



U.S. TREASURY DEPARTMENT OFFICE OF PUBLIC AFFAIRS

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TESTIMONY OF ASSISTANT SECRETARY FOR INTERNATIONAL AFFAIRS CLAY LOWERY BEFORE THE HOUSE FINANCIAL SERVICES SUBCOMMITTEE ON DOMESTIC AND INTERNATIONAL MONETARY POLICY, TRADE AND TECHNOLOGY ON REFORM OF CFIUS

Ms. Chairman, Ranking Member Maloney, and distinguished members of the Financial Services Subcommittee on Domestic and International Monetary Policy, Trade and Technology, I appreciate the opportunity to appear before you today. I am here speaking on behalf of the Administration, the Department of the Treasury, and the Committee on Foreign Investment in the United States (“CFIUS” or the “Committee”) to discuss ways to improve the CFIUS process.

Improving the CFIUS Process

We are reviewing the legislation introduced in the Financial Services Committee, as well as other legislation that has been introduced to update the CFIUS process. We do not have a formal Administration position at this time, but I would like to lay out the key principles that will guide us as we work with the Congress to integrate further America’s national and homeland security interests. Reforms should address two broad principles: U.S. national security imperatives in the post-9/11 environment and the need to continue welcoming investment in the U.S. and creating good jobs for American workers.

To advance those principles, the Administration supports improving communications with Congress on CFIUS matters. The Administration also welcomes other reforms to the CFIUS process, including those that enhance accountability, preserve the attractiveness of the United States for foreign investment, focus resources on transactions that present national security issues, ensure due consideration of the nature of the acquirer and assets to be acquired, strengthen the role of the intelligence community, and improve CFIUS monitoring of mitigation agreements. The CFIUS process should first and foremost ensure U.S. national security but should not unnecessarily discourage legitimate investment in U.S. businesses that will provide income, innovation, and employment for Americans. In today’s testimony, I plan on addressing these reform principles. The Administration looks forward to a dialogue with Congress regarding reforms to the CFIUS process. Let me first provide a paragraph or two on the historical context.

As Deputy Secretary of the Treasury Kimmitt described during his testimony before you on March 1, the Committee examines foreign acquisitions of U.S. companies pursuant to section 721 of the Defense Production Act of 1950. Commonly known as the Exon-Florio Amendment, section 721 gives the President the power to investigate such acquisitions and to suspend or prohibit a transaction if credible evidence leads him to believe that the acquirer might take action that threatens to impair the national security and if, in his judgment, existing laws, other than the International Emergency Economic Powers

Act and the Exon-Florio Amendment, do not provide adequate and appropriate authority for him to protect the national security. After the enactment of the Exon-Florio Amendment, the President delegated certain of his authorities to the Committee. Pursuant to an Executive Order of the President and subsequent Treasury regulations, the Committee receives notices of transactions subject to the Exon-Florio Amendment and conducts thorough interagency reviews and investigations to identify potential national security issues. The President retains the authority to suspend or prohibit transactions.

Improving Communication with Congress

As Deputy Secretary Kimmitt emphasized in his March 1 testimony, it is clear that improvements in the CFIUS process are still required, particularly with respect to communication with Congress and political accountability. The Administration is committed to improving communication with Congress concerning CFIUS matters and shares the view that Congress should receive timely information to help meet its oversight responsibilities. Treasury is now promptly notifying Congress of every review upon its completion, and the Administration is working hard to be responsive to Congressional inquiries. The Administration has also offered to conduct quarterly briefings for Congress on CFIUS matters. These quarterly briefings were scheduled to begin before the issues with respect to the DP World transaction became the subject of Congressional and media attention. The Administration is also actively preparing the 2006 quadrennial report on possible foreign efforts to conduct economic espionage in the United States or acquire critical U.S. technologies. We regret that a quadrennial report has not been prepared since 1994, and the Administration will issue the 2006 report in a timely and thorough manner. I look forward to your suggestions on how to foster better communication.

While reforms of the CFIUS process should advance our shared goal of improved communication, they should also reflect the importance of protecting proprietary information and the integrity of the executive branch's decision-making process. First, reforms to the CFIUS process should encourage companies to file with the Committee by ensuring that proprietary information they provide to the Committee is protected from public disclosure and will not be used for competitive purposes. Full disclosure of information by companies is critical to the Committee's ability to analyze thoroughly the national security risks associated with a transaction. Second, it is important to protect the executive branch's deliberative process and avoid exposure of classified methods and sources as well as possible politicization of CFIUS reviews and investigations for partisan purposes or at the behest of special interests. Third, reporting requirements should take into account the need for CFIUS member agencies to focus their limited resources on examining transactions notified to the Committee. I am confident that the Committee can provide Congress with the information it requires to fulfill its oversight role while respecting these important principles.

Enhancing Accountability

The Administration supports a high level of political accountability for CFIUS decisions and is committed to ensuring that senior, Senate-confirmed officials play an integral role in examining every transaction notified to the Committee. Improvements to the CFIUS process should also ensure that senior U.S. officials are focused on national security issues. I know that CFIUS agencies are now briefing at the highest levels in their respective agencies. However, the President and Cabinet-level officials should focus their attention on the cases that merit the greatest scrutiny. The President should focus on transactions that at least one member of the Committee recommends he suspend or prohibit. Requiring the President to make a determination when all CFIUS members agree that a transaction does not threaten to impair the national security would potentially divert his attention from transactions that could pose security risks.

Similarly, requiring Cabinet-level certification of CFIUS decisions on transactions that do not raise potential national security concerns would lengthen and delay the process, presenting an unnecessary impediment to legitimate investment. Such a requirement would also dilute the resources that the most senior U.S. officials could devote to transactions that do pose national security risks. This would

impede the Committee's ability to protect the national security as effectively as possible. I am confident that the Committee can carry out its obligations in a manner that guarantees high-level political accountability while focusing senior officials on transactions that raise possible national security threats.

Promoting Legitimate Investment in the United States

The Administration also emphasizes the importance of preserving the attractiveness of the United States to overseas investors. The intent of the Exon-Florio Amendment is not to discourage foreign direct investment (FDI) generally, but to provide a mechanism to review and, if the President finds necessary, to restrict investment that threatens the national security. FDI is critical to the U.S. economy. Majority-owned U.S. affiliates of foreign companies employed 5.1 million U.S. workers in 2004. Capital expenditures in 2004 by these affiliates totaled \$108 billion and their sales totaled \$2,302 billion. In 2003, these affiliates spent \$30 billion on R&D and accounted for 21 percent of total U.S. exports. Roughly 40 percent of those jobs were in manufacturing, four times the national average. If foreign companies were to reduce their spending in the U.S. as a result of perceptions that the United States was less welcoming of FDI, lower investment would cost American workers good jobs, reduce innovation, and lower the growth of the U.S. economy.

Reforms to the CFIUS process should send a signal that the United States is serious about national security and welcomes legitimate FDI. The Committee must examine each transaction thoroughly, but the timeframes for examination should not be unnecessarily long. In addition, the process should not require investigation of transactions that could not possibly impair the national security. Last year, the Committee received 65 notices of transactions under the Exon-Florio Amendment. This year, CFIUS filings are on a pace to total roughly 90. Improvements to the CFIUS process should promote filing of notice with respect to appropriate transactions but should not delay or deter FDI with no nexus to the national security. The Committee can best serve U.S. interests through thorough examinations that protect the national security while maintaining the credibility of the U.S. open investment policy for overseas investors and the confidence of U.S. investors abroad that they will not be subject to retaliatory discrimination.

Focusing on Transactions that Raise National Security Issues

The Administration is also committed to maintaining the Committee's appropriate focus on national security. Many transactions notified to the Committee do not raise national security issues, and requiring extended investigations of such transactions would send the wrong message that the United States does not welcome foreign investment. Reforms to the CFIUS process should ensure that members of the Committee focus their resources on transactions that could potentially impair the national security.

Focusing on the Nature of the Acquirer and the Assets to be Acquired

The Exon-Florio Amendment is nearly two decades old, and the Administration supports efforts to update it to reflect the post-9/11 security environment. The Committee should continue to consider a broad range of national security issues when reviewing transactions, and its assessment of threats and vulnerabilities should continue to change as conditions change. Two factors that should always be taken into account in CFIUS assessments are the nature of the acquiring entity and the nature of the assets to be acquired. These are essential in weighing the national security implications of any acquisition. The Administration supports requiring the Committee to consider the ultimate ownership of the acquirer and the possible foreign acquisition of critical infrastructure or other sensitive assets when reviewing any transaction under the Exon-Florio Amendment, both of which are factors the Committee already considers when reviewing transactions.

Mandatory investigations of acquisitions that do not present national security issues would divert critical resources away from examination of acquisitions that do pose potential hazards, however. During the

current Administration, there have been 281 notices filed with the Committee. Nine transactions have been subject to extended 45-day investigations, and two have reached the President for a final determination. Requiring an investigation of every transaction involving a foreign government-owned acquirer or the potential purchase of critical infrastructure assets would result in scores of investigations each year in which no national security concerns are present. This would diminish the Committee's ability to protect the national security.

Strengthening the Role of the Intelligence Community

The Administration also believes that the Committee can carry out its role more effectively by strengthening the role of the intelligence community in the CFIUS process, which is essential in a complex and changing national security environment. The Director of National Intelligence (DNI) has begun to do so by assigning an all-threat assessment responsibility to the National Intelligence Council and ensuring that all relevant intelligence community agencies and activities participate in the development of final intelligence assessments provided to the Committee. The Committee recently formalized the role of the Office of the DNI, which plays a key role in all CFIUS reviews and investigations by participating in CFIUS meetings, examining every transaction notified to the Committee, and providing broad and comprehensive threat assessments. The DNI already contributed greatly to the CFIUS process through reports by the Intelligence Community Acquisition Risk Center concerning transactions notified to the Committee, but formalizing its place in the process—and strengthening the threat assessments provided to the Committee—represent an enhancement of the intelligence community's role. The DNI does not vote on CFIUS matters and should not, because the role of the DNI is to provide intelligence support and not to make policy judgments based upon that intelligence.

Improving the Monitoring of Mitigation Agreements

A further key to improving the CFIUS process is to strengthen the monitoring of mitigation agreements entered into between entities filing notice under the Exon-Florio amendment and members of the Committee. Typically, the members of the Committee with the greatest relevant expertise assume the lead role in examining any national security issues related to a transaction and, when appropriate, developing appropriate mechanisms to address those risks. Mitigation agreements implement security measures that vary in scope and purpose according to the particular national security concerns raised by a specific transaction. Monitoring parties' adherence to mitigation agreements after the conclusion of the CFIUS process is an important part of protecting the national security. The Administration supports reforms that reinforce the authority and provide resources for agencies that negotiate mitigation agreements to improve existing enforcement practices.

Conclusion

Madame Chair, the Administration already has taken a number of steps to improve the CFIUS process and to address concerns raised by Congress. I would like to reiterate in closing that the Administration supports reforms to the CFIUS process, including those I have discussed, and will continue to work with Congress toward that end. Sound legislation can ensure that the Committee reviews transactions thoroughly, protects the national security, conducts its affairs in an accountable manner, and avoids creating undue barriers to foreign investment in the United States. All members of CFIUS are committed to working with Congress to improve the process, understanding that their top priority is to protect our national security.

I thank you for your time today and am happy to answer to any questions.