

Regulation of Foreign Direct Investment After the Dubai Ports Controversy: Has the U.S. Government Finally Figured Out How to Balance Foreign Threats to National Security Without Alienating Foreign Companies?

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I. INTRODUCTION

Congress has consistently struggled with balancing regulation of foreign direct investment (FDI) so as to protect the national security of the United States while promoting foreign investment that improves the U.S. economy. Congress has often enacted these FDI regulations in response to a real or perceived threat to national security. Congress passed the latest installment of FDI regulation, the Foreign Investment and National Security Act of 2007 (FINSAs), and it became effective in October 2007.¹ Part II of this Note examines the history of the specific laws that Congress has passed to regulate FDI, the threats to national security that prompted congressional action, and the details of the current law after FINSAs.

FINSAs made seven major changes to the existing FDI regulation. Part III details the FINSAs modifications to existing FDI regulation. This Note scrutinizes each of the seven changes, examining the congressional intent behind the changes and the likely result these changes will have on future FDI in the United States.

1. Foreign Investment and National Security Act of 2007, Pub. L. No. 110-49, 121 Stat. 246 (amending 50 U.S.C. app. § 2170 (2000)). FINSAs is the latest statute passed by Congress in a continuing effort to monitor FDI that could affect national security.

Finally, in Part IV, this Note formulates four recommendations intended to make future FDI regulations more business friendly to foreign investors without sacrificing the ability of the U.S. government to monitor transactions that could impair national security. Congress should adopt the following recommendations when drafting the next statute that addresses FDI: (1) remove the mandatory investigation of foreign government-controlled transactions, (2) create a separate committee in addition to the Committee on Foreign Investment in the United States (CFIUS) to instigate CFIUS reviews, (3) rework the evergreen provision to create a stronger res judicata effect on companies that voluntarily submit their transactions to CFIUS reviews, and (4) give the CFIUS more power to protect the secrecy of the information gathered in a review.

II. BACKGROUND

Foreign investment has been an extremely important part of the financial well-being of the United States since the beginning of the U.S. economy, but never more so than today. In 2005, foreign investors poured more than \$100 billion into the United States in the form of FDI.² Dependence on FDI is reflected everywhere in the U.S. economy, with the beneficial effects demonstrated in higher employment and increased research and development.³ In 2003, foreign investors employed over five million workers in the United States.⁴

With this awesome inflow of money and power from abroad also comes the threat of losing control over national security. By allowing foreign countries to invest in the United States the government cedes much of its control to these companies.⁵ In 2006, 53% of the U.S. population had a “negative view of foreign investors owning U.S. companies.”⁶ Terrorism has brought national security to the forefront of the public eye. The U.S. Government has repeatedly responded to national security scares caused by FDI

2. Press Release, U.S. Chamber of Commerce, Chamber Applauds House Passage of CFIUS Reform Bill (Feb. 28, 2007) [hereinafter Chamber Applauds], available at <http://www.uschamber.com/press/releases/2007/february/07-38.html>. In 2007, foreign investors invested over \$230 billion in FDI. Bureau of Econ. Analysis, Foreign Direct Investment in the U.S.: Country and Industry Detail for Capital Inflows, <http://www.bea.gov/international/fdi21web.htm> (last visited Sept. 28, 2008). This is approaching the pre-911 FDI of over \$300 billion. *Id.*

3. See generally EDWARD M. GRAHAM & DAVID MARCHICK, INST. FOR INT'L ECON., US NATIONAL SECURITY AND FOREIGN DIRECT INVESTMENT (2006) (listing the effects of FDI on different aspects of the U.S. economy).

4. *Id.* at 78.

5. See, e.g., Associated Press, *China Controlling More of U.S. Economy*, MSNBC, Dec. 21, 2007, <http://www.msnbc.msn.com/id/22362982/> (explaining how Chinese investment makes the United States less independent).

6. PEW RESEARCH CTR., BUSH APPROVAL FALLS TO 33%, CONGRESS EARNS RARE PRAISE (2006), available at <http://people-press.org/reports/display.php3?ReportID=271>. The current paranoia towards FDI involves sovereign wealth funds bailing out U.S. banks and providing much needed liquidity during the subprime credit squeeze. See Nadeem Walayat, *United States Transfer of Sovereignty to Sovereign Wealth Funds*, MARKET ORACLE, Jan. 2, 2008, <http://www.marketoracle.co.uk/Article3239.html> (voicing concerns that the U.S. could see “larger slices of important US and western world capital producing infrastructure flowing into the hands of asian and the middle eastern government controlled funds”). The sovereign wealth funds invested more than \$40 billion into the financial sector during the recent credit crisis. David Cho, *A Growing Foreign Stake in U.S. Banks*, WASH. POST, Jan. 16, 2008, at D01, available at <http://www.washingtonpost.com/wp-dyn/content/article/2008/01/15/AR2008011503664.html>.

by restricting foreign investment flow across U.S. borders.⁷ This tightening of FDI has led to a balancing act between regulating potential foreign threats and not alienating the foreign investors who legitimately improve the U.S. economy.⁸

A. The Turbulent History of the Legislature Choosing Sides Between FDI and National Security

The U.S. government regulates foreign investment under the authority granted to it by the Commerce Clause of the U.S. Constitution.⁹ The Commerce Clause gives Congress the power to “regulate commerce with foreign nations, and among the several states.”¹⁰ The current attempt to regulate FDI started in the 1970s when Congress began investigating the large inflow of FDI.¹¹ In response, Congress passed the Foreign Investment Study Act of 1974 and the International Investment Survey Act of 1976.¹² These Acts allowed the President to collect information on international investment and provide information to Congress.¹³

1. Committee on Foreign Investment in the United States

Governmental investigation under the Foreign Investment Study Act of 1974 led Congress to conclude that “the United States lacked a coherent mechanism to monitor foreign investment.”¹⁴ In response to the investigation, President Ford created the CFIUS through an executive order in 1975.¹⁵ He gave the committee the task of “continuing responsibility within the Executive Branch for monitoring the impact of foreign investment in the United States . . . and for coordinating the implementation of the United States policy on such investment.”¹⁶

2. The Exon-Florio Amendment

The next major historical change in FDI regulation occurred in 1988 when Congress enacted the Exon-Florio Amendment to section 721 of the Defense Production Act of

7. See Deborah M. Mostaghel, *Dubai Ports World Under Exon-Florio: A Threat to National Security or a Tempest in a Seaport?*, 70 ALB. L. REV. 583, 598–610 (2007) (providing instances of Congress reacting to a national security threat by creating more restrictive measures for FDI).

8. See Chamber Applauds, *supra* note 2 (stating that “[t]his bill strikes an appropriate balance between keeping Americans safe and keeping our economy open to the world”).

9. RAYMOND J. WALDMANN, *DIRECT INVESTMENT AND DEVELOPMENT IN THE U.S.* 24 (1979).

10. U.S. CONST. art I, § 8, cl. 3; see also WALDMANN, *supra* note 9, at 24 (explaining that congressional power to regulate commerce with foreign nations comes from the Commerce Clause).

11. See SARA L. GORDON & FRANCIS A. LEES, *FOREIGN MULTINATIONAL INVESTMENT IN THE UNITED STATES* 230–31 (1986) (describing how an investigation of a large increase in FDI led Congress to pass the Foreign Investment Survey Act and the International Investment Survey Act, authorizing the President to collect information on FDI inflow).

12. *Id.* at 231.

13. *Id.* Congress, under the Defense Production Act of 1950, originally granted the power to the President to investigate and monitor industries that could fill a role in the national defense of the United States. Defense Production Act, 50 U.S.C. app. §§ 2161–70 (1950).

14. Mostaghel, *supra* note 7, at 589.

15. Exec. Order No. 11,858, 3 C.F.R. 990 (1971–1975).

16. *Id.*

1950.¹⁷ Known as the Omnibus Trade and Competitiveness Act of 1988, the Exon-Florio Amendment allowed the President to “investigate foreign acquisitions, mergers, and takeovers of, or investments in, U.S. companies from a national security perspective.”¹⁸ The law authorized the President to block FDI when “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.”¹⁹ President Ford “delegated his initial review and decision-making authorities, as well as his investigative responsibilities, to CFIUS.”²⁰ Exon-Florio established a four-element procedure for the CFIUS to follow when reviewing FDI:

- (a) notice of the transaction, either through voluntary disclosure by the companies involved or at CFIUS’s request;
- (b) a 30-day review to determine whether the transaction raises national security concerns;
- (c) if it does, a 45-day investigation period to determine whether such concerns require action by the president;
- and (d) if such action is required, a 15-day period in which the president can permit, suspend or prohibit the transaction.²¹

The Exon-Florio Amendment was the first time CFIUS (or any governmental authority) had a specific blueprint for reviewing FDI.²²

3. *The Byrd Amendment*

In response to perceived threats to national security, the Exon-Florio Amendment has undergone major reforms in an attempt to better define the correct procedures for the CFIUS to follow.²³ In 1993, Congress amended Exon-Florio through part of the National Defense Authorization Act for Fiscal Year 1993, commonly known as the Byrd Amendment.²⁴ The Amendment created a mandatory review of any foreign company that was “controlled by or acting on behalf of a foreign government” and seeking to merge or take over a U.S. company.²⁵ Before Byrd, all CFIUS reviews were voluntary.²⁶ The Byrd Amendment produced stronger regulatory scrutiny for a business owned by a foreign government.²⁷ It also added a notification requirement,²⁸ which required the President to “immediately transmit to the Secretary of the Senate and the Clerk of the House of

17. GRAHAM & MARCHICK, *supra* note 3, at 34.

18. *Id.*

19. 50 U.S.C. app. § 2170(d) (2000).

20. GRAHAM & MARCHICK, *supra* note 3, at 34.

21. Melida Hodgson & Shiva Aminian, *CFIUS: Tightening the Screws on the Foreign Investment Review Process Advisory Board*, INT’L GOV. CONTRACTOR, Apr. 2006, ¶ 28.

22. The previous laws regulating FDI only gave the President and the CFIUS authority to monitor foreign investment coming into the United States but not a defined process on how to go about the review. *See supra* note 11 and accompanying text (describing the 1970s regulation which allowed the President to collect information on FDI); *supra* note 13 and accompanying text (explaining the Defense Production Act as the first time that Congress granted the President the power to investigate FDI).

23. *See* Mostaghel, *supra* note 7, at 591–603 (outlining the major reforms of Exon-Florio).

24. *Id.* at 600–01.

25. 50 U.S.C. app. § 2170(b) (2000).

26. Mostaghel, *supra* note 7, at 601–03.

27. *Id.*

28. 50 U.S.C. app. § 2170(g).

Representatives a written report of the President's determination of whether or not to take action . . . including a detailed explanation of the findings made . . . and the factors considered."²⁹ This section of the Byrd Amendment stated that Congress would not allow FDI decisions by the President and the CFIUS to go unchallenged.³⁰

4. Foreign Investment and National Security Act of 2007

Congress's most recent attempt to regulate foreign investment is the Foreign Investment and National Security Act of 2007 (FINSA), signed into law by President Bush on July 26, 2007.³¹ FINSA purports to clarify national security in the Exon-Florio Amendment and enhance reporting requirements of the CFIUS, adding to the transparency of CFIUS reviews.³² This Note examines the specific provisions of FINSA in Part II.C.

B. Perceived Threats to National Security

Each attempt at redefining the CFIUS has come through Congress because of then current threats to national security, whether real or perceived. The public outcry from these threats motivated Congress to attempt to adapt U.S. policy on FDI.³³ Each amendment was a response to a specific threat.³⁴ This Part will examine those specific threats.

1. Influx of Foreign Direct Investment

Congress gave the power to investigate and monitor FDI to President Ford who delegated it to the CFIUS.³⁵ President Ford's creation of the CFIUS in the 1970s was a direct response to a massive amount of FDI flowing into the United States.³⁶ Foreign investors were trying to take advantage of the dollar's depreciation against most other foreign currencies.³⁷ Congress soon realized, amid public worries, that the U.S. Government did not have the discretion to monitor this inflow of capital from abroad.³⁸ Another national security impetus for the creation of the CFIUS was massive buyouts of American businesses by Arabs in the 1970s.³⁹ The CFIUS, despite having the power to investigate and monitor FDI, initially had little power to prohibit or restrict FDI.⁴⁰

29. *Id.*

30. *Id.*

31. *President Bush Signs the CFIUS Reform Bill*, WASH. MONITOR, July 27, 2007, at 3 [hereinafter *President Bush*].

32. Foreign Investment and National Security Act of 2007, Pub. L. No. 110-49, 121 Stat. 246 (amending 50 U.S.C. app. § 2170 (2000)).

33. See GRAHAM & MARCHICK, *supra* note 3, at 117-40 (showing that each change in FDI regulation was preceded by public outcry).

34. See Mostaghel, *supra* note 7, at 604-10 (listing the specific threats to national security through FDI that occurred before Congress passed each amendment).

35. *Id.* at 589.

36. *Id.*

37. *Id.* at 588.

38. *Id.* at 589.

39. RALPH H. FOLSOM & MICHAEL W. GORDON, INTERNATIONAL BUSINESS TRANSACTIONS 832 (1995).

40. Mostaghel, *supra* note 7, at 589.

2. The Japanese Threat

Large amounts of FDI were still flowing into the United States in the 1980s from all over the world.⁴¹ The American public, along with Congress, began to get nervous about the large number of Japanese companies buying American businesses.⁴² This fear boiled over in 1986 when a Japanese company, Fujitsu, attempted to takeover Fairchild Semiconductor (Fairchild), a leader in the semiconductor business.⁴³ The deal failed⁴⁴ despite the U.S. government's legal inability to stop it.⁴⁵ The public and congressional outcry led Congress to develop the Exon-Florio Amendment, which is the first time Congress gave the CFIUS and the President the power to block FDI.⁴⁶

3. The First Divestment

President George H.W. Bush ordered the first formal divestment in 1990.⁴⁷ In a very political move, President Bush ordered a Chinese company, China National Aero-Technology Import and Export Corporation (CATIC), to divest any interest in MAMCO Manufacturing, Inc. (MAMCO), a Seattle-based commercial aircraft manufacturer.⁴⁸ The American public thought that the CFIUS was not doing enough to thwart attempts by foreign governments to take control of major U.S. industries.⁴⁹ The CFIUS has closely monitored recent investment attempts in the United States by the People's Republic of China since it is the last remaining communist threat.⁵⁰ CATIC was infamous in the FDI market and "had a reputation for disregarding foreign-export-control laws in order to

41. FOLSOM & GORDON, *supra* note 39, at 833.

42. *Id.*

43. Mostaghel, *supra* note 7, at 590–91.

44. The main reason for the failure of the proposed acquisition of Fairchild, rather than being business-related, was related to "congressional xenophobia" of the Japanese gaining a strong foothold in the semiconductor industry. Christopher J. Foreman, *Omnibus Trade and Competitiveness Act of 1988: Putting the Brakes on Foreign Investment*, 19 GA. J. INT'L & COMP. L. 175, 186 (1989) (discussing the public congressional outcry that led to Fujitsu retracting its attempt to acquire Fairchild). A further indicator that protectionist concerns, instead of national security, motivated Congress's public outcry was the fact that Japan posed little national security threat and a foreign corporation, Paris-based Schlumberger, already owned Fairchild. *Id.*

45. Gerald T. Nowak, *Above All, Do Not Harm: The Application of the Exon-Florio Amendment to Dual-Use Technologies*, 13 MICH. J. INT'L L. 1002, 1007–08 (1992).

46. EDWARD M. GRAHAM & PAUL R. KRUGMAN, FOREIGN DIRECT INVESTMENT IN THE UNITED STATES 121 (1991).

47. Jose E. Alvarez, *Political Protectionism and United States International Investment Obligations in Conflict: The Hazards of Exon-Florio*, 30 VA. J. INT'L L. 1, 96 (1989). A divestment order requires a foreign company, for reasons of national security, to remove any investment or ownership in the U.S. company involved in the transaction. See Patrick L. Schmidt, *The Exon-Florio Statute: How it Affects Foreign Investors and Lenders in the United States*, 27 INT'L LAW 795, 796 (1993) (explaining the divestment provision in Exon-Florio).

48. Alvarez, *supra* note 47, at 96.

49. *Id.*

50. See KERRY DUMBAUGH, CONG. RESEARCH SERVS., CHINA-U.S. RELATIONS: CURRENT ISSUES AND IMPLICATIONS FOR U.S. POLICY 35–36 (2007), available at http://assets.opencrs.com/rpts/RL33877_20071221.pdf (detailing the fear that many members of Congress have towards China's growing economic power); Tamara Loomis, *The China Syndrome*, LAW.COM, May 26, 2005, <http://www.law.com/jsp/article.jsp?id=1117011909652> (stating that "Chinese deals in particular are going to be closely scrutinized" and that "[t]here's a good bit of paranoia about China and its intentions").

obtain sensitive Western technology.”⁵¹ This led to the Byrd Amendment, drafted by Senator Robert Byrd in response to a desire to “tighten[] the CFIUS review process.”⁵²

4. *Dubai Ports Scandal*

Congress passed FINSA in direct response to Dubai Ports World’s (DP World) attempt to acquire operations of American ports.⁵³ The Dubai Ports scandal occurred in February 2006 when DP World attempted to purchase Peninsular and Oriental Steam Navigation Company (P&O), a British company that operated five U.S. ports.⁵⁴ DP World is a company owned in large part by the government of the United Arab Emirates (UAE), a U.S. ally located in the Middle East, through a holding company.⁵⁵ DP World voluntarily approached the CFIUS about a review to approve the buyout.⁵⁶ The CFIUS signed off within 30 days, as opposed to the 45 day period as required by the Byrd Amendment for foreign-government-owned businesses.⁵⁷

When the story reached the headlines, the American public and many members of Congress were openly critical of what they considered a “rubber-stamping” by the CFIUS.⁵⁸ Critics believed DP World created a national security risk because of “the UAE’s history as an operational and financial base for the hijackers who carried out the Sept. 11, 2001, attacks.”⁵⁹ Amid backlash from Congress and the American public, DP World voluntarily divested their ownership in P&O.⁶⁰ Congress responded by approving FINSA, created by Senators Chris Dodd and Richard Shelby to “overhaul how the government reviews foreign takeovers of U.S. companies.”⁶¹ Congress designed FINSA to give more transparency to the CFIUS’s review process.⁶²

51. Mostaghel, *supra* note 7, at 598.

52. Matthew R. Byrne, *Protecting National Security and Promoting Foreign Investment: Maintaining the Exon-Florio Balance*, 67 OHIO ST. L.J. 849, 868 (2006).

53. See Ed Mullane & Bhavna Kaul, *Sovereign Wealth Funds Could Be Impacted by Upcoming FINSA Regulations*, FT.COM, Feb. 4, 2008, http://www.ft.com/cms/s/2/d33cd7fc-d34b-11dc-b861-0000779fd2ac,dwp_uuid=e8477cc4-c820-11db-b0dc-000b5df10621.html (stating that heightened attention was brought to foreign investments after 9/11 and DP World’s attempt to acquire P&O).

54. GRAHAM & MARCHICK, *supra* note 3, at 139.

55. Mostaghel, *supra* note 7, at 606–07.

56. *Id.* at 606.

57. *Id.*

58. GRAHAM & MARCHICK, *supra* note 3, at 136–39.

59. Associated Press, *Lawmakers Seek Review of Dubai Ports World Deal*, NEWSMAX.COM, Feb. 16, 2006, <http://archive.newsmax.com/archives/articles/2006/2/16/140709.shtml?s=1h>.

60. DP World sold its complete ownership in P&O to the American company AIG Global Investment Group. Shakir Husain, *DP World Completes P&O Unit Sale to AIG*, GULFNEWS.COM, Mar. 17, 2007, http://archive.gulfnews.com/indepth/pando/more_stories/10111732.html. The companies completed the transaction in March 2007. *Id.*

61. Peter Kaplan, *Senators Plan New Bill on Foreign Takeover Reviews*, REUTERS, May 10, 2007, <http://www.reuters.com/article/mergersNews/idUSN1028906020070510>.

62. *President Bush*, *supra* note 31, at 3.

*C. The Current Look of the Exon-Florio Amendment After the Enactment of FINSA**1. CFIUS Membership*

According to FINSA, the CFIUS is statutorily required to have seven voting members: “(1) The Secretary of the Treasury, (2) The Secretary of Homeland Security, (3) The Secretary of Commerce, (4) The Secretary of Defense, (5) The Secretary of State, (6) The Attorney General of the United States, [and] (7) The Secretary of Energy.”⁶³ FINSA also allows the President to appoint “the heads of any other executive department, agency, or office, as the President determines appropriate, generally or on a case-by-case basis.”⁶⁴ FINSA specifies that the Secretary of the Treasury will serve as the chairperson of the CFIUS and creates the position of Assistant Secretary for the Department of the Treasury with “duties related to the Committee on Foreign Investment in the United States, as delegated by the Secretary of the Treasury.”⁶⁵ Although FINSA statutorily mandates that the CFIUS have at least nine members, FINSA gives the President authority to increase the size of the Committee as appropriate.⁶⁶ Within the CFIUS, the Secretary of the Treasury will designate “a member or members of the Committee to be the lead agency . . . on behalf of the Committee.”⁶⁷ This lead agency will be responsible “(A) for each covered transaction, and for negotiating any mitigation agreements or other conditions necessary to protect national security; and (B) for all matters related to the monitoring of the completed transaction, to ensure compliance.”⁶⁸

2. The CFIUS Process

Before FINSA was enacted, only the parties to the covered transaction initiated a review through the CIFUS.⁶⁹ Along with written notification from the parties of the covered transaction, FINSA also includes a section on unilateral initiation of a review by “the President or [the CFIUS].”⁷⁰ Once written notification of a covered transaction is formally accepted, the CFIUS has 30 days to complete the review.⁷¹ During the review process, a 45 day investigation of the covered transaction will begin if the CIFUS determines that:

63. 50 U.S.C.A. app. § 2170(k)(2) (West 2008). FINSA requires both the Secretary of Labor and the Director of National Intelligence to serve on the CFIUS as nonvoting, ex officio members. *Id.*

64. *Id.*

65. *Id.* § 2170(k)(3)–(4).

66. *Id.* § 2170(k)(2)(J).

67. 50 U.S.C.A. app. § 2170(k)(5).

68. *Id.* § 2170(3)(k)(5)(A)–(B).

69. Before FINSA, Exon-Florio allowed a member agency of the CFIUS to initiate a review. *See* 50 U.S.C. app. § 2170 (2000) (amended 2007). A member agency initiated only eight of the 470 notices from 1997 through 2004. U.S. GOV'T ACCOUNTABILITY OFFICE, DEFENSE TRADE: ENHANCEMENTS TO THE IMPLEMENTATION OF EXON-FLORIO COULD STRENGTHEN THE LAW'S EFFECTIVENESS 13 (2005) [hereinafter GAO REPORT], available at <http://www.gao.gov/cgi-bin/getrpt?GAO-05-686>. Instead, if a member agency became aware of a transaction subject to CFIUS review, the member agency would inform the Secretary of the Treasury (Chair of the CFIUS), who then would informally encourage the parties involved in the covered transaction to formally submit to a CFIUS review. *Id.* at 9.

70. 50 U.S.C.A. app. § 2170(b)(1)(D).

71. *Id.* § 2170(b)(1)(E).

[I] the transaction threatens to impair the national security of the United States and the threat has not been mitigated during or prior to the review . . . ; [II] the transaction is a foreign government-controlled transaction; or [III] the transaction would result in control of any critical infrastructure of or within the United States by or on the behalf of any foreign person, if the Committee determines that the transaction could impair national security.⁷²

The CFIUS may initiate an investigation after the 30 day review if “the lead agency recommends, and the Committee concurs, that an investigation be undertaken.”⁷³ During the investigation, the CFIUS will examine “the effects of a covered 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.”⁷⁴ An investigation concludes with the CFIUS taking one of four possible actions: (1) dismissing the investigation; (2) drafting a mitigation agreement with the parties of the covered transaction to alleviate the threat to national security; (3) allowing the parties to the covered transaction to withdraw and resubmit; or (4) submitting the findings of the investigation to the President to make a decision.⁷⁵

The CFIUS can unilaterally dismiss an investigation 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.”⁷⁶ The CFIUS may negotiate an agreement with the parties of the covered transaction that is meant to mitigate any threat to national security posed by the covered transaction and is “based on a risk-based analysis, conducted by the Committee.”⁷⁷ Any time after submission, the CFIUS may allow the parties of the covered transaction to withdraw and resubmit their proposal after restructuring.⁷⁸ The Committee as a whole must approve any withdrawal request, which must also be in writing.⁷⁹ If a proposal is withdrawn before the completion of the investigation, the Committee will establish “interim protections to address specific concerns with such transaction that have been raised . . . ; specific time frames for resubmitting . . . ; and . . . a process for tracking any actions that may be taken by any party to the transaction, in connection with the transaction, before the notice . . . is resubmitted.”⁸⁰

If the CFIUS completes and submits an investigation to the President, the President has 15 days to announce whether it is “appropriate to suspend or prohibit any covered transaction that threatens to impair the national security of the United States.”⁸¹ The President has the power to suspend or prohibit the covered transaction, or order a complete divestment if “there is credible evidence . . . that the foreign interest exercising

72. *Id.* § 2170(b)(2)(B).

73. *Id.* § 2170(b)(2)(B)(ii).

74. *Id.* § 2170(b)(2)(A).

75. *See* 50 U.S.C.A. app. § 2170 (listing the ways a CFIUS investigation can conclude).

76. *Id.* § 2170(b)(2)(D)(i).

77. *Id.* § 2170(l)(1)(B).

78. *Id.* § 2170(b)(1)(C)(ii).

79. *Id.*

80. 50 U.S.C.A. app. § 2170(l)(2)(A).

81. *Id.* § 2170(b)(4)(D)(1)–(2).

control might take action that threatens to impair the national security.”⁸² Presidents have very rarely used this power.⁸³

3. *The Evergreen Provision*

Before FINSA, if the CFIUS examined and cleared a transaction, both the CFIUS and the President lacked statutory power to reopen it.⁸⁴ FINSA allows the President or the CFIUS to reopen and review “any covered transaction that has previously been reviewed or investigated . . . if any party to the transaction [1] submitted false or misleading material information to the Committee in connection with the review or investigation or [2] omitted material information, including material documents, from information submitted to the Committee.”⁸⁵ The CFIUS can reopen a covered transaction if a party to the transaction intentionally and materially breaches a mitigation agreement and the CFIUS determines that there are no other adequate remedies to address the breach.⁸⁶

4. *Who Is Subject to a CFIUS Review?*

FINSA states that any “merger, acquisition, or takeover . . . by or with any foreign person which could result in foreign control of any [U.S.] person” and that could affect the national security of the United States is subject to possible review by the CFIUS.⁸⁷ Although FINSA does not define national security, the CFIUS does consider a number of factors in determining whether a covered transaction may have an effect on national security. These factors are: (1) domestic production needed for projected national defense requirements; (2) the capability and capacity of domestic industries to meet national defense requirements; (3) the control of domestic industries and commercial activity by foreign citizens as it affects the capability and capacity of the United States to meet the requirements of national security; (4) the potential effects of the proposed or pending transaction on sales of military goods, equipment, or technology to any country; (5) the potential national security-related effects on the United States’s critical infrastructure, including major energy assets; (6) the potential national security-related effects on the United States’s critical technologies; (7) whether the covered transaction is a foreign government-controlled transaction; (8) the relationship of the foreign government, if the transaction is foreign government-controlled, with the United States; (9) the long-term projection of United States requirements for sources of energy and other critical resources; and (10) other factors as the President or the Committee may determine to be

82. *Id.* §§ 2170(d)(1), (d)(4)(A).

83. Out of the 470 CFIUS reviews that occurred from 1997 through 2004, the CFIUS initiated eight investigations, which resulted in only one instance of the President ordering a divestiture. *See* GAO REPORT, *supra* note 69, at 14 (giving statistics on the number of investigations that have followed CFIUS reviews); *see also supra* Part II.B.3 (describing the CATIC divestiture).

84. Edward M. Lebow, *The Foreign Investment and National Security Act of 2007*, <http://www.haynesboone.com> (follow “Newsroom”; then follow “Publications”; then open 01/14/2008 article) (last visited Sept. 23, 2008).

85. 50 U.S.C.A. app. § 2170(b)(1)(D)(ii).

86. *Id.* § 2170(b)(1)(D)(iii).

87. *Id.* § 2170(a)(3), (b)(1)(A)(i).

appropriate.⁸⁸ A transaction the CFIUS views as touching upon any of the above listed ten factors is subject to a possible review.

5. Additional Requirements of a CFIUS Review

a. Analysis by the Director of National Intelligence

Along with FINSA's statutory mandate that the Director of National Intelligence serve as an ex officio member of the CFIUS, any covered transaction is subject to a "thorough analysis of any threat to the national security of the United States" by the Director of National Intelligence.⁸⁹ The Director of National Intelligence has 20 days from the time the foreign company gives official notice of a transaction to complete this analysis and provide the findings to the CFIUS.⁹⁰ During this analysis, "[t]he Director of National Intelligence shall ensure that the intelligence community remains engaged in the collection, analysis, and dissemination [to the CFIUS] of any relevant information."⁹¹

b. Accountability to Congress

If the CFIUS initiates a 45 day investigation and the results are not submitted to the President, the Secretary of the Treasury and the head of the lead agency must transmit to Congress a certified written report on the results of the investigation.⁹² Both the Secretary of the Treasury and the head of the lead agency must sign this report to certify that "there are no unresolved national security concerns with the transaction."⁹³ Upon any mitigation agreement or decision by the President on a covered transaction, Congress may request a briefing that details the actions taken in regard to the covered transaction.⁹⁴ The Secretary of the Treasury is required to submit an annual report to Congress detailing all completed CFIUS reviews and investigations of covered transactions.⁹⁵ This annual report must contain: (1) a list of all notices filed and all reviews or investigations completed with the basic information of the transaction; (2) specific trend information on the number of filings, investigations, withdrawals, and decisions; (3) cumulative trend information on the business sectors involved in the filings and the countries from which the investments originated; (4) information on which companies withdrew notices and later refiled or abandoned the transaction; (5) types of security arrangements and conditions in any mitigation agreements; and (6) a detailed discussion of all perceived adverse effects of the covered transaction on national security or critical infrastructure.⁹⁶ In a separate annual report, the Secretary of the Treasury is required to conduct a study on FDI in the United States with increased scrutiny on any investment "by foreign governments,

88. *See id.* § 2170(f) (listing the factors to be considered in CFIUS and presidential decisions on whether FDI will affect national security).

89. *Id.* § 2170(b)(4)(A).

90. 50 U.S.C.A. app. § 2170(b)(4)(B).

91. *Id.* § 2170(b)(4)(C).

92. *Id.* § 2170(b)(3)(B).

93. *Id.* § 2170(b)(3)(C)(ii).

94. *Id.* § 2170(g)(1).

95. 50 U.S.C.A. app. § 2170.

96. *See id.* § 2170(b)(m)(2) (detailing the requirements of the CFIUS annual report to Congress).

entities controlled by or acting on behalf of a foreign government, or persons of foreign countries which comply with any boycott of Israel or . . . do not ban organizations designated by the Secretary of State as foreign terrorist organizations.”⁹⁷

III. ANALYSIS

Will the FINSA modifications to FDI regulation succeed in the U.S. government’s attempt to make national security tighter without antagonizing foreign governments and companies into investing their money outside the United States? Has Congress finally drafted a bill that will strike an acceptable balance between keeping Americans safe from terrorist threats while keeping our economy open to the rest of the world? Or will FINSA just need to be modified the next time the government reacts to a perceived (or real) national security threat? This Part addresses these questions while examining FINSA’s major modifications to the Exon-Florio Amendment. This Part also inspects other CFIUS and FDI concerns that FINSA does not address.

A. FINSA Modifications to the Exon-Florio Amendment

By enacting FINSA, Congress modified the role of monitoring FDI by the CFIUS and the President in major ways. This Part examines Congress’s intended result for each modification and whether each alteration will likely achieve that result. This Part also examines seven major changes that FINSA made to the existing Exon-Florio Amendment and the likely result of those changes.

1. The Introduction of the CFIUS Lead Agency

FINSA requires the Secretary of the Treasury to appoint a lead agency to head each covered transaction, which includes investigating FDI transactions, negotiating mitigation agreements, and monitoring the completed transaction for compliance.⁹⁸ By formalizing the leadership of a CFIUS review, Congress intended to make the process more efficient and more effective.⁹⁹ FINSA also creates an element of increased responsibility for whichever department or members are part of this lead agency.¹⁰⁰ By assigning a lead agency, the department that has the most expertise in the specific industry involved in the covered transaction will head each review or investigation. For example, if the covered transaction involves foreign acquisition of an energy source, the Secretary of Energy would be in a much better position to determine the effects of the proposed transaction on the U.S. energy industry because of that person’s general knowledge gained through day-to-day monitoring of the energy industry. This lead agency will also make the review

97. *Id.* § 2170(c)(1)(A)–(B).

98. *Id.* § 2170(k)(5); *see supra* Part II.C.1 (discussing the lead agency appointment and function in FINSA). FINSA formalizes the past practice of the CFIUS where the agency most interested in or affected by the covered transaction would take the lead on investigating and negotiating. Memorandum from Simpson Thacher & Bartlett, Reform of the CFIUS Process in the Wake of Dubai Ports World (Aug. 10, 2007), available at <http://www.stblaw.com/content/publications/pub624.pdf>.

99. 109 CONG. REC. H7456 (daily ed. July 10, 2007) (first statement of Rep. Deborah Pryce, Member, House Comm. on Fin. Serv.).

100. *See id.* (noting that each agency directly involved with a transaction must sign a certification and forward it to Congress).

more efficient because the lead agency will need to obtain less information about the industry involved in the covered transaction, thus allowing more leeway in the 30 day CFIUS review deadline. Congress will now be able to hold this lead agency accountable for unsatisfactory decisions. The lead agency will likely make the CFIUS review process more efficient and effective without dissuading FDI. If anything, the assignment of a lead agency will increase the attractiveness of the U.S. market to foreign investors because there will be less risk in submitting formal notice.¹⁰¹

2. Mandatory 45 Day Investigation of Acquisitions Involving Foreign Governments

FINSA modified the Exon-Florio Amendment's handling of foreign government-controlled transactions.¹⁰² After Congress enacted FINSA, a mandatory 45 day CFIUS investigation is required on any foreign government-controlled transaction.¹⁰³ Congress intended this Amendment to be an extension of the Byrd Amendment, which created a mandatory CFIUS review for any transaction with a company controlled by a foreign government.¹⁰⁴ This section of FINSA was written in direct response to the public and political backlash of the CFIUS's handling of DP World's attempted acquisition of P&O.¹⁰⁵ The CFIUS located a loophole in the Byrd Amendment that required the 45 day investigation only if the CFIUS determined that DP World "could affect the national security of the United States."¹⁰⁶ One of the critiques of the Byrd Amendment is that it "had little actual effect on the Exon-Florio framework or process" because "CFIUS still [had] the discretion to determine whether a company [was] truly 'acting on behalf of' a foreign government."¹⁰⁷ Congress attempted to make it more difficult for the CFIUS to dismiss the required 45 day investigation by creating more personal accountability within the CFIUS.¹⁰⁸ Congress did this by requiring the Secretary of the Treasury and the head of the lead agency to determine and sign off on whether a company could affect national security.¹⁰⁹ This Amendment makes the Secretary of the Treasury and the head of the lead agency personally accountable for the actions of the CFIUS as a whole.¹¹⁰ By

101. This reduction of risk comes from (1) the ability of foreign investors to predict which department will head the review, and (2) the decreased possibility of a second review since the lead agency's industry expertise will increase the chances that the CFIUS will request all the material information.

102. See 50 U.S.C.A. app. § 2170(b)(2)(B)(II) (creating the new CFIUS rules for handling a foreign government-controlled transaction).

103. *Id.* §§ 2170(b)(1)(B), (b)(2)(c). The CFIUS will not order an investigation for a foreign government-controlled transaction only if both 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." *Id.* § 2170(b)(2)(D)(i).

104. 50 U.S.C. app. § 2170(b) (2000) (amended 2007).

105. Both Congress and the critics believed that the CFIUS rushed the review of the DP World transaction because the CFIUS only subjected the transaction to the 30 day review, instead of the 45 day investigation required by the Byrd Amendment, claiming the company was not a security threat. Jessica Holzer, *Was the Law Followed on Dubai Ports Deal OK?*, FORBES.COM, Feb. 23, 2006, http://www.forbes.com/2006/02/22/logistics-ports-dubai-cx_jh_0223cfius_print.html.

106. 50 U.S.C. app. § 2170(b).

107. Byrne, *supra* note 52, at 868 (citation omitted).

108. See 50 U.S.C.A. app. § 2170(b)(3)(c) (West 2008) (describing the increased certifications the CFIUS must make when reporting to Congress).

109. *Id.* § 2170(b)(3)(c)(iv).

110. Personal accountability has long been a common method of management used by corporate groups

making the Secretary of the Treasury personally accountable, Congress hoped that the Secretary would consider national security, as opposed to only economic considerations, when deciding whether or not to investigate.¹¹¹

The CFIUS will likely deliberate a dismissal of a transaction by a company controlled by a foreign government more because of the personal accountability of the Secretary of the Treasury and the head of the lead agency. However, it may also open up an easier avenue for bribery and lobbying by foreign governments. In many parts of the world, grease payments given to government officials are not only legal but considered a cost of doing business.¹¹² The amount of money involved in transactions reviewed by the CFIUS makes bribery attempts by a foreign government more realistic.¹¹³ The fewer people that sign off on a dismissal, the fewer people a foreign government will potentially need to bribe or lobby. The ability of the CFIUS to target certain countries and subject them to an investigation could also lead to an informal boycott for political reasons. This FINSA Amendment will likely satisfy Congress's intended results, increasing personal accountability within the CFIUS and making it more difficult to "rubber stamp" a review. However, the potential for the adverse effects listed above outweigh the gains imagined by Congress.

3. Defining National Security to Incorporate Issues Pertaining to Homeland Security Including Its Application to Critical Infrastructure and Critical Technologies

Under FINSA, "critical infrastructure" and "critical technologies" are factors that have the potential to affect national security and are therefore included under the CFIUS's authority to review.¹¹⁴ One of the main concerns for law firms and the foreign companies they represent is the lack of a definition of national security in the Exon-Florio Amendment.¹¹⁵ Whether a covered transaction poses a risk to national security is the

and government agencies. See Rose M. Patten, *From Implicit to Explicit: Putting Corporate Values and Personal Accountability Front and Centre*, IVEY BUS. J. ONLINE, Sept.–Oct. 2004, <http://www.allbusiness.com/management/business-support-services/229786-1.html> (stating that the top ten executives at BMO Financial Group must sign off on the financial results); *Hearing Before the Subcomm. on Government Management, Information, and Technology of the H. Comm. on Government Reform and Oversight*, 105th Cong. (1997) (Statement of John A. Koskinen, Deputy Dir. for Mgmt., Office of Mgmt. and Budget), available at <http://www.whitehouse.gov/omb/legislative/testimony/19970708-23251.html> (pointing out that a Chief Operating Officer will be personally accountable for the performance of a governmental performance-based organization).

111. Another criticism mentioned of the DP World transaction was that the "U.S. Treasury Department waives deals through because it wants to fund America's gaping current-account deficit." Holzer, *supra* note 105.

112. Nicholas Rummell, *30-Year-Old Bribery Law Brings New Headaches*, FIN. WK., June 18, 2007, <http://www.financialweek.com/apps/pbcs.dll/article?AID=/20070618/REG/70615005&SearchID=73284662078075> (stating that grease payments are ingrained in some countries' culture, such as China). Grease payments are "corporate gifts or payments for routine business, such as obtaining permits or police protection." *Id.*

113. DP World paid \$6.8 billion to acquire P&O. *The Real Shipping News: Behind the Furor over the Dubai Deal is a Well-Respected Company with Global Reach*, BUS. WK., Mar. 6, 2006, http://www.businessweek.com/magazine/content/06_10/b3974068.htm.

114. 50 U.S.C.A. app. § 2170(b)(4).

115. See Ronald D. Lee, *The Dog Doesn't Bark: CFIUS, the National Security Guard Dog with Teeth*, M&A LAW., Feb. 2005, at 5, 10, available at [http://www.arnoldporter.com/resources/documents/Article-National_Security_Guard_Dog\(2-05\).pdf](http://www.arnoldporter.com/resources/documents/Article-National_Security_Guard_Dog(2-05).pdf) (stating that "national security considerations that one or more CFIUS

measuring device the CFIUS uses to determine what transactions are subject to CFIUS review, but even different members of the CFIUS do not agree on a universal interpretation of “national security.”¹¹⁶ By adding the terms “critical infrastructure” and “critical technologies,” Congress made the CFIUS review much more inclusive of industries that may have avoided review in the past.¹¹⁷ Although requiring the CFIUS to investigate more industries will give the government more control over possible national security threats, the control comes at the expense of the competitiveness of FDI.

If a foreign controlled company is bidding against a U.S. company for an acquisition, the possibility of a CFIUS review of the transaction is clearly advantageous to the U.S. company. Not only must the foreign company consider the possible time delay of up to 90 days, but must also consider the risk that the transaction may be cancelled because of possible threats to national security. Because of the advantage a competing U.S. company gains when a foreign competitor is subjected to a CFIUS review, a U.S. company has an incentive to lobby the CFIUS to review a transaction even if there is minimal concern to regulators about national security. Another disadvantage of subjecting more industries to CFIUS review is the strain it creates on the U.S. government’s limited resources. By focusing CFIUS attention on industries that may only have a collateral effect on national security, even though still considered “critical,” FINSA takes already limited CFIUS resources away from industries that have a direct effect on national security.¹¹⁸

On the positive side, the clearer definition of national security will allow a foreign corporation (and the law firm that represents it) to better decide whether its transaction will be subject to a CFIUS review. The parties to a potentially covered transaction will find it easier to take into account the potential review when projecting the financial analysis of the acquisition and deciding whether to voluntarily submit the transaction to

agencies finds relevant may span a broad range”); Memorandum from Akin, Gump, Strauss, Hauer, & Feld, LLP, International Trade Alert—CFIUS National Security Review Creates New Uncertainty for Foreign Investment in the United States 1 (May 2, 2003), available at <http://www.akingump.com/docs/publication/562.pdf> (noting that the examples in the regulations of when the very broad term of “national security” could apply are far from exhaustive).

116. See JAMES K. JACKSON, CONG. RESEARCH SERVS., THE EXON-FLORIO NATIONAL SECURITY TEST FOR FOREIGN INVESTMENT 6 (2006), available at <http://www.fas.org/sgp/crs/natsec/RS22197.pdf> (confirming a lack of consensus on the role of foreign acquisitions in national security concerns). Some commentators have noted that even within the CFIUS, the members have different opinions on what should trigger an investigation. See *U.S. Congress Hears Testimony on Exon-Florio Amendment*, INT’L GOV’T CONTRACTOR, Mar. 2007, ¶ 22 (discussing a Government Accountability Office analysis that found that members “have differing opinions on the criteria that should trigger an investigation”).

117. Although critical infrastructure is only defined in the FINSA Amendment as including major energy assets, the Department of Homeland Security has defined critical infrastructure as “substantial sectors of the U.S. economy: agriculture, food, water, public health, emergency services, information and telecommunications, transportation, banking and financing, chemical industry and hazardous materials, and postal and shipping, as well as Government and the traditional industrial defense base.” Hodgson & Aminian, *supra* note 21.

118. With the headlines national security received after the DP World controversy, CFIUS activity had increased dramatically even before FINSA became effective. “In 2006, there were 113 filings (up 73[%] over 2005), [seven] second-stage investigations (up 250[%]) and [five] withdrawals (up 150[%]) during the second-stage investigation period.” Press Release, Nat’l Found. for Am. Policy, New Report Finds Process Has Grown More Difficult and Uncertain for Foreign Investors 2 (Jan. 25, 2007) [hereinafter New Report], available at <http://www.nfap.com/researchactivities/studies/CFIUSPressRelease.pdf>.

the CFIUS before they complete the transaction. Adding “critical infrastructure” and “critical technologies” will allow the CFIUS to extend its reach and monitor more FDI, thereby satisfying congressional intent. However, the addition will likely lead to less FDI because more industries will be subject to review, giving an advantage to U.S. companies.

4. Unilateral Initiation of Review of Any Foreign Acquisition by Any Member of the CFIUS

For the first time in the history of Exon-Florio, FINSA created a section regarding who can initiate a review.¹¹⁹ Before FINSA, Section 2170 stated that “[t]he President or the President’s designee may make an investigation to determine the effects on national security.”¹²⁰ This language did not specify who could initiate the review. By adding subsection (b)(1)(D) to Section 2170, Congress clarified who had the authority to start a review of a transaction.¹²¹

By enabling any member of the CFIUS to bring about a review, Congress opened up each CFIUS member to pressure from both foreign and U.S. competitors looking for an advantage. The review process could also create political power struggles within the CFIUS membership if the CFIUS makes the decision to review on the basis of political affiliations. Additionally, it could lead to competitors blackmailing and lobbying individual CFIUS members who are much less powerful and out of the public eye.

On the other hand, if only the President and parties to the transactions were able to initiate a review, many potentially hazardous transactions would slip through the process. First, the President has limited time to review transactions. Second, foreign companies with nefarious intentions might refuse to submit the transaction for review. The authority given to the CFIUS to initiate a review will likely allow fewer transactions to avoid the scrutiny of a review. The increased congressional scrutiny on the CFIUS process will likely avoid the possible negative consequences mentioned above by subjecting the CFIUS’s decision on whether to review a transaction to public scrutiny.

5. Including an Analysis by the Director of National Security of Any Proposed Threat

Under FINSA, Congress included a section requiring the Director of National Security to review and analyze any covered transaction where a foreign company has formally filed with the CFIUS. By including the Director of National Security on all reviews by the CFIUS, Congress attempted to prevent communication breakdowns between government agencies, as such breakdowns were partially blamed for the U.S. intelligence community missing the threat posed by 9/11.¹²² Although the Director of

119. See 50 U.S.C.A. app. § 2170(b)(D) (West 2008) (specifying the situations in which the CFIUS or the President may initiate a review).

120. 50 U.S.C. app. § 2170 (2000) (amended 2007).

121. 50 U.S.C.A. app. § 2170(b)(1)(D).

122. See NAT’L COMM’N ON TERRORIST ATTACKS UPON THE UNITED STATES, THE 9/11 COMMISSION REPORT 353–57 (Comm. Print 2004), available at <http://www.9-11commission.gov/report/911Report.pdf> (blaming lack of communication between government agencies for missing, in part, the threat posed by terrorist groups before the attacks of September 11). “The events of September 11, 2001 have led to an almost universal acknowledgment in the United States Government of the need for consolidating and streamlining collection,

National Intelligence only acts as an advisor to the CFIUS, and therefore is not involved in the policies or voting,¹²³ confidential information might be available to the National Security Agency that is not available to the members of the CFIUS. By adding this layer of analysis, Congress hoped to incorporate all available intelligence information into each of the CFIUS's decisions.¹²⁴ This modification to Exon-Florio will help provide the CFIUS with the critical information required to accurately judge whether a foreign company is a possible threat to national security. This analysis by the National Security Director will further congressional intent and incorporate more national security information into a CFIUS review. The only drawback may be that the increased exposure of the transaction may cause foreign companies to avoid investing in the United States because of privacy concerns.

6. Addition of the Evergreen Provision to Completed Reviews

FINSA allows the President or the CFIUS to reopen and review a transaction that they have already approved if any party to the transaction is found to have submitted false or misleading information or omitted material information during the original review.¹²⁵ Congress intended to protect the review process from intentional deceit by the parties to a covered transaction. The CFIUS can also use the evergreen provision in mitigation agreements between it and the parties to the transaction.¹²⁶ The evergreen provision is dangerous because it takes away the res judicata effect of a CFIUS review. One of the main incentives for companies to voluntarily submit notice of a transaction is the certainty gained by a successful review through the CFIUS and the comfort that their investment will not be unraveled after the company expends the resources to complete the transaction.¹²⁷ This subsection will likely advance congressional intent by taking

analysis, and dissemination of information concerning threats to the United States and its interests.” *Counterterrorism Information Sharing with Other Federal Agencies and with State and Local Governments and the Private Sector: Hearing Before the Joint S. and H. Comm. On Intelligence*, 107th Cong. 16 (2002) (statement of Eleanor Hill, Staff Dir., Joint Inquiry Staff), available at http://www.fas.org/irp/congress/2002_hr/100102hill.pdf.

123. 50 U.S.C.A. app. § 2170(b)(4)(D).

124. See *id.* § 2170(b)(4)(C) (stating that “[t]he Director of National Intelligence shall 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 conducted . . . with respect to a transaction”).

125. *Id.* § 2170(b)(1)(D)(ii). Commentators have referred to this ability to reopen a completed review as the evergreen provision. See, e.g., Memorandum from Hogan & Hartson, International Trade Update—President Bush to Sign Act to Reform U.S. Government Review of Foreign Investments in the United States (July 23, 2007), available at <http://www.hhlaw.com/files/Publication/ea6afd4e-8f10-4363-968f-69bc85191836/Presentation/PublicationAttachment/516552eb-c284-455e-9aeb-7d8d42e86bca/InternationalTradeUpdate.pdf>.

126. See 50 U.S.C.A. app. § 2170(I)(1)(A) (authorizing the CFIUS to enforce any agreement or condition with a 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).

127. Even before FINSA officially formalized this evergreen provision, it had met resistance from the business community. See Jessica Holzer, *National Security Chill on Takeovers*, FORBES.COM, Dec. 22, 2006, http://www.forbes.com/business/2006/12/21/cfius-outlook-washington-biz-wash-cx_jh_1222cfius.html (reporting an outcry from U.S. businesses when the CFIUS approved the acquisition of Lucent Technologies by a French-based company on the condition that the deal could be unwound should any national security concerns

away any incentive for parties to engage in deceitful practices by submitting notice of a covered transaction to the CFIUS solely to pass the review. However, the evergreen provision takes away any incentive for a company to voluntarily submit notice and therefore will likely reduce the number of voluntary submissions to the CFIUS if a decision is not binding.

7. Increased CFIUS Accountability to Congress

Before FINSA, Exon-Florio required the CFIUS to file a quadrennial report of any evidence of industrial espionage or coordinated efforts by foreign governments to acquire certain U.S. companies, instead of detailing any actions taken by the CFIUS.¹²⁸ In an attempt to increase transparency in the CFIUS process, FINSA now requires an annual report to Congress detailing any notice of a covered transaction that a company files with the CFIUS.¹²⁹ If the CFIUS orders an investigation, it must report any actions by either of the parties to the transaction or the CFIUS, and—upon congressional request—details of any mitigation agreement.¹³⁰ As Congress intended, these reporting requirements will take away the veil of secrecy that has surrounded the CFIUS and increase the transparency of CFIUS reviews.¹³¹ This additional transparency will likely lead to a reduction of FDI inflow into the United States. Foreign companies will hesitate to release private information knowing that it will be viewed and possibly leaked by Congress.¹³² The risk of confidential information becoming public will increase the cost of FDI to the foreign corporation, thereby making investment in U.S. companies less attractive.

IV. RECOMMENDATIONS

Due to foreign terrorist threats, the national security of the United States has been the focus of Congress and the American public. Congress needed to address and formalize the process of reviewing FDI. FINSA provided some of this formalization but, at the same time, possibly discouraged foreign companies from investing in the U.S. economy. This Part examines how Congress could better address national security while avoiding unintended results that FINSA could cause. This Part also offers suggestions for

arise).

128. 50 U.S.C. app. § 2170(k)(1) (2000) (amended 2007).

129. 50 U.S.C.A. app. § 2170(m).

130. *See id.* (detailing the congressional report requirements for the CFIUS).

131. The secrecy around CFIUS review of the DP World transaction is one of the main factors that led to the congressional uproar. *See* Letter from Charles E. Schumer, United States Senator, to George W. Bush, President of the United States (Feb. 22, 2006), *available at* <http://schumer.senate.gov/schumerwebsite/pressroom/record.cfm?id=259449&> (questioning the secrecy surrounding the failure of the CFIUS to order an investigation in the DP World transaction).

132. The U.S. Treasury has recently proposed rules that require companies to submit “a list of all financial institutions involved in a transaction, including advisors and sources of financing; every government contract held within the past five years by the US company that involves classified information, technology or data,” along with “any other government contract the US company has held within the last three years; and a list of products and services that the US company supplies to third parties that are then rebranded.” Stephanie Kirchaessner, *Cfius Disclosure Rules Threaten Delay to Sensitive Takeovers*, FT.COM, Apr. 23, 2008, <http://www.ft.com/cms/s/0/1266e3ba-10d1-11dd-b8d6-0000779fd2ac.html> (discussing the proposed rules that would require companies to submit this information to the CFIUS before the review).

the next time Congress reforms the CFIUS process.

A. Removal of the Mandatory Investigation of Foreign Government-Controlled Transactions

The modification to the Byrd Amendment, which requires both the Secretary of the Treasury and the head of the lead agency to authorize a dismissal of a foreign government-controlled transaction pursuant to the investigation phase, is unnecessary. Requiring a mandatory investigation ties up CFIUS resources, opens the CFIUS to political motivations, and puts unnecessary accountability on the Secretary of the Treasury and the head of the lead agency without affecting how the CFIUS process ensues.¹³³ A CFIUS review moves into the investigation phase if “the transaction threatens to impair the national security of the United States,”¹³⁴ regardless of whether a foreign government is a party in the transaction. One critique of the original Byrd Amendment was that it did nothing to change the CFIUS process; unfortunately, creating personal responsibility within the CFIUS will not change it either.¹³⁵ This mandatory investigation will expend CFIUS resources that could be better allocated to transactions that actually impair national security. Also, the Secretary of the Treasury or the head of the lead agency are likely unwilling to take personal responsibility for dismissing a transaction that could result in public backlash.

Requiring an investigation of a foreign government-controlled transaction creates a possibility of an informal boycott of controversial countries that the current formal boycott procedures could better handle. Congress created well-defined boycott laws to address countries that the U.S. government would like to economically pressure into changing certain conduct.¹³⁶ By allowing a possible informal boycott by the CFIUS, Congress undermines the effect of the formal procedures.

This mandatory investigation might also lead to political backlash from countries in which companies are largely owned by the government. With the current world tensions towards the United States—mainly in response to the Iraq war—enacting laws that seem imperialistic and restrictive towards non-market based economies might exacerbate these anxieties. FINSA also has the extraterritorial effect of making foreign companies who plan to invest in the United States hesitant about allowing any ownership by that government. Therefore, Congress should remove the required investigation of foreign government-controlled transactions not only because it is unnecessary, but also to prevent the ensuing political backlash that would result if the world perceives FINSA as another U.S. attempt to westernize non-market based economies.

133. This unnecessary accountability comes from the fact that the only way to avoid the mandatory CFIUS investigation is to have both the Secretary of the Treasury and the head of the lead agency jointly determine that the transaction will not impair national security. 50 U.S.C.A. app. § 2170(b)(2)(D)(i). Given the politics that will likely be involved in a foreign-government controlled transaction, it is unlikely that any of these transactions will be able to avoid the investigation phase by having the Secretary of the Treasury and the head of the lead agency accept the accountability of a possible political backlash.

134. *Id.* § 2170(b)(2)(B)(i)(I).

135. *See* Byrne, *supra* note 52, at 868 (discussing critiques of the Byrd Amendment).

136. *See, e.g.*, Cuban Liberty and Democratic Solidarity Act, 22 U.S.C. §§ 6021–91 (1996) (detailing the formal boycott against Cuba).

B. Creation of a Separate Committee to Review All FDI Transactions and Initiate CFIUS Reviews

Congress should create a separate committee—in addition to the CFIUS—to study all FDI, report the findings to Congress, and initiate CFIUS reviews. CFIUS reviews have increased exponentially since the DP World controversy,¹³⁷ further depleting the CFIUS's limited resources. By requiring the CFIUS to conduct a study of FDI, and allowing any member to initiate a CFIUS review, FINSAs increase the responsibility of the CFIUS, which could cause the CFIUS to lose focus on investigating the transactions already in front of it.

Separating the functions of investigating specific transactions and reviewing all FDI transactions to determine which ones should be subject to further investigation will create a more efficient and effective process. Assigning a separate committee to initiate CFIUS reviews will also mitigate any ulterior motives that could affect CFIUS members, such as reducing workloads, political motivations, and favoritism of certain companies. To prevent these same motives from affecting the initiation process, Congress should require a majority of CFIUS members to approve a review and construct this separate committee with different members. Not only will this new committee increase the focus of the CFIUS, it will also serve as a check on the CFIUS's activities.

This new committee should be composed of members that have more of a focus on national security than the CFIUS. Instead of the Secretary of the Treasury as chairperson, the Secretary of Homeland Security should head this committee. Other members should include the Secretary of Defense, along with the directors of the CIA and the FBI. The goal of this committee would be to better define which transactions actually could have a direct impact on critical infrastructure and technologies in the United States. By forming a separate committee, the CFIUS would be allowed to focus only on the specific review and possible investigation of transactions forwarded by this committee or voluntarily submitted by the companies in the transaction, instead of the current system, which requires the CFIUS to catch any suspicious transactions and subject them to a mandatory review.

C. Rework the Evergreen Provision to Only Include Intentional Fraud by the Parties to the Covered Transaction

Congress should allow the President or the CFIUS to reopen a covered transaction only if they find intentional misconduct on the part of the parties to a covered transaction. FINSAs allow the CFIUS to reopen a transaction after prior dismissal if “any party to the transaction . . . omitted material information, including material documents.”¹³⁸ This provision puts the burden of determining what information the CFIUS should consider material on the parties to the transaction, and allows the CFIUS to ignore the binding effect of a review whether the party intentionally omitted the material or not.

FINSAs cripples the effectiveness of the voluntary notice because, without requiring intentional omission, a party to a covered transaction gains no security by voluntarily

137. See *supra* note 118 (noting the significant increase in filings, second-stage investigations, and withdrawals before FINSAs became effective).

138. 50 U.S.C.A. app. § 2170(b)(1)(D)(ii).

notifying the CFIUS of the transaction. Instead the party will still be left open to another review through no fault of its own. Therefore, little incentive exists for a foreign company that believes it may be subject to a CFIUS review to submit voluntary notification. The burden of requesting material information should lay with the CFIUS. Then, if a party fails to submit the information, the CFIUS could charge the foreign company with an intentional omission.

The evergreen provision's current placement of the burden to determine what information the CFIUS will find material on the parties to a transaction is inefficient and unfair. By forcing the CFIUS to notify the foreign company of what is considered material and only allowing a past inspection to be reopened if this material information is intentionally omitted, the CFIUS will still be able to catch companies with nefarious intentions. At the same time, this approach will preserve the *res judicata* effect of an investigation. This is vital to the voluntary notification system.

The CFIUS should have to prove intent by clear and convincing evidence in order to reopen a review. Also, the material information required by the CFIUS needs to be clear and specific even though the individual companies may be in a better position to know what is material. Both of these requirements are critical to provide incentives for companies to submit their transactions if the CFIUS is to follow the current system of voluntary notification.

D. The Nature of a CFIUS Review Requires More Secrecy Than Allowed by FINSA

Congress needs to do more to protect the information gathered in a CFIUS review. FINSA allows too many people outside the covered transaction to view the material contained in a covered transaction.¹³⁹ If the public gets notification of a CFIUS review, the parties involved could get negative publicity that could lead to other companies refusing to do business with them.

The more people who have access to the proprietary information contained in a CFIUS review, the higher the chances of the information leaking to the public. The possibility of the public attaining information will increase the risks for a foreign company investing in the United States, thereby increasing the costs of FDI. By limiting the people who see this information to the CFIUS, the President, and one member of each chamber of Congress, Congress will be able to achieve increased transparency of CFIUS's reviews without creating an undue risk to the parties of a covered transaction.¹⁴⁰ Similar to the reasoning behind the attorney-client privilege, for voluntary disclosure to be effective, the company must believe that the CFIUS will protect its disclosure of confidential information. If a company has reason to believe that the CFIUS, or any other governmental officials, could leak the information in a CFIUS investigation to the public, it could severely cripple the voluntary notification system.

139. *See id.* § 2170(b)(3)(C)(iii) (listing the members of Congress to whom certifications and reports from the CFIUS are transmitted); *id.* § 2170(g)(2)(B) (stating that proprietary information should be submitted to a committee of Congress "only when the committee provides assurances of confidentiality").

140. Such information could include any director's or large shareholder's military and government service records, along with passport numbers and national identification numbers. *See* Kirchgassner, *supra* note 132 (discussing the proposed rules that would require directors and large shareholders to submit this personal information to the CFIUS).

V. CONCLUSION

As this Note describes, political tensions have marked the history of FDI inflow into the United States and the regulation that accompanies it. Congress has consistently responded to real and perceived national threats by drafting legislation allowing the President to respond to these threats. One approach, discussed in this Note, has been to monitor FDI that could possibly affect the national security of the United States. From the original enactment of the Defense Production Act of 1950 to the current FINSA regime, FDI legislation has increased the monitoring power of the President. Predicting the next national security threat that will arise may be impossible so it was necessary to create formalized guidelines to assess the possible national security impact of FDI. FINSA attempts to address this need by statutorily mandating the FDI review procedure.

Congress needed to formalize the process by which the CFIUS reviewed FDI transactions to make the review more predictable for the parties involved and the observers trying to predict the outcome. FINSA accomplished this goal but, in the process, unintentionally dissuaded FDI inflow to the United States. As this Note discussed, Congress could have accomplished the intended results of FINSA without creating as much hostility towards FDI and making the process of review more efficient.

It remains to be seen what the overall effect of FINSA will be on the United States's ability to respond to a threat while at the same time remaining competitive in the global FDI market. While many of the modifications to the CFIUS review process will allow the CFIUS a quicker, more informed decision on whether FDI may affect national security, the increased disclosure and the ability to reopen a completed review may cripple the ability of the United States to attract foreign investors.

In light of the increased globalization of financial markets, foreign companies have many more choices on where to invest their capital. Complying with FINSA, combined with the enhanced reporting requirements of Sarbanes-Oxley, has made FDI in the U.S. economy much more expensive and less attractive to foreign companies. Congress needs to address these concerns before the increased cost of FDI irreparably harms the U.S. economy. Instead of waiting for the next public outcry on a perceived threat to national security, Congress needs to take a proactive approach to FDI regulation.