

CFIUS - The Committee on Foreign Investment in the United States

James A. Lewis, Center for Strategic and International Studies

The United States has sought to open international markets since the early 1900s. The focus for recent trade liberalizations has been to remove barriers from foreign direct investments and to ownership by foreign companies of key services, like finance and telecommunications. Opening the door for American companies to sell or own outside the United States is a central element of U.S. foreign policy.

While American firms have been investing overseas, foreign firms have invested in the U.S. Foreign investment strengthens the American economy, and it would be difficult for the U.S. to deny to others the rights to an open market that it has sought for itself. However, some forms of investment, where a foreign entity assumes ownership and control of a U.S. plant or facility, can raise national security concerns. Recognizing the potential risks, in 1988 the U.S. made the Committee on Foreign Investment in the United States (CFIUS) responsible for reviewing foreign acquisitions of U.S. firms to make sure that the foreign purchase did not harm national security.¹

CFIUS was originally established in 1975 to monitor the economic effect of foreign investment in the United States. In 1988, Congress expanded CFIUS authorities to allow the President to block a sale if it threatened national security. In that same year, the President, pursuant to Executive Order 12661, delegated his investigative authorities to the Treasury Department. E.O. 12661 designated CFIUS to receive notices of foreign acquisitions of U.S. companies, to determine whether a particular acquisition has national security issues sufficient to warrant an investigation, and to undertake an investigation, if necessary, under the Exon-Florio provisions. The President, as a result of the investigation, can block the proposed sale if:

- (1) there is credible evidence that the foreign entity exercising control might take action that threatens national security, and
- (2) the provisions of law, other than the International Emergency Economic Powers Act do not provide adequate and appropriate authority to protect the national security.²

CFIUS is an interagency body staffed by mid-level officials and chaired by the Treasury Department. Defense, State, Justice, USTR and Commerce are among the agencies that participate in the CFIUS process. Representatives from FBI and the Intelligence community are also involved, in an advisory capacity. The President made the Department of Homeland Security a member of CFIUS in April of 2003. While CFIUS was created to monitor the economic implications of foreign investment in the U.S. (which is why Treasury chairs it), its review of the national security implications of foreign acquisitions of U.S. companies has become its most important function. The law does not require CFIUS to report to Congress, but the Committees of jurisdiction can always request briefings or hold hearings. In practice, they have rarely done so.

Companies are not required to file with CFIUS, but if they do not and CFIUS decides later that it objects to the purchase, the U.S. can force the new foreign owner to divest itself of the acquisition.

¹ Section 5021 of the Omnibus Trade and Competitiveness Act of 1988 (known as the Exon-Florio Amendment) amended Section 721 of the Defense Production Act to give the President the authority to suspend or prohibit any foreign acquisition, merger or takeover of a U.S. corporation that is determined to threaten national security.

² U.S. Department of Treasury, "Committee on Foreign Investment in the United States," <http://www.treas.gov/offices/international-affairs/exon-florio/>

Many companies decide it is safer to report; CFIUS then has a month in which to decide whether to nor to investigate the proposed sale. If it does not choose to investigate, the sale can go ahead. Once it is notified, CFIUS has 30 days to the transaction to determine if there are national security concerns that require further investigation. If CFIUS decides that further investigation is needed, it has 45 days in which to draft and submit a report and recommendation to the President. The President then has 15 days in which to decide upon an appropriate action.

Congress amended Exon-Florio in 1993 to require foreign companies to obtain CFIUS approval before acquiring U.S. companies when the foreign purchaser is “controlled by or acting on behalf of a foreign government” and the acquisition “could result in control of a person engaged in interstate commerce in the U.S. that could affect the national security of the United States.” This amendment reflects the conclusion that government-owned or controlled companies pose a greater risk to security than purely commercial entities and should always be reviewed.

Unsurprisingly, CFIUS finds very few submissions warrant investigation. Of the more than 1600 submissions received by CFIUS since 1988, only twenty-six have been investigated (as of January 2006), and only one of these went through the entire process and was blocked (in 1990, a Chinese firm was ordered to divest itself of an U.S. aircraft parts manufacturer). In most cases, if CFIUS chooses to open an investigation, companies respond by withdrawing the planned acquisition or by offering or restructure the acquisition in a way that addresses CFIUS’s security concerns.

Two concerns drive most CFIUS investigations. The first involves technology transfer, where a foreign party could gain access to sensitive technology by buying the U.S. producer. The second involves telecommunications security and cooperation with law enforcement, where a foreign purchaser of a U.S. telecommunications company would gain access private communications or would be less willing to cooperate with U.S. law enforcement agencies in investigations. In both instances, CFIUS investigations are made more complicated if the foreign purchaser is owned or controlled by a foreign government.

The Department of Defense has built on CFIUS by suggesting that defense-related firms meet ‘informally’ with DOD staff before making a submission to CFIUS. Firms that do not informally consult with DOD run the risk of having DOD announce that the 30 days allowed by law were not enough to review the transaction. Some firms have had to temporarily withdraw their CFIUS petitions in order to give DOD more time - often to propose and work out arrangements with the acquiring party that place restrictions on the acquisition to resolve national security concerns.

The Department of Justice and the FBI have also built on CFIUS for cases involving telecommunications companies. Justice and FBI will hold separate, parallel discussions with the acquiring firm to ensure that their concerns are addressed. This is usually done with a letter or memorandum between the concerned agency and the company (sometimes called a ‘Network Security Agreement’) where the foreign purchaser agrees to abide by certain conditions. CFIUS will not clear a case until Justice and DOD are satisfied.

In recent years, the most challenging cases before CFIUS have involved the telecommunications and information technology sectors as European and Asian firms sought to acquire telecommunications service providers like VoiceStream or Global Crossing or high-tech manufacturers like SVG. Privatization, the introduction of new services, and successful efforts in the WTO to break down the barriers to firms in one country providing telecommunications

services in another has created international opportunities in telecommunications that attracts foreign ownership.

Global Crossing is the most salient case. Its \$20 billion global fiber optic network crosses both the Atlantic and Pacific oceans and connects twenty-seven countries in Asia, North and South American and Europe. Global Crossing provides key services to a broad range of U.S. entities in both the public and private sectors, including the Department of Defense. The company filed for bankruptcy in 2002 and was the target of several acquisition attempts, including offers by foreign companies. The bid by Hong Kong firm Hutchison Whampoa raised serious national security concerns and the bid was withdrawn, Global Crossing was ultimately bought by Singapore Technologies Telemedia (STT).

Two earlier CFIUS cases involving telecom service providers help put Global Crossing in perspective. In those cases, concerns over potential interference with U.S. law enforcement operations or with foreign access to U.S. communications led to CFIUS investigation. These concerns were reinforced as the foreign acquirer in each case was partially owned by its government. A subsidiary of Nippon Telephone and Telegraph, which had the Japanese government as its majority shareholder at the time, was given permission to buy Verio, an internet service provider, once FBI concerns over wiretapping were resolved. The FBI was concerned that the Japanese government could use its interest in NTT to gain access to information about wiretaps or information about U.S. customers. The FBI negotiated with NTT to obtain procedures that protected classified information, made it easier for law enforcement officers to request information from Verio, and ensured that customer information was not disclosed to unauthorized parties.

Deutsche Telekom's proposal to purchase VoiceStream Wireless created similar concerns. Deutsche Telekom's majority owner at the time of the case was the German government, a situation that sparked concern among some lawmakers when the deal was announced last month. Critics in congress said that a foreign government-owned company would pose anti-competitive and national security issues (FCC approval was also required for the acquisition, but the FCC deferred to CFIUS in this case). CFIUS recommended that the President approve the acquisition after the FBI and Deutsche Telekom reached agreement on compromises assuring the FBI that it would still be able to conduct legally authorized wiretaps of domestic calls or surveillance of calls beginning or ending in the United States after the acquisition.

Since September 11, CFIUS has also begun to look at cases in terms of the effect on homeland security and critical infrastructure. CFIUS reviews whether foreign ownership of critical infrastructure could give a potential opponent the opportunity to disrupt important services or use insider knowledge to plan attacks. The Department of Homeland Security is the lead agency in these cases, and it could require the foreign purchaser to agree to conditions that could mitigate risk, such as requiring that key functions be performed only by U.S. citizens.

CFIUS has come under pressure in recent years as increased international economic integration has led more companies to invest in the U.S. At the same time, some critics see CFIUS as inadequate for dealing with the full range of security issues raised by 'foreign ownership, control or influence' (FOCI), particularly as CFIUS only reviews the initial purchase and not any later actions. The U.S. is undertaking the difficult task of trying to strengthen CFIUS to improve without losing the economic benefits of foreign investment.