

Testimony of
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Deputy Secretary
U. S. Department of Commerce
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On behalf of Secretary Gutierrez, I would like to thank the Committee for giving me the opportunity to appear before you today. As you know, the Department of Commerce is a member of the Committee on Foreign Investment in the United States (CFIUS), which was established in 1975 and was delegated authority by the President in 1988 to review and, as appropriate, investigate foreign acquisitions under the Exon-Florio amendment to the Defense Production Act of 1950.¹ My testimony will describe the participation by the Commerce Department's International Trade Administration (ITA) and Bureau of Industry and Security (BIS) in CFIUS's Exon-Florio reviews of proposed mergers, takeovers and acquisitions of U.S. firms by foreign parties.

ITA's Role

ITA was established in 1980 to carry out the international trade and investment-related functions of the Secretary of Commerce. In this capacity, ITA promotes trade and export expansion pursuant to Reorganization Plan 3 of 1979, and promotes and develops the

¹ See 50 U.S.C. app. § 2170. CFIUS's activities are pursuant to Executive Order 11858, 40 Fed. Reg. 20263 (May 7, 1975), as amended by Executive Order 12188, 45 Fed. Reg. 989 (Jan. 2, 1980), Executive Order 12661 of December 27, 1988, 54 Fed. Reg. 779 (Jan. 9, 1989), Executive Order 12869 of September 30, 1993, 58 Fed. Reg. 51751 (Oct. 4, 1993), and Executive Order 13286 of February 28, 2003, 68 Fed. Reg. 10619 (Mar. 5, 2003). The Treasury Department regulations implementing Exon-Florio are at 31 C.F.R. Part 800 (Office of International Investment Regulations Pertaining to Mergers, Acquisitions, and Takeovers by Foreign Persons).

foreign and domestic commerce of the United States pursuant to the Secretary's organic authority found in Title 15, United States Code.² Commerce participation in CFIUS and other international investment fora is led and coordinated by ITA.

ITA has industry expertise essential to the assessment of the potential national security implications of specific foreign investments in the United States. This expertise includes knowledge of the level of technological sophistication of the transaction participants, the market position of alternate suppliers, the financial and product service track record, and the future outlook for transaction participants. This expertise gives ITA the broad perspective needed for a comprehensive assessment of the national defense, competitive performance, trade and investment policy and commercial issues involved in each transaction, and for ensuring that the national security is fully safeguarded in a manner consistent with longstanding United States policy regarding foreign investment in the United States.

Within Commerce, CFIUS reviews are carried out by members of the Department of Commerce Exon-Florio Working Group. ITA chairs the group and coordinates the Department responses to the CFIUS. Members include representatives from ITA and BIS, the Technology Administration, the Economic and Statistics Administration, the National Telecommunications and Information Administration, and the Office of the General Counsel.

² See, e.g., 15 U.S.C. § 1512.

As provided in Treasury's regulations implementing CFIUS' delegated authority under Exon-Florio, Commerce, as a CFIUS member, may also notify CFIUS about any transactions with perceived national security implications that have not been notified by the Parties to the transaction, with a request for review and subsequent action by CFIUS. ITA has a formalized process of identifying such transactions, and asks Working Group members to identify and report any potential acquisitions by foreign companies that may be of interest to CFIUS, especially those transactions that involve smaller and/or privately held U.S. firms that may not have been reported widely in the media.

BIS's Role

The Bureau of Industry and Security (BIS) supports ITA in the development of the Commerce Department position on proposed foreign acquisitions and takeovers. The overall mission of BIS is to advance U.S. national security, foreign policy, and economic security interests. While BIS is best known for developing export controls for dual use items, issuing export licenses and enforcing export controls, BIS also conducts programs designed to ensure a strong, technologically superior U.S. defense industrial base. For example, BIS administers the Defense Priorities and Allocations System program that provides for expedited shipment of critical materials and services from the U.S. industrial base to meet urgent national security needs. BIS has been very active in using this authority to support the Department of Defense in Operation Enduring Freedom and Operation Iraqi Freedom.

With respect to the CFIUS process, BIS assesses the national security, defense industrial base, and export control implications of all proposed acquisitions of U.S. companies by foreign entities that have been notified to CFIUS. In so doing, BIS seeks to ensure that the U.S. defense industrial and technology base will not be compromised by such foreign acquisitions.

In reviewing each proposed acquisition, BIS reviews internal databases to determine whether the parties to the acquisition have violated U.S. export control laws. BIS also checks its CFIUS database for previous acquisitions by the foreign company and other acquisitions in the industry. In addition, BIS assesses whether there is significant sensitive technology being acquired, and evaluates the foreign company's plans for managing its compliance with U.S. export control laws.

In order to address potential industrial base concerns, BIS works with the Department of Defense to determine the importance of the firm that is being acquired to the Nation's defense manufacturing and technology infrastructure. BIS also works with the Departments of Justice and Homeland Security, and with the intelligence community, to investigate potential problems with the acquiring firm and the possible damage to national security and homeland security that might occur as a result of foreign access to key firms in the United States. For example, if the acquiring company was in the telecommunications industry, BIS would work with Department of Homeland Security and other agencies to resolve concerns about the safety of the Nation's communications infrastructure.

In addition, BIS compares companies involved in filings with CFIUS against a series of lists of individuals, companies, and organizations that may have acted in ways that jeopardize, or have the potential to jeopardize, U.S. national security. BIS reviews classified and unclassified lists including the Bureau's Entity List, our Unverified List, our Denied Persons List, and the Treasury Department's Specially Designated Nationals and Blocked Persons List. In sum, BIS's review of CFIUS transactions focuses on the national security impact that such proposed acquisitions may have on the release of sensitive technologies and on the defense industrial base.

Mr. Chairman, the expertise that the various Commerce agencies bring to the CFIUS process is unique and important to the success of CFIUS reviews.

Thank you for asking me to appear before you today, and I would be happy to answer any questions you may have at this time.