



U.S. TREASURY DEPARTMENT OFFICE OF PUBLIC AFFAIRS

EMBARGOED UNTIL: 10:00 am EST on March 2, 2006

Contact: Tony Fratto (202) 622-2910

**Testimony of Robert M. Kimmitt, Deputy Secretary
U.S. Department of the Treasury**

Before the Senate Committee on Banking, Housing, and Urban Affairs

Mr. Chairman, Ranking Member Sarbanes, and distinguished members of the Committee, I appreciate the opportunity to appear before you today to discuss once again the Committee on Foreign Investment in the United States (CFIUS) and the Committee's review of DP World's acquisition of P&O. I am here speaking on behalf of the Administration, the Treasury Department, and CFIUS.

The last time I testified before this Committee, the Committee was engaged in a broad examination of the CFIUS process in light of the recent report by the Government Accountability Office. The hearing this morning is an opportunity to continue that dialogue. Before discussing the review surrounding the DP World transaction, I would like to generally describe the CFIUS process.

CFIUS

Exon-Florio

CFIUS was established in 1975 by Executive Order of the President with the Secretary of the Treasury as its chair. Its main responsibility was "monitoring the impact of foreign investment in the United States and coordinating the implementation of United States policy on such investment." It analyzed foreign investment trends and developments in the United States and provided guidance to the President on significant transactions. However, it had no authority to take action with regard to specific foreign investments.

The Omnibus Trade and Competitiveness Act of 1988 added section 721 to the Defense Production Act of 1950 to provide authority to the President to suspend or prohibit any foreign acquisition, merger, or takeover of a U.S. company where the President determines that the foreign acquirer might take action that threatens to impair the national security of the United States. Section 721 is widely known as the Exon-Florio amendment, after its original congressional co-sponsors.

Specifically, the Exon-Florio amendment authorizes the President, or his designee, to investigate foreign acquisitions of U.S. companies to determine their effects on the national security. It also authorizes the President to take such action as he deems appropriate to prohibit or suspend such an acquisition if he finds that:

- (1) There is credible evidence that leads him to believe that the foreign investor might take action that threatens to impair the national security; and
- (2) Existing laws, other than the International Emergency Economic Powers Act (IEEPA) and the Exon-Florio amendment itself, do not in his judgment provide adequate and appropriate authority to protect the national security.

The President may direct the Attorney General to seek appropriate judicial relief to enforce Exon-Florio, including divestment. The President's findings are not subject to judicial review.

Following the enactment of the Exon-Florio amendment, the President delegated to CFIUS the responsibility to receive notices from companies engaged in transactions that are subject to Exon-Florio, to conduct reviews to identify the effects of such transactions on the national security, and, as appropriate, to undertake investigations. However, the President retained the authority to suspend or prohibit a transaction.

The Secretary of the Treasury is the Chair of CFIUS, and the Treasury's Office of International Investment serves as the Staff Chair of CFIUS. Treasury receives notices of transactions, serves as the contact point for the private sector, establishes a calendar for review of each transaction, and coordinates the interagency process. The other CFIUS member agencies are the Departments of State, Defense, Justice, and Commerce, OMB, CEA, USTR, OSTP, the NSC, the NEC and the newest member, the Department of Homeland Security. Additional agencies, such as the Departments of Energy and Transportation or the Nuclear Regulatory Commission are routinely invited to participate in a review when they have relevant expertise.

The CFIUS process is governed by Treasury regulations that were first issued in 1991 (31 CFR part 800). Under these regulations, parties to a proposed or completed acquisition, merger, or takeover of a U.S. company by a foreign entity may file a voluntary written notice with CFIUS through Treasury. Alternatively, a CFIUS member agency may on its own submit notice of a transaction. If a company fails to file notice, the transaction remains subject to the President's authority to block the deal indefinitely.

The CFIUS process starts upon receipt by Treasury of a complete, written notice. Treasury determines whether a filing is in fact complete, thereby triggering the start of the 30-day review

period. CFIUS may reject notices that do not comply with the notice requirements under the regulations. Upon receiving a complete filing, Treasury sends the notice to all CFIUS member agencies and to other agencies that might have an interest in a particular transaction. CFIUS then begins a thorough review of the notified transaction to determine its effect on national security. In some cases, this review prompts CFIUS to undertake an “investigation,” which must begin no later than 30 days after receipt of a notice. The Amendment requires CFIUS to complete any investigation and provide a recommendation to the President within 45 days of the investigation’s inception. The President in turn has up to 15 days to make a decision, for a total of up to 90 days for the entire process.

CFIUS Implementation

Although the formal review period commences when CFIUS receives a complete filing, there is often an informal review that begins in advance. Parties to a transaction may contact CFIUS before a filing in order to identify potential issues and seek guidance on information the parties to the transaction could provide to assist CFIUS’ review. This type of informal consultation between CFIUS and transaction parties enables both to address potential issues earlier in the review process. The pre-filing consultation allows the parties to answer many of CFIUS’ questions in the formal filing and allows for a more comprehensive filing. In some cases, CFIUS members negotiate security agreements before a filing is made. In addition, the pre-filing consultation may lead the parties to conclude that a transaction will not pass CFIUS review, in which case they may restructure their transaction to address national security issues or abandon it entirely.

During the initial 30-day review, each CFIUS member agency conducts its own internal analysis of the national security implications of the notified transaction. In addition, the U. S. Intelligence Community provides input to all CFIUS reviews. The Intelligence Community Acquisition Risk Center (CARC), now under the office of the Director of National Intelligence (DNI), provides threat assessments on the foreign acquirers. CFIUS will request a threat assessment report from CARC as early as possible in the review process. In order to facilitate reviews, CFIUS may request these reports before the parties to the transaction have made their formal filing. Further, additional agencies such as the Departments of Energy and Transportation and the Nuclear Regulatory Commission actively participate in the consideration of transactions that impact the industries under their respective jurisdictions.

During the review period, there are frequent contacts between CFIUS and the parties to the transaction. The transaction parties respond to information requests and provide briefings to CFIUS members in order to clarify issues and supplement filing materials. Although the CFIUS agencies may meet collectively with the parties as an interagency group, meetings also often occur between the parties and the agency or agencies that have a specific interest in the transaction. Typically, certain members of CFIUS will identify a concern early in the review and then assume the lead role in examining the issue and providing views and recommendations on whether the concern can be addressed. For example, if there are military contracts, the Department of Defense would lead the CFIUS review and recommend a course of action.

Depending on the facts of a particular case, CFIUS agencies that have identified specific risks that a transaction could pose to the national security may, separately or through CFIUS auspices, develop appropriate mechanisms to address those risks when other existing laws and regulations alone are not adequate or appropriate to protect the national security. Agreements implementing security measures vary in scope and purpose, and are negotiated on a case by case basis to address the particular concerns raised by an individual transaction. Publicly available examples of some of the general types of agreements that have been negotiated include: Special Security Agreements, which provide security protection for classified or other sensitive contracts; Board Resolutions, which, for instance, require a U.S. company to certify that the foreign investor will not have access to particular information or influence over particular contracts; Proxy Agreements, which isolate the foreign acquirer from any control or influence over the U.S. company; and Network Security Agreements (NSAs), which are used in telecommunications cases and often are imposed in the context of the Federal Communications Commission's (FCC) licensing process.

CFIUS operates by consensus among its members. A decision not to undertake an investigation is made only if the members agree that the transaction creates no national security concerns, or any identified national security concerns have been addressed to the satisfaction of all CFIUS agencies. The daily operation of CFIUS is conducted by professional staff at each agency. Each agency sends the filing to multiple groups in its agency depending on the issues involved in the filing. CFIUS staff report to the policy level, which is the Assistant Secretary level. A decision can be elevated to the Deputy Secretary level and on to the Cabinet officials, if necessary. If within the initial 30-day period there is consensus that the transaction does not raise national security concerns or any national security concerns have been addressed, Treasury, on behalf of CFIUS, writes to the parties notifying them of that determination. This concludes the CFIUS review of the acquisition.

If one or more members of CFIUS believe that national security concerns remain unresolved, then CFIUS conducts a 45-day investigation. The additional 45 days enables CFIUS and the parties to obtain additional information from the parties, conduct additional internal analysis, and continue addressing outstanding concerns. Upon completion of a 45-day investigation, CFIUS must provide a report to the President stating its recommendation. If CFIUS is unable to reach a unanimous recommendation, the Secretary of the Treasury, as Chairman, must submit a CFIUS report to the President setting forth the differing views and presenting the issues for decision. The President has up to 15 days to announce his decision on the case and inform Congress of his determination. The last report sent to Congress occurred in September 2003, when the President sent a classified report detailing his decision to take no action to block the transaction between Singapore Technologies Telemedia and Global Crossing.

The Exon-Florio amendment requires that information furnished to any CFIUS agency by the parties to a transaction shall be held confidential and not made public, except in the case of an administrative or judicial action or proceeding. This confidentiality provision does not prohibit CFIUS from sharing information with Congress. Treasury, as chair of CFIUS, upon request of congressional committees or subcommittees with jurisdiction over Exon-Florio matters, has arranged congressional briefings on transactions reviewed by CFIUS. These briefings are

conducted in closed sessions and, when appropriate, at a classified level. CFIUS members with equities in the transaction under discussion are invited to participate in these briefings.

Since the enactment of Exon-Florio in 1988, CFIUS has reviewed 1,604 foreign acquisitions of companies for potential national security concerns. In most of these reviews, CFIUS agencies have either identified no specific risks to national security created by the transactions or risks have been addressed during the review period. However, to date 25 cases have gone through investigation, twelve of which reached the President's desk for decision. In eleven of those, the President took no action, leaving the parties to the proposed acquisitions free to proceed. In one case, the President ordered the foreign acquirer to divest all its interest in the U.S. company. In another case that did not go to the President, the foreign acquirer undertook a voluntary divestiture. Of those 25 investigations, seven have been undertaken since 2001 with one going to the President for decision. However, these statistics do not reflect the instances where CFIUS agencies implemented security measures that obviated the need for an investigation or where, in response to dialogue with CFIUS agencies, parties to a transaction either voluntarily restructured the transaction to address national security concerns or withdrew from the transaction altogether.

DP World

Contrary to many accounts, the DP World transaction was not rushed through the review process in early February. On October 17, 2005, lawyers for DP World and P&O informally approached Treasury Department staff to discuss the preliminary stages of the transaction. This type of informal contact enables CFIUS staff to identify potential issues before the review process formally begins. In this case, Treasury staff identified port security as the primary issue and directed the companies to DHS. On October 31, DHS and the Department of Justice staff met with the companies to review the transaction and security issues.

On November 2, Treasury staff requested a CARC intelligence assessment from the Office of the DNI. Treasury received this assessment on December 5, and it was circulated to CFIUS staff. On December 6, staff from CFIUS agencies with the addition of staff from the Departments of Transportation and Energy met with company officials to review the transaction and to request additional information. On December 16, after two months of informal interaction, the companies officially filed their formal notice with Treasury, which circulated the filing to all CFIUS departments and agencies and also to the Departments of Energy and Transportation because of their statutory responsibilities and experience with DP World.

During the 30-day review period, members of the CFIUS staff were in contact with one another and the companies. As part of this process, DHS negotiated an assurances letter that addressed port security concerns. The final assurances letter was circulated to the committee on January 6 for its review, and CFIUS concluded its review on January 17. In total, far from rushing their review, members of CFIUS staff spent nearly 90 days reviewing this transaction. There were national security issues raised during this review process, but any and all concerns were addressed to the satisfaction of all members of CFIUS. By the time the transaction was formally approved, there was full agreement among the CFIUS members.

Another misperception is that this transaction was concluded in secret. Although the Exon-Florio amendment prohibits CFIUS from publicly disclosing information provided to it in connection with a filing under Exon-Florio, these transactions often become public through actions taken by the companies. Here, as is often the case, the companies issued a press release announcing the transaction on November 29. In addition, beginning on October 30, dozens of news articles were published regarding this transaction, well before CFIUS officially initiated, much less concluded its review.

Last Sunday, February 26, DP World announced that it would make a new filing with CFIUS and requested a 45-day investigation. Upon receipt of DP World's new filing, CFIUS will promptly initiate the review process, including DP World's request for an investigation. The 45-day investigation will consider existing materials as well as new information anticipated from the company. Importantly, the investigation process will also consider very carefully concerns raised by members of Congress, state and local officials, and other interested parties. We welcome your input during this process, including issues that will be raised at today's hearing.

Conclusion

Since my last appearance before this Committee, I have worked with my colleagues to address several of the flaws that you identified in CFIUS reviews. We have revised the interagency process to ensure that all members, especially the security agencies, have sufficient time and opportunity to review transactions, identify any security concerns, and fully address those concerns. Nonetheless, it is clear that improvements are still required. In particular, we must improve the CFIUS process to help ensure the Congress can fulfill its important oversight responsibilities. Although CFIUS operates under restrictions on public disclosures regarding pending cases, we have tried to be responsive to inquiries from Congress. I am open to suggestions on how we foster closer communication in the future. I think that we can find the right balance between providing Congress the information it requires to fulfill its oversight role while respecting the deliberative processes of the executive branch and the proprietary information of the parties filing with CFIUS.

Let me stress in closing, Mr. Chairman, that all members of CFIUS understand that their top priority is to protect our national security. As President Bush said: "If there was any doubt in my mind, or people in my administration's mind, that our ports would be less secure and the American people endangered, this deal wouldn't go forward."

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