
Policy Recommendations: Improving the Implementation of Exon-Florio

Does Exon-Florio need changing? As discussed in chapter 2, members of Congress have attempted to amend the Exon-Florio Amendment a number of times, including in 2005. Moreover, at the time of this writing, in the wake of the Dubai Ports World (DP World) controversy, there has been a flood of more than 20 bills introduced in Congress that would reform the Committee on Foreign Investment in the United States (CFIUS), prohibit DP World from acquiring Peninsular and Oriental Steam Navigation Company (P&O), or prohibit foreign ownership of ports and other critical infrastructure. Some earlier reform efforts have been successful, such as the Byrd Amendment in 1993, but most have never been considered or debated even in a congressional committee. Just as Fujitsu's attempt to acquire Fairchild and Sir James Goldsmith's attempt to buy Goodyear led to the adoption of the original Exon-Florio Amendment, a high-profile transaction often catalyzes members of Congress to seek changes to the amendment. The Byrd Amendment, which, among other things, requires mandatory investigations for acquisitions by foreign government-controlled firms, was introduced in the wake of the controversy over the 1992 attempt by Thomson-CSF, a French firm, to take control of LTV Aerospace and Defense Corporation, then a world leader in missile technology. At the time, the French government owned 60 percent of Thomson-CSF's shares, and controlled 75 percent of its voting stock.¹

1. *National Defense Authorization Act*, 102nd Congress, 2nd sess., *Congressional Record* 138 (September 18, 1992): S 14052.

Congressional pressure related to the case led Congress to pass the Byrd Amendment.²

Two events preceding the Dubai Ports controversy—the IBM sale of its personal computer division to the Chinese firm Lenovo, the China National Offshore Oil Corporation (CNOOC) offer to buy Unocal—similarly inspired a number of members of Congress to amend Exon-Florio. Responding to the CNOOC transaction, in August 2005 senators James Inhofe and Richard Shelby each offered sweeping amendments. The Inhofe Amendment would have transferred the chairmanship of CFIUS to the Department of Defense (DOD), broadened the criteria CFIUS considers to include “economic security,” and given Congress broad powers to override presidential approval of specific transactions. The Shelby bill retained many of the elements of the Inhofe Amendment but preserved the Department of the Treasury as the CFIUS chair and maintained “national security” as the sole criterion CFIUS should consider.³

The Dubai Ports controversy has led members of Congress to propose even broader legislation that would not only reform CFIUS but also make broad sections of the US economy off-limits to foreign ownership. Duncan Hunter (R-CA), chairman of the House Armed Services Committee, and 15 other members of the House of Representatives introduced a bill that would prohibit foreign ownership of a broad array of assets defined as “critical infrastructure” by the DOD, expand the criteria CFIUS would need to consider when evaluating transactions, and require broad notification of Exon-Florio reviews by CFIUS, including publication in the *Federal Register* of any transaction that moves to the “investigation stage.”⁴ As discussed below, if the Department of Homeland Security’s (DHS) current list of “critical infrastructure” activities were used to define what would be off-limits for foreign investment, we estimate that the criteria would cover more than 24 percent of the US economy. This would be a huge segment of the economy to bar to foreign investment. Moreover, in some sectors considered critical infrastructure, there is already a large foreign presence that has created no security concerns.

If Congressman Hunter’s bill were to become law, foreign firms might be forced to sell their US subsidiaries, with no apparent gain to US secu-

2. The Byrd Amendment was actually passed in two stages. Its provisions are found in the *National Defense Authorization Act for Fiscal Year 1993*, Public Law 102-484, *US Statutes at Large* 106: 2315; and *Defense Production Act Amendments of 1992*, Public Law 102-558, *US Statutes at Large* 106: 4198.

3. For a general discussion of these issues, see David M. Marchick and Edward M. Graham, “A Misplaced Curb on Investment,” *Financial Times*, October 5, 2005.

4. *To Promote the National Defense by Establishing Standards for the Ownership, Operation and Management of Critical Infrastructure in the United States, and for Other Purposes*, HR 4881, 109th Congress, 2nd sess., March 2006. Introduced by Representative Duncan Hunter (R-CA) (hereinafter, Hunter bill).

urity and almost sure harm to the US economy. (Details on US employment, and employment by foreign-owned firms, in those sectors and subsectors that correspond to the critical infrastructures list prepared by DHS are provided in an appendix to this chapter.) Similarly, Senators Menendez (D-NJ), Clinton (D-NY), Lautenberg (D-NJ), Boxer (D-CA), and Nelson (D-NJ) introduced a bill that would prohibit any mergers, acquisitions, or takeovers by companies owned or controlled by a foreign government of any US company involved in leasing, operating, managing, or owning real property or facilities at a United States port.⁵ Senator Norm Coleman (R-MN) introduced a bill that would require any foreign government-owned entity to establish a separate US corporation, with a majority of US citizens on the board of directors, for any investment in “critical infrastructure.”⁶ Senator Coleman’s bill gave existing foreign government-owned companies in sectors considered “critical infrastructure” six months to comply with the new corporate restrictions.⁷ In light of the active consideration of proposals to reform CFIUS, or restrict foreign investment in the United States, we discuss and analyze a number of ideas, some good and some bad, for improving or reforming the CFIUS process.

While a number of the bills mentioned above would have extremely negative implications for the United States, several improvements to the CFIUS process should be considered. The national security criteria that CFIUS considers should be expanded to cover critical infrastructure; CFIUS’s interactions with Congress, particularly regarding information sharing, should be more clearly defined; and its definitions of what constitutes control of a firm should be clarified. All of these changes can and should be made without compromising CFIUS’s ability to maintain confidentiality in the process.

5. *Port Security Act of 2006*, S 2334, 109th Congress, 2nd sess., February 2006. Introduced by Senator Robert Menendez.

6. *The Foreign Investment Transparency and Security Act of 2006*, S 2374, 109th Congress, 2nd sess., February 2006 (introduced by Senator Norm Coleman). See also *To Prohibit Entities Owned or Controlled by Foreign Governments from Carrying Out Operations at Seaports in the United States*, HR 4817, 109th Congress, 2nd sess., February 2006 (introduced by Congressman J. D. Hayworth). The Hayworth bill prohibits an entity that is owned or controlled by a foreign government from operating or entering into contract to operate US seaports. See also *Foreign Investment Security Improvement Act*, HR 4833, 109th Congress, 2nd sess., February 2006 (introduced by Congressman J. Doolittle). The Doolittle bill requires that only US persons may control security operations at seaports in the United States or enter into agreements to conduct such security operations. Finally, see *To Prohibit Entities Owned or Controlled by Foreign Governments from Conducting Certain Operations at Seaports in the United States, and from Entering into Agreements to Conduct Such Operations*, HR 4839, 109th Congress, 2nd sess., March 2006 (introduced by Congressman C. Shaw).

7. *Foreign Investment Transparency and Security Act of 2006*, S 2374, 109th Congress, 2nd sess., February 2006 (introduced by Senator Norm Coleman).

Covering Critical Infrastructure

As noted in chapter 2, the Exon-Florio Amendment identifies five factors that the president, or the president's designee, may take into account in determining "the requirements of national security."⁸ These factors cover

- domestic production needed for projected national defense requirements;
- the capability and capacity of domestic industries to meet national defense needs;
- the control of domestic industries and commercial activity by foreign citizens, and its effects on the capability and capacity of the United States to meet national security requirements;
- the potential effects of a proposed or pending transaction on sales of military goods, equipment, or technology to any country to which restrictions should apply under various export control and nonproliferation laws, as deemed by the secretary of state;
- the potential effects of a proposed or pending transaction on US international technological leadership in areas affecting US national security.⁹

Omitted from this list is the primary focus of the DHS in CFIUS reviews: protection of critical infrastructure. Because of the flexibility of the Exon-Florio Amendment, and particularly since "national security" is not defined in the statute or regulations, CFIUS began to focus on critical infrastructure during the Clinton administration. It has intensified this focus since President Bush added DHS to CFIUS in March 2003. A number of recent bills, including the Hunter bill, the Collins bill, and a bill introduced by Congresswoman Carolyn Maloney, would require CFIUS to consider the impact of foreign investment on critical infrastructure in the United States.¹⁰ We endorse these efforts. But simply stating that CFIUS should consider the national security impact of foreign investment on critical infrastructure is not enough. There has been little to no policy guidance in the form of speeches, testimony, or official policy pronouncements from any of the most involved agencies on how the US government believes "critical infrastructure" should be protected.

The DHS has identified 12 sectors that it considers to be critical infrastructure: agriculture and food, water, public health, emergency services,

8. Exon-Florio Amendment, App. § 2170(f).

9. Exon-Florio Amendment, App. § 2170(f)(1–5).

10. *Committee on Foreign Investment in the United States Reform Act*, HR 4915, 109th Congress, 2nd sess., March 2006.

the defense industry, telecommunications, energy, transportation, banking and finance, chemicals, postal services and shipping, and information technology.¹¹ Together, these sectors account for 24.4 percent of US non-farm civilian workers, a huge swath of the US economy.¹² But beyond specifying these sectors, the DHS has not identified the types of companies, or even subsectors, for which acquisition by a foreign firm would be deemed a high risk to national security, nor has DHS explained why foreign ownership of these sectors would create a national security risk. In the energy sector, it would seem fairly clear that foreign acquisitions of US nuclear energy companies could likely raise concerns about the security of critical infrastructure, so it would be appropriate to notify CFIUS of such an acquisition. Would the same apply to foreign acquisitions of US firms operating in other segments of the energy sector? Many foreign companies own electric distribution companies. Do these raise national security issues? What about foreign ownership of a wind farm? Similar questions certainly apply in the other sectors, including the food, transportation (including ports), and financial sectors, where foreign ownership of US firms is common, and where, in many cases, this ownership has been created via takeover of a previously US-owned firm.

Even though the federal government has committed significant time and resources to identifying “critical infrastructure” and developing a “national strategy” to protect it, policy pronouncements discussing the risks and ways to protect critical infrastructure have been shallow. In February 2003, amid much fanfare, the DHS issued a glossy, 100-page report entitled *The National Strategy for the Physical Protection of Critical Infrastructure and Key Assets*. This document identifies the sectors considered critical infrastructure, and makes bold statements about the importance of protecting it. However, a reader looking for details finds only bland generalities and few concrete policy or security prescriptions. The strategy identifies eight bland “guiding principles”: ensuring public safety, public confidence, and services; establishing responsibility and accountability; and encouraging and facilitating partnering among all levels of government, and between government and industry (US DHS 2003).

If protection of critical infrastructure is going to be a high priority for the federal government, which it should be, the DHS has an obligation to clarify exactly how it would protect critical infrastructure. In doing so, the DHS must specifically identify what risks are created by foreign investment in critical infrastructure activities. On this identification, however, persons experienced with CFIUS reviews know that, because factual issues

11. See *National Strategy for the Physical Protection of Critical Infrastructure and Key Assets* (February 2003), available at www.whitehouse.gov (accessed March 13, 2006); and HSPD-7 (December 2003), available at www.whitehouse.gov (accessed March 14, 2006).

12. Authors’ calculations based on 2002 BEA and Census data, available at www.bea.gov and www.census.gov.

drive CFIUS's national security analysis, transactions must be reviewed on a case-by-case basis. It would be both impossible and inappropriate for CFIUS agencies to provide full "bright-line" guidance, listing criteria that, if a transaction met them, surely would or would not trigger a CFIUS investigation, or require mitigation measures. At the same time, however, the security landscape has changed, and public guidance from CFIUS agencies has not clarified what new risks from foreign investment have arisen in the new post-September 11 environment, in even a general sense.

Thus in its regulations, or in any amendment to Exon-Florio, Congress and the CFIUS agencies should formally clarify that protecting critical infrastructure is a factor in assessing national security risk. In addition, the DHS, coordinating with other agencies, should provide greater guidance, through speeches, testimony, and other means, on the particular subsectors in the US economy that would raise national security concerns if foreign investors were to acquire companies in them. Not only would such guidance help foreign investors seeking to acquire US firms operating in the "critical infrastructure" sectors, but it might help DHS identify exactly in what ways foreign ownership of such firms might actually threaten US national security. As chapter 2 notes, the linkages between foreign ownership of firms with operations that can be classified as "critical infrastructure" and national security is anything but clear, and exactly what threats to infrastructure are created by foreign ownership have not been identified. Clarifying for foreign investors what sorts of transactions raise security concerns might thus help DHS and other relevant agencies think through whether, and under what circumstances, foreign ownership creates a security risk.

Establishing Security Standards for Employment of Nonnationals in Sensitive Positions

CFIUS faces the difficult issue of assessing whether foreign ownership of a US company might result in sensitive information, pertinent to national security, falling into hostile hands. One way this could happen, of course, is by such information passing to hostile parties from employees who are not US nationals but brought into the US operation by the foreign owner. The Department of Justice (DOJ), FBI, and DHS have sought to mitigate the national security risks of foreign ownership of companies in sensitive sectors by requiring in security agreements that either the US government or the acquirers conduct security screening on personnel operating in sensitive positions. This approach borrows from long-standing practices used for foreign-owned companies with classified contracts with the DOD or other US government agencies. In the telecommunications sector, which, as we have noted in chapter 2, is the only sector for which security agreements are published, recent network security agreements (NSAs) have

background checks of personnel involved in network operations and handling of data requests from the DOJ and FBI, either by the US government or by an independent third party, using a screening mechanism approved by the DHS and DOJ.

Screening of personnel involved in sensitive aspects of a company's business is arguably a low-cost, effective way to identify potential security vulnerabilities in a company. However, in many cases, key officials in foreign-owned companies operating in the United States are neither US citizens nor are they based in the United States. Deutsche Telecom, which runs T-Mobile, the fourth-largest wireless carrier in the United States, most likely has non-US citizens running key parts of the US network. Verizon, AT&T, and other large US-owned telecommunications companies almost surely do the same thing. In addition, Deutsche Telecom almost surely has officials based in Germany that regularly make decisions affecting its US subsidiary. For both non-US citizens working in the United States and non-US citizens working abroad, traditional screening practices employed by the US government or third-party screening companies might not be available.

In these circumstances, security agencies have two choices: They could require that company officials involved in sensitive activities be US citizens, or that the company screen non-Americans under screening processes and laws in those individuals' home countries. For certain activities, including handling classified information or processing a wiretap request from the FBI, it is entirely reasonable for the US government to require that the responsible officials be US citizens. However, for other positions, including technical positions key to running a telecommunications network, or operating a chemical plant in the United States, limiting these positions to US citizens could deny a firm the best global talent, without necessarily enhancing security. Moreover, American citizens are regularly employed in similar positions around the world by both subsidiaries of US companies and non-US companies. Precluding non-US citizens from these positions in foreign-owned operations in the United States could lead to foreign companies precluding American citizens from similar opportunities overseas.

US security agencies could potentially address any security concerns by having foreign nationals employed in sensitive positions screened by their own governments, or by independent screening agencies operating under the laws of a particular individual's home country. In doing so, US security agencies would need to accept the validity and integrity of a foreign country's screening process. But there are a number of countries for which this should not prove problematic. A number of British telecommunications, defense, chemical, and energy firms, some of them in the nuclear energy sector, operate in both the United Kingdom and the United States and even handle sensitive contracts for both the US and UK governments. British firms handling classified work for the UK government need to sat-

isfy the British security screening process known as ListX, an approach similar to DOD's regulations for foreign ownership of companies doing business with the Pentagon. If a British citizen is cleared to handle classified work in the United Kingdom, which is one of the United States' closest allies on security and political issues, surely that individual should, at a minimum, be deemed sufficiently trustworthy to run a telecommunications network or chemical plant in the United States.

The issue would arise, of course, as to exactly which countries' standards could be mutually recognized. Nevertheless, if security agencies are increasingly going to screen employees to mitigate perceived national security risks, because a global company needs to access talent from around the world, security agencies would benefit from putting in place mutual recognition arrangements on security screenings, at least with the United States' closest allies.

Enhancing Disclosure of Information to Congress

In the wake of the Dubai controversy, virtually every one of the bills introduced to reform the CFIUS process includes measures to enhance disclosure of information to Congress.¹³ These initiatives respond to the widespread view that CFIUS agencies have failed to adequately consult or share information with Congress on particular transactions. Critics make three complaints: First, CFIUS has failed to provide reports to Congress on investigations, as required by the amendment; second, CFIUS has failed to provide a quadrennial report, as required by the amendment; third, CFIUS should generally provide more information to Congress, since Congress is exempted from the amendment's confidentiality requirements.

In the first area of concern, Congressman Don Manzullo (R-IL) has argued that the Treasury Department takes too narrow a reading of the reporting requirement in the Exon-Florio Amendment, which reads as follows:

Report to the Congress. The President shall immediately transmit to the Secretary of the Senate and the Clerk of the House of Representatives a written report of the President's determination of whether or not to take action under subsection (d), including a detailed explanation of the findings made under subsection (e) and the factors considered under subsection (f). Such report shall be consistent with the requirements of subsection (c) of this Act.¹⁴

Subsection (d) of Exon-Florio, which provides the president with authority to block a transaction, reads:

13. *Committee on Foreign Investment in the United States Reform Act*. See also *United States Security Improvement Act of 2006*, HR 4813, 109th Congress, 2nd sess., February 2006 (introduced by Congressman M. Foley).

14. Exon-Florio Amendment, § 2170(g).

[t]he President may take such action for such time as the President considers appropriate to suspend or prohibit any acquisition, merger, or takeover, of a person engaged in interstate commerce in the United States proposed or pending on or after the date of enactment of this section by or with foreign persons so that such control will not threaten to impair the national security. The President shall announce the decision to take action pursuant to this subsection not later than 15 days after the investigation described in subsection (a) is completed. The President may direct the Attorney General to seek appropriate relief, including divestment relief, in the district courts of the United States in order to implement and enforce this section.¹⁵

Manzullo criticized CFIUS agencies in general, and the Department of the Treasury in particular, after CFIUS refused to share documents and national security analyses related to a recent case that required an investigation, but was resolved without needing a presidential decision. Manzullo believed that section (g) of Exon-Florio required a detailed report to Congress any time a transaction proceeded to the investigation stage. CFIUS agencies demurred, arguing that a report to Congress under section (g) is required only where the president personally decides on a transaction.

CFIUS agencies have also been criticized for failing to provide a quadrennial report to Congress, as the Exon-Florio Amendment requires. According to the amendment, the president (as opposed to CFIUS agencies) must issue a report to Congress every four years that “(a) evaluates whether there is credible evidence of a coordinated strategy by 1 or more countries or companies to acquire United States companies involved in research, development, or production of critical technologies for which the United States is a leading producer; and (b) evaluates whether there are industrial espionage activities directed or directly assisted by foreign governments against private United States companies aimed at obtaining commercial secrets related to critical technologies.”¹⁶

In a June 24, 2005, letter to Senators Thad Cochran and Robert Byrd, the chairman and ranking member of the Senate Appropriations Committee, C. Richard D’Amato and Roger W. Robinson, the chair and vice chair of the US-China Economic and Security Review Commission, wrote,

[I]t has come to our attention that the reporting requirement included in the Defense Production Act amendments of 1992—i.e., for the President to report to the Congress every four years “whether foreign governments or companies have a coordinated strategy to acquire US critical technology companies”—has not been met since the initial report was delivered in 1993 (see attachment). This omission clearly violates the law, and we strongly recommend that the report, which has not been produced in the last 12 years, be requested and executed as soon as possible. Having the content of this report will significantly help Congress properly evaluate the appropriateness of CFIUS decisions on whether foreign acquisitions

15. Exon-Florio Amendment, § 2170(d).

16. Exon-Florio Amendment, § 2170(k).

of US firms, particularly by Chinese government-controlled companies, should be approved or disapproved given the national security dimensions involved.¹⁷

Third, critics have contended that CFIUS agencies have withheld information from Congress, even though Congress is exempted from the confidentiality requirements of the amendment. Specifically, the amendment provides

Confidentiality of information. Any information or documentary material filed with the President or the President's designee pursuant to this section shall be exempt from disclosure under section 552 of title 5, United States Code, and no such information or documentary material may be made public, except as may be relevant to any administrative or judicial action or proceeding. *Nothing in this subsection shall be construed to prevent disclosure to either House of Congress or to any duly authorized committee or subcommittee of the Congress.*¹⁸ (emphasis added)

The calls for greater disclosure to Congress must be balanced by a recognition that, from an investment policy and national security perspective, strict confidentiality within the CFIUS process is warranted for a variety of reasons. Just as in antitrust reviews by the DOJ or the Federal Trade Commission, parties filing with CFIUS turn over a significant amount of confidential business information. The filing companies might be severely damaged not only if this information became public, but also if competitors obtained it. Perhaps more important, because the essence of any review includes the president's and CFIUS's judgments on national security issues, it is imperative that the proceedings remain confidential. Not only would CFIUS's national security judgments potentially embarrass the parties to a transaction, as well as the acquirer's host country, but US national security interests could be compromised if information related to a CFIUS review were made public.

Given the conflicting requirements that Congress be adequately informed of operations under Exon-Florio and the need for confidentiality in the CFIUS process, in our view, CFIUS agencies should develop a protocol with the relevant congressional committees (Banking and Financial Services, Homeland Security, and Armed Services) to establish better ground rules for the type of information CFIUS might share with Congress. As the amendment requires, the president should produce a quadrennial report, and inform Congress any time he personally makes a decision on a particular transaction. Beyond these statutory requirements, CFIUS should provide, on an annual basis, more aggregate data to Congress on the cases they process than is now provided. Such aggregate data could include

17. C. Richard D'Amato and Roger W. Robinson, Letter to Senators Thad Cochran and Robert C. Byrd, June 24, 2005, available at www.uscc.gov (accessed March 14, 2006).

18. Exon-Florio Amendment, § 2170(c).

- the number of transactions CFIUS reviews;
- the number of 30-day reviews, investigations, withdrawals, and decisions by the president;
- trends in the number of filings, investigation withdrawals, and presidential decisions;
- the sectors in which filings have been made, and the countries from which investments have emanated; and
- data disclosing whether companies that have withdrawn CFIUS notices later refiled such notices or, alternatively, abandoned the transaction.

CFIUS should also provide frequent, high-level classified briefings to key congressional committees on the types of national security issues that have arisen in transactions before the committee. Regular briefings would increase the confidence that key congressional committees show to CFIUS and help preserve the integrity of both the CFIUS process and the Exon-Florio Amendment.¹⁹

At the same time, Congress should not demand, nor should CFIUS provide, any confidential business data that parties to a particular transaction give to CFIUS. In many respects, Congress is better equipped to handle and preserve the confidentiality of national security briefings and information than confidential business data. Members of Congress can be expected to act vigorously as advocates for constituents, including business interests in their districts or state. A senator or congressperson, or their staff, may find the pressures to share business proprietary information irresistible if a constituent demands such information. By contrast, one would expect a member of Congress to face less pressure and be more discreet with national security information. CFIUS should feel comfortable informing Congress about their national security analysis of particular cases, but should resist pressure to share specific business information. Agencies do not provide confidential business information to Congress in any other regulatory review processes, such as those before the DOJ, Department of Transportation (DOT), or the Federal Communications Commission (FCC). Moreover, for statistical purposes, both domestically owned and foreign-owned businesses are required to supply certain information, often of a sensitive nature, to a number of federal agencies, such as the Bureau of the Census and the Bureau of Economic Analysis. But this information is also subject to very strict confidentiality requirements. Information supplied by firms to federal antitrust agencies—the Federal Trade Commission or the Antitrust Division of the DOJ under Hart-Scott-Rodino

19. For a full discussion of transparency issues, see David Marchick, Testimony Before the House Financial Services Committee on Foreign Investment, Jobs and National Security: The CFIUS Process, March 1, 2006.

investigations—is often highly sensitive, but subject to strict confidentiality requirements. CFIUS filings also include highly sensitive, proprietary company information, including market-sensitive information that competitors would love to have. CFIUS should not be an exception to the rule that confidential business information submitted to the federal government be kept confidential.

Congress should also not create a public notice requirement for Exon-Florio reviews.²⁰ A national security review process should remain confidential precisely because it affects US national security. In virtually every CFIUS review, the executive branch conducts background checks on companies and individuals, undertakes an intelligence assessment, and discusses highly classified national security issues. US national security could be negatively affected if these matters were discussed, or even if the public were notified.

Finally, Congress should avoid transparency measures that could facilitate the politicization of individual CFIUS reviews. It is fairly easy for domestic competitors to dream up fallacious national security arguments against a foreign acquisition of a US company. But CFIUS is meant to consider real national security threats, and not dubious threats that benefit a domestic competitor over a foreign company. The CFIUS process is and should remain a serious, sober inquiry into the national security implications of a particular acquisition, insulated from politicization in the same way as filings under the Hart-Scott-Rodino antitrust review process.

Improving and Clarifying the “Control” Standard

One of the most complicated factual determinations CFIUS frequently needs to make is whether a foreign acquirer will “control” a US entity. As mentioned above, the Exon-Florio Amendment requires a determination of whether there is foreign control; whether a foreign person might act to threaten US national security; and whether current laws, other than the International Emergency Economic Powers Act (IEEPA) or Exon-Florio, adequately mitigate the risk. But the Exon-Florio control test, which in practice has been interpreted to presume control any time a foreign interest owns more than 10 percent of a US company, is extraordinarily broad, lacking the texture associated with many other control tests under US law. CFIUS agencies should clarify the critical elements of the control test, and consider raising the 10 percent threshold above which control is presumed.

20. Congressman Manzullo has called for CFIUS to provide a notice and comment period in the *Federal Register*, hold a public hearing, and inform the relevant congressional committees any time an application is filed. See Statement of Congressman Donald Manzullo, Hearing before the House Financial Services Committee on Foreign Investment, Jobs and National Security: The CFIUS Process, March 1, 2006.

The Exon-Florio regulations define control to mean “the power, direct or indirect, whether or not exercised, and whether or not exercised or exercisable through the ownership of a majority or a dominant minority of the total outstanding voting securities of an issuer, or by proxy voting, contractual arrangements or other means, to determine, direct or decide matters affecting an entity.”²¹ Control is implied by the power to direct decisions about the disposition of any or all of the company’s principal assets, dissolution, closing or relocating production or research and development facilities, terminating contracts, or amending the articles of incorporation regarding any of the above matters.²²

CFIUS decisions about control are straightforward for complete acquisitions and majority investments, but involve a high degree of judgment and ambiguity for minority investments. The regulations do not define “a dominant minority,” but exempt from review transactions undertaken “solely for the purpose of investment” if the foreign person will hold 10 percent or less of the outstanding voting securities. Foreign debt does not imply control without evidence that the foreign lender has acquired it, such as an imminent or actual default.²³ Although the 10 percent ownership threshold has been a presumption of control in practice, the regulations reject a bright-line percentage shareholder test as “inappropriate” and likely to “make it relatively easy to structure transactions to circumvent the statute.” In addition, the regulations do not distinguish between direct control, such as ownership of shares in a US company by foreign citizens, governments, or other entities, and indirect control, such as foreign ownership of a corporation that controls a US company.²⁴

Commentators have characterized the CFIUS review process as “loose, ambiguous, highly discretionary, and not subject to judicial review, with no formal procedures, due process protections, opportunities to respond to opposing evidence, or standards for assessing the credibility of evidence, and except when a formal presidential determination is made, no written decisions” (Marans et al. 2004, 595). The control test, as articulated in CFIUS regulations, is an example of this ambiguity. CFIUS agencies should revise the control test, taking account of standards for control that

21. Regulations Pertaining to Mergers, Acquisitions, and Takeovers by Foreign Persons, *Code of Federal Regulations*, title 31, sec. 800.204 (2003).

22. Regulations Pertaining to Mergers, Acquisitions, and Takeovers, sec. 800.204(a)(1–5).

23. Regulations Pertaining to Mergers, Acquisitions, and Takeovers, sec. 800.303(a)(2): “The Committee will accept notices concerning transactions that involve loans or financing by foreign persons where, because of imminent or actual default or other condition, there is a significant possibility that the foreign person may obtain control of the US entity.”

24. Regulations Pertaining to Mergers, Acquisitions, and Takeovers, sec. 800.213, defines “foreign person” as a foreign national or any entity “over which control is exercised or exercisable by a foreign interest.”

other US government agencies use, as well as the greater specificity that other laws and regulations provide for determining control.

For another formulation of a US government control test, CFIUS agencies need look no further than the agency that regulates different aspects of a significant number of the transactions reviewed under Exon-Florio: the FCC. Under FCC regulations and case law, control can be de jure or de facto. Ownership of more than 50 percent of an entity's voting shares constitutes de jure control.²⁵ Whether minority ownership constitutes de facto control depends on a fact-specific determination made on a "case-by-case basis" that "var[ies] with the circumstances presented by each case."²⁶ Relevant factors are the minority shareholder's "power to dominate the management of corporate affairs,"²⁷ including the power to appoint more than 50 percent of a license holder's board of directors; authority to appoint, promote, demote, and fire senior executives; a role in major management decisions; authority to pay financial obligations, including expenses; ability to receive monies and profits from facility operations; and unfettered use of all facilities and equipment.²⁸

In one leading case, the FCC held that a party contributing 45 percent of a licensee's total equity, and holding 25 percent of its nonvoting stock, did not exercise de facto control.²⁹ Although the minority shareholder held an option to convert its nonvoting shares to voting shares, and to purchase an additional 25 percent of voting shares, thereby acquiring effective veto power over corporate affairs, the FCC emphasized the presence of a de jure controlling entity that had a majority of board votes, the members of which had significant experience in the industry.³⁰ By contrast, CFIUS agencies would certainly find control by a minority shareholder under the same conditions.

Similarly, the Department of Transportation uses an "actual control" test to determine whether a foreign person controls a US carrier. Actual control may be triggered by "myriad potential avenues" of influence,³¹ and has

25. See, e.g., Extension of Lines, New Lines, and Discontinuance, Reduction, Outage and Impairment of Service by Common Carriers; and Grants of Recognized Private Operating Agency Status, *Code of Federal Regulations*, title 47, sec. 63.24 (2004): "A change from less than 50 percent ownership to 50 percent or more ownership shall always be considered a transfer of control."

26. Extension of Lines, sec. 63.24(c).

27. In re BBC License Subsidiary, Federal Communications Commission Record 10: 7926 (April 27, 1995).

28. Extension of Lines, sec. 63.24(c).

29. In re BBC License Subsidiary, 7926, 7931–33.

30. In re BBC License Subsidiary, 7926, 7931–33.

31. Acquisition of Northwest Airlines by Wings Holdings, Department of Transportation Order 89-9-51, Docket 46371 (September 29, 1989).

been found when there is a “substantial ability to influence the carrier’s activities,” encompassing “actual and potential control . . . both positive and negative” and control originating in debt, equity, and personal relationships. Factors relevant to control include supermajority voting provisions or other minority-enhancing voting rights; minority veto power; buyout clauses; board representation; foreign nonvoting equity ownership; dependence on foreign contracts; foreign debt accompanied by creditor control provisions; and substantial business relationships. The Department of Transportation has ruled that foreign companies owning up to 25 percent of a US carrier’s voting stock and 49 percent of a US carrier’s equity do not have “actual control” over a US airline.³² It is hard to imagine that CFIUS would ever determine that a foreign company did not have control over a US company under the same conditions. At the time of this writing, the DOT had issued proposed regulations to loosen the control standard.³³

To be fair, the CFIUS control test is not the most restrictive control test that the US government uses. Under the regulations in the DOD’s National Industrial Security Program Operating Manual (NISPOM), facility security clearances may not be granted to contractors “under foreign ownership, control, or influence (FOCI)” (US DOD 1995, § 2.102(d)). The manual defines FOCI as

whenever a foreign interest has the power, direct or indirect, whether or not exercised, and whether or not exercisable through the ownership of the US company’s securities, by contractual arrangements or other means, to direct or decide matters affecting the management or operations of that company in a manner which may result in unauthorized access to classified information or may affect adversely the performance of classified contracts. (US DOD 1995, § 2.301(a))

The language in the DOD regulations covering foreign ownership of companies that do business with the Pentagon (the NISPOM FOCI) is strikingly similar to the CFIUS regulatory definition of control (US DOD 1995). The main substantive difference stems from the distinct objectives of Exon-Florio and NISPOM. For CFIUS, the control test focuses on the US entity itself and the foreign acquirer’s power to “determine, direct or decide matters affecting an entity.” NISPOM focuses on the more narrowly tailored exercise of power “in a manner which may result in unauthorized access to classified information or may affect adversely the performance of classified contracts.” To the extent that such textual nuances are material, they suggest that the CFIUS control test covers more transactions than NISPOM, as there are some aspects of control relevant to “matters affecting an entity” that would not necessarily involve either disclosing classified information or the potential to affect adversely the performance of sensitive or classified contracts.

32. Acquisition of Northwest Airlines by Wings Holdings.

33. See US DOT (2005), Office of the Secretary, DOT, Actual Control of US Air Carriers, DOT Docket No. OST-03-15759-15 (November 2, 2005) (Notice of Proposed Rulemaking).

At the same time, NISPOM sets forth a number of factors to determine FOCl, none of which is necessarily sufficient, and all of which must be considered in the aggregate. These include direct or indirect ownership of 5 percent of voting stock, or 25 percent of nonvoting stock; the presence of non-US citizens in management positions; foreign power to elect directors; foreign contracts; foreign debt if the borrower's overall debt-to-credit ratio is 40 to 60 or greater; 5 percent or more of total revenues originating in a single foreign person, or 30 percent from foreign sources overall; or ownership by the US company of 10 percent or more of any foreign interest (US DOD 1995, § 2.302(b)). Notably, the final clause—in which foreign control is inferred from a US company's ownership of foreign interests, rather than vice versa—turns the traditional test for foreign control on its head. Thus, in many respects, including the consideration of a 5 percent threshold of voting stock, foreign contracts, and sales to foreign persons, the NISPOM control test is broader and captures more transactions than the CFIUS control test does. At the same time, the factors that NISPOM considers are spelled out in greater detail than the CFIUS factors.

Other US government control tests also define control more clearly than the CFIUS regulations. The Change in Bank Control Act (CBCA), administered by the Office of the Comptroller of the Currency (OCC, an agency of the Treasury Department), defines control as "the power, directly or indirectly, to direct the management or policies of an insured depository institution or to vote 25 per cent or more of any class of voting securities of an insured depository institution."³⁴ The OCC presumes that acquiring 10 percent or more of any class of voting securities constitutes the power to direct a bank's management or policies, if the securities are subject to the registration requirements of section 12 of the Securities Exchange Act of 1934,³⁵ or if, immediately after the proposed acquisition, the acquirer is the largest single shareholder in that class.³⁶ The OCC also aggregates holdings between individuals, corporations, or other entities acting "in concert."³⁷ Here, the statute and accompanying regulations not only cre-

34. *Change in Bank Control Act (CBCA)*, Public Law 95-630, *US Statutes at Large* 92: 3683, codified at *US Code* 12 (2000), § 1817(j)(8)(B), and *Code of Federal Regulations*, title 12, sec. 5.50(d)(3) (2005), define control as "the power, directly or indirectly, to direct the management or policies of a national bank or to vote 25 percent or more of any class of voting securities of a national bank."

35. *Securities Exchange Act of 1934*, Public Law 73-291, *US Statutes at Large* 48: 881, codified at *US Code* 15 (2000), § 781.

36. Rules, Policies, and Procedures for Corporate Activities, *Code of Federal Regulations*, title 12, sec. 5.50(f)(2)(ii) (2005).

37. CBCA, § 1817(j)(1); and *Code of Federal Regulations*, title 12, sec. 5.50(d)(2) (2005) define "acting in concert" to be "knowing participation in a joint activity or parallel action towards a common goal of acquiring control whether or not pursuant to an express agreement" or "a combination or pooling of voting or other interests in the securities of an issuer for a common purpose pursuant to any . . . agreement . . . written or otherwise."

ate a bright-line test—an approach CFIUS rejected—but they also lay out standards for control in great detail and with some precision.

The need for greater clarity in the Exon-Florio regulations is bolstered by the fact that, in virtually all of these other contexts, the parties have either the right to a hearing or appeal, or the right to participate in a public adjudicative proceeding (for the DOT and FCC) or hearing (in the case of bank regulation before the Office of Thrift Supervision, Federal Reserve, and Federal Deposit Insurance Corporation). Under Exon-Florio, while parties retain the right to judicial review of various procedural elements of the amendment, there is no right of judicial review of the president's national security decisions. Nor are CFIUS agencies obligated to explain their decisions to the parties; because of the confidential nature of the process, they are not even obliged to inform the parties that CFIUS has determined control regarding either a foreign entity or a foreign government.

Because CFIUS bases its determinations on national security concerns, there is strong justification for the confidential nature of its deliberations. But because the proceedings are confidential, there is an even stronger argument that CFIUS should provide more detailed guidance to foreign investors on what constitutes control. In the past, CFIUS has been concerned that a bright-line test would encourage “gaming” of the rules, but appropriately articulated criteria could guide investors without the risk of manipulation. Foreign investors seek certainty, and should be able to assess the regulatory risk associated with an investment before making an investment decision. For their part, CFIUS agencies have no interest in reviewing complicated or contentious cases, in which an unclear control test potentially forces the agencies, or the president, to bar or condition an investment. Ultimately, CFIUS agencies care most about having the discretion to make control determinations, but maintaining this discretion and providing greater clarity to investors are not mutually exclusive.

CFIUS agencies should also reconsider whether the 10 percent ownership threshold is too low, even when the purpose of acquiring voting stock is not solely for investment. As discussed above, the essence of the Exon-Florio control test is whether the acquirer has the power to “determine, direct or decide matters affecting an entity.”³⁸ An investor could own 20 percent of a company's voting securities, and a seat or two on its board of directors, without having the power to determine, direct, or decide company matters. And, in the case of a default to a syndicate of banks, the Exon-Florio regulations would not find control even when a foreign bank owns up to 49 percent of a US company through its share of a syndicated loan, so long as the foreign bank, or banks, need “the majority consent of the US participants in the syndicate to take action.”³⁹ Simi-

38. *Code of Federal Regulations*, title 31, sec. 800.204(a).

39. Rules, Policies, and Procedures for Corporate Activities, *Code of Federal Regulations*, title 12, sec. 800.303(a)(3)(b)(1).

larly, other government agencies allow much larger ownership stakes without finding control.

Developing International Standards for National Security Review Processes

Last summer, French politicians expressed concerns over rumors that PepsiCo was seeking to acquire Danone, the French yogurt and water company; French prime minister Dominique de Villepin identified “[t]he Danone Group [as] one of the jewels of French industry” and promised “to defend the interests of France”⁴⁰ against the threatening acquisition.⁴¹ Subsequently, and notwithstanding existing mechanisms for reviewing certain foreign investments affecting security interests, the French government announced that it would establish a list of “strategic industries” to be shielded from foreign investment.

Leaving aside the almost humorous merits of any claims about the strategic significance of yogurt—which, as it turned out, did not make the French government’s list of strategic industries to be shielded from foreign ownership—the French reaction to the potential PepsiCo acquisition was not unusual or, for that matter, unexpected. Almost every country limits foreign ownership in certain sectors but often these limitations are narrowly defined to focus on particularly sensitive domestic industries. Over the last year, however, a number of countries have begun to reevaluate their laws governing permissible foreign direct investment (FDI), considering or adopting proposals to either impose tighter national security-based restrictions on FDI, or define such restrictions in broader economic and strategic terms, or both. In addition to France’s initiative, Russia has moved to identify sectors in which foreign investment would be limited.

In a May 2005 address to the Duma, Russian President Vladimir Putin called for a new law to protect “strategic industries.” At the time of this writing, legislation to protect these industries was being drafted, and at least 39 industries were on the initial list. In addition, the Russian Ministry of Natural Resources recently presented a proposal identifying specific natural resource deposits that would be subject to a new law on natural resources, which would effectively restrict the percentage of foreign ownership of those deposits. Not surprisingly, those in the Russian government supporting greater restrictions on foreign investment in

40. *LCI News*, July 20, 2005, available at www.lci.fr (accessed March 14, 2006).

41. This section is drawn from Marchick, Plotkin, and Fagan (2006), which is based in large part on a presentation the authors gave to senior Russian government officials in Moscow in October 2005, and an earlier meeting with Russian officials in Washington. At the latter meeting, Chris Caine, vice president for government programs for IBM, articulated a number of ideas included in this section.

“subsoil” resources have justified their position as preserving “national security.”⁴²

In Canada, the minister of industry recently proposed amendments to the Investment Canada Act, which currently requires review of investments of a certain monetary value, or in certain specified sensitive sectors, to determine their “net benefit” to Canada. The amendments would permit the review of any foreign investment, regardless of size or sector, that could compromise “national security” (Blakes Bulletin on Competition and Trade 2005).

In September 2005, Germany’s cabinet expanded the country’s foreign investment review mechanism to capture a broader set of foreign investments. This comes only a year after Germany implemented a new law allowing the government to veto foreign ownership of more than 25 percent of German defense companies.⁴³

Although they are distinct, the proposals in France, Russia, Canada, and the United States, as well as the expansion of the previous law in Germany, share some common ground. To varying degrees, the five proposals fundamentally signify the potential appeal of protectionist sentiments. The Canadian and US legislative proposals were spurred in part by Chinese companies’ failed bids for leading domestic natural resource companies; the changes in Germany came as a result of increased investments in Germany by US private equity funds.⁴⁴ Perhaps most important, in France, Russia, and Canada, there also has been a common thread in the debate over the proposals—namely, that because the United States already has a law (Exon-Florio) restricting foreign investment on national security grounds, so too should they.⁴⁵ The US experience under Exon-Florio has become a central issue for policy debate at home and abroad.

42. Bureau of National Affairs, “Russia Plans to Limit Foreign Investment in Move Seen as Threat to Trade Climate,” March 10, 2006.

43. Martin Aguera, “Germany Tightens Rules on Foreign Ownership,” Defense News and Army Times Publishing Co., September 19, 2005, 20.

44. In Canada, the proposed amendments were partly reacting to China Minmetals Corporation’s bid for Noranda, Inc., a leading Canadian mining company. Supporters of expanding Exon-Florio in the United States to include economic security received a boost from the public and congressional reaction to the failed bid of China National Offshore Oil Corporation for Unocal.

45. See, e.g., “Participation of Foreign Capital in Strategic Industries of Russia to Be Limited,” *Russian Business Monitor* (Russia), May 18, 2005. Russian officials clearly pointed the official Russian press to US and European restrictions: “The government has decided to use the experience of the US and France where there are stringent limitations for purchase of assets by foreign investors. Like Russia both countries are presidential republics. In the US if a foreign company is going to buy more than 5% of shares in a company that fulfills orders of the Department of Defense, the permit for such a deal is issued by the president. A similar system is in effect in France with the only difference that there the threshold for foreigners is either 5% of shares or three seats on the board of directors. Germany is preparing a similar bill.”

In a recent speech, Russian Economy Minister German Gref said that proposed Russian legislation blocking foreign investment would be “more liberal” than similar legislation in the United States.⁴⁶ A spokesman for the Russian Ministry of Industry and Energy stated that the draft law had been based on concepts similar laws in the United States, Spain, France, and Finland, among others.

In India, the government’s proposed restrictions on US investors seem to be directly linked to security commitments imposed by CFIUS on a company from that country. The Indian government, spurred on in part by a domestic company that had a difficult time clearing CFIUS, announced its intention to impose extremely broad security restrictions on foreign investments in telecommunications. These restrictions were announced in the context of a proposal to raise the ceiling on permitted foreign investment in the telecommunications sector, from 49 percent foreign ownership to 74 percent. It appears that the Indian government was responding to a request by the Indian company Videsh Sanchar Nigam Limited (VSNL), which signed a network security agreement (NSA) related to one of its investments in the United States. VSNL requested that the government impose similar security restrictions on US and other foreign investors. In a letter publicly filed with Indian regulatory officials, VSNL wrote,

[we] propose that TRAI [the Indian regulatory authority] consider whether, in the interests of a level competitive playing field as well as regulatory symmetry, a similar security agreement process should exist in India for U.S. and other foreign carriers who desire a license to provide domestic or international services. (VSNL 2005, appendix D)

VSNL further wrote,

While we certainly do not recommend that the Indian Government force foreign carriers to wait as long as VSNL has been made to wait for its license to enter the U.S. telecommunications market, we believe that the existence of these agreements in India and other countries will have a beneficial result by moderating the willingness of the U.S. government to impose burdensome conditions and requirements in their own security agreements, which of course hinder the ability of VSNL and other foreign carriers to compete fairly against U.S. carriers who are not subject to such requirements. (VSNL 2005, appendix D)

A number of other major countries, including the United Kingdom, Japan, and Germany, already have laws allowing them to restrict foreign investment on national security grounds.⁴⁷ To minimize the chilling effect on foreign investment of what seems to be a proliferation of new or ex-

46. Bureau of National Affairs, “Russia Plans to Limit Foreign Investment in Move Seen as Threat to Trade Climate,” March 10, 2006.

47. Germany requires screening foreign acquisitions of 25 percent or more of German armament companies under a law that took effect in July 2004. See US Department of State (2005) and US GAO (1996).

panded foreign investment review measures, we believe it would be useful for members of the Organization for Economic Cooperation and Development (OECD),⁴⁸ joined by China, India, and Russia,⁴⁹ to develop principles that govern laws for national security–related screening processes for foreign investment. Such principles need not be legally binding, but should have the political support of each participating country. China, India, and Russia are not members of the OECD, though they receive large amounts of foreign investment. As such, they should be invited to participate in these deliberations on an equal basis.

In the mid- to late 1990s, the OECD’s 29 members attempted to negotiate the Multilateral Agreement on Investment (MAI), a treaty that would have expanded investor protection among them. The MAI negotiations broke down in 1999 over a number of issues, including protection of culturally sensitive sectors, the environment, investments in public services, and protecting national security (Graham 2001, chapters 1 and 2). Although we support most of the goals that MAI negotiators pursued, we call for something much more modest: an agreed set of principles governing national security reviews, focused primarily on procedural and due process safeguards among leading FDI recipients. The United States, as the largest recipient of FDI, and with the most formal national security–based investment review process, should lead the effort to develop these principles, but each country should also appropriately define its own national security interests. Common ground could be developed on the procedures governing a national security review process, and such procedures could provide greater confidence for foreign investors, expanding foreign investment throughout the world. A number of the issues discussed earlier in this chapter could form the basis for an agreed set of principles, which could, among others, include

- a voluntary, not mandatory, national security–based investment review process,⁵⁰

48. As of this writing, the members of the OECD were Australia, Austria, Belgium, Canada, Czech Republic, Denmark, Finland, France, Germany, Greece, Hungary, Iceland, Ireland, Italy, Japan, Korea, Luxembourg, Mexico, Netherlands, New Zealand, Norway, Poland, Portugal, Slovak Republic, Spain, Sweden, Switzerland, Turkey, United Kingdom, and the United States.

49. India has blocked a number of foreign investments on security grounds, including a recent proposed investment by Huawei, the Chinese telecommunications equipment maker. India’s defense ministry has been quoted as saying that “there are general security concerns regarding activities of Chinese companies. Safeguards are practically difficult to implement in highly technical areas.” In addition, the Indian intelligence agency, the Research and Analysis Wing (RAW), has been highly critical of Huawei, stating: “This company has been responsible for sweeping and debugging operations in the Chinese embassy. In view of China’s focus on cyber warfare there is a risk of exposing our strategic telecom network to the Chinese.” See Nicole Willig, “India Blocks Foreign Telecom Gear,” October 11, 2005, available at www.lightreading.com (accessed March 14, 2006).

50. See pages 166 to 169 for a full discussion of this issue.

- a review process that provides predictability to transaction parties by ensuring that reviews will be conducted within a reasonable and definite time frame; focuses on national security, not economic security; and is led by an economic agency, with consultation from security agencies;
- a review mechanism that ensures confidentiality of proprietary business information;
- the decision to not use national security as a pretext for blocking transactions to protect domestic industry; and
- investment review decisions not made by legislative bodies.

Rejecting Proposed Amendments

Congress and the executive branch can protect national security while maintaining and promoting inward foreign direct investment. To achieve these twin goals, however, a number of ideas currently in play in Congress and elsewhere should be rejected. These include mandatory filings, moving the CFIUS chair out of the Treasury Department, and including economic security tests in the Exon-Florio process.

Mandatory Filings

One of the centerpieces of the Exon-Florio Amendment is that filing, or providing notice, with the Department of the Treasury is voluntary. This policy has frequently come under fire from various members of Congress, CFIUS observers,⁵¹ and even the DOD, which drafted legislation in 2001 requiring CFIUS to review all foreign acquisitions above \$100 million.⁵² This proposal, which was included in a draft military authorization bill circulated within the US government for review, was later withdrawn after protests from the Treasury and Commerce Departments and foreign governments.⁵³ The administration's decision not to pursue this initiative was the right decision, because mandatory filing is both unnecessary and inconsistent with the philosophy underlying Exon-Florio and broader US international economic priorities.

51. See testimony of Patrick A. Mulloy before the Senate Banking, Housing and Urban Affairs Committee Hearing on the Implementation of the Exon-Florio Amendment and the Committee on Foreign Investment in the United States, 109th Congress, 1st sess., October 20, 2005.

52. Peter Spiegel, "Defense Hawks Gain Upper Hand After Long Crusade," *Financial Times*, April 6, 2002.

53. Peter Spiegel, "Pentagon Retracts Plans for Review of Mergers," *Financial Times*, April 18, 2002.

Mandatory filing proposals assume that foreign acquisitions of US firms that raise national security concerns will evade CFIUS review if providing notice is voluntary. However, parties to an acquisition of a US firm by a foreign investor have a strong incentive to file with CFIUS if there is any potential security issue, because the Exon-Florio Amendment allows CFIUS agencies to review and potentially unwind any transaction at any time, even after a particular acquisition closes. By contrast, if CFIUS reviews a transaction and the president does not bar it, CFIUS may not revisit or reopen its review.

To facilitate both review of transactions of interest and deterrence of companies avoiding provision of notice to CFIUS, the Department of the Treasury has set up an interagency process, through which any agency can request that CFIUS review a transaction for which the parties have not provided notice. CFIUS agencies regularly scour business pages for transactions they would like to review. If the Department of the Treasury or other CFIUS agencies collectively decide that they would like to review a transaction, a Treasury official typically contacts the company and requests that it provide notice. The Exon-Florio Amendment also allows any CFIUS agency to submit notice of a proposed or completed acquisition to the Department of the Treasury, thereby starting the national security review process.⁵⁴

CFIUS agencies have debated the propriety of asking parties to a transaction to file when those parties have not done so, but in the post-September 11 environment, this internal debate has shifted toward asking for a filing. Almost always, if one agency wants to review a transaction, the other agencies will follow. In a sense, internal CFIUS practice has returned to a concept embodied, but never adopted, in the original Exon-Florio bill: requiring the secretary of commerce to investigate any transaction pursuant to the request of the head of any department or agency.⁵⁵

However, requiring that all foreign acquisitions be filed with CFIUS would be unwieldy, and could hamper CFIUS's ability to protect national security. In recent years, there have been hundreds of foreign acquisitions of US companies every year, but a relatively small number of these have had potential security implications of any sort. CFIUS has received formal filings for between 50 and 80 transactions each year.⁵⁶ But even to preliminarily investigate this relatively small number of formal notifications, the Treasury and interagency staff that handle CFIUS matters have been stretched. The Office of International Investment at the Department of the Treasury, responsible for coordinating the interagency CFIUS process today, employs only four professional staff members. Most of the other

54. *Code of Federal Regulations*, title 800, sec. 402(a)(2).

55. *Trade and International Economic Policy Reform Act of 1987*, § 905(a).

56. See table 2.1 for the actual number of filings since 1988.

agencies assign one or two professional staff persons to act in coordinating roles, drawing on subject-matter experts as needed. Unless staffing levels were significantly increased, mandatory filings for all foreign acquisitions would completely overwhelm the CFIUS process. Even with the existing caseload, congressional funding for additional CFIUS staff is needed.

Thus the sheer volume of filings that would accompany a requirement that all foreign acquisitions be notified would make it much more difficult for CFIUS to identify cases that genuinely present national security issues. When a large, complex case moves to the investigation phase, or the security agencies are negotiating an NSA, the sheer volume of work of one difficult case can overwhelm the CFIUS staff. Adding hundreds of new filings per year, most of which would in no way implicate national security, would draw the attention of CFIUS agencies away from cases that really do matter, undermining CFIUS's ability to spend the time and resources necessary to review, investigate, and develop mitigation measures to address national security risks.

We thus believe that the present voluntary system of notification has worked well because most foreign acquisitions create no national security issues whatsoever, regardless of how broadly the term "national security" is defined. Transactions that warrant review generally have been notified, and in instances where parties to a transaction were reluctant to do so, pressure has been brought to bear to achieve the desired notification. Mandatory notification would require that the staff in the CFIUS agencies assigned to Exon-Florio cases be substantially enlarged, with no enhancements to national security.

Finally, there are strong international economic policy reasons to retain voluntary, as opposed to mandatory, filings. A mandatory filing requirement would transform CFIUS, from an interagency body that reviews transactions that could involve national security, into a more generic foreign investment review board. The United States has long pressed other countries not to create, or to eliminate, their own investment review boards. In the US-Australia Free Trade Agreement, signed in 2004, one of the United States' top priorities, and one of the last issues to be closed, was eliminating the Australian Foreign Investment Review Board. While the United States could not persuade the Australians to eliminate the board, it was able to exempt from review all US investments in new businesses, and raise the threshold for review of US acquisitions of Australian entities in most sectors from 50 million to 800 million Australian dollars. Similarly, the United States worked for years to convince Canada to eliminate its investment review structure, negotiated preferential terms for investment reviews in Canada for American investments under the US-Canada Free Trade Agreement, and has negotiated bilateral investment treaties (BITs) with more than 40 countries, guaranteeing nondiscriminatory treatment of investments from the United States. As the United States seeks to eliminate

investment restrictions abroad, requiring mandatory filings under Exon-Florio would be a step in the wrong direction, undermining the United States' moral authority to press for removal of restrictions on investment in other countries.

Moving the CFIUS Chair Out of Treasury

As previously discussed, Senator Inhofe introduced a bill in August 2005 that would have transferred the CFIUS chair to the DOD. In March 2006 Senator Susan Collins (R-ME) introduced a bill moving the CFIUS chair to the Department of Homeland Security (the Collins bill). The original amendment offered by Senator Exon in 1988 placed the responsibility for heading the interagency review process with the Secretary of Commerce. Congressman Manzullo and others in the House of Representatives have similarly advocated that Commerce assume CFIUS leadership. As discussed in chapter 2, after a heated debate over the original Exon bill, including a blunt and rare (in the sense that Washington agencies typically seek to expand, not limit, their authority) statement from then-Secretary of Commerce Malcolm Baldrige: "I do not want the authority."⁵⁷ Congress passed the amendment without designating a particular agency to chair the review process. The version of the bill that the Reagan administration finally endorsed did not assign this responsibility to the secretary of commerce but granted authority to the president or the president's designee. Shortly after the enactment of the Exon-Florio Amendment, President Reagan designated CFIUS as the body responsible to "receive notices and other information, to determine whether investigations should be undertaken and to make investigations" under Exon-Florio.⁵⁸ Reagan also appointed the Secretary of the Treasury, the most investment-friendly Cabinet agency, to chair CFIUS and implement Exon-Florio. Reagan's decision was right at the time, and remains right even in the current post-September 11 environment.

Though the Exon-Florio Amendment was silent on the chairmanship of CFIUS, designating Treasury as its chair was consistent with legislative intent. Even the most hawkish members of Congress who advocated the original Exon-Florio measure were clear that they did not seek to stop or slow foreign investment into the United States. By designating Treasury as the CFIUS chair, the Reagan administration signaled its intention to continue to "welcome foreign investment," as articulated in President Reagan's policy statement with regard to foreign investment. Indeed, the current description of the CFIUS process on the Department of the Tre-

57. Senate Committee on Commerce, Science and Transportation: Hearing on HR 3, Foreign Acquisitions of Domestic Companies, 100th Congress (1987).

58. Executive Order no. 12,661, *Federal Register* 54 (1989): 779, § 3-201(1)(f).

sury's Web site makes clear that US policy continues to favor foreign investment, and presumes that such investment should be restricted only when national security interests are at stake.⁵⁹

The same checks and balances that characterize the US system of government can be found in the CFIUS process. In general, most transactions notified to CFIUS do not require significant scrutiny. For hard or complex cases, debate is frequently fierce between the economic and security agencies. The economic agencies typically include the departments of the Treasury, Commerce, and State, and the US Trade Representative. The security agencies typically include the DOD, DHS, DOJ, and FBI. In certain cases, State and Commerce have split views on a particular transaction, since both agencies have bureaus with an economic focus, the Economics and Business Bureau and the International Trade Administration respectively, and a security focus, the Political Military Bureau and Bureau of Industry and Security respectively.

These checks and balances would be upset by handing the CFIUS chair to a security agency. Whereas economic agencies try to move the process along, security agencies have been known to simply dig in and avoid engagement. While only the president—and not the Treasury—can overrule the security agencies, Treasury's leadership, with White House support, in pressing CFIUS agencies to engage is critical for the CFIUS process to function effectively. If the DOD or DHS were to chair CFIUS, security agencies would not only dominate the debate over national security issues (rightly so, given their expertise), but they would also control the process. More transactions would be blocked, and even more transactions would be unnecessarily delayed. At least as a signal, the presumption would potentially shift from foreign investment being a positive development unless US national security interests were threatened to the opposite: Unless the parties could prove that national security interests were not implicated by a transaction, the proposed foreign investment would be deemed unwelcome.

The question of whether the Department of Commerce should chair CFIUS is a closer call. After all, Commerce not only has a strong proinvestment and protrade philosophy (notwithstanding exceptions for textiles and steel, among others), but also strong security credentials on export control issues, identified in the Exon-Florio Amendment as a factor CFIUS should consider in its security analysis. At the same time, Commerce's international focus is primarily in promoting exports, and not, as in the case of Treasury, promoting inward investment. In tough cases,

59. "The Exon-Florio provision is implemented within the context of this open investment policy. The intent of Exon-Florio is not to discourage FDI generally, but to provide a mechanism to review and, if the President finds necessary, to restrict FDI that threatens the national security." Office of International Affairs, US Department of the Treasury, Exon-Florio Provision, available at www.treas.gov (accessed January 12, 2006).

when Commerce is split internally between the International Trade Administration and the Bureau of Industry and Security, the department's effectiveness in leading CFIUS would be undermined. Finally, as discussed in chapter 5, CFIUS has increasingly become politicized. While Treasury is not immune to political influence or interference, it tends to be less susceptible than Commerce. Treasury is better equipped to chair the process in a fair, impartial, and nonpoliticized manner.

There are many critics of Treasury's leadership of CFIUS. In their view, as recently expressed by Congressman Manzullo (we paraphrase), Treasury has never seen a foreign investment it did not like. A recent Government Accountability Office report (US GAO 2005) also criticized Treasury's handling of a number of CFIUS cases, suggesting that Treasury sought to impose too narrow a definition of national security on other agencies.⁶⁰ Patrick Mulloy, a member of the US-China Economic and Security Review Commission, recently argued that Treasury's proinvestment "culture" inhibits its leadership of CFIUS.⁶¹ Further, critics argue, Treasury lacks the security expertise required to evaluate and assess national security risks; though it still has some enforcement responsibilities that were not shifted to the DHS, Treasury's role is limited to that of a cheerleader for foreign investment, on one hand, and a processor of paper (the CFIUS notice, follow-up questions, etc.) on the other.

However, in our view, the inherent tension between the economic and security agencies is healthy and, in most cases, will help produce better, more rigorously debated decisions. Critics of Treasury are correct that the Treasury bureau responsible for CFIUS issues—the International Affairs Bureau—lacks real security expertise. However, the answer to this is not to remove Treasury as the chair of CFIUS, but to strengthen Treasury's leadership. The International Affairs Bureau, which serves the staff coordination role at Treasury, can and should bolster its security credentials by bringing security specialists onto its staff, or possibly by borrowing security experts from elsewhere in Treasury, such as the Terrorism and Financial Crimes division, or from other agencies, such as the CIA, NSA, DHS, or DOJ. In doing so, Treasury will solidify its already strong economic leadership credentials with a better ability to engage on the national security issues raised by the DOJ, DOD, DHS, and FBI. This approach would strengthen the CFIUS process and enhance CFIUS's ability to protect national security without chilling the foreign investment that the United States needs.

60. Other GAO reports have also been critical of various CFIUS policies and practices. See US GAO (1995, 2002).

61. Hearings on the Implementation of the Exon-Florio Amendment and the Committee on Foreign Investment in the United States before the Senate Committee on Banking, Housing and Urban Affairs, 100th Congress (October 20, 2005).

Introducing an Economic Security Test

The Exon-Florio Amendment is perhaps most frequently criticized for not allowing CFIUS and the president to consider economic as opposed to national security issues. As discussed in chapter 2, the original bill introduced by Senator Exon would have allowed an administration to block acquisitions that threatened the “essential commerce” of the United States.⁶² Since the original Exon bill, a number of members of Congress have sought, unsuccessfully, to broaden the scope of review under Exon-Florio to include “economic security,”⁶³ acquisition of a “domestic steel company,”⁶⁴ and “the industrial and technological base of the United States.”⁶⁵ Senator Inhofe recently rekindled this debate with his proposed amendment to Exon-Florio.

The same arguments used to thwart past efforts to broaden the scope of Exon-Florio are applicable today. First, adopting an “economic security” or “economic effects” test would undermine the United States’ long-standing policy of welcoming foreign investment. More specifically, considering the economic security effects of an investment would create a broad-based investment review regime in the United States for virtually any significant foreign investment. The United States has long argued against such investment regimes, including the review mechanisms in Canada and Australia. Creating an investment review mechanism in the United States would encourage other countries to do the same, to the detriment of US companies. Second, an economic security test would be extremely difficult for CFIUS to implement, because it would be virtually impossible to define economic security. While national security is not defined in the statute, CFIUS includes three agencies—the DOD, DHS, and DOJ—charged with protecting US national security. By contrast, efforts to protect economic security would likely fall prey to domestic companies using it to shield themselves from international competition. Third, expanding the scope of a CFIUS inquiry to include economic security would increase the likelihood and frequency of Congress politicizing the CFIUS process. It would be much easier for a US company seeking either to avoid being acquired, or to protect itself from additional competition, to argue that US economic security demands that a foreign acquisition be blocked. A domestic company could point to the possible negative employment ef-

62. See statement of Senator Exon, *Foreign Investment, National Security and Essential Commerce Act of 1987*, HR 3, 100th Congress (1987).

63. *Foreign Investment and Economic Security Act of 1991*, HR 2386, 102nd Congress (1991).

64. *Steel and National Security Act*, HR 2394, 107th Congress (2001).

65. *To Amend the Defense Production Act of 1950 to Clarify and Strengthen Provisions Pertaining to National Security Takeovers*, HR 5225, 101st Congress, 2nd sess. (1990).

fects of an acquisition, arguing that protecting particular jobs in a particular community is important for the United States' economic security. Finally, expanding the review criteria would likely violate a number of the United States' international agreements, including BITs, treaties of friendship, commerce, and navigation (FCNs), and various free trade agreements, including those with major investment partners such as Canada, Australia, Mexico, and Singapore. Since the United States began BIT negotiations in the early 1980s, it has ratified more than 40 BITs with developing countries. While the terms of these BITs vary from agreement to agreement, a core provision in them is a national treatment commitment, under which the United States has agreed to accord investors from the other party "treatment no less favorable than it accords, in like circumstances, to its own investors."⁶⁶ All BITs include a "national security" or "essential security" provision that exempts a party from, among other things, BIT national treatment obligations. However, the national or essential security provisions in BITs have traditionally only covered investments that truly compromise national, as opposed to economic, security interests.⁶⁷ Jose Alvarez, a leading authority on Exon-Florio and international investment treaties, argues that the essential security exception in BITs must be read narrowly to apply to acts "legally justified under international law, such as self-defense under the U.N. Charter or legitimate acts of reprisal," or, alternatively, to "vital or fundamental security issues."⁶⁸ Indeed, Alvarez argues that the national security standard "assaults" the national treatment and most favored nation (MFN) guarantees in US treaties (Alvarez 1989, 120). While we have qualms about whether a foreign country would actually challenge the United States' right to prohibit investments for national security reasons, we do believe that if Exon-Florio were expanded to cover economic security, the United States would be at substantial risk of violating its treaty obligations. For these reasons, we believe it would be harmful to US economic and national security interests to expand Exon-Florio's criteria to include economic security.

66. See, e.g., Article 3 of the US Model Bilateral Investment Treaty, available at www.state.gov (accessed March 14, 2006). The model BIT states, "Each Party shall accord to investors of the other Party treatment no less favorable than it accords, in like circumstances, to its own investors with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments in its territory."

67. See e.g., Article 18 of the US Model Bilateral Investment Treaty, which states, "Nothing in this Treaty shall be construed ... to preclude a Party from applying measures that it considers necessary for the fulfillment of its obligations with respect to the maintenance or restoration of international peace or security, or the protection of its own essential security interests."

68. Alvarez (1989, footnote 626). Alvarez discusses at length the potential incompatibility of Exon-Florio with the United States' various international obligations.

Conclusion

The Dubai controversy has created an extraordinary amount of pressure to reform CFIUS. Critics charge that the process is secretive, politically tone-deaf, and unreasonably biased toward economic policy interests at the expense of national security. One irony of the congressional brouhaha over the transaction is that it has ignored the important changes in CFIUS that have taken place in recent years. As discussed in chapter 2, since September 11, 2001, CFIUS has applied greater scrutiny to foreign investments, imposed even tougher requirements as a condition for approval, and enhanced enforcement of security agreements negotiated through the Exon-Florio process. CFIUS has also intensely scrutinized any transaction involving investments from greater China and has done so in a difficult, politicized environment, as discussed in chapters 4 and 5.

CFIUS can be improved within the current statutory framework, which is sufficiently flexible to allow the needed improvement without new legislation to force what could be steps in the wrong direction. CFIUS faces the challenge of simultaneously protecting US national security, which has to be the United States' first priority, while maintaining an open investment climate. As discussed in several sections of this book, the vast majority of foreign acquisitions do not threaten US national security interests in any respect. It is hard to see a national security issue in a German parent firm controlling a Daimler-Chrysler auto assembly plant, or a Japanese firm controlling a Hollywood film studio, or a Dutch company owning Ben & Jerry's, the favorite ice cream maker of one of the coauthors' children. For the narrow set of transactions that genuinely threaten US national security, we believe that the Exon-Florio Amendment gives the president ample authority to block a transaction, or otherwise mitigate any concerns raised by a particular acquisition. Moreover, CFIUS agencies have demonstrated their willingness to use the full authority of the law when circumstances warrant it.

Why then is there current discomfort on Capitol Hill over Exon-Florio and the CFIUS process? As noted in earlier chapters and discussed in depth in chapter 4, one source of this discomfort has been the very recent, but thus far very limited, rise of China as a foreign investor. In the future, there might be additional efforts by Chinese firms to acquire US firms, and CFIUS is likely to give some of those transactions special scrutiny. But at the same time, the authority already granted to the president, and administered by CFIUS, adequately addresses the security-related concerns that such future acquisitions may create.

Clearly, not all members of Congress share our views on either the overall adequacy of the CFIUS process or its specific ability to block a transaction that poses a true security threat. If we were to be asked why this is, we probably would answer that it is because CFIUS has done an inadequate job of informing Congress of the work it actually does, and how, in

practice, it has safeguarded legitimate security interests. CFIUS agencies must submit the reports called for in the statute; Treasury should hire additional staff to produce these reports and provide Congress with relevant information regarding the process. CFIUS should also keep records of informal consultations with foreign investors that frequently precede announcements of transactions or formal filings. Such consultations do occur and have resulted in some proposed acquisitions not proceeding because the parties became convinced, on the basis of consultations, that a formal review would lead to a block of the transaction, or to security-motivated conditions being placed on it that the parties could not accept. It would be entirely appropriate for CFIUS to report aggregate information to Congress regarding such consultations, such as numbers and the sectors involved, without disclosing specific information deemed business-sensitive or proprietary. Such reporting could include CFIUS estimates of how many transactions failed to materialize because of CFIUS concerns. There is no reason this could not be done without revealing confidential information.

In the current environment, some foreign investors might be forgiven for wondering if their money is still welcome in the United States. Of course, it is; the United States, as we have emphasized, has a strong interest and need to attract foreign investment. Indeed, because of its savings gap, the United States must either borrow or receive in foreign investment a total of over \$800 billion each year. Moreover, as stressed in chapter 3, FDI in the United States creates considerable benefits that go beyond its role in helping to close the US saving-investment gap.

Unfortunately, the congressional reaction to the Dubai Ports deal and other controversial transactions has cast doubt on the United States' interest in encouraging foreign direct investment. Under these circumstances, it would seem to us entirely appropriate that President Bush, with the support of Congress, reissue a statement along the lines of that of President Ronald Reagan in 1982, in which Reagan indicated that foreign investment in the United States was welcome if it did not raise national security concerns. Such a statement might not only reassure foreign investors but also prove vital to US national security. Without continued and growing inflows of foreign investment, the US manufacturing base, employment, competitiveness, and innovation will all be at risk. Unless the United States remains open to foreign investment, it will alienate its allies. And unless the United States continues to welcome foreign investment, it could find itself more and more isolated in an increasingly interdependent world. There are those who would restrict this investment in the name of strengthening the economy and national security. If they have their way, the United States will lose what has been an important source of economic vitality, and the result will be exactly the contrary of what they set out to achieve. Maintaining an open environment for FDI is, in itself, deeply in the national security interest of the United States.

Appendix 6A

US Critical Infrastructure Sectors

The Department of Homeland Security (DHS) has designated 12 sectors and subsectors of the US economy as comprising “critical infrastructure.” A bill introduced by Congressman Duncan Hunter (R-CA) into the US House of Representatives will greatly restrict or forbid foreign ownership in critical infrastructure sectors. Also, a bill introduced by Senator Richard Shelby (R-AL) would require an extended CFIUS review of foreign ownership in these sectors. As of the time of this writing, these bills have not passed.

Table 6A.1 lists the sectors DHS apparently had in mind when compiling its critical infrastructure list. We say “apparently had in mind” because, as noted in chapter 6, DHS has been somewhat less than precise in compiling the designation of these sectors. The US Bureau of the Census exhaustively categorizes economic activity in the United States into sectors and subsectors under the newly developed North American Industrial Classification System (NAICS). Officials of the United States, Canada, and Mexico jointly developed this system to consistently classify economic activity throughout the North American Free Trade Agreement (NAFTA) area. Rather incredibly, the DHS seems to have developed its list without reference to the NAICS.

Thus, we have attempted to match the (imprecise) DHS critical infrastructure categories with the (precise) NAICS categories. Some of the DHS categories seem to include more than one NAICS category, so the table has more than 12 sectors and subsectors. They nonetheless correspond, as best as we can determine, to the intent of DHS. Using data from the Bureau of the Census and the Bureau of Economic Analysis, the table indicates total US employment in each of these sectors and subsectors and employment by US affiliates of foreign investors.

Note that US affiliates of foreign investors that operate US seaports do not employ any US workers. This is because foreign-owned port operators in the United States undertake port operations as long-term service contracts, where these operators do not actually own the ports (even though some press articles at the time of this writing have reported otherwise). The activities of these operators thus are not classified under “water transport support activities,” the broad category under which seaport operations are classified, but rather appear elsewhere in the NAICS.

Table 6A.1 US employment in critical infrastructure sectors and employment by US affiliates of foreign investors in these sectors, 2002

NAICS category	Sector	Total US employment		Employment in US affiliates of foreign investors	
		Thousands ^a	As percent of total US nonagricultural employment	Thousands ^b	As percent of US employment in sector ^c
311	Food manufacturing	1,443.6	1.10	114.4	7.9
324	Petroleum and coal	100.4	0.08	20.6	20.5
325	Chemicals	827.4	0.63	257.6	31.1
332992– 332995	Arms, ammunition, and ordnance	27.6	0.02	0	0
334	Computers and electronics	1,300.4	1.00	167.5	12.9
515	Broadcasting except Internet	254.2	0.20	12.9	5.1
3364	Aerospace products and parts, including aircraft and missiles	391.2	0.30	31.9	8.2
516 and 5112	Internet/software publishing	312.1	0.24	4.6	1.5
518	Internet service provider/online information services	149.1	0.11	10.0	6.7
517	Telecommunications services	1,144.0	0.88	36.3	3.2
5415	Computer systems design and related, including computer scientists and programmers, except as classified under “computers and electronics”	1,059.0	0.81	41.4	3.9
481	Air transport, excluding support	548.3	0.42	1.0	0.2
482 and 4882	Rail transport and support	20.7 ^d	0.02	10.7	51.7
483	Water transport, excluding support	64.3	0.05	5.2	8.1
484	Truck transport, excluding support	1,333.3	1.02	10.2	0.8

(table continues next page)

Table 6A.1 US employment in critical infrastructure sectors and employment by US affiliates of foreign investors in these sectors, 2002 (continued)

NAICS category	Sector	Total US employment		Employment in US affiliates of foreign investors	
		Thousands ^a	As percent of total US nonagricultural employment	Thousands ^b	As percent of US employment in sector ^c
485	Transit and ground transport, including urban transit systems	387.3	0.30	58.5	15.1
486	Pipelines	50.4	0.04	2.1	4.2
4881	Air transport support services, including air traffic control and airport operations	126.3	0.10	0	0
4883	Water transport support activities, including seaports	77.2	0.06	0	0
4885	Freight handling	164.4	0.13	n.a.	n.a.
5221	Depository institutions (banking)	2,081.7	1.60	124.1	6.0
523–525	Finance except banking	4,382.0	3.36	230.2	5.2
493	Warehousing, etc.	149.4	0.11	29.1	19.5
62	Health care and social assistance	14,900.1	11.43	76.6	0.5
2211	Electrical power generation and transmission	535.6	0.41	21.5	4.0
2212	Natural gas distribution	85.4	0.07	2.8	3.3
2213	Water and sewage	41.9	0.03	10.9	26.0
	Total employment in the sectors above	31,867.3	24.45	1,180.1	3.7
<i>Memorandum:</i>					
	Total US nonagricultural employment ^e	130,341			

n.a. = not available

a. Data obtained from US Bureau of the Census, 2002 Economic Census, www.census.gov.

b. Data obtained from Bureau of Economic Analysis, www.bea.gov.

c. Authors' calculations.

d. Includes only rail transport support services.

e. Data obtained from US Department of Labor, Bureau of Labor Statistics, <http://data.bls.gov>.