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DEFENSE TRADE

Implementation of Exon-Florio

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Acquisition and Sourcing Management

October 6, 2005

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Implementation of Exon-Florio

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Highlights

Highlights of GAO-06-135T, a report to Senate Banking, Housing, and Urban Affairs Committee

Why GAO Did This Study

The 1988 Exon-Florio amendment to the Defense Production Act authorizes the President to suspend or prohibit foreign acquisitions of U.S. companies that may harm national security, an action the President has taken only once. Implementing Exon-Florio can pose a significant challenge because of the need to weigh security concerns against U.S. open investment policy—which requires equal treatment of foreign and domestic investors.

Exon-Florio's investigative authority was delegated to the Committee on Foreign Investment in the United States (Committee)—an interagency committee established in 1975 to monitor and coordinate U.S. policy on foreign investments. In September 2002, GAO reported on weaknesses in the Committee's implementation of Exon-Florio. This review further examined the Committee's implementation of Exon-Florio.

What GAO Recommends

GAO's accompanying report on Exon-Florio—*Defense Trade: Enhancements to the Implementation of Exon-Florio Could Strengthen the Law's Effectiveness*, GAO-05-686 (Washington, D.C.: Sept. 28, 2005)—contains matters for congressional consideration regarding Exon-Florio's coverage and needed improvements to the implementation of the law.

www.gao.gov/cgi-bin/getrpt?GAO-06-135T.

To view the full product, including the scope and methodology, click on the link above. For more information, contact Katherine V. Schinasi at (202) 512-4841 or schinasik@gao.gov.

What GAO Found

Several aspects of the process for implementing Exon-Florio could be enhanced thereby strengthening the law's effectiveness. First, in light of differing views among Committee members about the scope of Exon-Florio—specifically, what defines a threat to national security, we have suggested that Congress should consider amending Exon-Florio to more clearly emphasize the factors that should be considered in determining potential harm to national security.

Second, to provide additional time for analyzing transactions when necessary, while avoiding the perceived negative connotation of investigation on foreign investment in the United States we have suggested that the Congress eliminate the distinction between the 30-day review and the 45-day investigation and make the entire 75-day period available for review.

Third, the Committee's current approach to provide additional time for analysis or to resolve concerns while avoiding the potential negative impacts of an investigation on foreign investment in the United Stated is to encourage companies to withdraw their notifications of proposed or completed acquisitions and refile them at a later date. Since 1997, companies involved in 18 acquisitions have been allowed to withdraw their notification to refile at a later time. The new filing is considered a new case and restarts the 30-day clock. While withdrawing and refiling provides additional time while minimizing the risk of chilling foreign investment, withdrawal may also heighten the risk to national security in transactions where there are concerns and the acquisition has been completed or is likely to be completed during the withdrawal period. We are therefore suggesting that the Congress consider requiring the Committee Chair to (1) establish interim protections where specific concerns have been raised, (2) specify time frames for refiling, and (3) establish a process for tracking any actions being taken during the withdrawal period.

Finally, to provide more transparency and facilitate congressional oversight, we are suggesting that the Congress may want to revisit the criterion for reporting circumstances surrounding cases to the Congress. Currently, the criterion is a presidential decision. However, there have only been two such decisions since 1997 and thus only two reports to Congress.

Mr. Chairman and Members of the Committee:

I am pleased to be here today to discuss the implementation of Exon-Florio—an amendment to the Defense Production Act of 1950[1] that authorizes the President to suspend or prohibit foreign acquisitions, mergers, or takeovers[2] of U.S. companies that pose a threat to national security. As such, Exon-Florio is meant to serve as a safety net when laws other than the International Emergency Economic Powers Act[3] may be ineffective in protecting national security. As you know, implementing Exon-Florio can pose a significant challenge for the federal government because of the potential for conflict with the long-standing U.S. open investment policy. This policy recognizes the economic benefits associated with foreign investments. Accordingly, foreign investors are to be treated no differently than domestic investors.

The Committee on Foreign Investment in the United States, originally established in 1975 to monitor foreign investments, has been delegated responsibility for investigating foreign acquisitions when necessary. According to the regulations, after a company voluntarily files a notice of a pending or completed acquisition by a foreign concern, the Committee conducts a 30-day review to determine whether there are any national security concerns. If the Committee is unable to complete its review within 30 days, the Committee may either allow the companies to withdraw the notification or initiate a 45-day investigation. At the completion of the investigation, the Committee submits a report to the President, including a recommendation for action. The Committee currently has 12 members: the Department of the Treasury, which serves as Chair; the Departments of Commerce, Defense, Homeland Security, Justice, and State; and six offices in the Executive Office of the President.[4] Other agencies may be called on when their particular expertise is needed.

[1] 50 U.S.C. app. § 2170.

[2] In the remainder of this statement, acquisitions, mergers, and takeovers are referred to as acquisitions.

[3] The International Emergency Economic Powers Act gives the President broad powers to deal with any "unusual and extraordinary threat" to the national security, foreign policy, or economy of the United States (50 U.S.C. §§ 1701-1706). To exercise this authority, however, the President must declare a national emergency to deal with any such threat. Under this legislation, the President has the authority to investigate, regulate, and, if necessary, block any foreign interest's acquisition of U.S. companies (50 U.S.C. § 1702(a) (1) (B)).

[4] See appendix I for information on Committee members.

The Department of Homeland Security was the most recently added member, created as a result of the terrorist attacks of September 11th and the recognition of the new security environment in which we exist.

Over the past decade, GAO has conducted several reviews of the Committee's actions and has found areas where improvements should be made. For example, in September 2002, we reported that member agencies could improve the agreements they negotiated with companies under Exon-Florio to mitigate national security concerns.[5] While our recent work indicates that member agencies have begun to take action to respond to some of our recommendations, concerns remain about the extent to which the Committee's implementation of Exon-Florio has provided the safety net envisioned by the law. My comments today will focus on the process the Committee follows in conducting its reviews, concerns about the process, and suggestions we have made in our report on these issues.[6] It should be noted that because the law provides for confidentiality of information filed under Exon-Florio, our ability to discuss certain details of cases we examined is limited.

In summary, several aspects of the Committee's process for implementing Exon-Florio could be enhanced thereby strengthening the law's effectiveness. First, in light of differing views among Committee members about the scope of Exon-Florio—specifically, what defines a threat to national security, we have suggested that Congress should consider amending Exon-Florio to more clearly emphasize the factors that should be considered in determining potential harm to national security.

Second, to provide additional time for analyzing transactions when necessary, while avoiding the perceived negative connotation of investigation on foreign investment in the United States we have suggested that the Congress eliminate the distinction between the 30-day review and the 45-day investigation and make the entire 75-day period available for review.

Third, the Committee's current approach to provide additional time for analysis or to resolve concerns while avoiding the potential negative

[5] *GAO, Defense Trade: Mitigating National Security Concerns under Exon-Florio Could be Improved*, GAO-02-736 (Washington, D.C.: Sept. 12, 2002).

[6] *GAO, Defense Trade: Enhancements to the Implementation of Exon-Florio Could Strengthen the Law's Effectiveness*, GAO-05-686 (Washington, D.C.: Sept. 28, 2005).

impacts of an investigation on foreign investment in the United Stated is to encourage companies to withdraw their notifications of proposed or completed acquisitions and refile them at a later date. Since 1997, companies involved in 18 acquisitions have been allowed to withdraw their notification to refile at a later time. The new filing is considered a new case and restarts the 30-day clock. While withdrawing and refiling provides additional time while minimizing the risk of chilling foreign investment, withdrawal may also heighten the risk to national security in transactions where there are concerns and the acquisition has been completed or is likely to be completed during the withdrawal period. We are therefore suggesting that the Congress consider requiring the Committee Chair to (1) establish interim protections where specific concerns have been raised, (2) specify time frames for refiling, and (3) establish a process for tracking any actions being taken during the withdrawal period.

Finally, to provide more transparency and facilitate congressional oversight, we are suggesting that the Congress may want to revisit the criterion for reporting circumstances surrounding cases to the Congress. Currently, the criterion is a presidential decision. However, there have only been two such decisions since 1997 and thus only two reports to Congress.[7]

Background

The Exon-Florio amendment to the Defense Production Act, enacted in 1988, authorized the President to investigate the impact of foreign acquisitions of U.S. companies on national security and to suspend or prohibit acquisitions that might threaten national security. The President delegated the investigative authority to the Committee on Foreign Investment in the United States, an interagency group established in 1975 to monitor and coordinate U.S. policy on foreign investment in the United States.[8]

In 1991, the Treasury Department, as chair of the Committee, issued regulations to implement Exon-Florio. The law and regulations establish a

[7] See Appendix II for a number of cases reviewed by the Committee between fiscal years 1997 and 2004 and the disposition of these cases.

[8] Executive Order 11858 (May 7, 1975), as amended by Executive Order 12188 (Jan. 2, 1980), Executive Order 12661 (Dec. 27, 1988), Executive Order 12860 (Sept. 3, 1993), and Executive Order 13286 (Feb. 28, 2003).

four-step process for reviewing foreign acquisitions of U.S. companies: (1) voluntary notice by the companies;[9] (2) a 30-day review to determine whether the acquisition could pose a threat to national security; (3) a 45-day investigation to determine whether those concerns require a recommendation to the President for possible action; and (4) a presidential decision to permit, suspend, or prohibit the acquisition. In most cases, the Committee completes its review within the initial 30 days because there are no national security concerns or concerns have been addressed, or the companies and the government agree on measures to mitigate identified security concerns. In cases where the Committee is unable to complete its review within 30 days, the Committee may initiate a 45-day investigation or allow companies to withdraw their notifications. The Committee generally grants requests to withdraw. When the Committee concludes a 45-day investigation, it is required to submit a report to the President containing recommendations. If Committee members cannot agree on a recommendation, the regulations require that the report to the President include the differing views of all Committee members.[10] The President has 15 days to decide whether to prohibit or suspend the proposed acquisition, order divestiture of a completed acquisition, or take no action.[11]

While neither the statute nor the implementing regulation defines "national security," the statute provides the following factors to be considered in determining a threat to national security:

- Domestic production needed for projected national defense requirements.
- The capability and capacity of domestic industries to meet national defense requirements, including the availability of human resources, products, technology, materials, and other supplies and services.

[9] Notification is not mandatory. However, any member agency is authorized to submit a notification of an acquisition if the companies have not done so. To date, no agency has submitted a notification of an acquisition. Instead, member agencies have informed Treasury of acquisitions that may be subject to Exon-Florio, and Treasury has contacted the companies to encourage them to officially notify the Committee of the acquisition to begin a review.

[10] 31 C.F.R. § 800.504(b).

[11] In 1990, the President ordered a Chinese aerospace company to divest its ownership of a U.S. aircraft parts manufacturer. To date, this is the only divestiture the President has ordered.

- The control of domestic industries and commercial activity by foreign citizens as it affects the capability and capacity of the United States to meet national security requirements.

- The potential effects of the proposed or pending transaction on sales of military goods, equipment, or technology to any country identified under applicable law as (a) supporting terrorism or (b) a country of concern for missile proliferation or the proliferation of chemical and biological weapons.

- The potential effects of the proposed or pending transaction on U.S. international technological leadership in areas affecting national security.

Differing Views of What Defines A National Security Threat and When to Initiate an Investigation May Weaken Exon-Florio's Effectiveness

Lack of agreement among Committee members on what defines a threat to national security and what criteria should be used to initiate an investigation may be limiting the Committee's analyses of proposed and completed foreign acquisitions. From 1997 through 2004, the Committee received a total of 470 notices of proposed or completed acquisitions,[12] yet it initiated only 8 investigations.

Some Committee member agencies, including Treasury, apply a more traditional and narrow definition of what constitutes a threat to national security—that is, (1) the U.S. company possesses export-controlled technologies or items; (2) the company has classified contracts and critical technologies; or (3) there is specific derogatory intelligence on the foreign company. Other members, including the departments of Defense and Justice, argue that acquisitions should be analyzed in broader terms. According to officials from these departments, vulnerabilities can result from foreign control of critical infrastructure, such as control of or access to information traveling on networks. Vulnerabilities can also result from foreign control of critical inputs to defense systems or a decrease in the number of innovative small businesses researching and developing new defense-related technologies.

While these vulnerabilities may not pose an immediate threat to national security, they may create the potential for longer term harm to U.S. national security interests by reducing U.S. technological leadership in

[12] Nineteen of these notices were refilings.

defense systems. For example, in reviewing a 2001 acquisition of a U.S. company, the departments of Defense and Commerce raised several concerns about foreign ownership of sensitive but unclassified technology, including the possibility of this sensitive technology being transferred to countries of concern or losing U.S. government access to the technology. However, Treasury argued that these concerns were not national security concerns because they did not involve classified contracts, the foreign company's country of origin was a U.S. ally, or there was no specific negative intelligence about the company's actions in the United States.

In one proposed acquisition that we reviewed, disagreement over the definition of national security resulted in an enforcement provision being removed from an agreement between the foreign company and the Departments of Defense and Homeland Security. Defense had raised concerns about the security of its supply of specialized integrated circuits, which are used in a variety of defense technologies that the Defense Science Board had identified as essential to our national defense—technologies found in unmanned aerial vehicles, the Joint Tactical Radio System, and cryptography and other communications protection devices. However, Treasury and other Committee members argued that the security of supply issue was an industrial policy concern and, therefore, was outside the scope of Exon-Florio's authority. As a result of removing the provision, the President's authority to require divestiture under Exon-Florio has been eliminated as a remedy in the event of noncompliance.[13]

Committee members also disagree on the criteria that should be applied to determine whether a proposed or completed acquisition should be investigated. While Exon-Florio provides that the "President or the President's designee may make an investigation to determine the effects on national security" of acquisitions that could result in foreign control of a U.S. company, it does not provide specific guidance for the appropriate criteria for initiating an investigation of an acquisition.[14] Currently, Treasury, as Committee Chair, applies essentially the same criteria established in the law for the President to suspend or prohibit a

[13] The regulations provide that the Committee may reopen its review or investigation and revise its recommendation to the President only if it determines that the companies omitted or provided false or misleading information (31 C.F.R. § 800.601(e)).

[14] 50 U.S.C. App. § 2170(a). Under the statute, investigations are mandatory in those cases in which the acquiring company is "controlled by or acting on behalf of a foreign government" and the acquisition could result in control of the U.S. company and could affect the national security of the United States (50 U.S.C. App. § 2170(b)).

transaction, or order divestiture: (1) there is credible evidence that the foreign controlling interest may take action to threaten national security and (2) no laws other than the International Emergency Economic Powers Act are appropriate or adequate to protect national security.[15] However, the Defense, Justice, and Homeland Security departments have argued that applying these criteria at this point in the process is inappropriate because the purpose of an investigation is to determine whether or not a credible threat exists. Notes from a policy-level discussion of one particular case further corroborated these differing views.

Allowing Withdrawal of Notifications to Avoid Investigations While Providing Additional Time May Leave National Security Concerns Unresolved

Committee guidelines require member agencies to inform the Committee of national security concerns by the 23rd day of a 30-day review—further compressing the limited time allowed by legislation to determine whether a proposed or completed foreign acquisition poses a threat to national security. According to one Treasury official, the information is needed a week early to meet the legislated 30-day requirement. While most reviews are completed in the legislatively required 30 days, some Committee members have found that completing a review within such short time frames can be difficult—particularly in complex cases. One Defense official said that without advance notice of the acquisition, time frames are too short to complete analyses and provide input for the Defense Department's position. Another official said that to meet the 23-day deadline, analysts have only 3 to 10 days to analyze the acquisition. In one instance, Homeland Security was unable to provide input within the 23-day time frame.

If a review cannot be completed within 30 days and more time is needed to determine whether a problem exists or identify actions that would mitigate concerns, the Committee can initiate a 45-day investigation of the acquisition or allow companies to withdraw their notifications and refile at a later date.[16] According to Treasury officials, the Committee's interest is to ensure that the implementation of Exon-Florio does not undermine U.S. open investment policy. Concerned that public knowledge of investigations could devalue companies' stock, erode confidence of foreign investors, and ultimately chill foreign investment in the United

[15] 50 U.S.C. app. § 2170(e).

[16] Exon-Florio's implementing regulations permit companies to request to withdraw notifications at any time up to a presidential decision. After the Committee approves a withdrawal, any subsequent refiling is considered a new, voluntary notice.

States, the Committee has generally allowed and often encouraged companies to withdraw their notifications rather than initiate an investigation.

While an acquisition is pending, companies that have withdrawn their notification have an incentive to resolve any outstanding issues and refile as soon as possible. However, if an acquisition has been concluded, there is less incentive to resolve issues and refile, extending the time during which any concerns remain unresolved. Between 1997 and 2004, companies involved in 18 acquisitions have withdrawn their notification and refiled 19 times. In two cases, the companies had already concluded the acquisition and did not refile until 9 months to 1 year. Consequently, the concerns raised by Defense and Commerce about potential export control issues in these cases remained unresolved for as much as a year—further increasing the risk that a foreign acquisition of a U.S. company would pose a threat to national security.

We identified two cases in which companies that had concluded an acquisition before filing with the Committee withdrew their notification.[17] In each case, the company has yet to refile. In one case, the company filed with the Committee more than a year after completing the acquisition. The Committee allowed it to withdraw the notification to provide more time to answer the Committee's questions and provide assurances concerning export control matters. The company refiled, and was permitted to withdraw a second time because there were still unresolved issues. Four years have passed since the second withdrawal. In the second case, the company—which filed with the Committee more than 6 months after completing its acquisition—was also allowed to withdraw its notification. That was more than 2 years ago.

Lack of Reporting Contributes to the Opaqueness of the Committee's Process

In enacting Exon-Florio, the Congress, while recognizing the need for confidentiality, indicated a desire for insight into the process by requiring the President to report to the Congress on any transaction that the President prohibited. In response to concerns about the lack of transparency in the Committee's process, the Congress passed the Byrd Amendment to Exon-Florio in 1992, requiring a report to the Congress if the President makes any decision regarding a proposed foreign

[17] In one of these cases, as discussed above, the company had previously withdrawn and refiled more than a year later.

acquisition. In 1992, another amendment also directed the President to report every 4 years on whether there is credible evidence of a coordinated strategy by one or more countries to acquire U.S. companies involved in research, development, or production of critical technologies for which the United States is a leading producer, and whether there are industrial espionage activities directed or assisted by foreign governments against private U.S. companies aimed at obtaining commercial secrets related to critical technologies.

While the Byrd Amendment expanded required reporting on Committee actions, few reports have been submitted to the Congress because withdrawing and refiling notices to restart the clock limits the number of cases that result in a presidential decision. Since 1997, only two cases—both involving telecommunications systems—resulted in a presidential decision and a subsequent report to the Congress. Infrequent reporting of Committee deliberations on specific cases provides little insight into the Committee's process to identify concerns raised during investigations and determine the extent to which the Committee has reached consensus on a case. Further, despite the 1992 requirement for a report on foreign acquisition strategies every 4 years, there has been only one report—in 1994.

In conclusion, in recognition of the benefits of open investment, Exon-Florio comes into play only as a last resort. However, since that is its role, effective application in support of recognizing and mitigating national security risks remains critical. While Exon-Florio provides the Committee on Foreign Investment in the United States the latitude to address new emerging threats, the more traditional interpretation of what constitutes a threat to national security fails to fully consider the factors currently embodied in the law. Further, the practical requirement to complete reviews within 23 days to meet the 30-day legislative requirement, along with the reluctance to proceed to an investigation, limits agencies' abilities to complete in-depth analyses. However, the alternative—allowing companies to withdraw and refile their notifications—increases the risk that the Committee, and the Congress, will lose visibility over foreign acquisitions of U.S. companies.

Our report lays out several matters for congressional consideration to (1) help resolve the differing views as to the extent of coverage of Exon-Florio, (2) address the need for additional time, and (3) increase insight and oversight of the process. Further, we are suggesting that, when withdrawal is allowed for a transaction that has been completed, the Committee establish interim protections where specific concerns have

been raised, specific time frames for refiling, and a process for tracking any actions being taken during a withdrawal period.

Mr. Chairman, this concludes my prepared statement. I will be happy to answer any questions you or other Members of the Committee may have.

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For information about this testimony, please contact Katherine V. Schinasi, Managing Director, Acquisition and Sourcing Management, at (202) 512-4841 or schinasik@gao.gov. Other individuals making key contributions to this product include Thomas J. Denomme, Allison Bawden, Gregory K. Harmon, Paula J. Haurilesko, John Van Schaik, Karen Sloan, and Michael Zola.

Scope and Methodology

Our understanding of the Committee on Foreign Investment in the United States' process is based on our current work and builds on our review of the process and our discussions with agency officials for our 2002 report. For our current review, and to expand our understanding of the Committee's process for reviewing foreign acquisitions of U.S. companies, we met with officials from the Department of Commerce, the Department of Defense, the Department of Homeland Security, the Department of Justice, and the Department of the Treasury. For prior reviews we also collected data from and discussed the issues with representatives of the Department of State, the Council of Economic Advisors, the Office of Science and Technology, and the U.S. Trade Representative. Further, we conducted case studies of nine acquisitions that were filed with the Committee between June 28, 1995, and December 31, 2004. These case studies included reviewing files containing company submissions, correspondence between the Committee and the companies' representatives, email traffic between member agencies, and minutes of policy-level meetings attended by at various times all 12 Committee members.

We selected acquisitions based on recommendations by Committee member agencies and the following criteria: (1) the Committee permitted the companies to withdraw the notification; (2) the Committee or member agencies concluded agreements to mitigate national security concerns; (3) the foreign company had been involved in a prior acquisition notified to the Committee; or (4) GAO had reviewed the acquisition for its 2002 report. We did not attempt to validate the conclusions reached by the Committee on any of the cases we reviewed. We also discussed our draft

report from our current review with officials from the Department of State and the U.S. Trade Representative's office to obtain their views on our findings.

To determine whether the weaknesses in provisions to assist agencies in monitoring agreements that GAO had identified in its 2002 report had been addressed, we analyzed agreements concluded under the Committee's authority between 2003 and 2005. We conducted our review from April 2004 through July 2005 in accordance with generally accepted government auditing standards.

Appendix I: Agencies Represented on the Committee on Foreign Investment in the United States

Agencies Represented	Year Added	Lead Office Mission
Executive Departments		
Department of the Treasury (Chair)	1975	Office of International Investment: Coordinates policies toward foreign investments in the United States and U.S. investments abroad.
Department of Commerce	1975	International Trade Administration: Coordinates issues concerning trade promotion, international commercial policy, market access, and trade law enforcement.
Department of Defense	1975	Defense Technology Security Administration: Administers the development and implementation of Defense technology security policies on international transfers of defense-related goods, services, and technologies.
Department of State	1975	Bureau of Economic and Business Affairs: Formulates and implements policy regarding foreign economic matters, including trade and international finance and development.
Department of Justice	1988	Criminal Division: Develops, enforces, and supervises the application of all federal criminal laws, except for those assigned to other Justice Department divisions.
Department of Homeland Security	2003	Information Analysis and Infrastructure Protection: Identifies and assesses current and future threats to the homeland, maps those threats against vulnerabilities, issues warnings, and takes preventative and protective action.
Executive Office of the President		
Council of Economic Advisers	1980	Performs analyses and appraisals of the national economy for the purpose of providing policy recommendations to the President.
Office of the United States Trade Representative	1980	Directs all trade negotiations of and formulates trade policy for the United States.
Office of Management and Budget	1988	Evaluates, formulates, and coordinates management procedures and program objectives within and among federal departments and agencies, and controls administration of the federal budget.
National Economic Council	1993	Coordinates the economic policy-making process and provides economic policy advice to the President.
National Security Council	1993	Advises and assists the President in integrating all aspects of national security policy as it affects the United States.
Office of Science and Technology Policy	1993	Provides scientific, engineering and technological analyses for the President for federal policies, plans, and programs.

Source: GAO analysis.

Appendix II: Notifications to the Committee on Foreign Investment in the United States and Actions Taken, 1997 through 2004

Year	Notifications	Acquisitions[a]	Investigations[b]	Notices withdrawn after investigation begun	Presidential decisions
1997	62	60	0	0	0
1998	65	62	2	2	0
1999	79	76	0	0	0
2000	72	71	1	0	1
2001	55	51	1	1	0
2002	43	42	0	0	0
2003	41	39	2	1	1
2004	53	50	2	2	0
Total	**470**	**451**	**8**	**6**	**2**[c]

Source: Department of the Treasury.

[a]Acquisitions that were withdrawn and refiled are shown in the year of initial notification.

[b]Investigations are shown in the year of their notification.

[c]In both cases the President took no action, thereby allowing the transaction, and sent a report to Congress.

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