

1994

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Recommended Citation

Corr, Christopher F. "A Survey of United States Controls on Foreign Investment and Operations: How Much Is Enough?" American University International Law Review 9, no. 2 (1994): 417-463,

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A SURVEY OF UNITED STATES CONTROLS ON FOREIGN INVESTMENT AND OPERATIONS: HOW MUCH IS ENOUGH?

Christopher F. Corr*

INTRODUCTION

Foreign investment in the United States in recent years has provoked extensive, sometimes passionate discussion. Commentators have painted a disturbing portrait of a nation that is dangerously defenseless against an onslaught of strategic foreign buyouts and acquisitions,¹ and have

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1. See, e.g., MARTIN TOLCHIN & SUSAN J. TOLCHIN, *SELLING OUR SECURITY: THE EROSION OF AMERICA'S ASSETS* 10-12 (1992) [hereinafter TOLCHIN & TOLCHIN, *SELLING*] (proposing that foreign investment threatens America's economic and political security); MARTIN TOLCHIN & SUSAN TOLCHIN, *BUYING INTO AMERICA: HOW FOREIGN MONEY IS CHANGING THE FACE OF OUR NATION* 203-04 [hereinafter TOLCHIN & TOLCHIN, *BUYING*] (arguing that foreign debt compromises the United States' ability to function as a sovereign nation in much the same manner as foreign debt has hampered the economic choices of the Latin American debtor nations). The Tolchins present a shocking picture of a "United States industrial base hemorrhaging technology so dramatically that entire industries are in danger of going the way of VCRs and color TVs." Paul Magnusson, *America's Dangerous Liaisons*, BUS. WK., Nov. 2, 1992, at 16; see also Marc Levinson, *The Hand Wringers*, NEWSWEEK, Oct. 26, 1992, at 44 (stating that the Tolchins argue that "the government should restrict foreign investment to keep companies in American hands where 'national security' is involved"). Some commentators characterize foreign investment as an economic "war" in which America does not defend itself. DOUGLAS FRANTZ & CATHERINE COLLINS, *SELLING OUT: HOW WE ARE LETTING JAPAN BUY OUR LAND, OUR INDUSTRIES, OUR FINANCIAL INSTITUTIONS, AND OUR FUTURE* 125-26 (1989). American leaders do not perceive the foreign conquest because American business and politics lack the long-term planning that would reveal the constraints that foreign investment makes on America's ability to make independent decisions. *Id.* at 127. Recently, U.S. leaders have begun to face the problems of foreign investment. See LAURA D. TYSON, *WHO'S BASHING WHOM: TRADE CONFLICT IN HIGH-TECHNOLOGY INDUSTRIES* 291 (1992) (summarizing a change of attitude in the Bush Administration to examine the

called for increased restrictions and stricter enforcement.² The policy debate in the United States has centered largely on the merits versus the risks of uncontrolled foreign investment.³ There has been little discussion or contemplation of the regime for controlling foreign investment currently in place.⁴

The United States, in fact, maintains a variety of direct and indirect federal controls on foreign investment and operations under disparate statutes that are enforced by a variety of agencies. Numerous state laws add to the regulatory array. Consequently, the system at times lacks coherence and effectiveness in carrying out national investment objectives.⁵ The lack of coherence results from the virtual absence of a com-

possible benefits of a governmental role in protecting selected American high-technology areas from exploitation by foreign investors); Jim Adams, *French Group Withdraws Bid for LTV Missile Subsidiary*, Reuters Bus. Rep., July 6, 1992, available in LEXIS, News Library, BUSRPT File (expressing Senator Byrd's opposition to the foreign purchase of industrial components that are critical for U.S. military security); *U.S. Congressional Leader Urges Investment Curbs*, Japan Econ. Newswire, Feb. 27, 1991, available in LEXIS, News Library, JEN File (quoting House Majority Leader Gephardt in urging the President to assert more control over the incursions of foreign investment).

2. See *Exon-Florio Said to Be Inadequate, More Stringent Controls Needed*, Daily Rep. for Executives (BNA), No. 93, at A-5 (May 14, 1991) (reporting that Congressmen Levine and Wolf called for stronger U.S. controls over foreign investment). The Congressmen pointed to the importance of high technology weaponry in minimizing U.S. casualties in the Persian Gulf war. *Id.* Permitting foreign investment in high technology weapons manufacturers would weaken the U.S. control of access to weapons development methodologies. *Id.*

3. See Paul Magnusson, *Why Corporate Nationality Matters*, BUS. WK., July 12, 1993, at 142 (contrasting the views of Secretary of Labor, Robert B. Reich, and Chairperson of the Council of Economic Advisors, Laura D'Andrea Tyson). Mr. Reich maintains that within the global economy, the critical factor is who has the jobs, not who owns the corporation. *Id.* Ms. Tyson, however, insists that foreign investors use their position as owner to gain access to critical technology. *Id.* Thus, foreign investors can benefit from United States government-sponsored research. *Id.* See also EDWARD GRAHAM & PAUL KRUGMEN, *FOREIGN DIRECT INVESTMENT IN THE UNITED STATES* 119-60 (1991) (providing an overview of current U.S. policy and policy alternatives toward foreign direct investment).

4. See SUSAN J. TOLCHIN & MARTIN TOLCHIN, *DISMANTLING AMERICA: THE RUSH TO DEREGULATE* 237-40 [hereinafter TOLCHIN & TOLCHIN, *DISMANTLING*] (reviewing the general policy direction of the Reagan and Bush Administrations to deregulate even in the face of increased coordination among foreign competitors seeking to dominate U.S. markets and the U.S. Government); TYSON, *supra* note 1, at 290-93 (explaining that there is a general perception that the federal government should minimize the intrusion of its regulations in investment operations).

5. See Jose E. Alvarez, *Political Protectionism and United States Investment*

monly understood, uniform policy or scheme underlying the various federal statutes. Furthermore, fragmentation of jurisdiction inhibits efforts to identify and monitor whether regulations are consistently applied and whether the system in its entirety serves and protects U.S. interests.⁶ This legal framework also can disadvantage foreign investors who have trouble identifying the overlapping controls that may apply to a contemplated transaction, which, in turn, obscures an accurate analysis of investment risks, with potentially severe consequences.⁷

The current system of U.S. foreign investment controls therefore warrants a comprehensive review.⁸ A review of all controls should include not only explicit restrictions on foreign direct investment⁹ in U.S. entities, but also those on U.S. operations of foreign-owned businesses which can impede foreign investment.¹⁰ Moreover, the various reporting requirements imposed upon foreign investors should be viewed as part

Obligations in Conflict: The Hazards of Exon-Florio, 30 VA. J. INT'L L. 1, 159 (1989) (stating that U.S. reactions to foreign investment "appear schizophrenic" by restricting the foreign investments that other policies expressly attempt to expand); Cecelia M. Waldeck, Note, *Proposals for Limiting Foreign Investment Risk Under the Exon-Florio Amendment*, 42 HASTINGS L.J. 1175, 1214 (1991) (noting that the legislation for controlling foreign investment does not define the security or investment objectives of regulation). Neither agencies nor investors have statutory or regulatory standards to coordinate future actions with other public and private actors. *Id.* at 1253.

6. See Waldeck, *supra* note 5, at 1252 (describing the multiplicity of parties and interests among the agencies responsible for administering the legislation controlling foreign investments).

7. See Waldeck, *supra* note 5, at 1253-54 (stating that the legislation controlling foreign investments does not provide explicit policy directives against which an administrator could measure program effectiveness).

8. See Waldeck, *supra* note 5, at 1252-54 (arguing that re-organization, rather than redesign, of current controls on foreign investments would provide adequate protection with minimal disruption of investor expectations).

9. See UNITED STATES DEPARTMENT OF COMMERCE, ECONOMIC AND STATISTICS ADMINISTRATION, FOREIGN DIRECT INVESTMENT IN THE UNITED STATES: AN UPDATE 1 (1993) (defining the investment areas of concern for controlling foreign investment). While not an easily or consistently defined term, "foreign direct investment" is generally viewed as the foreign purchase of 10% or more of a U.S. business enterprise. *Id.* See also EDWARD GRAHAM & PAUL KRUGMEN, FOREIGN DIRECT INVESTMENT IN THE UNITED STATES 7 (1991) (addressing the general difficulties in defining foreign direct investment).

10. See TOLCHIN & TOLCHIN, DISMANTLING, *supra* note 4, at 10 (stating that regulatory reform must consider all significant burdens of alternative regulations). The significant burdens of regulation include report generation costs, agency delays in approvals, and attention to regulations during planning. *Id.*

of the regulatory regime, as regulatory reports also may burden and discourage foreign investment.

This Article seeks to examine the entire federal system of controls on foreign investment in the United States as a necessary starting point for reconsideration of the system. Accordingly, the analysis divides U.S. controls into three general categories: Part I discusses general investment controls; Part II examines restrictions on investment and operations in specific commercial areas; and Part III analyzes requirements for reporting investment activity.¹¹ The Article addresses only the federal laws and regulations affecting foreign investment. It is important to bear in mind, however, that foreign investors also are subject to separate sector-specific restrictions in many states, which further impede foreign investment and which may have no rational connection to federal law or policy.¹²

I. GENERAL INVESTMENT CONTROLS

A. EXON-FLORIO REVIEW

1. Overview

The 1988 Exon-Florio Amendment to the Defense Production Act of 1950¹³ (Exon-Florio or the Amendment) is the primary and most controversial law governing foreign investment in the United States.¹⁴ Un-

11. See *infra* Parts II-IV (analyzing competing U.S. policies and controls on foreign investment).

12. See Alvarez, *supra* note 5, at 157-58 (reviewing state laws that either imitate or contradict federal restrictions on foreign investment). Roughly half of the states apply some type of control on foreign investment, typically in the areas of real estate and natural resources. *Id.* For example, Hawaii (HAW. REV. STAT. § 226-103) and Indiana (IND. CODE ANN. § 23-2-3.1-2) have enacted statutes restricting foreign investment. For a further discussion of restrictive state measures, see Cheryl Tate, Note, *The Constitutionality of State Attempts to Regulate Foreign Investment*, 99 YALE L.J. 2023 (1990). As explained in that article, state restrictions are of questionable constitutionality under the Commerce Clause and the President's constitutional foreign affairs power. *Id.*

13. Exon-Florio Amendment to the Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100-418, § 5021, 102 Stat. 1107, 1425 (codified at 50 U.S.C. app. § 2170 (1988) [hereinafter Exon-Florio Amendment].

14. See Marc Greidinger, *The Exon-Florio Amendment: A Solution in Search of a Problem*, 6 AM. U. J. INT'L L. & POL'Y 111, 172 (1991) (stating that the Exon-Florio Amendment is unnecessary because other existing law provides adequate protection of national security without inviting executive agency abuse by, for example,

der Exon-Florio, the federal government has discretion to block any proposed investment that appears to threaten national security.¹⁵ Given the discretionary nature of the Amendment, the actual impact of the law depends greatly on the policy objectives of the administration enforcing it.¹⁶ Foreign investors must address both the legal and policy restrictions of Exon-Florio before acquiring or purchasing a stake in a U.S. business.

Congress enacted Exon-Florio as Section 5021 of the Omnibus Trade and Competitiveness Act of 1988, which amended the Defense Production Act of 1950 by adding a Section 721.¹⁷ In implementing Exon-Florio, President Reagan established the Committee on Foreign Investment in the United States (CFIUS or the Committee)¹⁸ and authorized

protecting against efficient foreign competition); Alvarez, *supra* note 5, at 170-71 (contending that in enacting the Exon-Florio Amendment, Congress reacted to an imaginary danger without discussing alternatives and risked compromising international agreements and cooperation); see also Thomas W. Soseman, Comment, *The Exon-Florio Amendment to the 1988 Trade Bill: A Guardian of National Security or a Protectionist Weapon?*, 15 J. CORP. L. 597, 621 (1990) (arguing that the Exon-Florio Amendment lacks administrative standards and delegates too much decision-making authority to executive branches, thus inviting abuse, for example, by using its powers to defend against hostile takeovers).

15. See Alvarez, *supra* note 5, at 109 (summarizing the sanctions that the President can activate under the Exon-Florio Amendment to deter acquisition of U.S. firms).

16. See Alvarez, *supra* note 5, at 108-09 (noting the discretion given to the President when obtaining concessions from foreign investors). Mr. Alvarez states that, under the Exon-Florio Amendment, the President is not publicly accountable for the agreements reached with foreign investors. *Id.* Consequently, investors generally cannot obtain guidance from the results of presidential negotiations with other foreign investors. *Id.*

17. 50 U.S.C. app. § 2170 (1991). Section 721 was made permanent by Pub. L. No. 102-99 (Aug. 17, 1991), and unlike the remainder of the Defense Production Act of 1950, is not subject to expiration. *Id.*

18. See Interim Directive Regarding Disposition of Certain Mergers, Acquisitions, and Takeovers, 53 Fed. Reg. 43,999 (1988), reprinted in 50 U.S.C. app. § 2170 (1988) (delegating to the Secretary of the Treasury, in consultation with CFIUS, the authority to investigate foreign investments to determine whether the President should suspend any acquisition). President Ford previously had created CFIUS in order to monitor the impact of foreign investment in the United States. Exec. Order No. 11,858, 40 Fed. Reg. 20,263 (1975). CFIUS originally consisted of the Secretaries of the State, Treasury, Defense, and Commerce departments, as well as the Assistant to the President for Economic Affairs and the Executive Director of the Council on International Economic Policy. *Id.* At the outset, CFIUS did not have a regulatory role. *Id.* Presidents have adjusted the membership of CFIUS to conform to their

it to enforce and administer the Amendment.¹⁹

Under the statutory provisions of Exon-Florio, CFIUS has authority to investigate the national security effects of proposed or pending mergers, acquisitions, or takeovers by or with foreign persons.²⁰ If a CFIUS investigation concludes that a transaction could impair national security, the Committee may block the transaction or force divestment if the transaction already has occurred.²¹ Foreign parties involved in U.S. acquisitions or investments, as well as CFIUS member agencies, may request that CFIUS review whether a proposed investment is permissible under the Exon-Florio provisions. Although the filing of a request for review is voluntary, caution suggests that a foreign party should seriously consider filing a review request with CFIUS prior to making any acquisition or investment if it appears the investment might fall within the broad scope of the law. Failure to file and obtain a favorable determination in advance from CFIUS could result in subsequent delays and disruptions to a transaction. Additionally, forced divestment may result after a transaction is completed.

Exon-Florio establishes time limits for a CFIUS review.²² CFIUS has 30 days after it receives a request from a potential investor or a CFIUS agency to determine whether to conduct an investigation.²³ If CFIUS decides an investigation is not warranted, it will inform the parties that it will take no further action. In the event CFIUS decides to conduct an

administration's objectives. *See, e.g.*, Exec. Order No. 12,188, 45 Fed. Reg. 989 (1980) (assigning the responsibilities of the United States Trade Representative, including determining membership on CFIUS). President Clinton added three new members to CFIUS. Exec. Order No. 12,860, 58 Fed. Reg. 47,201 (1993).

19. *See* 50 U.S.C. app. § 2170(e) (1988) (authorizing the President to direct the issuance of regulations to implement the Exon-Florio Amendment); 31 C.F.R. § 800 (1993) (indicating the regulations that CFIUS issued to implement the Exon-Florio Amendment); Alan F. Holmer et al., *The Final Exon-Florio Regulations on Foreign Direct Investment: The Final Word or Prelude to Tighter Controls?*, 23 LAW & POL'Y INT'L BUS. 593, 614-15 (1992) (warning that the political and economic climate in the United States may result in regulations that further increase the risks for foreign investors).

20. *See* 31 C.F.R. § 800.301 (1993) (stating that the Exon-Florio regulation applies where any "foreign person" initiates an acquisition of a "United States person"). A business entity is a "United States person" for purposes of Exon-Florio protection where the business entity is engaged in "interstate commerce in the United States, irrespective of the nationality of the natural persons or entities which control" the business entity. 31 C.F.R. § 800.220 (1993).

21. 50 U.S.C. app. § 2170(a), (c) (1988).

22. 50 U.S.C. app. § 2170(a) (1988).

23. 50 U.S.C. app. § 2170(a) (1988).

investigation, it has 45 days in which to complete the investigation and report the results to the President.²⁴

In its investigation, CFIUS must analyze whether the investment will result in foreign control that will impair national security.²⁵ After receiving the report, the President has 15 days to determine the appropriate course of action²⁶ and to report the reasons for his decision to Congress.²⁷ Thus, under the statutory timetable, a review request can result in a delay of a proposed transaction of between 30-90 days.

2. Review Request

CFIUS regulations require that a voluntary review request from a foreign entity should include descriptive information regarding the nature of the transaction, the name and address of the foreign person making the acquisition, its parent, and the U.S. target of the acquisition, as well as the date the transaction is to be concluded or was concluded.²⁸ More importantly, the regulations also require disclosure of detailed information regarding the business activities of the U.S. entity being acquired, such as involvement in classified contracts, security clearances, products, or data subject to U.S. export control licenses. The regulations also require information regarding the business of the foreign person and its future plans for the U.S. entity, such as plans for selling, transferring, or diminishing production and research and development.²⁹

Ultimately, it is incumbent upon the foreign investor to determine whether it should seek CFIUS review before embarking on a U.S. acquisition or investment, because it is the foreign investor who will incur the consequences of failing to do so.³⁰ CFIUS can, however, initiate its

24. 50 U.S.C. app. § 2170(a) (1988).

25. 31 C.F.R. § 800.501(a) (1993).

26. 50 U.S.C. app. § 2170(c) (1988).

27. 50 U.S.C. app. § 2170(g) (Supp. IV 1992). Before the 1992 amendment, the President was required to report to Congress only if the decision was to block a transaction. 50 U.S.C. app. § 2170(f) (1988).

28. 31 C.F.R. § 800.402 (1993).

29. *Id.*

30. See Wm. Gregory Turner, *Exon-Florio: The Little Statute That Could Become a Big Headache for Foreign Investors*, 4 TRANSNAT'L LAW. 701, 717 (1991) (noting that the foreign investor's decision regarding how much information to disclose when voluntarily submitting to CFIUS review is difficult because it represents the sole medium of communication between the foreign investor and CFIUS before the President decides whether to block the transaction). See generally Patrick L. Schmidt, *Exon-Florio: A Primer for Foreign Investors and Foreign Lenders Doing Business in*

own investigation and intervene to disrupt or prohibit a transaction.³¹ More significantly, if the transaction has already been completed, CFIUS can force the foreign investor to divest.³² If CFIUS issues an order to divest subsequent to the transaction, the foreign investor is responsible for finding a suitable buyer.³³

The foreign investor should also be aware of the potential for abuse of Exon-Florio when considering an attempt to make a U.S. acquisition or investment. The structure of the CFIUS review procedure provides an incentive for the seller of a U.S. company to press for finalization of a transaction involving foreign persons before a CFIUS review is requested or a CFIUS investigation is completed: the sellers are not liable for a CFIUS divestment order after the deal is closed.³⁴ Foreign investors also should recognize that, conversely, rival domestic investors or hostile takeover targets can use an Exon-Florio request against a foreign investor's bid. At a minimum, this tactic can raise the political profile of the matter and delay a foreign bid pending CFIUS review.³⁵

A foreign investor considering whether to request CFIUS review must analyze two basic issues.³⁶ First, the foreign investor must determine whether it will acquire control over the U.S. entity under the CFIUS regulations. "Control" is defined broadly and nebulously as the power to

the United States, 20 INT'L BUS. LAW. 485 (1992) (providing a more detailed discussion of points of concern for foreign investors when considering the acquisition of a U.S. company or investment).

31. See Holmer, *supra* note 19, at 594 (stating that the CFIUS provisions authorize the President to investigate both proposed and finalized foreign acquisitions of American businesses).

32. Holmer, *supra* note 19, at 594.

33. See Waldeck, *supra* note 5, at 1176 (explaining that the President may direct the United States Attorney General to seek appropriate relief to uphold the Exon-Florio Amendment).

34. Jonathan A. Knee, *Limiting Abuse of Exon-Florio by Takeover Targets*, 23 G.W. J. INT'L L. & ECON. 475 (1990). *Contra* Stuart E. Eizenstat & Lawrence R. Fullerton, *Crying Wolf on Takeover Matters; Abuse of the Exon-Florio Provision?*, 11 NAT'L L.J. 29 (1989) (stating that the members of a company resisting a hostile takeover may attempt to cause delay and successfully cause the United States Government to intervene).

35. See *supra* note 34 and *infra* note 95 and accompanying text (discussing the proposed purchase of LTV by the French company Thompson, where Thompson's domestic rivals lobbied against Thompson's proposed acquisition as a danger to U.S. security).

36. See *infra* notes 37-42 and accompanying text (defining control and how it is acquired by a foreign investor as the foreign investor embarks upon a takeover attempt of a U.S. company).

determine or direct "matters affecting an entity" through a majority ownership interest or even a dominant minority of total voting shares.³⁷ Control can be acquired by purchasing or converting voting securities of a business, or by merger or consolidation.³⁸ Moreover, control can be acquired by entering a joint venture with a U.S. entity, if the foreign joint venture partner would thereby acquire control of an existing business contributed by the U.S. partner.³⁹ If the joint venture involves an entirely new or "greenfield" business started by joint venture partners, however, it would not be covered by the CFIUS regulations.⁴⁰ Additionally, an attempt by a foreign lender to foreclose on the assets of a U.S. entity to which it provided financing would be deemed an acquisition of control under the CFIUS regulations.⁴¹

Second, if a foreign investor determines that it will acquire control through its investment, it must grapple with the elusive question of whether the investment may be viewed as impairing the "national security" of the United States—a term that neither the statute nor the regulations define.⁴² In analyzing the question, the foreign investor must consider the strategic significance of the type of product or technology that

37. 31 C.F.R. § 800.204 (1993).

38. Lynne T. Boehringer, *The Exon-Florio Amendment: An Impressive Restraint on Foreign Direct Investment in the United States*, 9 WIS. INT'L L.J. 413, 444-45 (1991).

39. 31 C.F.R. § 800.301(b)(5) (1991).

40. See Melvin Rische, *Foreign Ownership, Control, or Influence: The Implications for United States Companies Performing Defense Contracts*, 20 PUB. CONT. L.J. 143, 152 (1991) (noting that a joint venture between a foreign company and a U.S. company is subject to U.S. security clearance, provided that the foreign company (1) is not the majority shareholder in the corporation; (2) will not obstruct the U.S. company's ability to perform classified contracts; and (3) can be excluded from access to classified information).

41. See *id.* at 444 n.146 (explaining that the Code of Federal Regulations includes in its definition of control situations in which a foreign investor exercises a degree of power over a U.S. company based on a contractual arrangement previously established between the foreign investor and the U.S. company).

42. See Waldeck, *supra* note 5, at 1211 n.246 (acknowledging that paragraph (e) of the Exon-Florio recommends that the President consider factors such as the level of business production needed to meet national defense requirements, the ability of domestic companies to meet such requirements, and the extent foreign control over U.S. businesses would impede national defense efforts when determining whether a particular acquisition may impair national security); *id.* at 1184 (observing that in 1986 there was anxiety in the American political and business communities over the proposed acquisition of Fairchild Semiconductors by a Japanese computer manufacturer known as Fujitsu Ltd.).

the U.S. entity produces,⁴³ the relationship between its home country and the United States, and whether the home country government is involved in the transaction.⁴⁴ In this connection, the foreign investor also should identify whether the U.S. acquisition target contracts with the United States Government under security clearances, or provides products to the U.S. military services.⁴⁵ Further, the foreign investor should review the market share of the U.S. entity and the other U.S. producers in that market.⁴⁶

Filing under Exon-Florio is voluntary, and there are no formal sanctions for neglecting to do so.⁴⁷ Failure to request a review prior to an acquisition that may involve control of a national security-sensitive entity could, however, cause unwanted delays, interruptions, uncertainty, and blockage or forced divestment.⁴⁸ Regardless of whether the foreign investor decides to request CFIUS review, CFIUS member agencies can request review of transactions on their own initiative in response to either requests from Congress or a U.S. industry.⁴⁹ In view of the potential consequences, the foreign investor generally is obliged to accept any costs or delays, and to request CFIUS review before completing a

43. See also 50 U.S.C. app. § 2404(d)(2) (1981) (noting that when implementing export controls, the Secretary of Defense shall consider keystone equipment not available outside the United States that would endanger national security within the United States if such technology were exported to other countries). See generally Gerald T. Nowak, *Above All, Do No Harm: The Application of the Exon-Florio Amendment to Dual-Use Technologies*, 13 MICH. J. INT'L L. 1002, 1004-05 (1992) (providing discussion of the difficulty of determining the national security significance of dual-use products).

44. Cf. 50 U.S.C. app. § 2404(b)(1)(D) (1981) (noting that the President will consider the relationship a foreign country currently has and the relationship that the foreign country is likely to have in the future with the United States when determining whether the foreign country is to be removed from the list of controlled countries for the purpose of implementing American export controls).

45. See *infra* Part II.A (discussing that there are specific Defense Department restrictions on foreign investment in industries involved in classified contracts, which overlap with Exon-Florio in the area of investment in the defense industry). The approval of the Defense Department under its regulations is a basic precondition to Exon-Florio approval. Rische, *supra* note 40, at 152. The acquiring company's ability to maintain the target company's security clearance under the Defense Department rules has a significant impact on the permissibility on the transaction under Exon-Florio. *Id.*

46. Schmidt, *supra* note 30, at 487.

47. Schmidt, *supra* note 30, at 485.

48. Schmidt, *supra* note 30, at 485.

49. Schmidt, *supra* note 30, at 485.

potential acquisition or investment. This action is especially expedient if, after conducting the above analysis, it remains uncertain whether the investment is covered by Exon-Florio.⁵⁰ Given the vague standards of Exon-Florio, this is most often the case.

3. Enforcement

As the determination of what constitutes a threat to national security is based on a subjective consideration of fairly nebulous criteria, enforcement of Exon-Florio by its very nature will depend upon the foreign investment policy of the incumbent administration.⁵¹ The application and predictability of Exon-Florio therefore will often vary from one administration to another.⁵²

During the relatively laissez-faire Reagan and Bush Administrations, under which a more activist Democratic Congress passed Exon-Florio, the law was not vigorously applied. Under these Republican administrations, the probability that a particular transaction would be investigated after notice to CFIUS was statistically quite low.⁵³ As of the date of this Article, CFIUS has conducted investigations of fewer than five percent of the transactions of which it has been notified,⁵⁴ and of those, the President formally has blocked only one.⁵⁵ A number of other for-

50. Schmidt, *supra* note 30, at 485.

51. See Rick Wartzman, *Keep Out: Foreign Moves to Buy U.S. Defense Firms Face Higher Hurdles, New National Security Law Orders Tighter Scrutiny in Wake of Thompson Case—Would Clinton be Tougher?*, WALL ST. J., Nov. 2, 1992, at A6 (stating that the investment frontier within the United States is likely to become stricter with respect to foreign companies under the Clinton Administration).

52. *Id.*

53. See *id.* (noting that in 700 transactions reviewed by CFIUS, all but thirteen were given a cursory review).

54. *Id.* The small portion of transactions that are investigated reflects, to some extent, the large number of review requests filed, many for the sake of caution, as a result of the hazy standards and high risks for not reporting. *Id.*

55. See Jim Mendenhall, *United States Executive Authority to Divest Acquisitions Under the Exon-Florio Amendment—The MAMCO Divestiture*, 32 HARV. INT'L L.J. 286 (1991) (discussing CFIUS's disapproval of the acquisition of MAMCO Manufacturing, an aircraft parts producer, by the Chinese company China Natural Aero-Technology Import and Export Corporation (CATIC)). President Bush ordered CATIC, which had acquired MAMCO before CFIUS completed its investigation, to divest its interest in MAMCO. *Id.* In ordering this complete blockage and forced divestiture, the President gave no explanation for his decision other than a recitation of the statutory language regarding potential impairment of national security. *Id.* As MAMCO manufactured only parts for commercial aircraft, the President's decision to block the trans-

eign investors, however, have withdrawn their investment plans when faced with potential CFIUS opposition,⁵⁶ or when under heavy political pressure during a CFIUS investigation.⁵⁷

The use of Exon-Florio to investigate and restrict foreign investment appears to be increasing under the Clinton Administration, which seems more willing to intervene.⁵⁸ Congress also has demonstrated a desire

action was viewed with surprise, particularly since this was the first and only occasion on which the severe measure was imposed. *Id.* A closer look at the circumstances involved at the time, however, suggests that the President's action may have been a response to reports that CATIC had been seeking to acquire military airspace technology, as well as general political tensions between the United States and China. *Id.*

56. See Martin Tolchin, *Agency on Foreign Takeovers Wielding Power*, WALL ST. J., April 24, 1989, at D6 (explaining that CFIUS was dissatisfied with terms of a proposed acquisition by the Japanese company, Tokuyama Soda Company, of the U.S. company, General Ceramics). General Ceramics was party to a classified contract with the Department of Energy, pursuant to which it held a security clearance for the production of a component for nuclear weapons. *Id.* In response, the parties withdrew their notification, General Ceramics agreed to sell-off its classified Energy Department contract, and then, upon re-notification, the transaction was not disapproved. *Id.*

57. See Holmer, *supra* note 19, at 611 (noting also that foreign buyers have restructured deals or provided commitments due to CFIUS investigations).

58. The Administration's views on the merits of foreign investment, however, are not uniform. See *supra* notes 1, 2 (revealing that some Administration officials such as Council of Economic Advisors Chairman Tyson are outspoken for more vigilant scrutiny of foreign investments, while others such as Labor Secretary Reich welcome foreign investment). Notwithstanding this apparent split, the Clinton Administration quickly acted to apply Exon-Florio more vigorously. *Id.* For example, the Administration reportedly sought to change a decision made in the last days of the Bush Administration to permit the U.S. company, Applied Magnetics, to sell its optical products division to the Japanese company, Nakamichi Peripherals, Inc. Keith Bradsher, *Military Supplier's Sale Cleared*, N.Y. TIMES, May 26, 1993, at D3. Applied Magnetics was the only U.S. company reportedly producing laser disk drive components for use in the guidance system of the patriot missile, among other applications. *Id.* The move to reopen and reconsider a prior CFIUS approval was, up to that point, unprecedented, requiring a finding that there is a "material discrepancy" in the information originally provided by the parties to the transaction. *Id.* CFIUS came under intense Congressional criticism for inadequate consideration of national security factors in this case, as CFIUS reportedly opted not to disapprove the transaction after the standard 30-day review, without further investigation. *Treasury Official Denies Charges that CFIUS Review Ignored Defense Implications*, INSIDE U.S. TRADE, Feb. 5, 1993, at 19. The House Energy and Commerce Subcommittee on Commerce, Consumer Protection and Competitiveness, which has jurisdiction over the Exon-Florio matters, spearheaded the attack on CFIUS. *Id.* A Commerce Department analysis of the CFIUS review, contained in a confidential memorandum to the Treasury Department, stated that the committee was unaware that Applied Magnetics was the only producer of the

for more restrictive enforcement of Exon-Florio through amendments passed in 1992, discussed in the following section.

4. 1992 Statutory Amendments

During the final weeks of the 102nd Congress, Senators Byrd (D-W.V.) and Bingaman (D-N.M.) sponsored legislation affecting Exon-Florio as part of the Defense Authorization Bill.⁵⁹ The provisions were designed to strengthen enforcement of Exon-Florio by limiting Presidential discretion to avoid investigating proposed foreign takeovers, and by increasing scrutiny of foreign governments and foreign government-owned companies.⁶⁰ While the provisions clearly add opportunities for political pressure to the current process of reviewing proposed foreign deals,⁶¹ they will have only a nominal legal effect on the administration of Exon-Florio.⁶²

The Byrd Amendment⁶³ requires a mandatory investigation of acquisitions or takeovers by a foreign government or by companies controlled or "acting on behalf of" foreign governments, if such transaction "could result in control" of a U.S. company involved in "activities that could affect national security."⁶⁴ The mandatory requirements of the amend-

laser disk drive components. *Id.* The memorandum also stated that CFIUS was unaware of the extent to which the Navy's Trident missiles and the Army's Patriot missiles depend on these components. *Id.*

59. H.R. 5006, 102d Cong., 2d Sess. (1992). President Bush signed this bill into law on October 23, 1992. Pub. L. No. 102-484, 106 Stat. 2315 (codified at 50 U.S.C. app. § 2170 (Supp. 1993)).

60. See 50 U.S.C. app. § 2170a(c)(1) (Supp. IV 1992) (stating that the provision applies to "(A) any domestic or foreign organization or corporation that is effectively owned or controlled by a foreign government; and (B) any individual acting on behalf of a foreign government, as determined by the President").

61. See 50 U.S.C. app. § 2170(c) (Supp. IV 1992) (ensuring full disclosure of Presidential findings to Congress); 50 U.S.C. app. § 2170(g) (Supp. IV 1992) (mandating that the President submit to Congress reports that clearly outline the rationale for actions taken or not taken).

62. See 50 U.S.C. app. § 2170(i) (Supp. IV 1992) (stating that "nothing in this section shall be construed to alter or affect any existing power, process, regulation, investigation, enforcement measure, or review provided by any other provision of law").

63. 50 U.S.C. app. § 2170 (Supp. IV 1992).

64. 50 U.S.C. app. § 2170(b) (Supp. IV 1992). Proposed implementing regulations were published on February 16, 1994. These regulations would define a "foreign government" broadly to include any government body exercising governmental functions, such as state and local authorities. See 31 C.F.R. § 800, 210; 59 Fed. Reg.

ment, however, are conditioned on what amounts to a discretionary finding by CFIUS that national security could be affected by the transaction, that the subject U.S. company would be under foreign "control," and possibly, that a foreign company was "acting on behalf of" a foreign government.⁶⁵ Thus, despite the mandatory language, investigatory discretion still rests with CFIUS.

Even in the absence of the amendment, CFIUS almost certainly would conduct an investigation if it concluded that a transaction with a foreign company, at least one that was government-owned or controlled, "could affect national security." Moreover, while the amendment requires that an investigation is mandatory upon such a finding, it is not mandatory for the parties involved in the underlying transaction to notify CFIUS, potentially undercutting any "mandatory" effect.⁶⁶ The Byrd Amendment also requires CFIUS to consider in its review a number of specified factors, but each of these should logically be, and reportedly are, part of a CFIUS review in any event.⁶⁷

The Byrd Amendment thus is of dubious legal consequence, although its political effect may prove more significant. It sends a clear message to CFIUS that Congress will carefully review its consideration of proposed investments involving foreign government-owned entities. The most significant change in the Byrd Amendment requires the President to report to Congress at the conclusion of all investigations, including

7,666 (1994). However, the regulations also specify that a mandatory investigation would not be required where the foreign government entity was merely a "passive participant in an acquisition by a foreign person." *Id.*

65. See 50 U.S.C. app. § 2170(a) (Supp. IV 1992) (defining the scope of mandatory investigations). While the standard for mandatory review of foreign government acquisitions—those which "could affect" national security—is technically lower than the general standard of review for transactions which "threaten to impair" national security, it appears the practical effect of this theoretical distinction will prove negligible. Similarly, while it is possible that CFIUS could seek to broaden application of the amendment by liberally interpreting what constitutes a foreign company "acting on behalf of" or controlled by a foreign government, this ultimately is a matter for CFIUS's discretion; CFIUS's original authority already permitted it to scrutinize and limit access of such companies if it desired to do so. 50 U.S.C. app. § 2170(i) (Supp. IV 1992).

66. 50 U.S.C. app. § 2170(f) (Supp. IV 1992).

67. See 50 U.S.C. app. § 2170(f) (Supp. IV 1992) (setting forth the statutory factors which include U.S. national security production requirements, U.S. domestic production capacity, and the effects of foreign control). The Treasury Department determined that these factors were "straightforward" in the statute and did not require implementing regulations. 59 Fed. Reg. 7,666 (1994).

those in which a proposed transaction is approved, adding to the process an opportunity for Congress to exert political pressure for more vigorous, stricter enforcement.⁶⁸ The statutory enumeration of factors for consideration also adds political weight to the specified criteria, and makes it more likely that the factors will be considered carefully.⁶⁹

Additional measures set forth in the Bingaman legislation of the Defense Authorization Act of 1992⁷⁰ prohibit foreign government-owned companies from purchasing U.S. defense contractors that are engaged in contracts requiring access to certain proscribed categories of information, or that are involved in contracts valued at more than \$500 million with the Defense or Energy Departments.⁷¹ While technically not an amendment to Exon-Florio, the Bingaman legislation contains an exception which provides that the prohibition does not apply if Exon-Florio is *not* invoked to prevent the transaction.⁷² The Bingaman provision arguably is susceptible to two interpretations: (1) the transaction is permissible unless CFIUS prohibits it; or (2) the transaction is not permitted unless CFIUS allows it. The first interpretation renders the provision tautological and meaningless: if Exon-Florio is invoked to prevent the investment, a separate provision prohibiting the purchase would be redundant. Even under the second interpretation, however, the Bingaman legislation is of questionable effect, because the transaction would be subject to Defense Department controls and almost certainly would be reported to

68. 50 U.S.C. app. § 2170(g) (Supp. IV 1992). While previously the President only needed to report decisions to block an investment, CFIUS now must keep in mind that all of its decisions could face Congressional scrutiny. The Treasury Department determined that these statutory reporting requirements also did not require implementing regulations. 59 Fed. Reg. 7,666 (1994).

69. See 50 U.S.C. app. § 2170(f)(4) (Supp. IV 1992) (requiring the President to consider potential effects of the proposed or pending transaction on sales of military goods, equipment, or technology to any country identified by the Secretary of State to support terrorism, missile proliferation or the proliferation of chemical and biological weapons under the Export Administration Act or any country listed on the Nuclear Non-Proliferation-Special Country List). The Byrd Amendment also requires the President to consider potential national security ramifications of the proposed or pending transaction on international technological leadership by the United States. 50 U.S.C. app. § 2170(f)(5) (Supp. IV 1992).

70. 50 U.S.C. app. § 2170(a) (Supp. IV 1992).

71. 50 U.S.C. app. § 2170(a) (Supp. IV 1992). To increase sensitivity to "high tech" issues, the White House Assistants for National Security and Economic Policy, as well as the Office of Science and Technology Policy, were added to CFIUS to assist in such reviews. *Id.*

72. 50 U.S.C. app. § 2170(a)(b) (Supp. IV 1992).

and reviewed by CFIUS, regardless of the legislation.

B. PREMERGER NOTIFICATION UNDER HART-SCOTT-RODINO

Another general investment control is the premerger notification and waiting period requirement enacted in the Hart-Scott-Rodino Antitrust Improvements Act of 1976.⁷³ Unlike the Exon-Florio provisions, which focus exclusively on foreign investors for national security reasons, these general antitrust requirements apply to domestic as well as foreign concerns.⁷⁴ Foreign companies seeking to invest in the United States nevertheless must face these statutory requirements and restrictions, which allow U.S. authorities the opportunity to analyze the effect of a proposed foreign investment.

Title II of the 1976 Hart-Scott-Rodino Antitrust Improvements Act added a provision to the Clayton Act, Section 7A.⁷⁵ Section 7A imposes notification and waiting period requirements on firms planning certain mergers and acquisitions.⁷⁶ Under the authority of Section 7A, the Federal Trade Commission (FTC) promulgated regulations implementing the premerger notification and waiting period requirements of the law.⁷⁷

Section 7A requires that, for certain large transactions, both the acquiring persons and acquired person must file notice with the FTC and the Antitrust Division of the Department of Justice,⁷⁸ and observe a specific waiting period⁷⁹ before consummating a transaction. The pur-

73. 15 U.S.C. § 18a (1988).

74. *See* 15 U.S.C. § 18a(a) (1988) (mandating that the provision is applicable to all persons).

75. 15 U.S.C. § 18a (1988).

76. 15 U.S.C. § 18a (1988).

77. 16 C.F.R. §§ 800-803 (1993). *See* 16 C.F.R. § 803 app. (1993) (examining the Premerger Notification and Report Form).

78. 15 U.S.C. § 18a(b)(1) (1988). With certain exceptions, the term "person" is very broadly defined to include the "ultimate parent entity and all entities which it controls directly or indirectly." 16 C.F.R. § 801.1(a)(1) (1993). Because an "ultimate parent" is an entity that is not controlled by another, the reporting requirement goes not only to the parties directly acquiring and being acquired, but also to the parents of such parties. *Id.*

79. 15 U.S.C. § 18a(b), (e) (1988). Although the initial waiting period varies with the nature of the acquisition, the waiting period generally is 30 days following the acquiring person's filing, but for cash tender offers, the period is 15 days from the filing date. 15 U.S.C. § 18a(b)(1)(B) (1988). This period may be extended should either agency request additional information regarding the proposed acquisition. 15

pose of the statute is to enhance the United States Government's capability for preventative enforcement under the Clayton Act by providing the antitrust enforcement agencies, such as the FTC and the Justice Department, with sufficient time for advanced screening of substantial acquisitions.⁸⁰ During the waiting period, the enforcement agencies may act to prohibit a proposed acquisition. Compliance with the requirements of Section 7A does not, however, mean that the transaction is permissible under the antitrust laws, nor does it prevent future challenges to the transaction.⁸¹ Accordingly, foreign investors should carefully analyze the substantive provisions of all applicable antitrust laws prior to proceeding with an acquisition in the United States.

Acquisitions covered by Section 7A include mergers, consolidations, purchases of business assets, newly formed joint ventures, and conversions of non-voting securities into voting securities (although purchases of convertible non-voting securities are not covered).⁸² Significantly, Section 7A requirements apply only if the entities involved in the transaction, and the acquisition itself, are of sufficient size. Thus, Section 7A applies only if two threshold requirements are satisfied: (1) size of the parties; and (2) size of the acquisition.

Regarding the size of the parties, the acquisition need only be reported if it involves: "*an acquired person* engaged in manufacturing and having annual net sales or total assets of at least \$10 million (or not engaged in manufacturing and having total assets of at least \$10 million) and an *acquiring person* with total assets or annual net sales of at least \$100 million;" or "*an acquired person* with total assets or net sales of \$100 million, and an *acquiring person* with total assets or annual net

U.S.C. § 18a(e) (1988).

80. See also 15 U.S.C. § 18a(h) (1988) (stating that information submitted to the FTC and Justice Department pursuant to Section 7A is exempt from the Freedom of Information Act and may not be made public, unless deemed relevant to an administrative or judicial proceeding). The federal enforcement agencies are authorized to provide this information to Congress, although courts have ruled that they may not provide the information to state antitrust enforcement agencies. *Liebermann v. FTC*, 771 F.2d 32 (2d Cir. 1985); *Mattox v. FTC*, 752 F.2d 116 (5th Cir. 1985).

81. 15 U.S.C. § 18a(i) (1988).

82. 15 U.S.C. § 18a(a), (c) (1988). See *infra* Part II.A (stating that acquisitions in the defense industry are particularly vulnerable to antitrust problems, given the limited competition in this area). See generally *FTC v. PPG Indus. Inc.*, 798 F.2d 1500 (D.C. Cir. 1986) (holding that the evidence showed that the proposed acquisition would be harmful enough to competition to forbid the acquisition under the Clayton Act).

sales of at least \$10 million."⁸³

Regarding the size of the acquisition, the acquisition need only be reported if it would result in the acquiring person's holding "*at least 15% of the voting securities or assets of the acquired person*" or "*an aggregate total amount of voting securities and assets of the acquired person in excess of \$15 million.*"⁸⁴

The statute and regulations set forth complex rules for measuring or valuing the assets and sales of the participating persons, and the holdings, securities and assets involved in the acquisition. These rules must be carefully reviewed before determining whether the premerger notification requirements apply.

There are a number of exceptions to the premerger notification requirements of Section 7A. Certain exceptions apply only to acquisitions by "foreign persons,"⁸⁵ in cases in which the acquisition involves: (1) assets located outside the United States;⁸⁶ (2) U.S. assets that total less than \$15 million;⁸⁷ (3) voting stock of a foreign issuer if such stock would not confer control over either an issuer holding assets of \$15 million or more located in the United States, or a U.S. issuer with annual net sales or total assets of \$25 million;⁸⁸ or (4) an acquisition where the acquired person is also foreign and the combined aggregate U.S. annual sales and the aggregate U.S.-located assets, of both the acquiring and acquired persons, are less than \$110 million.⁸⁹ Other exceptions apply to both domestic and foreign companies and exempt intra-person transactions, such as mergers between subsidiaries of the same parent, and the formation of new wholly-owned subsidiaries.⁹⁰

83. 15 U.S.C. § 18a(a)(2)(A)-(C) (1988).

84. 15 U.S.C. § 18a(a)(3) (1988). In addition, subsequent acquisitions will be reportable if they would result in the acquiring person's crossing one of the specified higher thresholds and if they do not qualify for an exemption. 16 C.F.R. § 801.20 (1993).

85. See 16 C.F.R. § 801.1(e)(2)(i)(A) (1993) (defining "foreign persons" as a person whose ultimate parent is not incorporated in the United States, is not organized under the laws of the United States, and does not have its principal offices with the United States).

86. 16 C.F.R. § 802.51(a) (1993).

87. See 16 C.F.R. § 802.51(c) (1993) (noting that the \$15 million limit here and in other exceptions does not include "investment assets," which are defined as cash, deposits in financial institutions, and instruments evidencing government obligations).

88. 16 C.F.R. § 802.51(b)(1)-(2) (1993).

89. 16 C.F.R. § 802.51(d) (1993).

90. See 16 C.F.R. § 802.30 (1993) (stating that an acquisition in which, by reason of holdings of voting securities, the acquiring and acquired persons are the same

Where disclosure is not exempted, compliance is mandatory and is enforced by sanctions. Specifically, if a potential foreign or domestic investor does not observe the premerger notification and waiting period requirement under Section 7A, and jurisdiction can be established over the foreign investor, it is subject to civil penalties of up to \$10,000 per day and an injunction on the acquisition pending compliance.⁹¹

While the Section 7A requirements do not target or impose special restrictions on foreign companies, foreign investors nevertheless must be aware of and comply with these requirements before going forward with a planned acquisition. In determining whether a particular transaction is covered by Section 7A, foreign investors should carefully analyze the applicability of exemptions, particularly those discussed above, that are available only to the foreign investors. A particular concern for foreign investors is that, while the information they submit is largely exempt from public disclosure under the Freedom of Information Act (FOIA), it nevertheless may be disclosed to Congress, which has taken a keen interest in foreign acquisitions.

II. RESTRICTIONS IN SPECIFIC AREAS

The United States also maintains legal restrictions on foreign investment and operations in various economic sectors. The strictness of and limits and exceptions to these controls vary depending on the sector and statute involved. Foreign companies must ensure that they are aware of and comply with these specific controls before deciding whether to go forward with an investment. The consequences of noncompliance with these prohibitions are severe. Most commonly, the investor can be forced to divest or discontinue operations, although fines and other penalties can apply in certain cases.

A. GOVERNMENT PROCUREMENT

1. Investments in Defense-Related Sectors

The Defense Industrial Security Program of the U.S. Department of Defense sets forth indirect restrictions on foreign investment in the U.S. defense industry through limits on access to sensitive government pro-

person, shall be exempt from the requirements of the act).

91. See 15 U.S.C. § 18a(g) (1988) (implying that these penalties apply even if the acquisition otherwise meets the substantive requirements of the antitrust laws).

jects. Foreign companies investing in the defense industry must explore the possible effects of this program or risk the loss of the acquired company's security clearance. In the defense industry, a security clearance generally is vital to participation in contracts with the government, which is the essential defense industry customer, and hence an acquired company's loss of the clearance can render the acquisition untenable and force divestment.⁹²

In addition to these defense industrial security restrictions, foreign investors also must analyze whether the U.S. company in which they wish to invest deals in the types of technology controlled by the Departments of State⁹³ or Commerce.⁹⁴ If so, foreign investors must determine whether they will be permitted access to the technology, or, if they need the technology, whether they could structure the transaction in a manner to avoid transfer of the technology.⁹⁵ In this context, a prospective foreign investor's compliance with the export controls of its own nation can effect the determination whether it will be permitted to invest.

Under the Defense Industrial Security Program, companies that are subject to foreign ownership, control or influence, commonly referred to as companies under "FOCI", generally have difficulty obtaining the security clearance necessary to participate in the large and lucrative field of classified United States Government contracts.⁹⁶

Under the National Security Act of 1947,⁹⁷ the Defense Department is authorized to restrict the release of classified information to private

92. See Rishe, *supra* note 40, at 144-45 (explaining that foreign investments in U.S. companies may inhibit the companies' ability to perform classified defense contracts and may have a negative effect on the revenues these contracts generate if the companies do not obtain a security clearance).

93. See 22 C.F.R. § 120.1 (1993) (stating that through the International Traffic in Arms Regulation, the State Department's Office of Defense Controls administers restrictions on defense goods and technology).

94. See Export Administration Regulations, 15 C.F.R. § 768 (1993) (stating that the Commerce Department's Bureau of Export Administration controls dual-use technology).

95. See generally Wartzman, *supra* note 51, at A1 (discussing Thomson CSF S.A., a French company, and its violations of multinational export controls). These violations were used in a successful effort to prevent Thomson from purchasing LTV, a U.S. defense-related company. *Id.*

96. See Rishe, *supra* note 40, at 144-45 (discussing foreign investment in the United States and how these foreign connections can inhibit a U.S. company's ability to perform classified defense contracts).

97. 50 U.S.C. § 401 (1988).

industry. Pursuant to this authority and that of a 1960 Executive Order,⁹⁸ the Defense Department promulgated the Industrial Security Manual (ISM), and the Industrial Security Regulation (ISR),⁹⁹ which comprise the Defense Industrial Security Program, and set forth the policy, procedures, and requirements for obtaining classified data.¹⁰⁰

Before obtaining access to classified information, a contractor must establish its need for the information, usually claiming a connection with performance of a classified government contract, and must obtain a facility security clearance and a personal security clearance. A facility security clearance (FCL) generally permits a specific location or part of a contractor's organization to receive specified classified information.¹⁰¹ In order to obtain an FCL, a contractor must complete and submit forms in which it agrees to implement certain security measures and disclose information on foreign affiliations.¹⁰² The contractor must promptly notify the Defense Department in the event of any change in the conditions of the contractor. In parent-subsidiary relationships, the parent, as well as the subsidiary, must qualify for an FCL to the same level of classified information, unless special arrangements are made with the

98. See Executive Order No. 10865, 25 Fed. Reg. 1,583 (1960) (authorizing the Defense Department to safeguard classified information and to enter into arrangements to protect the classified information of other agencies including the Departments of Agriculture, Commerce, Justice, Labor, State, Treasury and Transportation, as well as the General Services Administration, and the U.S. Information Agency). *But see generally* 48 C.F.R. § 904.700 (1992) (authorizing the Department of Energy to procure its own systems for protecting classified information); 32 C.F.R. § 1902.13 (1993) (authorizing the Central Intelligence Agency to establish its own system for protecting classified information).

99. These rules, which were issued by Defense Department directives 5220.22-M (1989) and 5220.22-R (1985), are not published. The rules are administered by the Defense Investigative Service.

100. See Federal Acquisition Regulations (FAR), 48 C.F.R. § 52.204-2 (1992) (requiring contractors seeking access to classified information to certify that they will enter security arrangements in compliance with the industrial security rules, including the Department of Defense Industrial Security Manual for Safeguarding Classified Information and any revisions to that manual).

101. See Rishe, *supra* note 40, at 149-50 (claiming that a facility security clearance (FCL) represents an administrative determination that a specific location of a contractor's organization is eligible for access to certain categories of classified information).

102. See *supra* note 97 (requiring the contractor's certification that it will implement security controls through Defense Department Form 441, the "Department of Defense Security Agreement" and also requiring information concerning foreign affiliations through Form 4415, the "Certificate Pertaining to Foreign Interests").

Defense Department.¹⁰³

Second, a personal security clearance (PSC) must be obtained for the owners, officers, directors and executive personnel of a corporation, as well as all personnel who will have access to the classified information.¹⁰⁴ Foreign nationals generally are not eligible for a PSC.¹⁰⁵

Companies under FOCI generally are not eligible for a security clearance. The Defense Department determines whether FOCI exists on a case-by-case basis, based on information submitted to the Defense Department by the contractor. In conducting this analysis, the Defense Department will consider whether the foreign ownership constitutes five percent or more of the corporate securities, whether the foreign ownership can designate representatives as corporate directors or officers or otherwise influence such parties, and whether there are interlocking directors with foreign entities.¹⁰⁶

There are ways, however, in which a contractor designated as being under FOCI can be granted access to classified information through corporate insulation arrangements or bilateral government agreements. These measures must be adopted and implemented in coordination with the Defense Department, and their acceptability is determined by the Department.¹⁰⁷

In terms of insulation measures, the board of directors of a U.S. firm subject to FOCI may be required to issue a resolution¹⁰⁸ certifying that the foreign interests will have no access to the classified information, or

103. Rishe, *supra* note 40, at 154.

104. *See id.* at 157 (holding that a personnel security clearance (PSC) entitles an individual to have access to classified information pursuant to the terms of the PSC). One of the prerequisites for obtaining an FCL is that owners, officers, directors, and executive personnel must be covered by a PSC. *Id.*

105. *See id.* at 151 (discussing the circumstances when a Representative of a Foreign Interest (RFI) is not eligible for a PSC).

106. Industrial Security Regulation ¶ 2-202.

107. *See* Rishe, *supra* note 40, at 176 (explaining that in some cases the Defense Departments permits a contractor subject to FOCI to operate under an Interim Security Agreement, which creates an agreement to allow the parties time to put in place the final arrangements for the company's FCL and to allow it time to implement insulation arrangements or bilateral government agreements).

108. *See* Rishe, *supra* note 40, at 168 (stating that for a board resolution to be acceptable to the DOD as eliminating FOCI concerns, the corporate structure must support the claims of the resolution, in that the major corporate officers and the board chairman are U.S. citizens, and the majority of the company's stock is held by U.S. entities. *Id.*

influence on the performance of the contract.¹⁰⁹ A standard voting trust agreement¹¹⁰ or proxy agreement¹¹¹ may also be executed to insulate the U.S. company, whereby the foreign shareholder transfers the stock to independent U.S. citizens who act as voting trustees or proxy holders, thereby eliminating the foreign shareholder's influence on the management of the corporation.¹¹²

United States affiliates of foreign companies also may be eligible for access to classified information under reciprocal industrial security agreements between the United States and the country of the foreign company. Reciprocal clearance arrangements may occur where classified information is already available to the foreign government, or, in rarer circumstances, where the Defense Department decides that the company is eligible for a special security arrangement.¹¹³

In summary, under the Defense Industrial Security Program, foreign companies and their wholly-owned U.S. subsidiaries generally are prohibited from obtaining security clearances to classified information.¹¹⁴ Moreover, if a foreign company acquires a partial interest in a U.S. defense contractor with an existing security clearance, it may significantly impede or prevent the U.S. company from performing under the classified contract, but only if the Exon-Florio provisions are met.¹¹⁵ Therefore, the foreign investor must first examine the impact of its acquisition on a U.S. company's security clearance and explore possible

109. Rishe, *supra* note 40, at 167-68.

110. Rishe, *supra* note 40, at 167 (defining a voting trust agreement as an agreement that seeks to eliminate the possibility of foreign interests gaining access to classified information or being in a position to affect the performance of classified contracts).

111. See Rishe, *supra* note 40, at 172 (noting that in proxy agreements, the voting rights of stock owned by the foreign interests are conveyed to the proxy holders through the irrevocable proxy agreements).

112. Rishe, *supra* note 40. See ISR ¶ 2-205.b, 2-205.c (showing that the major distinctions between these two alternatives is that a voting trust involves transfer of legal title in the shares while the irrevocable proxy agreement does not).

113. See Rishe, *supra* note 40, at 172-73 (noting that these agreements also provide that foreign nationals of these foreign companies may receive a U.S. security clearance if they hold positions in the U.S. subsidiary).

114. See 18 U.S.C. § 798 (1988) (providing that the release of such classified information to unauthorized persons is a crime punishable by a fine of \$10,000 or imprisonment for up to ten years). The Act does not, however, set forth penalties for receipt of such information. *Id.*

115. See Holmer, *supra* note 19, at 594 (commenting on the Exon-Florio provisions that regulate certain foreign direct investment in the United States).

arrangements that may avoid impairment of the clearance. Proceeding with an investment before conducting such an analysis could result in suspension or revocation of the U.S. company's clearance and could bar further classified contract activity, potentially undermining the purpose of the investment.

In addition to these defense-related procurement rules, the general federal procurement process operates to limit foreign investment and operations, as is discussed in the next section.

2. United States Government Procurement Generally

The U.S. procurement market in general is enormous and lucrative,¹¹⁶ and for many companies the United States Government is an important, or even the primary or exclusive, customer.¹¹⁷ The United States Government has a strong preference for domestically produced products over foreign ones, as mandated by the Buy American Act,¹¹⁸ and these preferences can impede foreign investment in certain circumstances.¹¹⁹ Under the Buy American Act rules, United States Government entities must give priority to products from the United States, for

116. According to statistics from the General Service Administration Federal Procurement Database Report, the United States Government purchased over \$210 billion worth of goods and services in 1991, of which only \$6 billion worth were supplied by foreign contractors. Although, as noted earlier, this Article is concerned with federal laws and restrictions, it should be noted that there are also significant restrictions on procurement of foreign products by state and local governments.

117. See 10 U.S.C. §§ 2301-2330 (1988) (showing that United States Government procurement is governed by the Armed Forces Procurement Act). The act governs procurement by the Department of Defense, the Military Services, the Coast Guard, and the National Aeronautics and Space Administration. *Id.* The Federal Property and Administrative Services Act of 1949 governs civilian procurement. 41 U.S.C. § 251.

118. Buy American Act of 1988, 41 U.S.C. § 10a-10d (Supp. 1992), implemented by regulations set forth at 48 C.F.R. § 25.100-205.

119. See 48 C.F.R. § 25.105(a)-(c) (1992) (implementing these preferences by requiring that a price differential be added to contract offers involving a foreign product, which generally is 6-12% for non-defense procurement); Memorandum from John R. Luckey, Legislative Attorney, to House Committee on Government Operations 2 (June 16, 1989), reprinted in *Implementation of International Government Procurement Agreements and the Buy American Act of 1988: Hearings before the Subcomm. on Legislation and National Security of the House Comm. on Government Operations*, 101st Cong., 1st Sess., 85 (1989) (stating that a 50% differential exists for defense procurement, excluding exempted duties); 48 C.F.R. §§ 25.105, 225.105 (1992) (imposing restrictions on procurement of foreign goods pursuant to the Balance of Payments Program, which applies to procurement outside the United States).

which the cost of the U.S. materials or components comprises at least 50% of the total cost.¹²⁰ Despite being subject to significant exceptions and waivers,¹²¹ the Buy American Act restrictions apply to a large portion of government contracts.¹²²

The procurement preferences of the Buy American Act indirectly affect foreign investment by imposing what amounts to a domestic content requirement. Where the foreign investor seeks to establish a U.S. production or assembly facility that sources parts and components from overseas suppliers, these requirements may mean that the finished products would not be of U.S. origin. Because there are often important economic incentives to sourcing parts and components from overseas parent companies, the Buy American Act can be a deterrent to foreign invest-

120. See 48 C.F.R. § 25.101, 25.108 (1992) (specifying the scope of what is defined as a domestic product).

121. See 41 U.S.C. § 10a (Supp. 1992) (enumerating Buy American Act exceptions to the mandated preferences where U.S. products are found to be unavailable and where application of restrictions would be unreasonably costly or contrary to the public interest). Trade Agreements Act of 1979, 19 U.S.C. §§ 2501-2518 (1988) (setting forth a significant exception that allows the United States Trade Representative to waive Buy American Act restrictions with regard to contracts covered by the Government Procurement Code of the General Agreement on Tariffs and Trade; 19 U.S.C. § 2511-2518 (1988) (applying the waiver power to contracts with foreign countries that are signatories to the GATT Procurement Code and involve U.S. products and suppliers). The GATT Procurement Code applies to contracts over a threshold value level, currently \$176,000, where the foreign contractor is from a country that is a signatory to the GATT Procurement Code, and where the U.S. agency and products involved are enumerated in the Code. 48 C.F.R. § 25.400 (1992).

122. See 22 U.S.C. § 2350(b) (1988) (providing that restrictions for military products may be waived pursuant to bilateral defense agreements such as Memoranda of Understanding (MOUs)); 48 C.F.R. § 225.801; 870 (1992) (stating that restrictions for military products may be waived pursuant to bilateral defense agreements such as Memoranda of Understanding); 48 C.F.R. § 25.403(e)-(f) (1992) (stating that the waivers are not applicable to service, construction, or research and development contracts); 48 C.F.R. § 25.406 (1992) (providing that the waivers are not applicable to all United States Government agencies, such as the Departments of Transportation and Energy). Under a 1988 amendment to the Buy American Act, procurement from countries that are listed as discriminating against U.S. sales are prohibited pursuant to the enforcement provisions of Title III of the 1979 Trade Agreements Act. 41 U.S.C. § 10b-1(a); 19 U.S.C. § 2515 (1988). Moreover, to encourage countries to join the GATT Procurement Code, the Trade Agreements Act bans procurement of products that otherwise would be covered by the GATT Procurement Code from any country that is not designated by the United States Trade Representative as being a signatory to the GATT Procurement Code. 19 U.S.C. § 2512(a) (1988). See 48 C.F.R. § 25.401 (1992) (setting forth these designated countries).

ment in the United States, particularly where the federal government is a significant or primary element of the market. At minimum, it could restrict the way in which the foreign entity may do business.

The recent trend to impose harsher penalties on companies that violate the Buy American Act exacerbates the deterrent effect of the act's requirements.¹²³ In order to contract with the United States Government, companies must ensure that they fully comply with all Buy American Act restrictions and certify to that effect.¹²⁴ Companies can incur penalties for improper or erroneous certifications regarding the U.S. content of the merchandise sold.¹²⁵ The standard penalty for violations of the Buy American Act in prior practice was a debarment or suspension of contractors for a set period of time, generally three years.¹²⁶ In the past several years, the Buy American Act has increasingly been enforced under the False Claims Act,¹²⁷ which provides for civil penalties of up to three times the damages caused, plus \$10,000 for each false claim,¹²⁸ and criminal penalties consisting of fines and up to five years imprisonment.¹²⁹ A private person, such as a competitor who has knowledge of a false claim, can initiate a civil false claims action.¹³⁰

123. See William H. Lash, III, *Warning! Buy American or Else*, J. COM., Nov. 25, 1992, at A6 (observing the trend of more Buy American Act requirements).

124. See 48 C.F.R. §§ 25.109, 52.225-1 (1992) setting forth provisions in solicitations and clauses added to contracts that require contractors to certify that they are supplying only domestic end products); 48 C.F.R. § 52.225-3 (1992) (requiring at least 50% of the cost of components to be U.S. parts).

125. See Lash, *supra* note 123, at A6 (reporting the high penalties faced by companies that violate the Buy American Act).

126. See 48 C.F.R. § 9.4 (1992) (providing for disbarment or suspension among the penalties for errant contractors); Lash, *supra* note 123, at A6 (reporting that the standard practice is to suspend the contractor for three years).

127. False Claims Act, 31 U.S.C. § 3729-33 (1988). See *United States v. Rule Industries*, 878 F.2d 535, 537-30 (1st Cir. 1989) (finding that a contractor had knowingly falsely certified that it was supplying domestic saw blades which had been imported and further processed in the United States, but not to the point of comprising over half of the value of the end product). The company was fined in excess of \$600,000 under the False Claims Act. *Id.*

128. 31 U.S.C. § 3729(a) (1988).

129. 18 U.S.C. § 287 (1988). Moreover, the Small Business Act provides specific penalties for contractors who knowingly misrepresent their status as "small business" or minority contractors, including fines of up to \$500,000 and imprisonment of up to 10 years. 15 U.S.C. § 645(d) (1988).

130. See 31 U.S.C. § 3730(d) (1988) (providing that where the government proceeds under 31 U.S.C. § 3730(c)(1) (1988), the plaintiff may be awarded 15-25% of the fine or recovery, in most circumstances); see also *United States ex rel. Pedicone*

Thus, while the Buy American Act does not explicitly restrict foreign investment, the strong preferences for U.S. goods mandated by the act, and the harsh penalties for its violation, discourage foreign investment, and limit the operations of entities where federal procurement is an important part of business.

B. COMMUNICATIONS

Foreign companies seeking to invest in the U.S. communications industry are faced with legal obstacles set forth by the Communications Act of 1934.¹³¹ The Communications Act contains several prohibitions on the foreign operation, ownership, or control of wireless communications facilities in the United States, and also regulates the entry and interconnection of domestic and international communications common carriers.¹³² The Federal Communications Commission (FCC) is the agency authorized to administer the law and regulations.¹³³ The FCC has substantial discretion over whether to bar foreign ownership in the communications field.¹³⁴ This authority differs from the discretionary restraints administered by other agencies where the President ultimately decides whether to block an investment.¹³⁵

The Communications Act provides that no broadcast or common carrier license may be granted to or held by any alien individual or foreign corporation¹³⁶ if the FCC finds that refusal to grant or revoca-

v. Mazak Corp., 807 F. Supp. 1350 (S.D. Ohio 1992), (involving a former employee of a foreign-owned U.S. company who filed a suit alleging a violation of the Buy American Act). The defendant, Mazak Corp., was fined \$2.3 million, of which \$717,000 was paid to the former employee. *Id.*

131. 47 U.S.C. §§ 151-613 (1988 & Supp. 1991). The U.S. communications industry includes wireless and wire communications, whether broadcast or common carrier. 47 U.S.C. §§ 151-153 (1988 & Supp. 1991).

132. 47 U.S.C. §§ 151-53 (1988 & Supp. 1991).

133. 47 C.F.R. § 76 (1992).

134. 47 C.F.R. § 310 (1988 & Supp. 1991).

135. *Compare* 47 U.S.C. § 310(b)(4) (1988 & Supp. 1991) (authorizing the administering agency to determine the acceptability of a foreign investment) *with supra* notes 25-29 and accompanying text (discussing discretionary restrictions on foreign investment in other areas where Presidential approval generally is required).

136. *See* 47 U.S.C. § 310(b) (1988) (giving a broad definition of "foreign corporation" that includes not only those organized in a foreign country but also: 1) corporations in which *any* officer or director is an alien; 2) corporations in which aliens or their representatives hold more than one fifth of the capital stock; and 2) corporations controlled directly or indirectly by another corporation of which any officer or one

tion of the license will serve the public interest.¹³⁷ Foreign investors must be mindful of this provision not only when investing in U.S. communications companies, but also when acquiring an interest in a diversified U.S. corporation that does not operate in the communications industry, but that may have some holdings in common carriers; the FCC could force the acquiror to divest such holdings.¹³⁸ The Communications Act also sets forth the express prohibition that no station license of any kind may be granted to or held by a foreign government.¹³⁹

The Communications Act sets forth other requirements on wireless communications so that only persons who are legally eligible for employment in the United States may operate a radio or television station.¹⁴⁰ Certain communications common carriers engage only in wire communications, however, and federal law does not prescribe explicit citizenship requirements for these communications carriers.¹⁴¹

Foreign investors also are restricted from wireless satellite communications under the Communications Satellite Act of 1962,¹⁴² which established a satellite communications system for servicing the United States.¹⁴³ Under authority of the act, the Communications Satellite Corporation (COMSAT) was established to administer this satellite communications system.¹⁴⁴ Although COMSAT is a private corporation, it is subject to federal regulation by the Communications Satellite Act, and foreign ownership of shares in the corporation is limited to 20%.¹⁴⁵

C. TRANSPORTATION

Investment by foreign companies in U.S. air and maritime transport is significantly restricted, as discussed in the following sections.

fourth of the directors are aliens, or aliens own one fourth of the capital stock).

137. 47 U.S.C. § 310(b) (1988).

138. *See Briefly*, L.A. TIMES, Dec. 25, 1990, at D2 (stating that under 47 U.S.C. § 310(b) (1988), MCA Studios was required to sell its New Jersey-based television station after Matsushita acquired MCA).

139. 47 U.S.C. § 310(a) (1988).

140. 47 U.S.C. § 303(l)(1) (1988). *But cf.* 47 C.F.R. § 76 (1992) (allowing alien ownership of cable television systems).

141. 47 U.S.C. §§ 201-224 (1988).

142. 47 U.S.C. §§ 701-757 (1988).

143. *Id.*

144. 47 U.S.C. § 731 (1988). *See* 31 C.F.R. § 25.501 (1993) (regulating COMSAT).

145. 47 U.S.C. § 734(d) (1988).

1. Aviation

a. Operations

Foreign participation in the heavily regulated U.S. air transportation industry is subject to substantial restrictions, under authority of the Federal Aviation Act of 1958,¹⁴⁶ as implemented by regulations promulgated by the Office of Aviation Analysis of the Department of Transportation.¹⁴⁷ Under the Federal Aviation Act, foreign airlines are flatly prohibited from operating in U.S. domestic air service.¹⁴⁸ Domestic airline operations are limited to aircraft registered in the United States, for which only a U.S. citizen¹⁴⁹ or a corporation organized in the United States¹⁵⁰ with aircraft based and used primarily in the United States, may register.

Non-United States persons may engage in international air transportation serving U.S. and foreign destinations, but they must operate as "foreign air carriers"¹⁵¹ and must acquire a permit from the Department of Transportation.¹⁵² The Department of Transportation's regulations set forth the requirements for permit applications¹⁵³ and the terms, condi-

146. 49 U.S.C. §§ 1301-1557 (1988).

147. 14 C.F.R. §§ 211-298 (1992).

148. 49 U.S.C. § 1301(3) (1988). Domestic operations are those between destinations in United States territory. *Id.* There are exceptions to the prohibition on domestic service in emergency situations. 49 U.S.C. § 1386(b)(7).

149. 49 U.S.C. § 1401(a)-(b) (1988). A corporation is a U.S. citizen if it is incorporated in the United States; if at least 75% of the voting interest and 51% of the equity is owned or controlled by U.S. citizens; and at least two-thirds of the directors and other managing officers of the corporation are U.S. citizens. 49 U.S.C. § 1301(16) (1988). If the carrier is owned by an individual, or individuals, or a partnership, all the individuals or entities involved must be U.S. citizens or permanent resident aliens. *Id.*

150. 49 U.S.C. § 1041(b)(1)(A)(ii) (1988). Non-U.S. citizens incorporated in the United States can do business if their fleet is "based and primarily used in the United States." *Id.*

151. *See* 49 U.S.C. § 1301(22), (24) (1988) (defining a "foreign air carrier" as a person who is not a citizen of the United States, who carries persons or property between the United States and places outside the United States, for compensation).

152. 49 U.S.C. § 1372(a) (1988). *See* 49 U.S.C. § 1508(b) (1988) (allowing foreign aircraft to navigate in United States sovereign territory if authorized by Transportation Department regulations (*i.e.*, with permit)). International air service is deemed to be between a United States and foreign destination. *Id.*

153. 14 C.F.R. § 211 (1992).

tions and limitations of foreign air carrier permits.¹⁵⁴

b. *Investment*

Notwithstanding the restrictions on operations by foreign carriers, foreign companies may invest in U.S. airlines, but only to the extent that the recipient U.S. airline would remain a U.S. citizen under the tight limitations of the Federal Aviation Act, which requires that no more than 25% of the voting stock, and 49% of the total equity be held by foreign investors.¹⁵⁵ Moreover, investments below this statutory threshold are also subject to review by the Department of Transportation if the foreign investor is an air carrier that would operate jointly with the U.S. airline in which it had invested.¹⁵⁶

These federal restrictions on direct investment received significant attention in 1992-93, a time of turmoil for the U.S. airline industry that was characterized by large losses, bankruptcies and restructuring¹⁵⁷ when several financially troubled airlines sought investment from foreign airlines,¹⁵⁸ and certain investment offers were withdrawn because of the regulations.¹⁵⁹ A key factor in Transportation Department approval of such investments is the reciprocal access accorded to U.S. airlines by the government of the investing company.¹⁶⁰ Threshold levels for in-

154. *Id.* § 213.

155. See *supra* note 149 (discussing the limitations set forth in 49 U.S.C. § 1301(16) (1988)).

156. See 14 C.F.R. § 399.88 (1992) (regulating designator code sharing, the practice of combining connecting flights under the same booking code).

157. See Richard M. Weintraub, *Rebuilding US Air; Investment by British Airways Gives Carrier a Big Lift*, WASH. POST, Mar. 23, 1993, at F1 (reporting that in 1992, two U.S. companies, Eastern Airlines and Pan Am, went bankrupt; TWA and Continental barely survived; and the largest three U.S. airlines—American, Delta, and United—all experienced significant losses).

158. See Martha M. Hamilton, *Northwest-KLM Deal Tentatively Approved; Airlines Sought Antitrust Law Immunity to Integrate Operations*, WASH. POST, Nov. 17, 1992, at B1 (indicating that Northwest Airlines formed an alliance with KLM Royal Dutch Airlines in a search for capital and expanded routes); Martin Tolchin, *U.S. Gives Britain a Warning in Approving USAir Deal*, N.Y. TIMES, Mar. 16, 1993, at D1 (announcing the Department of Transportation's approval of a British Airways proposal to invest \$300 million in USAir).

159. See *British Air Drops Bid to Acquire 44 Percent Stake in Troubled USAir*, 1992 Daily Rep. for Executives (BNA) No. 247, at D-3 (Dec. 23, 1992) (stating that British Airways withdrew its bid to acquire 44% of USAir's equity and 21% of USAir's voting rights because the Department of Transportation was likely to reject the bid).

160. See *id.* at D-3 (quoting then-Secretary of Transportation, Andrew Card, Jr., as

vestment have remained controversial, as some in the United States have called for increasing the level at which foreigners may invest,¹⁶¹ while others have called for a moratorium on foreign investment in the airlines.¹⁶² A General Accounting Office study, published on January 10, 1993, states that relaxing the limitations on foreign investment in U.S. airlines would provide needed funds for debt-ridden U.S. airlines, but would not preserve competition in the industry.¹⁶³

While the operations and direct investments by foreign carriers are restricted, certain indirect investments by foreign-owned U.S. companies in the U.S. airline industry are not. Foreign-owned U.S. corporations may own U.S. aircraft and operate in U.S. domestic air service if the corporation is organized in the United States and if its aircraft are based and used in the United States.¹⁶⁴ By using such an approach, foreigners may indirectly operate in the U.S. air service market via formation of a domestic airline subsidiary or through acquisition of control over an

saying that the British Airways-USAir proposal would have been approved had the British market been more open to U.S. carriers); Hamilton, *supra* note 158, at B1 (suggesting that an agreement between the United States and the Netherlands, allowing unlimited access to each other's airline markets, paved the way for approval of the Northwest-KLM deal). Limited U.S. access to British routes is a controversial aspect of the proposed British Airways investment in USAir, and Congress has pressed for access concessions as a condition to approval of the British Airways offer. *See also State Dept. Nominee Urged to Open British Airways to U.S. Carrier*, INSIDE U.S. TRADE, Mar. 26, 1993, at 5.

161. *See British Air Drops Bid to Acquire 44 Percent Stake in Troubled USAir*, *supra* note 159, at D-3 (quoting the Secretary of Transportation in the Bush Administration, Andrew Card, Jr., as advocating raising the allowable limit of foreign voting stock ownership from 25 to 49%).

162. *See WASH. TRADE DAILY*, Jan. 25, 1993, at 2 (explaining that the Chairman of Delta Airlines, Ronald Allen, called for a moratorium on foreign investment in United States airlines in response to the British Airways offer discussed *supra*). A recent study by the Economic Strategy Institute found that foreign air carriers with protected home routes are injuring lower cost U.S. carriers, and called for a ban on foreign airlines' investment in U.S. airlines, unless reciprocal rights were implemented in the investor's home market. ECONOMIC STRATEGY INSTITUTE, REPORT (July 1993). The report cited the British Airways investment as one that should have been prohibited. *Id.*

163. GENERAL ACCOUNTING OFFICE, AIRLINE COMPETITION: IMPACT OF CHANGING FOREIGN INVESTMENT AND CONTROL LIMITS ON U.S. AIRLINES, Jan. 10, 1993. *See supra* note 162 and accompanying text (discussing a report by the Economic Strategy Institute that concluded that non-reciprocal investment access would injure U.S. competition).

164. *See supra* notes 162, 163 and accompanying text (discussing how foreign carriers may operate in the U.S. airline industry).

existing U.S. air carrier.¹⁶⁵

2. Maritime Restrictions

Foreign companies face two basic types of restrictions on their participation in the U.S. maritime industry—those on domestic transport (coastal and inland waters), and those on international transport. In addition to explicit restrictions on foreign maritime investment, U.S. law discourages foreign investment by curtailing the operations of foreign-owned marine-transport companies and vessels.

a. *Domestic Transport*

The Merchant Marine Act of 1920¹⁶⁶ contains the "Jones Act," a law providing that merchandise moving between ports in the United States must be transported on U.S.-built, owned and registered vessels.¹⁶⁷ Foreign investment in companies or vessels operating in this trade could jeopardize their viability. Under the Jones Act, the Secretary of the Treasury is given discretion to suspend these requirements with respect to countries granting reciprocal treatment, but suspension of this kind is granted only in extraordinary circumstances. Coastal and intercoastal restrictions are administered by the United States Customs Service and the Coast Guard,¹⁶⁸ and inland trade is governed by the Interstate Commerce Commission.

b. *International Transport*

The Shipping Act of 1916¹⁶⁹ sets forth a direct restriction on foreign

165. The Federal Aviation Act previously was more restrictive, requiring that notice be provided to the Treasury Department and the United States Attorney General before such an indirect foreign entry into United States air commerce. 49 U.S.C. § 1378(b)(1) (1988). This provision was terminated in 1989, however, and there no longer are specific restrictions on foreign investment in the United States aircraft industry. 49 U.S.C. § 1551 (1988). Controls under 49 U.S.C. § 1378(b)(1) were terminated in 1989 pursuant to the provisions found in 49 U.S.C. § 1551. *Id.* Of course, other restrictions, such as Exon-Florio and Hart-Scott-Rodino, discussed *supra*, may apply.

166. 46 U.S.C. app. §§ 861-889 (1988).

167. 46 U.S.C. app. § 883 (1988).

168. 19 C.F.R. § 4.8 (1992).

169. 46 U.S.C. app. §§ 801-842 (1988).

investment. The Shipping Act requires the approval of the Secretary of Treasury before a U.S. vessel can be transferred to a non-U.S. citizen,¹⁷⁰ with certain narrow exceptions.¹⁷¹

Furthermore, there are three major laws which prevent foreign vessels from carrying certain United States Government cargo, by authorizing or directing government agencies to ship preferentially on U.S. flag vessels on non-competitive terms. First, the Cargo Preference Act of 1954¹⁷² requires that at least half of specified government-generated cargo be transported on privately-owned, U.S.-flag commercial vessels, when they are available at fair and reasonable rates.¹⁷³ Second, the Cargo Preference Act requires that all cargoes covered must be shipped on U.S.-flag vessels, subject to significant waiver authority.¹⁷⁴ Third, the Cargo Preference Act of 1904¹⁷⁵ requires all items procured for or owned by the military departments to be carried exclusively on U.S.-flag vessels.¹⁷⁶ There recently have been proposals to relax these restrictions, but none have been adopted as of the date of this Article.¹⁷⁷

D. BANKING

While banking traditionally has been an area with few restrictions on foreign activity and investment,¹⁷⁸ the Foreign Bank Supervision Enhancement Act of 1991¹⁷⁹ establishes more stringent rules for federal supervision of foreign banks seeking to invest or operate in the United States. The Supervision Enhancement Act requires Federal review prior to a foreign bank's establishment of branches, agencies or commercial lending company subsidiaries in the United States.¹⁸⁰

170. 46 U.S.C. app. §§ 808(c); 835(b), (e) (1988).

171. 46 U.S.C. app. §§ 1181, 31322(a)(1)(b), 31328 (1988).

172. 46 U.S.C. § 1241 (1988).

173. 46 U.S.C. app. § 1241(b)(1) (1988).

174. 46 U.S.C. § 1241-1 (1988).

175. 10 U.S.C. § 2631 (1988).

176. Vessels owned by the United States also may be eligible for construction and operating subsidies not available to foreign vessels. 46 U.S.C. §§ 1151, 1171 (1988).

177. See Bill Mongelluzzo, *Alameda Corridor Rail Talks Back on Track*, J. COM., Oct. 14, 1993, at A1 (discussing recent proposals in Congress).

178. See Timothy J. Sheehan, *Foreign Acquisition of U.S. Banking Institutions: The Current Climate*, 4 WIS. INT'L. L.J. 20 (1985) (discussing the history of controls on foreign investment).

179. Pub. L. No. 102-242, 105 Stat. 2286 (codified in scattered sections of 12 U.S.C.A.).

180. 12 U.S.C. § 3105(d) (Supp. IV 1992). The relevant standards for approval

The Foreign Bank Act also authorizes the Federal Reserve Board to terminate a foreign bank's U.S. activities and offices if it finds that the foreign bank has violated U.S. law or engaged in an unsafe and unsound banking practice.¹⁸¹ The Federal Reserve Board also is empowered to order a foreign bank that operates a state branch or subsidiary to terminate its activities if it finds the foreign bank is not properly regulated in its home country or has violated legal banking norms.¹⁸²

General investments by foreigners in U.S. banks also are regulated in certain circumstances. In particular, the act requires disclosure of any purchase of shares in a U.S. bank with the use of loans from a foreign bank that were secured by such shares.¹⁸³ Foreign banks must be careful to comply with the act, as penalties can be severe. The act provides for a civil penalty of up to \$25,000 for each day during which a violation continues.¹⁸⁴ Further, there is a three-tiered penalty system for failure to make required reports, ranging in severity from maximums of \$2,000 to \$1,000,000 per day for inadvertent and knowing violations, respectively.¹⁸⁵

are: 1) whether a foreign bank engages in banking abroad and is subject to comprehensive supervision in its home country; 2) whether the home country regulator has approved the U.S. office; 3) the financial and managerial resources of the foreign bank; 4) whether the foreign bank has provided adequate assurances on the availability of information to the U.S. regulatory agency; and 5) whether the foreign bank is in compliance with all applicable U.S. laws. *Id.*

181. 12 U.S.C. § 3105(e) (Supp. IV 1992).

182. *Id.* In particular, the Federal Reserve must examine if: 1) the foreign bank is not subject to comprehensive supervision or regulation on a consolidated basis by the authorities in its home country; or 2) there is reasonable cause to believe that such foreign bank, or any of its affiliate, has committed a violation of law or engaged in an unsafe or unsound banking practice in the United States, and as a result of such practice(s), its continued operation would not be consistent with the public interest or the purposes of the applicable statutes. *Id.*

183. *See* 12 U.S.C. § 1817(j)(9) (Supp. IV 1992) (requiring financial institutions that are secured by shares of insured depository institutions to file reports with federal regulators).

184. 12 U.S.C. § 3110(a)(1) (Supp. IV 1992).

185. 12 U.S.C. § 3110(c) (Supp. IV 1992). The first tier penalty of not more than \$2,000 per day applies to any foreign bank, branch, agency, other office, or subsidiary of a foreign bank that: 1) maintains procedures reasonably adapted to avoid any inadvertent error and, unintentionally and as a result of such error, either fails to make required reports within the time period specified by the appropriate federal banking agency, or submits false or misleading reports; or 2) inadvertently transmits or publishes any report that is minimally late. *Id.* The second tier penalty of not more than \$20,000 per day applies to any foreign bank, branch, agency other office,

There also are certain longstanding restrictions on bank operations by foreigners at the federal level. The National Bank Act¹⁸⁶ provides that all directors of national banks must be U.S. citizens. Further, at least two-thirds of the directors on the board of a national bank must reside in the state where the bank is located or within 100 miles of the bank.¹⁸⁷ The Comptroller of the Currency may waive the citizenship requirements for a minority of the directors of a national bank that is a subsidiary or affiliate of a foreign bank.¹⁸⁸

Notwithstanding these restrictions on directors, there are no federal statutory or regulatory citizenship requirements restricting ownership or control of, or investment in, national banks. Subject to the provisions of Foreign Bank Supervision Enhancement Act, foreign banks generally may own federally or state-chartered banks, and may establish federal or state branches or agencies.¹⁸⁹ The general federal policy regarding the regulation of U.S. branches of foreign banks has been and, for the most part, continues to be, to afford them national treatment. Therefore, provided it can satisfy the newly imposed regulatory requirements, a foreign bank wishing to engage in full service wholesale and retail banking in the United States generally has the choice of establishing a direct branch in the United States, or establishing or acquiring a federally or state-chartered bank.¹⁹⁰

E. ENERGY RESOURCES

Foreign investment in various sectors of the energy industry in the

or subsidiary of a foreign bank that: 1) fails to make required reports within the time period specified by the appropriate federal banking agency; or 2) submits false or misleading reports. *Id.* The third tier penalty of not more than \$1,000,000 or one percent of total assets of the foreign bank, branch, agency, other office, and subsidiary of a foreign bank, whichever is less, is imposed per day and applies to any foreign bank, branch, agency, other office, or subsidiary of a foreign bank that knowingly or with reckless disregard for the accuracy of any report submits false or misleading reports. *Id.*

186. 12 U.S.C. §§ 21-215 (1988 & Supp. IV 1992).

187. 12 U.S.C. § 72 (1988).

188. *Id.* Some states also prescribe the citizenship and residence of directors of banks organized under their laws. *Id.*

189. See *supra* note 180 (establishing that a branch or agency in the United States is the major alternative to organization or acquisition of a national or state bank). Despite the fact that there may be no federal limitations, a number of states prohibit or restrict foreign bank ownership of banks organized under their laws. *Id.*

190. Sheehan, *supra* note 178, at 44.

United States is restricted under several laws.

1. Mining

The Mining Law of 1987¹⁹¹ limits the right to explore for minerals and to purchase lands containing such deposits to "citizens of the United States and those who have declared their intention to become such."¹⁹² These prohibitions are enforced by the Department of the Interior.

Although the Mining Law generally bars foreign corporations and individuals from holding mining claims or mineral deposits in public lands, judicial and administrative courts have construed the citizenship requirement to allow domestic corporations owned by foreign persons access to minerals on public lands.¹⁹³ Foreign-owned corporations are considered citizens of the United States if they are organized under U.S. law, and thus may exercise federal mining claims under the law.¹⁹⁴

2. Nuclear Energy

Foreign investment in the U.S. nuclear energy industry, both in power plants and operations prospecting for uranium and other source material, is largely proscribed. As amended, the Atomic Energy Act of 1954¹⁹⁵ effectively bars foreign ownership of companies operating in the nuclear power industry. The Atomic Energy Act contains a section that regulates the licensing of production facilities that use nuclear materials, and prohibits the Nuclear Regulatory Commission (NRC) from issuing a license to "an alien or any corporation or other entity if the NRC knows or has reason to believe it is owned, controlled or dominated by an alien, a foreign corporation, or a foreign government."¹⁹⁶

191. 30 U.S.C. § 22 (1988).

192. *Id.*

193. *See, e.g., Doe v. Waterloo Mining Co.*, 70 F. 455, 463 (C.D. Cal. 1895) (presuming that stockholders of a corporation, organized under state laws and party to an action, are citizens of that state); *Duncan v. Eagle Rock Gold Mining and Reduction Co.*, 111 P. 588 (Colo. 1910) (holding that a corporation organized under state law need not prove the citizenship of its stockholders); *Jackson v. White Cloud Gold Mining and Mill Co.*, 85 P. 639 (Colo. 1906) (holding that a corporation organized under state law is not required to prove its stockholders' citizenship).

194. 30 U.S.C. § 24 (1988).

195. Atomic Energy Act of Aug. 30, 1954, 68 Stat. 921 (codified as amended in scattered sections of 42 U.S.C.).

196. 42 U.S.C. § 2133(d) (1988). The Atomic Energy Act generally prohibits license granting to any person within the United States if, in the opinion of the Com-

The Atomic Energy Act also authorizes the United States Department of Energy to issue leases or permits for exploring or mining nuclear source material in land belonging to the United States.¹⁹⁷ Under this authority, the Energy Department may restrict the mining rights of foreign entities.¹⁹⁸

3. Oil and Gas

The Mineral Lands Leasing Act of 1920¹⁹⁹ restricts foreign procurement of leases to explore and extract deposits of coal, oil, oil shale, gas, and various nonfuel minerals on United States Government lands, with certain exceptions. Specifically, only foreigners from countries which grant reciprocal mineral leasing privileges to citizens or corporations of the United States may invest in exploration leases.²⁰⁰ Subject to the same reciprocity requirements, foreigners also are permitted to hold indirect interests in leases granted under the act, by owning stock in a U.S. corporation that is qualified to hold exploratory leases.²⁰¹

Foreigners also may be restricted from importing or exporting natural gas, pursuant to the discretion granted the Energy Department under the Natural Gas Act.²⁰² While the Natural Gas Act does not explicitly reference controls on foreign entities, it requires persons seeking to import or export natural gas to obtain authorization from Department of Energy.²⁰³ Such authorization is granted only if consistent with the "public interest," which often is interpreted as against foreign involvement.²⁰⁴

mission, the issuance of a license to such person would be inimical to the common defense and security or to the health and safety of the public. 42 U.S.C. §§ 2133(d), 2134(d) (1988).

197. See 42 U.S.C. § 2097 (1988) (authorizing issuance of mining leases). The Atomic Energy Act's coverage, however, is limited to federal land not encompassed by the Mineral Lands Leasing Act of 1920, discussed *infra*. See 42 U.S.C. § 2098(c) (1988) (exempting previously existing mining claims from provisions of the Atomic Energy Act).

198. *Id.*

199. 30 U.S.C. §§ 181-287 (1988).

200. 30 U.S.C. § 181 (1988); 43 C.F.R. § 3102.2 (1992). Under the Mineral Lands Leasing Act, the Secretary of the Interior can only grant leases to aliens, including U.S. domestic corporations controlled by foreign persons, whose nation allows U.S. citizens similar or like privileges. 43 C.F.R. § 3102.2 (1992).

201. 43 C.F.R. § 3102.2 (1992).

202. 15 U.S.C. § 717 (1988).

203. 15 U.S.C. § 717(b)(2) (1988) (requiring authorization for imports and exports of natural gas).

204. 15 U.S.C. § 717(a) (1988). While the law is nominally non-discriminatory,

The Outer Continental Shelf Lands Act²⁰⁵ authorizes the leasing of oil and natural gas in the offshore area comprising the continental shelf of the United States. The regulations implementing the law provide that leases may be issued only to U.S. citizens, aliens or U.S.-organized corporations.²⁰⁶

4. Other Resources

The Federal Power Act²⁰⁷ authorizes the Federal Energy Regulatory Commission to issue licenses to construct and to operate power plants on public lands.²⁰⁸ Under the Federal Power Act, licenses may be granted only to U.S. citizens and domestic corporations.²⁰⁹

Finally, under the Geothermal Steam Act of 1970,²¹⁰ the issuance of leases for geothermal steam development and utilization is restricted to U.S. citizens and corporations organized under U.S. law.²¹¹

F. COMMERCIAL FISHERIES

The Coast Guard Authorization Act of 1989 limits foreign investment in the U.S. commercial fishing industry by imposing restrictions on foreign ownership of vessels which are permitted or documented to operate in the U.S. fishing industry.²¹² In particular, vessels documented for U.S. fisheries must be owned by U.S. citizens.²¹³

the nationality of an entity seeking such authorization is a significant consideration of the Energy Department. *Id.*

205. 43 U.S.C. §§ 1331-1356 (1988).

206. 43 C.F.R. § 3102.1 (1992). These regulations were promulgated by the Interior Department. *Id.* Of course, as noted *supra*, U.S. subsidiaries of foreign corporations may operate under the Outer Continental Shelf Lands Act.

207. 16 U.S.C. §§ 791(a)-825 (1988).

208. 16 U.S.C. § 797(a) (1988). In particular, the Commission must license facilities involved the "development, transmission, and utilization" of power on land and water that are under the control of the United States Government. *Id.*

209. 16 U.S.C. § 797(e) (1988); *see supra* note 193 and accompanying text (noting that a domestic corporation is one that is organized under U.S. law, and thus may include a foreign-based corporation).

210. 30 U.S.C. §§ 1001-1027 (1988).

211. 30 U.S.C. § 1015 (1988).

212. 46 U.S.C. § 12102 (1988) (describing those vessels eligible for documentation). The prohibitions run to newly documented vessels. *Id.*

213. 46 U.S.C. § 12102(c) (1988) (requiring that a majority of the voting stock be held by United States citizens).

Another law, the Fishery Conservation and Management Act of 1976,²¹⁴ extends U.S. regulatory control over fisheries in the Fisheries Conservation Zone (FCZ),²¹⁵ the area up to 200 nautical miles from the coast of the United States. While not explicitly restricting investment, the Act limits foreign operations by instituting preferences for U.S. vessels harvesting fish in the FCZ, and for U.S. fish processors regarding such fish.²¹⁶ Foreign flag vessels may operate within the FCZ only pursuant to U.S. permits issued by the Secretary of State.²¹⁷ These foreign flag fishing operations are subject to quotas limiting them to fish that will not be taken by the U.S. industry.²¹⁸

G. REAL PROPERTY INVESTMENT

Real property regulation is primarily a matter of state law, and the question of who can hold land is determined by the constitutions, statutes and court decisions of the various states.²¹⁹ The principal controls imposed by federal statutes on alien ownership of land concern ownership by nationals of countries with which the United States is at war, or in connection with a presidential declaration of national emergency.²²⁰ There also are a number of federal reporting requirements applicable to foreign land acquisitions, which are discussed below in Part III.

III. REPORTING REQUIREMENTS

Congress has also enacted a number of laws that, while not imposing or contemplating restrictions on foreign investment and operation, nevertheless set forth extensive reporting and disclosure requirements for such transactions. As noted earlier, these investment reporting requirements

214. 16 U.S.C. § 1821 (1988).

215. *See* 16 U.S.C. § 1811 (1988) (amending and replacing 1976 language which had described the FCC).

216. 16 U.S.C. § 1811(a) (1988) (announcing the sovereign rights of the United States over fish and fish management in designated zones).

217. 16 U.S.C. § 1824(b)(1)-(2) (1988).

218. 16 U.S.C. § 1821(d) (1988).

219. As noted *supra*, this Article does not reach state restrictions.

220. *See generally* International Emergency Economic Powers Act (IEEPA), 50 U.S.C. §§ 1701-1706 (1988) (defining national emergency and the exercise of Presidential authority during such emergencies); Trading With the Enemy Act (TWEA), 50 U.S.C.A. app. §§ 1-44 (1988) (defining the purposes and applications of the prohibition on trade with wartime enemies).

should be considered part of the U.S. investment control regime. The requirements afford the United States a measure of protection via the monitoring of foreign investment. Further, mandatory submission of reports are to some extent burdens on foreign investment, and in certain cases may deter potential investors concerned about negative political reaction or press coverage given the sensitivity of foreign investment.

It is incumbent on the foreign investor to take these diverse requirements seriously, so that they identify applicable reporting obligations and submit accurate responsive information. Failure to file can exact strong penalties,²²¹ and failure to report information accurately may expose a foreign investor to penalties for false statements, including possible imprisonment.²²²

A. THE INTERNATIONAL INVESTMENT SURVEY ACT OF 1976

The International Investment Survey Act of 1976 (IISA),²²³ imposes the most comprehensive reporting requirements applicable to foreigners. The IISA authorizes both the Commerce Department to monitor direct foreign investment²²⁴ and the Treasury Department to monitor indirect or "portfolio" investments.²²⁵ In order to carry out its monitoring functions, the Bureau of Economic Analysis of the Commerce Department issued implementing regulations²²⁶ requiring so-called "United States

221. See *infra* notes 222, 236, 243, 248, and accompanying text (discussing the extent of penalties imposed).

222. 18 U.S.C. § 1001 (1988) (punishing those guilty of submitting false information with fines of up to \$10,000 or imprisonment of up to five years). In addition to the requirements discussed *infra*, legislation has been proposed in recent years to impose further reporting requirements on foreign investors. The most burdensome and controversial was the so-called "Bryant bill" in 1989, which would have required all foreign investors (those holding or acquiring a five percent or greater interest in a U.S. concern) to register with the Commerce Department. See Tate, *supra* note 12, for further discussion of the bill.

223. 22 U.S.C. §§ 3101-3108 (1988).

224. 22 U.S.C. § 3102(10) (1988) (defining direct foreign investment as the direct or indirect ownership of 10% or more of the voting securities of a United States business by a foreign person).

225. 31 C.F.R. § 129.1 (1992) (setting forth the Treasury Department's implementing regulations under International Investment Survey Act (IISA)); 31 C.F.R. § 129.4-5 (1992) (requiring stockholders of certain issues to file periodic reports). The following discussion will focus on the Commerce Department rules because they are more extensive and apply directly to the foreign investor.

226. 15 C.F.R. § 806 (1992) (setting forth the Commerce Department implementing regulations for the IISA).

affiliates" of foreign companies to file various reports concerning their financial status and activities.²²⁷ "United States affiliates" are defined as U.S. companies in which a foreign person has a direct investment of 10% or more.²²⁸

Under the Commerce Department rules, periodic reports must be filed quarterly and annually by such "United States affiliates," and a more comprehensive report must be filed every 5 years.²²⁹ Additional forms are required when foreign entities first acquire 10% or more of the voting shares of a U.S. company,²³⁰ or when existing United States affiliates of foreign entities acquire additional U.S. business enterprises.²³¹

There are notable exceptions to these requirements for smaller enterprises. United States affiliates generally are exempt from the reporting requirements where the total cost of the acquisition is \$1 million or less and does not involve the purchase of 200 acres or more of U.S. real property. However, even if the United States affiliate is exempt from filing a comprehensive fifth year investment survey, it still must file an exemption claim.²³²

Because the stated purpose of the IISA is to collect data for informational and statistical purposes, it explicitly provides that information submitted is afforded confidential treatment. The Secretary of Commerce is required to submit an annual report on the level and significance of foreign investment to Congress, but leaks to the press are possible, especially regarding politically sensitive deals.²³³ Although the Presi-

227. 22 U.S.C. § 3103 (1988).

228. 22 U.S.C. § 3102(10) (1993).

229. See 22 U.S.C. § 3103(b) (1988) (describing reports required by IISA); 15 C.F.R. § 806.15 (1992) (listing forms to be used for various reports). The quarterly report must be filed on Form BB-605. 15 C.F.R. § 806.15(h). In addition, the annual report must be filed on Form BB-15. 15 C.F.R. § 806.15(i). Finally, the comprehensive must be filed on Form BE-12. 15 C.F.R. § 806.15(j)(2).

230. 15 C.F.R. § 806.15(j)(3)(i) (1992) (requiring Form BE-13 in such circumstances).

231. 15 C.F.R. § 806.15(j)(3)(ii) (1992) (requiring Form BE-13 in such circumstances). Form BE-607 also must be filed to set forth the industrial classification of a new foreign affiliate, or when the classification of an existing affiliate changes. 15 C.F.R. § 806.15(j)(1).

232. 15 C.F.R. § 806.15(j)(3) (1992). United States affiliates also are exempt from filing quarterly submissions if total assets, sales and net income were *each* less than \$20 million. 15 C.F.R. § 806.15(h)(2)(i). Annual reports are not required for affiliates where the asset, sales and net income levels are below \$10 million. *Id.*

233. 22 U.S.C. § 3104(c) (1988) (defining permissible use of information collect-

dent may authorize the exchange of information within and between agencies, information shared in this manner is to be used confidentially for analytical or statistical purposes only.²³⁴ In this connection, Congress amended IISA via the Foreign Direct Investment and International Financial Data Improvements Act, to authorize the exchange of foreign investment data between the Census Bureau, the Bureau of Economic Analysis, and the Bureau of Labor Statistics.²³⁵

IISA provides for civil penalties of up to \$10,000 for companies failing to furnish required information, and for an injunction commanding compliance. Under the Act and applicable regulations, "willful" failure to submit required information also may be criminally punishable by fines of up to \$10,000 and/or imprisonment of up to one year.²³⁶

B. THE AGRICULTURE FOREIGN INVESTMENT DISCLOSURE ACT OF 1978

The Agriculture Foreign Investment Disclosure Act of 1978 (AFIDA)²³⁷ requires foreign persons to file a report with the Department of Agriculture if they directly or indirectly hold a "significant interest in or substantial control of"²³⁸ entities that own or lease agricultural land in the United States. The Agricultural Stabilization and Conservation Service of the U.S. Department of Agriculture promulgates and administers implementing regulations.²³⁹

Under this law, a "foreign person" includes not only a foreign citizen or a corporation organized with a principal place of business in a foreign country, but also a U.S. company in which a foreign entity holds an interest of only 10% or more.²⁴⁰ "Agricultural" land means any land that presently or within the past 5 years has been used for farming,

ed).

234. 15 C.F.R. § 806.5 (1992).

235. 22 U.S.C. § 3104(d) (1988). IISA does not authorize information exchange with other agencies such as the Treasury Department, and contains provisions to maintain the confidentiality of the data and to prevent disclosure of the identity of reporting parties. 22 U.S.C. §§ 3104(c), (e); 3143(d); 3144.

236. 22 U.S.C. § 3105 (1988); 15 C.F.R. § 806.6 (1992) (authorizing civil and criminal penalties for violations).

237. 7 U.S.C. §§ 3501-3508 (1988).

238. 7 C.F.R. § 781.2(k)(1)-(3) (1992) (defining "significant interest in, or substantial control of").

239. 7 C.F.R. § 781.1 (1992).

240. 7 C.F.R. § 781.2(g)(1)-(4) (1992) (defining the term "foreign person").

ranching, forestry or timber production.²⁴¹ In contrast to reports under the IISA, these reports are available for public inspection.²⁴² Inadvertent or willful noncompliance with the reporting requirements is subject to penalty under the AFIDA, which may be as severe as 25% of the acquisition value.²⁴³

C. FOREIGN INVESTMENT AND REAL PROPERTY TAX ACT OF 1989

The Foreign Investment and Real Property Tax Act of 1989 (FIRPTA)²⁴⁴ was enacted to amend the Internal Revenue Code by extending tax liability to foreign investors selling or disposing of real property interests in the United States. FIRPTA sets forth complex tax rules governing such transactions which are outside the scope of this Article.²⁴⁵

FIRPTA is mentioned in this discussion because, as legislated, it imposes annual reporting requirements on foreign entities holding U.S. real property interests.²⁴⁶ These requirements have not yet become effective, however, because the Treasury Department has not issued regulations as of the date of this Article, and it is unclear when, or even whether, the Treasury Department will do so.²⁴⁷ If implemented, these

241. 7 C.F.R. § 781.2(b) (1992); *see* 7 C.F.R. § 781.2(c) (1992) (defining an interest in such land as including not only ownership, but also leaseholds of ten years or more).

242. 7 C.F.R. § 781.3(a) (1992).

243. 7 U.S.C. § 3502 (1992); 7 C.F.R. § 781.4 (1992) (detailing the Department of Agriculture's broad discretion in imposing fines on non-complying parties).

244. 26 U.S.C. §§ 861, 897, 6039C (Supp. I 1989).

245. *See* I.R.C. § 897 (1989) (setting forth the complex tax rules of Foreign Investment and Real Property Tax Act (FIRPTA)). The foreign investor should carefully analyze the tax consequences of a proposed investment in the United States. *Id.* § 897(c)(1). Under these rules, which cover not only the taxation of gains on sales of U.S. real property, but also income from U.S. acquisitions, and dividends from U.S. investments. *Id.*; *see also* Charles R. Irish & Miké G. Reinecke, *United States Taxation of Foreign Materials*, 4 WIS. INT'L L.J. 1 (1985) (discussing generally the taxation of foreign materials).

246. I.R.C. § 6039C (1989). A U.S. real property interest can include not only general real estate, but also investments in energy producing properties such as mines and wells, as well as interests in U.S. real estate holding companies. I.R.C. § 897(c)(1) (1989).

247. I.R.C. § 6039C (1989). FIRPTA authorized the Treasury Department to promulgate regulations to require reporting in foreign persons holding direct investments in U.S. real property interests. *Id.* Debate over the reporting system led to the tax withholding system currently in place, which makes it doubtful, despite the language

requirements would treat a foreign person as holding a direct investment in U.S. real property interests during any calendar year if: 1) the foreign person did not engage in U.S. trade or business at any time during the calendar year; and 2) the fair market value of the U.S. real property interest held directly by the person at any time during the calendar year amounted to \$50,000 or more. These requirements also would provide for significant penalties for failure to submit required information.²⁴⁸

D. THE CURRENCY AND FOREIGN TRANSACTION REPORTING ACT

A comprehensive review of reporting requirements should include mention of the Currency and Foreign Transactions Reporting Act (CFTRA)²⁴⁹ which contains a set of transaction reporting requirements that apply to both domestic and foreign investors. Domestic and foreign persons²⁵⁰ who physically transport, mail or ship currency or other monetary instruments to or from the United States in excess of \$10,000 must file a Report of International Currency or Monetary Instruments with the United States Customs Service.²⁵¹ A transfer of funds through normal banking procedures that does not involve the physical transportation of currency or monetary instruments, as well as warehouse receipt and bills of lading, are excluded from the reporting requirement.²⁵²

Each person subject to U.S. jurisdiction having an interest in, or other

of the law, that Treasury will implement the reporting requirements, any time in the foreseeable future. *Id.*

248. *Id.* The fine is \$25 for each day that the failure to submit information continues. *Id.* The law limits the total fine, however, to the lesser of \$25,000 or 5% of the aggregate fair market value of the U.S. real property interests owned by the person at any time during the year. I.R.C. § 6652(f) (1989).

249. 31 U.S.C. §§ 321, 5311-5314, 5316-5322 (1988).

250. See 31 C.F.R. § 103.11(n) (1992) (defining domestic and foreign persons as "an individual, a corporation, a partnership, a trust or estate, a joint stock company, an association, a syndicate, joint venture or other unincorporated organization or group, and all entities cognizable as legal personalities . . .").

251. See 31 U.S.C. § 5313 (1988) and 31 C.F.R. § 103.23 (1992) (reporting requirement may be satisfied by filing a Customs Form 4790). The \$10,000 limit comprises all transactions in the aggregate on one occasion. 31 C.F.R. § 103.23 (1992). The filing requirements also apply to persons who cause such transactions to occur, or who attempt to do so. *Id.* Additionally, each person who receives monetary instruments in an amount greater than \$5,000 at one time transported into the United States from or through a place outside the United States is required to file such report. *Id.* Generally, this will include the transportation of U.S. coins and currency, travelers' checks, bearer negotiable instruments, incomplete instruments and banker securities. *Id.*

252. *Id.*

authority over, any type of foreign financial account in a foreign country is required to report the existence of the account to the Internal Revenue Service (IRS) for each year in which such relationship exists.²⁵³ Financial institutions²⁵⁴ also are required to file reports with the IRS²⁵⁵ on currency transactions²⁵⁶ of amounts over \$10,000.²⁵⁷ Although this requirement applies to banks, and targets neither investors nor foreigners, foreign investors may be concerned that U.S. financial institutions must provide the IRS with detailed information pertaining to covered transactions, including information about the individuals, corporations, and financial institutions involved.²⁵⁸

E. SECURITIES REPORTING REQUIREMENTS

Finally, the Securities and Exchange Commission (SEC) requires a party acquiring a direct or indirect ownership of 5% or more of any stock of a registered company to file a report. This requirement also applies to both domestic or foreign entities.²⁵⁹ The report must be filed within 10 days of an acquisition and requires disclosure of the citizenship or place of incorporation of the beneficial owner.²⁶⁰ Penalties for failure to file, as well as for filing false information, include criminal

253. 31 C.F.R. § 103.24(a) (1992). These requirements do not apply to foreign subsidiaries of a United States person. *Id.* Treasury Department regulations also require specified financial institutions to disclose in detail certain transactions with designated foreign financial agencies. 31 C.F.R. § 103.25(a) (1992).

254. 31 C.F.R. § 103.11(i) (1992). Financial institutions are defined broadly to include: insured, commercial and investment banks; agencies or branches of foreign banks in the U.S.; operators of credit card systems; brokers or dealers in securities or commodities; currency exchanges; investment companies; insurance companies; loan or finance companies; thrift institutions; travel agencies; pawnbrokers; dealers in precious metals, stones or jewels; and telegraph companies. *Id.*

255. *See id.* (reporting requirement may be fulfilled by filing an IRS Form 4789).

256. *Id.* Currency transactions include deposits, withdrawals, exchanges of currency or other payment, transfer by, through or to such financial institution that involves a transaction in currency or more than \$10,000. *Id.*; 31 C.F.R. § 103.22 (1992).

257. 31 C.F.R. § 103.22(a)(1) (1992). Multiple transactions by or for the same person on any one day are treated as a single transaction if the financial institution is aware of them. *Id.*

258. *Id.* The penalties applicable to a financial institution for failure to make a required report is the greater of \$100,000 or the amount of the reportable transaction. *Id.*

259. *See* 15 U.S.C. § 78m(d), (g) (1988) (requiring filings to be made on SEC Form 13-D).

260. *Id.*

liability.²⁶¹

CONCLUSION

With the growth of multinational corporations and the globalization of national economies, it is imperative that the President set forth a clear policy on foreign investment, based on its consideration of the merits and liabilities involved.²⁶² This policy naturally should define the national objectives of the United States in controlling foreign investment and operations, and by practical extension, it should provide the framework for the appropriate investment control statutory regime to best satisfy these objectives. It is manifest that the current system, comprising an array of direct and indirect restrictions, impediments, reporting requirements, and related exceptions, implemented by the spectrum of agencies, under numerous federal statutes, should be reconsidered and revised to carry out the defined national goals.

The increasing importance of the foreign investment question and the dubious effectiveness of the current framework call on the President to authorize a formal review of the present legal system controlling foreign investment, based on clearly articulated national objectives, with recommendations for necessary revisions. The President has authority to mandate such a report under the IISA.²⁶³ There is precedent in other areas, most recently in the U.S. trade relief laws, for an agency to analyze an existing legal framework perceived to be in need of revision, and to provide a proposal for rationalizing and simplifying the law to make it coherent and accessible.²⁶⁴

261. 18 U.S.C. § 1001 (1988).

262. See *supra* notes 1, 2 and accompanying text (discussing that the Clinton Administration clearly perceives the importance of the issue, and has been debating this point at length, in the context of the National Economic Council). No policy has yet emerged on this issue, however. *Id.*

263. 22 U.S.C. § 3103(a)(2)-(3) (1988). Under the IISA, the President has wide latitude to conduct studies:

[O]n specific aspects of international investment and trade and services which may have significant implications for the economic welfare and national security of the United States; . . . [a]nd to report periodically . . . on national and international developments with respect to laws and regulations affecting international investment in trade and services

Id.

The President also retains residual authority through requests such as studies. *Id.*

264. 58 Fed. Reg. 12,253 (1993). On December 16, 1992, the Ways and Means Committee of the United States House of Representatives requested the United States

The study should have the following guiding principles: (1) the objective of controls on foreign investment and operations is to protect articulated U.S. national and economic security interests; (2) the controls targeting foreign investment which do not advocate and/or carry out these goals should be eliminated as unnecessary limits on the free flow of finance and commerce; and (3) because an overlapping and convoluted system of statutory controls is counterproductive to achieving and monitoring national objectives, redundant or duplicate provisions should be eliminated, anomalous or overly complex regulations should be simplified, and the system should be rearranged, rationalized and consolidated under the primary authority of the minimum agencies necessary. To the extent substantive legal changes are required to achieve these objectives, they should be set out as legislative proposals in the report.

A presidential request for such a report would galvanize and focus the debate on what truly are national objectives in the area of foreign investment controls. Moreover, the completion of a report with explicit proposals for improving the current investment control regime would serve the country well, by showing the way to a more coherent, consistent and accessible system to gauge whether important U.S. national objectives are being adequately protected and preserved. At the same time, it would create a more transparent and predictable investment environment for foreign investors.

International Trade Commission (ITC) to conduct a study and prepare a report concerning the reorganization of U.S. trade relief laws under 19 U.S.C. § 1332(g). The ITC was requested to carry out the following objectives: "(1) the logical and accessible arrangement of the law; (2) the elimination of duplicate provisions; and (3) the elimination or simplification of anomalous or illogical provisions, to the extent that this is possible without substantive or procedural changes to the existing provisions of the law." *Id.* at 12,253-54. In any report on the current regime for foreign investment, the report should recommend changes to any anomalous or illogical provisions which would require substantive or procedural changes. *Id.*