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FOREIGN INVESTMENT AND NATIONAL SECURITY ACT OF 2007

JUNE 13, 2007.—Ordered to be printed

Mr. DODD, from the Committee on Banking, Housing, and Urban Affairs, submitted the following

R E P O R T

[To accompany S. 1610]

The Committee on Banking, Housing, and Urban Affairs, having had under consideration an original bill (S. 1610), to ensure national security while promoting foreign investment and the creation and maintenance of jobs, to reform the process by which such investments are examined for any effect they may have on national security, to establish the Committee on Foreign Investment in the United States, and for other purposes, reports favorably thereon and recommends that the bill do pass.

I. PURPOSE

Section 721 of the Defense Production Act, also known as the Exon-Florio Amendment ("Exon-Florio"), established a statutory framework for the United States Government to analyze foreign acquisitions, mergers, and takeovers (hereafter "transactions") of privately-owned entities within the United States to determine whether such transactions affect the national security of the United States. The Foreign Investment and National Security Act of 2007 (hereafter "the Act") amends Section 721 for the purpose of strengthening the process by which such transactions are reviewed and, when warranted, investigated for national security concerns. In addition, the Act provides for a system of Congressional notification so that Congress is able to conduct proper oversight of the national security implications of foreign direct investment in the United States to ensure that it is beneficial and has no adverse impact on U.S. national security.

59–010

II. BACKGROUND

In 1988, Section 721 of the Defense Production Act of 1950, Exon-Florio, was passed in response to congressional concerns about the impact on national security of certain foreign acquisitions of United States corporate entities. Exon-Florio established a process by which proposed foreign transactions would be analyzed by the Executive Branch of the United States Government (specifically, "the President or the President's designee") to determine whether such transactions could pose a threat to U.S. national security. Historically, U.S. Presidents have assigned the responsibility for implementing Exon-Florio to the Committee on Foreign Investment in the United States (hereafter, "CFIUS"), a multi-agency organization established by Executive Order in 1975. Exon-Florio was amended in 1992 by the so-called "Byrd Amendment" to require that all foreign transactions involving a foreign government-owned or controlled entity would be subject to a more stringent analytical process.

CFIUS Process.—Exon-Florio established a four-step process for examining a foreign acquisition: (1) voluntary notice by the companies; (2) a 30-day review to identify any national security concerns; (3) an optional 45-day investigation to determine whether identified concerns require more extensive mitigation efforts or a recommendation to the President for possible action; and (4) a Presidential decision to permit, suspend, or prohibit an acquisition in those instances where potential national security concerns cannot be mitigated.

During the standard review period, CFIUS conducts a national security analysis to determine whether any national security issues exist with a particular transaction, and if so, whether those concerns can be mitigated. In practice, companies sometimes "pre-file" with CFIUS, providing information about the transaction in order to ensure that CFIUS has all necessary information during the formal review period. Further, companies may withdraw from the formal review in order to address concerns on the condition that they re-file promptly with CFIUS or abandon the transaction. Therefore, while the vast majority of CFIUS transactions are approved by the end of the 30-day review, the total time devoted to transactions is sometimes longer. If national security concerns have not been resolved during the 30-day review, CFIUS can extend its review to a second stage 45-day investigation. At the end of a 45-day investigation, the transaction is sent to the President for a decision, accompanied by a CFIUS report and recommendation. Any transaction that goes to the President must be reported to Congress. Transactions that enter investigation may also be terminated before reaching the President, with the companies voluntarily withdrawing and abandoning the investment. Presidential decisions are also avoided in cases where a mitigation agreement has been reached during the investigation period and the companies withdraw from investigation and immediately re-file.

Mitigation agreements, which are contracts with CFIUS or CFIUS agencies entered into by the parties to the transaction, are an important element of the CFIUS review and investigation process. These agreements are intended to mitigate possible national security threats posed by a transaction short of requiring that the

parties abandon the transaction altogether. The Department of Defense (hereafter "DOD") has for many years used various types of mitigation agreements under existing DOD authority and regulations, such as the National Industrial Security Program Operating Manual (NISPOM) to address the impact of foreign ownership and control over companies that have classified contracts with the Pentagon or intelligence agencies. In recent years, the Departments of Justice and Homeland Security have also done so.

Of necessity, the reviews and investigations, which contain classified evaluations of national security vulnerabilities as well as extensive proprietary business information, remain highly confidential. Given this lack of transparency, there have been concerns over the years about CFIUS's accountability to Congress and to the public, particularly with regard to fundamental questions of whether CFIUS policies are consistent with the statute, executive orders, and regulations that govern its operations and whether CFIUS policies are applied consistently from transaction to transaction.

CFIUS has explicit authority in the regulations (31 CFR 800.601(e)) to reopen a case in the event that CFIUS discovers there has been a material misstatement or omission in the information provided by the parties to the transaction. CFIUS agencies also have all of the remedies that are normally available under a contract in order to enforce the terms of the mitigation agreement. In addition, in a large number of CFIUS cases, and particularly those involving the Defense Department, CFIUS approvals can be effectively nullified simply by ending the federal agency's contracting relationship with the company. Defense-related contracts are often a central element of CFIUS transactions, so the threat of being denied a contract going forward ensures compliance with the terms of mitigation agreements or other conditions agreed to by the foreign investor.

Congressional Oversight Difficult within Existing Procedures.—Since Exon-Florio went into effect, transactions have been reviewed in a highly confidential manner in part to prevent the public release of sensitive proprietary information. The practical effect of conducting transactional reviews in this manner, however, has made congressional oversight and public understanding of Exon-Florio extremely difficult.

Recent Concerns about CFIUS Process.—In February 2004, after a series of specific transactions brought to the forefront the difficulty in conducting thorough oversight by Congress of the security review process, then chairman of the Committee on Banking, Housing, and Urban Affairs, Senator Shelby, and then Ranking Member of the Committee, Senator Sarbanes, requested a study by the Government Accountability Office of the implementation of Exon-Florio. That study was completed in September 2005.

In its 2005 report, GAO offered a number of recommendations for congressional action. Those recommendations include more clearly delineating the factors to be considered in CFIUS reviews and investigations; addressing the time constraint problem by replacing the existing review and investigation phases; and providing for greater transparency by reviewing the existing Exon-Florio provision pertaining to notifications to Congress. Finally, to address congressional concerns regarding the status of cases withdrawn from CFIUS review for the purpose of "stopping the clock," GAO rec-

ommended that Congress require the Secretary of the Treasury to establish more formal and stringent criteria to govern such withdrawals, including a process for tracking withdrawn cases.

While GAO was conducting its examination, but prior to the release of its findings, the China National Offshore Oil Corporation (CNOOC) announced on June 23, 2005, its intention to acquire Unocal, a U.S. energy company. This announcement resulted in increased congressional concerns regarding foreign acquisitions of U.S. energy companies. While the CNOOC bid was withdrawn prior to that proposed transaction's review by CFIUS, the Chinese company's bid led many members of Congress to raise questions about the transfer of ownership or control of certain sectors of the U.S. economy to foreign companies, especially to foreign companies located within or controlled by countries the governments of which might not be sympathetic to U.S. regional security interests.

On October 6, 2005, the Committee on Banking, Housing, and Urban Affairs conducted a hearing into the findings of the GAO report. Testifying on behalf of GAO were Ms. Katherine Schinasi, Managing Director for Acquisition and Management, and Ann Calvaresi, director of Industrial Base Issues. Discussion between the GAO witnesses and Banking Committee members further highlighted deficiencies in implementation of Exon-Florio and the level of dissatisfaction with the lack of communication between CFIUS and the appropriate oversight committees of Congress. That hearing was followed on October 20, 2005 by another hearing that allowed the Banking Committee to hear directly from many of the agencies that comprise CFIUS, including the Department of the Treasury, which has the lead role in implementing Exon-Florio, as well as private sector representatives.

In late January 2006, congressional offices became aware of the proposed acquisition of terminal operations at a number of U.S. maritime ports by Dubai Ports World (hereafter "DPW"), an established port operator owned by the government of the Emirate of Dubai. Concern within Congress about a transaction that would transfer control of terminal operations to a company owned by a Persian Gulf emirate through whose financial system funds had been transferred to the terrorists who carried out the September 11, 2001 attacks upon the United States, and that had been a central conduit for nuclear weapons components being smuggled to hostile regimes, provided further impetus for review of the manner in which foreign transactions were being analyzed by CFIUS. That senior White House officials, and the Secretaries and Deputy Secretaries of the Departments of the Treasury and Homeland Security were unaware of the Dubai Ports World transaction, combined with the fact that this transaction was not subjected to a formal investigation in violation of the Byrd Amendment, compounded congressional concerns about the nature of the underlying transaction.

In response to Congressional criticism related to the DPW case in 2006, CFIUS agencies pledged to address flaws in the CFIUS process identified by Congress. There were 113 transactions filed with CFIUS in 2006, up 74 percent from the previous year. Because companies seek CFIUS consideration voluntarily, this increase reflected greater sensitivity among foreign investors, which in turn may reflect a more aggressive stance from CFIUS. CFIUS conducted seven second-stage investigations, the same number of

investigations that had been conducted over the previous 5-year period. There was also an increase in the number of companies withdrawing from CFIUS reviews and investigations, which suggests a higher degree of scrutiny: either companies withdrew for the purpose of terminating the underlying transaction or in order to restructure the transaction to address CFIUS concerns.

The number of cases in which CFIUS approved transactions with conditions attached through mitigation agreements also increased. CFIUS has also increased its Congressional outreach, notifying the Congressional leadership and committees of jurisdiction upon completion of CFIUS action on each transaction. Treasury also finally produced the long-overdue quadrennial report on CFIUS-related issues as mandated by the Defense Production Act of 1950.

Despite these changes after the DPW case, CFIUS has not fully addressed key problems identified by Congress. Key concerns raised by the DPW case included a lack of senior-level involvement in CFIUS decision-making, failures in communications to Congress, and ambiguity in the standards by which CFIUS determines the need for second-stage investigations as well as in the procedures for seeking, monitoring, and enforcing mitigation agreements.

In response to continued concerns regarding implementation of Exon-Florio, on April 30, 2006, the Committee on Banking, Housing, and Urban Affairs reported an original bill (S. 109–264) which made significant amendments to Section 721 to strengthen the review and oversight process. Senate bill 109–264 passed the Senate on July 26, 2006. On the same day the House passed its own reform legislation (H.R. 5337). No further action occurred on the bills prior to the adjournment of the 109th Congress.

On February 28, 2007, The House once again passed legislation amending Section 721 to strengthen the foreign investment review process (H.R. 556—The National Foreign Investment Reform and Strengthened Transparency Act of 2007). On May 16, 2007, the Senate Committee on Banking, Housing and Urban Affairs convened to consider and report an original bill (The Foreign Investment and National Security Act of 2007) proposed by Chairman Christopher J. Dodd, after working closely with Ranking Member Richard Shelby and drawing upon the extensive work that members of the Committee had undertaken on this subject in the 109th Congress.

The Committee believes that Senate passage of the Committee's reported bill will not only implement needed reforms and thereby strengthen national security, but also provide more transparency and predictability to the CFIUS process that is important to ensuring that the U.S. economy continues to benefit from the fruits of foreign direct investment.

III. MAJOR PROVISIONS OF THE BILL

The Foreign Investment and National Security Act of 2007—

1. Establishes the membership of the Committee on Foreign Investment in the United States (CFIUS) in statute.

2. Strengthens the role of the Director of National Intelligence (hereafter "DNI") by making the DNI an ex-officio member of CFIUS and requiring that the Director undertake a thorough analysis of the transaction with respect to any national security implications, engage the intelligence community, and report the DNI's

findings to the committee within 20 days of the commencement of the CFIUS review. Requires the DNI to update CFIUS with any additional relevant intelligence information that becomes available during the course of a review and/or investigation.

3. Mandates the designation of a lead agency or agencies for each covered transaction, in addition to the Treasury Department, charged with negotiating any mitigation agreement or other conditions to ensure that national security is protected, and for follow up compliance with the terms of the agreement after the transaction has been approved by CFIUS.

4. Provides for the 30-day review of covered transactions by CFIUS to determine its effects on national security, and for sign-off at the assistant secretary-level (or above) that there is no threat to national security by the proposed transaction.

5. Provides for the 45-day investigation of covered transactions that threaten to impair national security, including transactions involving foreign government-owned companies and control of critical infrastructure, and for sign off at the Deputy Secretary level that there is no threat to the national security by the proposed transaction.

6. Provides for certain exceptions for the requirement that a state-owned entity automatically go to the investigation stage if the Secretary or Deputy Secretary of the Treasury, and the equivalent level official in the Lead Agency, determine after review of the transaction that national security will not be impaired by the transaction.

7. Requires assessment of a country's compliance with U.S. and multilateral counter-terrorism, non-proliferation and export control regimes for acquisitions by state-owned companies in the investigation stage.

8. Provides authority to the President to suspend or prohibit a covered transaction if there is credible evidence that such transaction threatens to impair U.S. national security.

9. Provides authority to CFIUS, or the lead agencies acting on behalf of CFIUS, to negotiate, impose and enforce conditions necessary to mitigate any threat to national security related to a covered transaction.

10. Adds to the list of factors that CFIUS should consider in the conduct of its reviews and investigation to include among other things consideration of the potential impact of a transaction on critical infrastructure, energy assets, or critical technologies.

11. Provides for written notice, to the Congress at the conclusion of the CFIUS process for both reviews and investigations, providing details about the transaction, including written assurance that the transaction does not threaten to impair national security or that any initial concerns have been mitigated through binding agreements between the parties and CFIUS (or the lead agency or agencies designated by the Chairman of CFIUS.).

12. Provides for detailed annual reports to Congress on the activities of CFIUS, including information concerning the transactions that have been reviewed or investigated during the previous 12 months.

13. Provides for an investigation by the Inspector General of the Department of Treasury to determine why the department failed to comply with provisions of the Defense Production Act with respect

to certain reporting requirements related to potential industrial espionage or coordinated strategies by foreign parties with respect to U.S. critical technology by foreign parties.

14. Provides for the issuance of regulations and guidance to carry out the provisions of the Act.

IV. DESCRIPTION OF THE LEGISLATION

The Committee's reported bill seeks to address legitimate concerns about CFIUS procedures and policies, while also providing statutory clarity so that a climate favorable to foreign investments is maintained. It enshrines in statute a process by which all transactions that have been temporarily withdrawn from CFIUS are closely monitored and establishes a clear process by which any potential national security issues can be addressed together with a clear and permanent process of post-transaction monitoring.

The bill would strengthen the Administration's accountability, enhance Congress's ability to perform its necessary oversight of the CFIUS process, better protect classified and proprietary business information utilized by CFIUS—all without creating any unnecessary barriers to normal investment transactions in the United States. The bill mandates an intelligence assessment of each CFIUS transaction, led by the Director of National Intelligence (DNI)—who would serve as an ex officio member of CFIUS with no policy role. The Committee understands that CFIUS monitors the press and other sources for information on transactions and on occasion consults with parties about those transactions.

The bill also provides for the designation of a lead agency for each transaction to oversee the process along with the CFIUS chairman—The Secretary of Treasury or his designee. The Committee expects the Treasury Department to make its designation of the lead agency or agencies for each transaction based upon the nature of the national security threat posed by the transaction and the expertise of the agency or agencies in understanding and mitigating such threat. The Committee expects CFIUS to continue to monitor covered transactions that may have national security implications. The Committee also expects all relevant government agencies to cooperate with the information collection process conducted by CFIUS and the DNI with respect to information that is relevant to CFIUS's national security analysis. When the original Exon-Florio analysis was enacted into law, Congress made clear that "national security" is to be broadly defined. Access to relevant sources of information within the United States Government is critical for the ability of CFIUS to protect United States national security.

All approved CFIUS transactions must be certified by the CFIUS Chair (or designee) and designated lead agency head (or designee) to ensure that there is a clear and direct senior-level responsibility for CFIUS decisions.

Regarding the provision outlining the process for the development of the Director of National Intelligence's intelligence analysis, the bill reported by the Committee requires that the DNI provide its intelligence assessment to CFIUS members not later than 20 days from the commencement of the review of the transaction. The Committee expects that the DNI shall do a thorough job of pro-

viding CFIUS with intelligence analysis throughout the entire CFIUS process.

The legislation reinforces CFIUS's capacity to refuse, suspend, modify or reverse any transaction if a written notice of such transaction is not filed with CFIUS or if there is an intentional material omission or falsehood in connection with a completed CFIUS review or investigation, or an intentional material breach in any post-transaction mitigation agreement, and establishes a formal requirement that all filings with CFIUS must be complete and accurate to the best of the filing party's ability. Thus, the Committee establishes a clear signal that all violations of such notice certification should be considered in the context of Title 18, Section 1001, and all intentional breaches or misstatements could also lead to severe modification or divestment of an acquisition of a previously reviewed transaction at any time.

The bill establishes a mechanism by which CFIUS can unilaterally reopen a transaction that had previously been approved. The Committee expects that this authority will only be used in exceptional circumstances when no other remedies exist and where there has been an intentional breach that affects national security. For that reason, the bill requires important procedural safeguards to ensure that this authority is not used lightly—among other safeguards, it requires, for example, that the decision to reopen a case is made at the same level of seniority as is required in the bill for the approval of transactions. The bill makes clear that CFIUS can only reopen a transaction if these threshold tests are met. The Committee also expects CFIUS to use the so-called "evergreen" provision in exceptional cases when national security concerns can be addressed in no other way.

The Committee 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 ways that threaten the national security of those countries—will be reviewed closely for their national security impact.

The legislation establishes a system of briefings and annual reporting to Congress. Both in briefings and reporting, the Committee recognizes that, in addition to Congressional leadership and the committees of jurisdiction named in the legislation, CFIUS will be obligated to brief, and report to, other committees that have "jurisdiction over any aspect of" the covered transactions which are the subject of the briefing and/or reporting. The Committee also expects CFIUS agencies to keep state governors informed of any relevant information related to a covered transaction, particularly those involving critical infrastructure, where a governor or state agencies under his direction would have interactions with such infrastructure as a normal course of carrying out its duties to protect its citizens.

The Committee bill also establishes procedures for the creation, implementation, and monitoring of mitigation agreements. The Committee believes that mitigation agreements play a critical role

in the CFIUS process, allowing CFIUS to fully address national security concerns arising from a transaction without resorting to an outright rejection of the transaction when concerns arise. The Committee believes that mitigation agreements should address national security threats that arise as a result of the covered transaction, when those threats can not be adequately addressed by other areas of law or regulation. Specifically, mitigation agreements should not be considered the first option for addressing more general national security concerns, but rather should be focused on threats that arise directly from the transaction in those cases where other areas of law or regulation cannot adequately mitigate those threats.

The legislation mandates that heightened scrutiny be applied to transactions involving foreign government ownership and control. It requires either a second stage investigation for such transactions, or a Deputy Secretary level certification that the transaction poses no threat to national security. The Committee believes that acquisitions by certain government-owned companies do create heightened national security concerns, particularly where government-owned companies make decisions for inherently governmental—as opposed to commercial—reasons. But not all government acquisitions create the same degree of national security risk. This bill recognizes these differences by providing flexibility for the Executive branch to distinguish between foreign government investments. If a transaction by a state-owned entity either presents no threat to national security or when such threat can be addressed by a mitigation agreement, CFIUS has the flexibility to approve the transaction within the initial 30 days, subject to the procedural requirements described above. The Committee believes this flexibility is important in allowing CFIUS to focus its resources and efforts on those cases involving foreign governments that truly raise national security concerns.

V. SECTION-BY-SECTION ANALYSIS OF BILL

Section 1—This section establishes the short title of the bill as the "Foreign Investment and National Security Act of 2007" and sets forth the table of contents.

Section 2—This section amends Section 721 of the Defense Production Act of 1950 to reform and strengthen the way that acquisitions by foreign companies of companies operating in the United States are analyzed for with respect to their impact on United States national security.

Subsection (a) defines terms used throughout the bill: Committee, control, covered transaction, foreign government controlled transaction, critical infrastructure, critical technologies, and lead agency.

Subsection (b) establishes the method by which covered transactions are reviewed and investigated by the Committee on Foreign Investment in the United States to determine if they threaten to impair United States national security; establishes that any transaction involving a foreign government-controlled company or critical infrastructure must undergo an "investigation" by CFIUS unless the Chairman and designated lead agency head (or their designees) jointly determine that such transaction does not pose a national security threat; establishes the voluntary process for parties notifying CFIUS of a proposed transaction and a procedure for

treating transactions that are withdrawn from the CFIUS process by the parties to a transaction; establishes a procedure for the President and CFIUS to unilaterally initiate a review of a transaction, and to initiate a review of a previously reviewed transaction in certain exceptional cases; makes clear that national security reviews of transactions shall take no longer than 30 days and, if necessary, investigations that follow reviews shall take no longer than 45 days; describes reasons for a transaction to undergo an investigation; establishes that no review or investigation is complete until the chairman and designated lead agency head (or their designees) sign a certified notice or report (in the case of an investigation); specifies who in Congress shall receive the certified notices or reports related to approved transactions; provides for a thorough intelligence analysis coordinated by the Director of National Intelligence (DNI) of any threat to national security by any covered transaction and for the findings to be made available to CFIUS not later than 20 days after the review process has commenced; provides that the DNI shall be an ex-officio member of CFIUS with no policy role; and provides for notice of results of review or investigation to the parties by CFIUS; provides for regulations to implement changes to existing law.

Section 3—This section formally establishes the Committee on Foreign Investment in the United States; establishes its membership; specifies that the Secretary of the Treasury shall be the chairman and specifies that a lead agency or agencies with relevant expertise be designated for each transaction; provides discretionary authority to the President to add additional departments, agencies or offices to the Committee.

Section 4—This section amends Section 721(f) to add additional factors to be considered by CFIUS, including the impact of the transaction on the sale of military goods, equipment, or technology to any country identified by the Secretary of Defense as posing a potential regional military threat to the interests of the United States, the security related impact of a transaction related to critical infrastructure in the United States, potential effects on United States critical technology and major energy assets, and the adherence of the parent country to its international nonproliferation obligations and its record of cooperation in counterterrorism efforts for investigations of acquisitions by state-owned companies.

Section 5—This section establishes that CFIUS, or lead agencies acting on behalf of CFIUS (which agencies may, like DOD or the Department of Commerce, have existing regulatory authority through which they can act independently of CFIUS) may enter into agreements with parties to a transaction to mitigate any threats to national security; establishes that CFIUS shall name appropriate lead Federal agencies to monitor, on behalf of CFIUS compliance with such agreements, negotiate any changes in such agreements on behalf of CFIUS and report back to CFIUS on compliance and modifications. This section also establishes a method of tracking transactions that are withdrawn from the review or investigation process as well as a process for setting interim protections on such transactions to address specific national security concerns.

Section 6—This section amends subsections (d) and (e) of 721 of the Defense Production Act related to actions by the President related to the CFIUS process. It provides broad authority to the

President, subject to certain conditions, to take such action for such time as he considers appropriate to suspend or prohibit a transaction by a foreign person or government that threatens to impair the national security of the United States. It provides for the Attorney General, upon the direction of the President, to seek appropriate relief, including divestment by the foreign party if no other remedy is available to protect the national security of the United States.

Section 7—This section establishes a broad new system for reporting information on CFIUS activities to Congress so that it may conduct appropriate oversight of the CFIUS. This includes a mechanism for Congress to request a detailed, classified briefing on a transaction; and affirmative protections for proprietary business information. The section requires CFIUS to file annual reports with Congress that contain information on transactions handled by the CFIUS, cumulative and trend analysis of transactions by business sector and country of origin, information on security and mitigation agreements. This section also incorporates into the annual reporting the contents of the previously required quadrennial reporting on foreign industrial espionage in the U.S. and on foreign attempts to control a particular U.S. business or industrial sector, and requires a report on investments in the U.S. by countries that do not ban foreign terrorist organizations and by countries that support the boycott of Israel. The quadrennial report is repealed as redundant.

Section 8—This section makes clear that parties to a transaction must certify that the information they file with CFIUS is complete and correct.

Section 9—This section directs the President to cause regulations to be issued to carry out the requirements of Section 721, and specifies that to the extent possible they minimize paperwork burden and coordinate new reporting requirements with existing ones.

Section 10—This section clarifies that no portion of the bill should be construed as affecting or altering other existing law or regulation.

Section 11—This section establishes an effective date 90 days after enactment.

VI. HEARINGS

The Committee on Banking, Housing, and Urban Affairs held the following public hearings on implementation of the Exon-Florio Amendment to the Defense Production Act of 1950:

October 6, 2005 A Review of the CFIUS Process for Implementing the Exon-Florio Amendment

Witnesses: Ms. Katherine Schinasi, Managing Director, Acquisition and Sourcing Management, U.S. Government Accountability Office; Ms. Ann Calvarese Barr, Director, Industrial Base Issues, U.S. Government Accountability Office.

October 20, 2005 Implementation of the Exon-Florio Amendment and the Committee on Foreign Investment in the United States

Witnesses: The Honorable James Inhofe, United States Senator; The Honorable Robert Kimmitt, Deputy Secretary, Department of the Treasury; The Honorable David

A. Sampson, Deputy Secretary, Department of Commerce; The Honorable Stewart Baker, Assistant Secretary for Policy, Department of Homeland Security; The Honorable E. Anthony Wayne, Assistant Secretary for Economic and Business Affairs, Department of State; The Honorable Robert McCallum, Acting Deputy General, Department of Justice; The Honorable Peter Flory, Assistant Secretary for International Security Policy, Department of Defense; The Honorable Patrick A. Mulloy, U.S.-China Economic and Security Review Commission; Mr. David Marchick, Partner, Covington and Burling.

March 2, 2006, Continued Examination of Implementation of the Exon-Florio Amendment: Focus on Dubai Ports World's Acquisition of P&O

Witnesses: The Honorable Robert Kimmitt, Deputy Secretary, Department of the Treasury; The Honorable Eric Edelman, Under Secretary for Policy, Department of Defense; The Honorable Robert Joseph, Under Secretary for Arms Control and International Security, Department of State; The Honorable Stewart Baker, Assistant Secretary for Policy, Department of Homeland Security.

VII. COMMITTEE CONSIDERATION

The Committee on Banking, Housing, and Urban Affairs met in open session on May 16, 2007, and ordered the bill reported, without amendment.

VIII. CONGRESSIONAL BUDGET OFFICE COST ESTIMATE

Section 11(b) of the Standing Rules of the Senate, and Section 403 of the Congressional Budget Impoundment and Control Act, require that each committee report on a bill contain a statement estimating the cost of the proposed legislation. The Congressional Budget Office has provided the following cost estimate and estimate of costs of private-sector mandates.

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, DC, May 25, 2007.

Hon. CHRISTOPHER J. DODD,
Chairman, Committee on Banking, Housing, and Urban Affairs, United States Senate, Washington, DC.

DEAR MR. CHAIRMAN: The Congressional Budget Office has prepared the enclosed cost estimate for the Foreign Investment and National Security Act of 2007.

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contact is Matthew Pickford.

Sincerely,

PETER R. ORSZAG,
Director.

Enclosure.

Foreign Investment and National Security Act of 2007

The legislation would amend the Defense Production Act of 1950 to establish in law the Committee on Foreign Investment in the United States (CFIUS). The committee would consist of at least

nine permanent members with seven full members, including the Secretaries of the Treasury, Homeland Security, Commerce, Defense, State, and Energy, as well as the Attorney General and two ex-officio members including the Secretary of Labor and the Director of National Intelligence to coordinate the review of foreign investment in the United States that involves national security or critical infrastructure. The legislation would formalize and expand the review and investigation process. In addition, the legislation would require specific reports by the Department of the Treasury on the previous work of CFIUS and on foreign investment in the United States.

CBO expects that complying with the bill's provisions would increase the administrative expenses of some federal agencies, including the Department of the Treasury, but because of the confidential nature of the CFIUS review process, the number of agencies involved, and the confidential information needed to prepare an estimate for some provisions of the legislation, CBO cannot determine a precise estimate of the likely total costs of this bill. Additional costs over the 2007–2012 period, however, would generally come from agencies' salary and expense budgets which are subject to annual appropriation. Such costs would probably total at least a few million dollars per year.

Enacting the legislation would likely increase collections of civil penalties for the violations related to the review process. Such collections are recorded in the budget as revenues and deposited in the Treasury. CBO estimates that the additional collections of civil penalties would not be significant because of the relatively small number of cases likely to be involved. Enacting the bill would not affect direct spending.

The legislation contains no intergovernmental or private-sector mandates as defined in the Unfunded Mandates Reform Act and would not affect the budgets of state, local, or tribal governments.

On February 16, 2007, CBO provided a cost estimate for H.R. 566, the National Security Foreign Investment Reform and Strengthened Transparency Act of 2007, as ordered reported by the House Committee on Financial Services on February 13, 2007. The two bills are concerned with CFIUS but have some different provisions. H.R. 566 would authorize the appropriation of $10 million annually over the 2008–2011 period. The Senate legislation does not authorize the appropriation of a specific amount to implement the CFIUS responsibilities.

The CBO staff contact for this estimate is Matthew Pickford. This estimate was approved by Peter H. Fontaine, Deputy Assistant Director for Budget Analysis.

IX. REGULATORY IMPACT STATEMENT

In accordance with paragraph 11(b), rule XXVI, of the Standing Rules of the Senate, the Committee makes the following statement concerning the regulatory impact of the bill.

The bill seeks to ensure that certain transactions involving companies owned or controlled by foreign governments undergo a thorough investigation to determine whether the national security would be impacted by the transactions. While the bill gives discretion to CFIUS to forego investigations under certain limited circumstances, it could nevertheless entail the production of more doc-

umentation by involved corporate entities than would otherwise have been required.

The requirement established in the bill under (b)(2)(B) that foreign transactions involving U.S. critical infrastructure be subjected to an investigation unless national security concerns have been previously addressed through conclusion of a mitigation agreement could entail costs to both the government, charged with implementing the provisions of the bill, and the corporate entities charged with complying.

The Congressional Budget Office Cost Estimate prepared for this bill notes that enactment of the legislation "would likely increase collections of civil penalties for the violations related to the review process" . . . "CBO estimates that the additional collections of civil penalties would not be significant because of the relatively small number of cases likely to be involved."

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