.php?option=com_content&task=view&id=1491&Itemid=61; Stephanie Kirchgaessner, *CFIUS Probe Blamed for Sale of Voting-Machine Company*, FIN. TIMES, Dec. 22, 2006, at 4.

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to make security commitments as a condition of approval.[32] These agreements allow CFIUS to reopen its review—and potentially order divestment—in the event of future noncompliance with the security agreement.

III.
LEGISLATIVE HISTORY

Reform of CFIUS had been high on the Congressional agenda for several years.[33] While the controversy surrounding the Dubai World Ports acquisition was the catalyst for the most-vocal congressional complaints about the CFIUS process, the roots of this concern clearly go back to September 11, 2001. The debate about the importance of foreign investment in the past had focused on matters of national pride, such as the acquisition of U.S. companies by Japanese investors in the 1980s, or on the implications of defense-related investments. There was, however, a sudden realization on 9-11 that the critical infrastructure of the United States—from ports, to energy, to telecommunications—could be at risk from terrorist threats. There was also a fear, well founded or not, that acquisitions of this infrastructure by foreign companies—especially those controlled by foreign governments—could pose a security risk beyond anything CFIUS had previously considered. At the same time, there was a feeling in Congress, spurred by the critical GAO report, that the CFIUS process was not transparent and that Congress was not an active player in the process.

This was the backdrop to the Dubai World Ports deal. When the deal became public, it had already been approved by CFIUS, and members of the 109th Congress reacted swiftly to both the deal and to the CFIUS decision. Resolutions of congressional disapproval of that decision were introduced in both houses of Congress,[34] as were more substantial legislative measures. These included a House bill, introduced by 109 members of Congress, which would have directed the President to suspend the CFIUS decision on Dubai World Ports and conduct a full 45-day investigation of the acquisition. The bill also would have made the Secretary of Homeland Security re-

32. *See, e.g.*, Daniel Dombey & Stephanie Kirchgaessner, *Calls for US to Block Chinese Stake in 3Com*, FIN. TIMES, Oct. 13, 2007, at 2.

33. *See, e.g.*, S. 1797, 109th Cong. (2005).

34. H.R.J. Res. 79, 109th Cong. (2006); S.J. Res. 32, 109th Cong. (2006).

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sponsible for providing CFIUS with a range of intelligence information relevant to the deal.[35] The same bill called for Congressional briefings on the deal once the new, 45-day investigation was completed.

Most of these measures had several themes in common, among them the critical nature of security issues at U.S. ports and the need for a more-formal and strategic role for Congress. In addition, at least some of the measures introduced in response to Dubai World Ports focused on the ownership of DP World by the Government of Dubai, and made it clear that it mattered who was making the acquisition, in this case a government-owned company from the Middle East.[36] Moreover, all of the measures expressed congressional frustration with a process that led to at least some members of Congress initially learning of the deal in the newspapers.[37] In the end, a showdown between the Bush Administration and Congress over this issue was avoided when Dubai World Ports voluntarily divested the U.S. ports operations of the company.

This did not, however, end congressional scrutiny of the CFIUS process. Much of the legislation introduced in the wake of Dubai World Ports focused on security issues at U.S. ports and other critical infrastructure.[38] But there was also a general consensus in Congress that the Exon-Florio Amendment needed to be updated to adjust to a post 9-11 world. Several themes emerged, including mandatory Congressional notification of CFIUS activity[39] prior to any investigation or deci-

35. H.R. 4807, 109th Cong. § 2(c) (2006).

36. H.R.J. 79 ("Whereas the United Arab Emirates, while our ally in the war on terrorism, has been used as a base for terrorist operations and financing, including in the planning of the attacks of September 11, 2001").

37. *Id.* ("Whereas Congress was not informed of or consulted with regarding this transaction and any potential national security implications").

38. For example, H.R. 4842, 109th Cong. (2006) and S. 2334, 109th Cong. (2006) would have amended the Defense Production Act of 1950 to prohibit a merger, acquisition, or takeover that results in a foreign government-owned entity leasing, operating, managing, or owning real property or facilities at a U.S. port.

39. *See,* for example, the Protect America First Act of 2006, H.R. 4917, 109th Cong. § 2 (2006), which would have directed the President to notify Congressional leadership within five days of receipt of written notification of a proposed or pending acquisition by an individual controlled or acting on behalf of a foreign government.

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sion and a Congressional veto of CFIUS decisions.[40] There was also a move to transfer CFIUS leadership from Treasury, which was perceived as an agency primarily focused on economic issues, to agencies that, by definition, focused primarily on national security.[41] Other legislation would have heightened the President's burden for approving foreign acquisitions, making it more difficult to approve foreign acquisitions, putting substantial political pressure on CFIUS and the President.[42]

Two themes that were the centerpieces of the final legislation signed by the President this past summer—acquisitions by entities controlled by foreign governments and acquisitions of critical infrastructure—emerged in a variety of forms, most of them more draconian than the provisions included in the final legislation.[43] While Dubai World Ports may have been the spark that ignited the congressional scrutiny of the CFIUS process, concerns about acquisitions of U.S. companies by entities

40. *See*, for example, H.R. 4929, 109th Cong. § 2 (2006), which would have given Congress 30 days after notification of an approved transaction to pass a joint resolution disapproving the transaction.

41. *See* H.R. 4917 § 3 (expressing the sense of Congress that CFIUS be transferred from the Department of the Treasury to the Department of Homeland Security and that the Secretary of Homeland Security should serve as CFIUS chairman); *see also* S. 2380, 109th Cong. § 3 (2006) (proposing that the Director of National Intelligence and the Director of Central Intelligence be added as members of CFIUS, that the Secretaries of Homeland Security and of Defense be vice chairs, and that a Subcommittee on Intelligence be established); *see also* S. 2400, 109th Cong. (2006) (proposing that authority to review foreign acquisitions be transferred to the Department of Homeland Security).

42. *See* H.R. 4814, 109th Cong. § 2 (2006), which would have prohibited a proposed acquisition or takeover in the United States by or with a foreign interest which could result in foreign control unless the President has determined that there is no credible evidence to believe that the foreign interest might take action that would threaten to impair U.S. national security.

43. *See* H.R. 4881, 109th Cong. § 2 (2006), which would have prohibited a corporation from owning, or being authorized to manage or operate, any system or asset that is included on the national defense critical infrastructure list unless the corporation meets specified critical infrastructure national security management requirements, including: (1) being organized under the laws of the United States; (2) having a board of directors the majority of whom are U.S. citizens; (3) having a chief executive officer and board chairman who are U.S. citizens; (4) having a majority of voting shares and nonvoting shares being owned by U.S. citizens; and (5) having more than 50 percent of the board members approved by the Secretary of Defense, in consultation with the Secretary of Homeland Security.

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owned or controlled by foreign governments have existed for decades. In fact, in 1992 Congress amended the Exon-Florio provision to require a 45-day CFIUS investigation when the foreign company in question is controlled by or acting on behalf of a foreign government, and the acquisition "could result in control of a person engaged in interstate commerce in the United States that could affect the national security of the United States."[44] Although the language of what is known as "The Byrd Amendment," named after its congressional sponsor, gave CFIUS plenty of room to avoid an investigation based on the issues of "control" or "national security," many in Congress felt that CFIUS had not followed the spirit of the Byrd Amendment.[45] September 11 only heightened the importance of this issue to Congress, as did the emergence of large state-owned energy companies that were making substantial foreign investments around the world.

In the end, both the House[46] and Senate[47] in the 109th Congress approved legislation by unanimous consent that rejected many of the more draconian proposals while maintaining the major themes that dominated debate, including establishing a role for the Director of National Intelligence and increasing CFIUS's reporting requirements to Congress. The legislation would have required investigations where the acquiring firm was controlled by or acting on the direction of a foreign government, and clarified the definition of "national security" to include any transaction involving "critical infrastructure" of the United States. While both bills died when the legislative session ended in December before the House and Senate could reconcile their versions of the legislation, the stage was set for the new Democratic majority in the 110th Congress to take up where their Republican predecessors left off.

While many of the same themes emerged in debate during the 110th Congress, the end product that was signed into

44. 50 U.S.C. app. § 2170(b) (2000).

45. *See* H.R. REP. No. 110-24, pt. 1, at 10 (2007) ("[A]ddressing what many in Congress view as a potential misreading of Congressional intent in the so-called 'Byrd amendment' to Exon-Florio, the bill ensures that transactions involving companies controlled by foreign governments will receive heightened scrutiny by CFIUS.").

46. H.R. 5337, 109th Cong. (2006) (enacted).

47. S. 3549, 109th Cong. (2006) (enacted).

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law by President Bush was one that the Administration, Congress and the U.S. business community could all live with. Congress had put its stamp on the CFIUS process and made it clear it would henceforth be a player in that process, without turning that process on its head in a way that would necessarily discourage foreign investment in the United States.

IV.
DETERMINING WHETHER TO NOTIFY CFIUS

While the statute does not require the parties to a transaction to submit a notice to CFIUS, in light of CFIUS's ability to initiate an investigation without such a notice, and the President's power to order divestment, parties to a transaction may choose to submit in advance a voluntary notice about the transaction to CFIUS, with the goal of receiving a "no action" letter.[48]

There are two basic legal issues to be considered in deciding whether to submit a notice: (i) whether the transaction is an "acquisition" of any person engaged in interstate commerce in the United States within the meaning of the law; and (ii) whether the U.S. business being acquired has some relation to "national security," including, but not limited to, "homeland security."

A. *Definition of "Acquisition"*

The term "acquisition" refers collectively to "an acquisition, merger, or takeover,"[49] including a takeover resulting from a default on a loan. These transactions are acquisitions within the meaning of the Exon-Florio Amendment if they result, or could result, in foreign control of a U.S. business. "Control" is defined as the power, direct or indirect, whether or not exercised, to make decisions in such areas as: the sale of principal assets; dissolution; the closing or relocation of production or research and development facilities; the termination of contracts; or the amendment of the articles of incorporation.[50]

48. *See* 31 C.F.R. § 800.601(a) (2007).
49. *Id.* § 800.201.
50. *Id.* § 800.204.

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Control can be exercised through ownership of a dominant minority of the shares or through contractual arrangements. There are no quantitative guidelines for determining whether a foreign interest exercises "control," except that an acquisition of ten percent or less of the voting securities of a U.S. company is exempted if the securities are held "solely for the purpose of investment," such that the buyer has no intention of directing "basic business decisions."[51] The new law does not specifically define control, but leaves it to the Committee to define further by regulation.[52]

Finally, the terms "U.S. person" and "foreign person" are both defined rather broadly, such that the U.S. branch or subsidiary of a foreign entity is both a U.S. person (the acquisition of which is subject to CFIUS review) and a foreign person (an acquisition by which is subject to CFIUS review).[53]

B. *Definition of "National Security"*

This is the area where the new legislation will have the most impact, as discussed further below. Heretofore, review has been most likely for acquisitions of companies with defense contracts, especially those involving classified materials, as well as companies in certain sectors, including the aerospace, chemicals, information technology, and semiconductor industries. Additionally, the telecommunications sector has been scrutinized carefully in recent years.[54] Although not defined specifically in the new law, the term "national security" has been "clarified" to include "those issues relating to homeland security, including its application to critical infrastructure."[55]

C. *Notice Requirements*

The types of information that must be submitted to CFIUS include: descriptions of the business lines of the acquiring company and the company being acquired; persons own-

51. *Id.* § 800.204(a), .219, .302(d).

52. Foreign Investment and National Security Act of 2007, Pub. L. No. 110-49, § 2, 121 Stat. 246, 246.

53. 31 C.F.R. § 800.222.

54. Stephanie Kirchgasessner et al., *3Com Deal Faces Security Scrutiny*, FIN. TIMES, Sept. 29, 2007, at 1.

55. Foreign Investment and National Security Act of 2007 § 2.

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ing or controlling the acquiring company; and plans of the acquiring company with respect to the disposition of research and development activities, production facilities, product lines, and technology of the U.S. company.[56] Also to be submitted is information on products and services of the U.S. company that have or could have military applications, as well as contracts of the U.S. company with the U.S. military.[57] CFIUS is authorized to request additional information from the parties and recent practice indicates that such requests are readily forthcoming.[58] Parties should expect to receive requests for information on a range of subjects beyond those addressed in the initial notice.

D. *Time Table*

While the timetable discussed above suggests that all CFIUS decisions will be made within 30 or 90 days after a notice is filed, practice shows that the time needed to obtain CFIUS approval can be unpredictable. First, there is a practice (increasing in recent trends) whereby parties submit informal "pre-notices" to CFIUS weeks before the official notice, effectively stretching the time for CFIUS review. In addition, because both the parties and CFIUS tend to prefer to conclude investigations without necessitating a Presidential decision, parties sometimes obtain CFIUS permission to withdraw and re-file notice, thereby restarting the 30-day clock.[59]

E. *Additional Important Provisions of the New Law*

1. *Investigations of Foreign Government-Controlled Transactions*

Under the law, full CFIUS investigations are required when the committee's initial 30-day review results in a determination that the transaction threatens to impair the national security of the United States, or when the lead agency on the review recommends and the Committee agrees that an investigation be undertaken.[60] In addition, the legislation requires, with limited exceptions, a full CFIUS investigation of any trans-

56. 31 C.F.R. § 800.402(c).
57. *Id.* § 802.402(c)(3)(v).
58. *Id.* § 800.701(a).
59. *See* U.S. GEN. ACCOUNTABILITY OFFICE, *supra* note 28, at 15-16.
60. Foreign Investment and National Security Act of 2007 §2.

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action that could result in control of a U.S. company by a foreign government or an entity controlled by a foreign government.[61] The CFIUS committee would conduct this full 45-day investigation in cases in which its initial 30-day national security review reveals the potential for foreign government control.[62] An investigation would not be required if the Secretary of the Treasury and the head of the lead agency for the initial review determine that the proposed transaction would not impair national security.[63] Such a determination could not be delegated any lower than the level of Deputy Secretary.[64]

2. *Expanded Definition of Critical Infrastructure*

Similarly, the legislation requires, with the same exceptions, full CFIUS investigations of proposed foreign acquisitions of critical infrastructure, which is defined broadly as physical or virtual systems so vital to the United States that their incapacity or destruction would have a debilitating impact on national security.[65] Again, the investigation can be avoided if the Secretary of the Treasury and the lead agency involved in the transaction find that the deal will not impair national security.[66]

The legislative history of the bill makes clear that the Congress was particularly concerned with foreign acquisitions in the energy sector.[67] The House committee report on the proposed legislation notes that the bill "makes clear that national security encompasses national security threats to critical U.S. infrastructure, including energy-related infrastructure. The Committee expects that acquisitions of U.S. energy companies or assets by foreign governments or companies controlled by foreign governments—including any instance in which such foreign government has used energy assets to interfere with or influence policies or economic conditions in other countries in that they threaten the national security of those countries—will be reviewed closely for their national security impact."[68]

61. *Id.*
62. *Id.*
63. *Id.*
64. *Id.*
65. *Id.*
66. *Id.*
67. H.R. REP. No. 110-24, pt. 1, at 15 (2007).
68. *Id.*

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In addition to energy, however, most industries can fall within the reach of this provision, including telecommunications, manufacturing and transportation.

3. *Composition of the CFIUS Committee and Reporting Requirements*

The new law establishes the CFIUS committee.[69] It names the Secretary of the Treasury as the chair of the interagency committee, and creates a new position of Assistant Secretary of the Treasury to oversee CFIUS matters, to be appointed by the President and approved by the Senate.[70] It also directs the Treasury Secretary to designate a lead agency for each covered transaction, and instructs the Director of National Intelligence to carry out a national security analysis of any covered transaction.[71] In addition, the Treasury Secretary is directed to report within six months in the Federal Register the types of transactions that have presented national security considerations, including those that would result in foreign control of U.S. critical infrastructure.[72]

The new law establishes extensive Congressional notification requirements , including post-investigation reports certifying that there are no unresolved national security concerns with reviewed transactions.[73] The law also calls for an annual report to Congress on all reviews and investigations during the previous year, including an evaluation of whether there is credible evidence of a coordinated strategy by one or more countries or companies to acquire U.S. companies involved in research, development, or production of critical technologies.[74]

The law also details factors to be considered by the Committee as part of its national security reviews.[75] These include the potential national security-related effects on U.S. critical infrastructure, including major energy assets, and the potential effects on U.S. critical technologies, defined as technology

69. Foreign Investment and National Security Act of 2007 § 3.
70. *Id.*
71. *Id.* §§ 2, 3.
72. *Id.* § 2.
73. *Id.* § 7.
74. *Id.* § 7.
75. *Id.* § 4.

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essential to national defense.[76] The law also calls for an analysis, especially in the case of a foreign government-controlled transaction, of the adherence of the acquiring country to nonproliferation control regimes.[77] Other factors to be considered include the acquiring country's record in cooperating in counter-terrorism efforts, as well as an analysis of that country's national export control laws.[78]

4. *Mitigation Agreements, Monitoring and Enforcement*

The legislation authorizes CFIUS, or the lead agency in the case, to enter into agreements with any parties to covered transactions designed to mitigate potential national security threats.[79] Any such agreements, which already are part of CFIUS practice, must be based on a risk-based analysis of the threat to national security of the proposed transaction, and are to be monitored and enforced by the lead agency in charge of the transaction.[80] While a "no action" letter from CFIUS has generally insulated the transaction from any subsequent action under the Exon-Florio Amendment, the new legislation provides for close scrutiny of all such transactions. It permits CFIUS to open a review of previously approved transactions "if any party to the transaction submitted false or misleading information to the Committee in connection with the review,"[81] as well as those cases in which any party to a previously reviewed transaction has materially breached a mitigation agreement.[82] In addition, the Committee has been directed to track withdrawn submissions.[83]

V.
CONCLUSION

The enactment of the Foreign Investment and National Security Act of 2007 this past summer ended almost two years of congressional scrutiny of the CFIUS process, but it did not

76. *Id.* §§ 2, 4.
77. *Id.* § 4.
78. *Id.*
79. *Id.* § 5.
80. *Id.*
81. *Id.* § 2.
82. *Id.*
83. *Id.* § 5.

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put an end to the debate about how open the United States should remain to foreign investment in the wake of September 11, 2001. Suspicion among Americans to high-profile foreign investment is nothing new—witness the emotional reaction to the purchase of Rockefeller Center and Pebble Beach in the 1980s. At the same time, responses by economists and government officials about the importance of foreign investment and open markets have become both steady and predictable, especially in light of popular sentiment that trade agreements may be responsible for losing more American jobs than they create.

But in the fall of 2007, at the time of the writing of this article, the stakes are much higher. The collapse of the housing market in the United States and the stock market turmoil spurred by the sub-prime mortgage crisis have underscored the fact that foreign investment in everything from U.S. companies to government securities is helping to keep the U.S. economy afloat. By one estimate, the United States attracted $175 billion in foreign direct investment last year alone.[84] There have been suggestions that putting mergers and acquisitions through the CFIUS process has in some cases had a chilling effect on specific foreign investments,[85] and certainly there is anecdotal evidence that foreign companies have thought twice about completing acquisitions that become front-page news and the focus of congressional attention. At the same time, 9-11 made clear that anything can happen, and 9-11 was only six years ago.

The legislation that emerged from almost two years of debate struck a balance between the need for foreign investment and the need to make sure the critical infrastructure of the United States remains secure. Moreover, the 110th Congress now has a major stake in letting the CFIUS process work without interference. The new law, after all, is their law. The issues that were important to Congress—from applying scrutiny to acquisitions by government-controlled entities to regular

84. Carlos M. Gutierrez, U.S. Sec'y of Commerce, Remarks at the Organization for International Investment Annual Dinner (Nov. 13, 2007), http://www.commerce.gov/NewsRoom/SecretarySpeeches/PROD01_004716 ("The U.S. attracted $175 billion in FDI last year, double that of a decade ago—more than any other country. Today, the total stock of foreign long-term investment here is $1.8 trillion.").

85. JACKSON, *supra* note 5, at 12.

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congressional reporting requirements—are now embedded in the new law.

There are mixed signs coming from Congress about whether they will let the process work. While there have been some recent congressional stirrings about certain deals and even Congressional resolutions, the reaction has been muted compared to that over Dubai World Ports. At the same time, congressional hearings have already been held on the national security implications of foreign investment in the United States through sovereign investment funds, with officials from the Department of Treasury testifying about the authority of CFIUS to investigate the national security implications of such investments, if necessary.[86]

The same issue was raised in a letter to Treasury Secretary Henry Paulson from four influential senators, including the chairman of the Senate Banking Committee.[87] Under the new law, the Administration must put out new regulations on Exon-Florio sometime in 2008. In their letter to Treasury, the four senators made it clear that Congress will be part of that process. "We urge you to promulgate regulations regarding P.L. 110-49, the Foreign Investment and National Security Act of 2007, broad enough to ensure that potential national security implications are appropriately assessed in the context of ongoing foreign investments in the U.S. economy[.]" The letter concluded, "As you consider new regulations to implements P.L. 110-49, we expect you to consult closely with Congress."

Given the history of the last two years, this regulatory process may be the next big test for how much space Congress has given CFIUS in light of enactment of the Foreign Investment and National Security Act of 2007.

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86. *Sovereign Wealth Fund Acquisitions and Other Foreign Government Investments in the U.S.: Assessing the Economic and National Security Implications: Hearing Before the S. Comm. on Banking, Hous., & Urban Affairs*, 110th Cong. (2007) (statement of David H. McCormick, U.S. Under Sec'y of the Treasury), *available at* http://banking.senate.gov/_files/111407_McCormick.pdf.

87. Letter from Sen. Jim Webb, Sen. Christopher Dodd, Sen. Richard Shelby and Sen. Evan Bayh to Henry Paulson, U.S. Sec'y of the Treasury (Sept. 27, 2007).

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