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Christopher M. Ernst

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NOTES

The Foreign Ownership Disclosure Act of 1989: Do You Know Who Owns Your Piece of the Rock?

Since 1980 there has been an explosion in the amount of foreign investment, both direct and indirect, in the United States. In 1988 the United States experienced its first foreign direct investment deficit.¹ "Already, foreign buyers have acquired such . . . companies as CBS Records, Purina Mills, Brooks Brothers, Celanese, Doubleday, Smith-Corona, Hardee's, Firestone, Pillsbury, and Smith & Wesson."² Two years ago, the Japanese real estate company, Mitsubishi Estate Company, announced that it had secured a fifty-one percent interest in the Rockefeller Group, Inc., which owns, among other entities, Rockefeller Center and Radio City Music Hall, American landmarks in the heart of New York City.³ Through its ownership in the Rockefeller Group, Mitsubishi will count among its tenants: General Electric Company, National Broadcasting Company, Time Warner, Price Waterhouse and Morgan Stanley.⁴ The purchase cost Mitsubishi Estate Company \$846 million.⁵ This is just one example of recent investment by foreign investors.⁶

¹ The United States invested \$327 billion in foreign countries while foreign countries invested \$329 billion in the U.S. *Foreign Investment in the U.S.: Hearing on S.289 and S.856 Before the Senate Comm. on Commerce, Science and Transportation*, 101st Cong., 1st Sess. 42 (1989) (statement of Sen. Harkin) [hereinafter *Hearing*].

² 135 CONG. REC. E1366, E1367 (daily ed. Apr. 26, 1989) (quoting Anderson, *Is America for Sale?*, PARADE, Apr. 16, 1989).

³ Plain Dealer, Oct. 31, 1989, at 1-D, col. 1. See also *Update: Some Trophy*, REALTOR NEWS, Nov. 6, 1989, at 1. Other Japanese investment in New York includes the Exxon Building, bought by Mitsui Foundation for \$610 million; the ABC Headquarters, bought for \$175 million, and the Tiffany Building, bought for \$94 million. Lambert & Howard, *U.S. Real Estate: The Japanese Factor*, PROB. & PROP. Nov./Dec. 1987, at 29, 31.

⁴ *Japanese Buy New York Cachet with Deal for Rockefeller Center*, N.Y. Times, Nov. 1, 1989, at 1, col. 1.

⁵ *Id.*; Plain Dealer, *supra* note 3.

⁶ Foreign investment has worked its way into many other business opportunities that touch our lives.

For the average American, the result [of the foreign investment] is that today many 'American' brands no longer are. Carnation is now owned by the Nestle group of Switzerland, Standard Oil of Ohio belongs to British Petroleum of the United Kingdom. We shop

With the sudden increase in foreign investment, an alarming problem has come to the attention of Congress. There is no systematic method for registering foreign investment. Without such a method, it is nearly impossible to determine who owns what; the United States government does not know how much of America is owned by foreign investors. Such ignorance could be potentially dangerous. The Foreign Ownership Disclosure Act of 1989 (FODA) was a bill before Congress, which would force foreign investors to reveal basic information to the government.

The foreign direct investment (FDI) in this country normally entails the purchase of equity either in a business or in real estate. Much of this note will examine some of the various types of FDI and why there might be reasons for concern. But an operative definition is important before a close study of the subject may begin. Globally, there is no set definition for foreign direct investment. The most common definition is where "a foreign person or company obtains direct or indirect ownership of at least ten percent of controlling equity."⁷ This has generally been interpreted to mean ten percent of the voting securities.⁸ The reason for focusing on voting securities is that they allow an investor to express her voice in the management of the corporation. Though ownership of voting securities does not necessarily imply possession of distributional rights, the two often go together. Ownership of voting securities does, however, imply the right to control, at least in part, the equity or assets of a corporation. The International Monetary Fund points to that element of supervisory control when it characterizes foreign direct investment as an "investment that is made to acquire a lasting interest in an enterprise operating in an economy other than that of the investor, the investor's purpose being to have an effective voice in the management of the enterprise."⁹ These definitions also apply to real property holdings.¹⁰ Real estate, in fact, is quite a popular investment opportunity.¹¹ As will

at Supermarkets owned by Germans (A&P), and when we buy our hamburgers from Hardee's, the answer to the question "Where's the beef . . . from?" is Canada.

135 CONG. REC., S854, S855 (daily ed. Jan. 31, 1989) (statement of Sen. Harkin).

⁷ H. PONIACHEK, *DIRECT FOREIGN INVESTMENT IN THE UNITED STATES* xi (1986).

⁸ *Foreign Investment in U.S. Real Estate: Federal and State Laws Affecting the Foreign Investor — An Update*, 16 REAL PROP. PROB. & TR. J. 465, 466 (1981).

⁹ U.S. DEPARTMENT OF COMMERCE, *INTERNATIONAL DIRECT INVESTMENT: GLOBAL TRENDS AND THE U.S. ROLE* 171 (1988) (quoting the International Monetary Fund definition) [hereinafter *IDI*].

¹⁰ *Id.* at 1.

¹¹ Almost one half of the real estate in downtown Los Angeles is believed to be controlled by foreign investors. 134 CONG. REC. H9581, H9589 (daily ed. Oct. 5, 1988) (statement of Rep. Bryant). Foreigner investors are believed to own thirty-nine percent of Houston. *Id.* It is thought that one-third of all available office space in Minneapolis is owned by Canadians, while "Toronto's Reichman brothers own 8 percent of Manhattan's office space." 135 CONG. REC., *supra* note 2. Foreign investors own over 1,900,000 acres of the State of Maine, mostly woodland for their pulp

be shown, though, these definitions are not concrete and can vary with the different types of ownership.

There are many reasons for the increased investment. The weak American dollar,¹² the openness of U.S. markets, the fear of future barriers to the American markets, and strong economic growth have been among the most motivating.¹³ Since the Japanese have recently increased their investment in the United States, much attention has been focused on them. Because of their industrial growth, the Japanese have become very wealthy and have earned vast sums of money by virtue of their exports.¹⁴ Given their emphasis on saving and investing money, the Japanese have looked to this country for investment opportunities. While cries of prejudice have been raised¹⁵ and are occasionally valid,¹⁶

and paper operations. *Study: Foreigners Own 1% of Acreage*, Chicago Trib., May 1, 1989, at 3, col. 1. That figure is approximately twice of what is owned by foreign investors in California. *Id.*

¹² When Sony bought CBS records for \$2 billion, it "represented the same amount of yen as would have amounted to \$1 billion two years earlier." *Rohatyn Says U.S. Should Scrutinize Foreign Investment in U.S.*, CORP. FIN. WK., Feb. 1, 1988, at 8.

¹³ *IDI*, *supra* note 9, at 38. *IDI* lists eight reasons for increased foreign investment in the U.S.

- There is a growing recognition among foreign multinational corporations (MNCs) of the size of the United States market and a perception of the United States as a "safe haven" of political stability and economic strength in a turbulent world.

- Large foreign multinational firms are becoming increasingly confident of their ability to compete with U.S. firms in the United States.

- Concern about possible increased U.S. protectionism has encouraged foreign establishment or acquisition of U.S. facilities to avoid prospective trade barriers.

- Strong economic growth in the United States has improved the earnings of many domestic firms, making them attractive for foreign acquisition.

- Corporate restructuring also has increased the number of domestic candidates available for foreign takeovers, as enterprises have spun off some divisions in the process of corporate reorganization.

- Relatively high U.S. interest rates, compared with rates abroad, motivated U.S. affiliates to reinvest their earnings and, to the extent possible, to borrow from their foreign parents rather than borrow in U.S. financial markets.

- Foreign investors were actively pursued by individual state and municipal governments, especially in the South.

- The recent depreciation of the U.S. dollar against most leading foreign currencies reduced the foreign-currency cost of acquiring U.S. companies, building new facilities and expanding existing ones.

Id.

¹⁴ "Basically, the VCR's and the Toyotas are coming back." *Foreign Investors Step Into More Active Roles*, N.Y. Times, May 15, 1988, at A5, col. 1.

¹⁵ It is instructive to note that "when Irving Bank Corp. of New York this week decided to sell 51 percent of its stock to a foreign company, Banca Commerciale Italiana of Roma, it caused hardly a ripple, even though if the deal goes through, Irving would be the largest U.S. bank under foreign control. But imagine the ideological brouhaha if control of the nation's 24th largest bank were to pass into the hands, say, of the Fuji Bank of Tokyo!" Rowen, *A Trade Bill We Could Live Without*, Wash. Post, Apr. 20, 1988, at A21, col. 1.

¹⁶ Sixty-five percent of Americans would disapprove of a U.S. bank being sold to the Japanese and sixty-one percent think that Japanese imports should be restricted. In 1982, a Chinese-Ameri-

when Japanese investment is scrutinized, its rapid pace in the United States has at least drawn attention to the scope of all foreign direct investment.¹⁷ If this trend continues, Japan should surpass Great Britain and the Netherlands as the largest foreign investor in the United States.¹⁸

There is no broad umbrella requirement in the United States that compels foreign nationals who invest in American business or real estate to disclose their identity.¹⁹ Although twenty different governmental entities collect data on foreign investment in the United States, the information is either insufficient or flawed.²⁰ As a result, the United States government does not know who owns America. On January 3, 1989, United States Congressman John Bryant (D-Texas) introduced FODA, also known as H.R. 5, into the House of Representatives.²¹ "[FODA] addresses the critical need to establish a centralized and reliable source of data regarding the rapid increase in foreign ownership of U.S. farms, banks, factories, corporations, and Government securities."²² On January 31, 1989, Senator Thomas Harkin (D-Indiana) introduced the same bill in the Senate, stating that "[t]he purpose of this bill is to require the systematic registration of most foreign-owned interests in our country."²³

Under FODA, foreign nationals owning more than five percent of a U.S. business or real estate valued at five million dollars or more would be required to disclose to the government their "address; identity; nationality; . . . industry; the date the interest was acquired; the percentage of the interest and its market value; and the name[,] location and industry of the U.S. property."²⁴ Examination of FODA must be done by first understanding the reasons for creating such a broad law. When these concerns are established, an accurate test of foreign direct investment

can was beaten to death in front of a blue collar bar in Detroit. His assailants thought he was Japanese. Smith, *Fear and Loathing of Japan*, FORTUNE, Feb. 26, 1990, at 51.

¹⁷ 135 CONG. REC., *supra* note 2, at E1367.

¹⁸ Yoneyama, *U.S. House Passes Foreign Ownership Disclosure Bill*, Kyodo News Service, Oct. 6, 1988 (LEXIS, NEXIS library, Archiv. file) (Great Britain and the Netherlands are the first and second largest investor countries in the United States, respectively).

¹⁹ *Id.*

²⁰ The data is often considered confidential, restricted to only the agency that collected the data. Other agencies (or even the public), which could use the raw data for different purposes, may not have access to it, thus making the usefulness of the data very limited. Other flaws include a two-year lag before the data is finally published. The data collected often has insufficient specifics, thus reducing its usefulness, and, when it is collected, there is no central repository for storage of it. The adequacy of the reporting techniques has also been assailed. U.S. GENERAL ACCOUNTING OFFICE, FOREIGN INVESTMENT: FED. DATA COLLECTION ON FOREIGN INVESTMENT IN THE U.S., 1-2 (Oct. 1989) [hereinafter FOREIGN INVESTMENT] (introductory letter from Mr. Allan Mendelowitz, Director of Trade, Energy, and Finance Issues, to Sen. Ernest Hollings and Rep. John Dingell).

²¹ H.R. 5, 101st Cong., 1st Sess., 135 CONG. REC. 1, E4 (daily ed. Jan. 3, 1989).

²² *Id.*

²³ S. 289, 101st Cong., 1st Sess., 101 CONG. REC. 8, S854 (daily ed. Jan. 31, 1989).

²⁴ 135 CONG. REC., *supra* note 21.

needs to be created. With such a test, the government would be able to collect the data it truly needs.

I. THE HISTORY OF ALIEN LANDHOLDING LAWS IN THE UNITED STATES

Before examining the current condition of laws affecting foreign direct investment in the United States, it is important to have an understanding of the history of alien landholding laws. By appreciating the descent of laws that restrict alien ownership, it will be easier to place modern laws in their proper context.

The United States' first laws were brought from England with America's first settlers; U.S. alien landholding laws have their origins firmly rooted in the British common law.²⁵ In British common law, aliens, those without citizen status, could not fully own real property.²⁶ The basis of this law was the notion that those who owed no fealty, or allegiance, to the sovereign could use land, but not own it in a fee simple absolute manner.²⁷ An alien could not pass the property through "descent, dower, or courtesy."²⁸ The theory underlying the common law was that aliens should not be allowed to hold land with the same rights as a monarch's subject.²⁹ Consequently, the "monarch had the prerogative to claim an alien's landholdings without compensation . . ."³⁰ The Crown then had the ultimate control of the land, thus limiting an alien's "ownership" of the land.³¹ After the American Revolution and the ensuing formal development of the country, many states passed laws that required Tories to relinquish their land to the state governments.³² When these laws were challenged in the U.S. Supreme Court, the Court

²⁵ Sullivan, *Alien Land Laws: A Re-evaluation*, 36 TEMP. L.Q. 15 (1962).

²⁶ Azevedo, *Foreign Direct Investment in U.S. Real Estate: A Survey of Federal and State Entry Level Regulation*, 7 N.C.J. INT'L. L. & COM. REG. 147 (1982).

²⁷ *Id.*

²⁸ Pfeffer and Quintana, *Foreign Investment in the United States: a Nineteenth Century Perspective*, 17 STAN. J. INT'L. L. 45 (1981).

²⁹ Lazarus, *An Historical Analysis of Alien Land Law: Washington Territory & State 1853-1889*, 12 U. PUGET SOUND L. REV. 197, 198 (1987).

³⁰ *Id.*

³¹ "An alien's real property rights were much more limited. Under the common law, an alien could take and hold real property against all but the Crown, but could not by deed convey that title." Note, *Alien Landownership in the United States: A Matter of State Control*, 14 BROOKLYN J. INT'L L. 147, 150 (1988).

Two consequences resulted from this feature of the common law alien land disability. First, land that might otherwise go to an alien by operation of law escheated to the sovereign unless an eligible heir of the decedent could be found. Second, untransferred land remaining at the time of an alien landowner's death automatically escheated because aliens were deemed to have no legal heirs.

Lazarus, *supra* note 29, at 199.

³² Note, *supra* note 31, at 151.

adopted the British Common Law principle.³³ Thus, aliens under U.S. law possessed the same inability to own property as aliens did under English law.

After the United States became more settled, many states relaxed their laws, giving aliens the same property rights as citizens.³⁴ At that point, there was great concern about the development of the country, particularly the Western frontier, which outweighed the traditional and historical convictions about alien landholding leftover from British common law. Liberalization of landholding laws was a key component to developing the country.³⁵ "This [liberalization] implies greater interest in using attractive terms of land tenure as a means of encouraging settlement than as an inducement for aliens to become citizens."³⁶

In the nineteenth century, when immigration increased drastically, not only did many states revert to their previous exclusionary practices, but the Federal Government also involved itself.³⁷ These state and federal measures, reactionary in nature,³⁸ were intended to protect the country from the increase of foreign investment.³⁹ Much of the concern focused on the ownership of farms and ranches where many foreign investors had begun developing large estates.

Opponents of foreign ownership claimed that the system of small, individual homesteads was in peril and would be replaced by tenant farming and feudalism. . . . Protesters pointed to the presence of British nobles on the boards of directors of many cattle companies and warned of the imminent danger of a takeover of America by the British aristocracy.⁴⁰

³³ *Id.*

³⁴ Azevedo, *supra* note 26, at 28.

³⁵ Note, *State Laws Restricting Land Purchases by Aliens: Some Constitutional and Policy Considerations*, 21 COLUM. J. TRANSNAT'L L. 135, 137 (1982).

³⁶ Sullivan, *supra* note 25, at 30.

³⁷ For a good discussion of immigration in the United States at this time, see O. HANDLIN, *THE UPROOTED: THE EPIC STORY OF THE GREAT MIGRATIONS THAT MADE THE AMERICAN PEOPLE* (1951); A. KRAUT, *THE HUDDLED MASSES: THE IMMIGRANT IN AMERICAN SOCIETY, 1880-1921* (1982); R. EASTERLIN, D. WARD, W. BERNARD, & R. UEDA, *IMMIGRATION* (1982).

³⁸ "This wave of restrictive statute-making was a product of agricultural discontent. . . The great abuse in the eyes of the farmer was the large-scale engrossment of farm land by absentees. . . Alien landholdings were extensive. . . Alien holdings of such magnitude [farms often in excess of one million acres] aroused much concern in farm areas throughout the country. This was understandable in a time of depression, mortgage foreclosure and increased farm tenancy, when prospects for the independent farmer were especially bleak." Sullivan, *supra* note 25, at 31.

³⁹ Morrison, *Limitations on Alien Investment in American Real Estate*, 60 MINN. L. REV. 621, 625 (1976).

⁴⁰ Pfeffer & Quintana, *supra* note 28, at 50. While the establishment of a feudal system in America would be a tremendous undertaking, the bitter memories of serfdom, poverty, and subservience to the powerful landholder were fresher in nineteenth century than they are today. Consequently, the existence of the farmers's fear of such an economic backslide is understandable, if not plausible.

In the late nineteenth century, Congress passed the Territorial Land Act of 1887 which prevented all aliens who had not yet declared their intention to become naturalized citizens from purchasing land.⁴¹

In the twentieth century, the focus of alien landholding laws, some of which are still on the books, narrowed. The Alien Property Custodian Regulations allow the government, in the interests of national defense, to seize alien-owned property temporarily during time of war.⁴² More recently, Congress passed the Agriculture Foreign Investment Disclosure Act of 1978 (AFIDA) which required disclosure, resembling that which would be required by FODA, for agricultural interests.⁴³ This bill was passed for reasons similar to those behind the passage of the state agricultural alien landholding laws: fear of foreign investors and absentee owners.⁴⁴ Congress then enacted the Foreign Investment in Real Property Tax Act of 1980 (FIRPTA).⁴⁵ FIRPTA was designed to equalize the tax differences between foreign and domestic investments, thus reducing the appeal of foreign investment in U.S. real estate.⁴⁶

Almost all of the alien landholding laws have been enacted by the individual states. Historically, the various state laws have all reflected the political and economic climates of the time.⁴⁷ Increases in immigration often resulted in more stringent laws aimed at excluding aliens. In the late nineteenth and early twentieth centuries, many states passed landholding laws as a response to the influx of aliens.⁴⁸ Farm states were concerned over absentee alien landlords⁴⁹ and, consequently, legislated to limit their holdings of U.S. property.⁵⁰ In the West, the laws were aimed

⁴¹ "No alien or person who is not a citizen of the United States, or who has not declared his intention to become a citizen of the United States in the manner provided by law shall acquire title to or own any land in any of the Territories of the United States." 48 U.S.C. § 1501 (1988). See also Note, *supra* note 31, at 156.

⁴² 50 U.S.C. app. § 1 (1988).

⁴³ 7 U.S.C. §§ 3501-3508 (1988).

⁴⁴ Most farmers were fearful that foreign investors were going to cause an upheaval in agriculture which could have placed the livelihood of many rural Americans in jeopardy. "These parties [American farmers and their representatives] testified that little was known about foreign investment in U.S. agricultural land; that fears were developing about the connection between rapidly increasing prices of prime U.S. agricultural acreage and investments by foreigners in U.S. agricultural acreage; that foreigners, because they were often absentee owners, might not be as motivated as native owners to practice soil conservation; and, finally, that foreign-based speculators might sell more readily to developers than U.S. landowners would and thus contribute to the decrease of productive farm acreage in the United States." Azevedo, *supra* note 26, at 29.

⁴⁵ 26 U.S.C. §§ 861, 871, 882, 897 (1988). See also, Note, *supra* note 31, at 158.

⁴⁶ *Id.*

⁴⁷ See generally, Note, *supra* note 31, at 152-55.

⁴⁸ Sullivan, *supra* note 25, at 26.

⁴⁹ For a discussion of absentee landlords, see generally *supra* note 44 and accompanying text.

⁵⁰ Restrictions vary greatly. They include prohibiting the purchasing of title, limiting the length of leasehold estates, limiting the length of freehold estates, and restricting the amount of land a foreigner may own. Azevedo, *supra* note 26, at 28, 38-47.

at Asian nationals.⁵¹ These anti-Asian laws, in particular those affecting the Japanese, became quite popular prior to and during World War II as a result of economic fears and the rise of American nationalism,⁵² but they were largely repealed after the war.⁵³

There has been a great deal of debate on whether the federal government, as opposed to the states, should attempt to regulate the ownership of real property. While the Supremacy Clause of the Constitution enables the federal government to "entirely preempt or partially invalidate conflicting state legislation,"⁵⁴ and the Commerce Clause gives the government the power to regulate foreign commerce,⁵⁵ neither was specifically intended for real property transactions.⁵⁶ A state has the inherent power to control the "devolution of property within its territorial boundaries,"⁵⁷ because, historically, the federal government could not, as a matter of practicality, reflect the geographically specific need of local communities.⁵⁸ As shown by AFIDA, however, "[c]omprehensive federal legislation enacted pursuant to the federal power over interstate and foreign commerce . . . could nevertheless 'occupy the field,' thereby preempting all state legislation."⁵⁹ This circumvents the Federal-State argument, allowing the U.S. government, as opposed (or in addition) to the state, the power to control alien landholding.

II. CONCERNS SURROUNDING FOREIGN INVESTMENT IN THE UNITED STATES

Historically, the concern over foreign investment in the United States either concentrated on farming, or was, especially in urban set-

⁵¹ Note, *supra* note 35, at 137; Note, *supra* note 31, at 152; Sullivan, *supra* note 25, at 26.

⁵² "[A]nti-Japanese sentiment [flourished] in the Pacific Coast states. Earlier those states had shown concern about Chinese immigration, and had resorted to landholding restriction to a minor extent. The Japanese not only migrated to the Pacific Coast states in large numbers after 1900, but engaged in agricultural pursuits to a greater extent than the Chinese. They proved so efficient as farmers that fears of competition among their citizen neighbors soon developed. When efforts to restrict Japanese immigration failed to produce the desired effect, strong pressures developed for legislation that would force the Japanese farmer off the land. These pressures, in which race prejudice and economic motives blended almost indistinguishably, centered in California." Sullivan, *supra* note 25, at 32-33.

⁵³ The Supreme Court also ruled that "alien land laws which had the effect of discriminating solely against the Japanese, were vulnerable to attack on equal protection and due process clauses." Note, *supra* note 31, at 153.

⁵⁴ Note, *supra* note 35, at 139.

⁵⁵ Note, *supra* note 31, at 161-63.

⁵⁶ THE FEDERALIST No. 45, at 292 (J. Madison) (*reprinted in* Sullivan, *supra* note 25, at 163, n.104).

⁵⁷ Note, *supra* note 31, at 177.

⁵⁸ *Id.* at 180.

⁵⁹ Note, *supra* note 35, at 140.

tings, a Populist xenophobic reaction to immigration.⁶⁰ The laws were intended to protect the small farmer struggling to make a living or were the result of White America's hostility to the "newcomers," most notably the Asians.⁶¹ However, in the past twenty years, the focus of this concern has shifted. Most investment has grown dramatically, and the targets of investment have moved away from agricultural land towards businesses and urban real estate. Fears that foreigners are taking over the economic centers of the country and not just the farmland have developed.

Today, there are four major areas of concern over foreign investment. They are (A) influence on FDI policy and national security, (B) domestic corporate behavior, (C) global monopoly, and (D) technology transfer.⁶² The most important area is the first one. It centers directly around the role the dollar can play in the field of political decision making.

A. Influence on American Politics and National Security

Politics has long been known as an area where money talks. Foreign investors control a great deal of money which gives them an opportunity to control our decision makers. This concern is not unfounded. California and Florida both had unitary taxes. Because unitary tax is based on worldwide sales, as opposed to sales within state boundaries, many foreign manufacturers did not savor the economic environment of these two states.

Executives of Sony of America, a subsidiary of the Japanese company, threatened both the Florida and California legislatures with cancellation of plans to build facilities in their states unless the unitary tax was repealed. . . . Florida complied in a hastily called session during Christmas week in 1984. Sony contributed \$29,000 to the election campaigns of California legislators in 1984 in an effort to repeal the state's unitary tax. They were abetted by a coalition of Japanese investors, who added \$108,000 to the coffers, and by European investors and their governments, who also contributed money as well as their considerable political weight. The prime minister of Great Britain, Margaret Thatcher, personally lobbied the U.S. president on the issue of unitary repeal. California finally knuckled under the pressures in 1986, when the legislature repealed the unitary tax.⁶³

⁶⁰ Huizinga, *Alien Land Laws: Constitutional Limitations on State Power to Regulate*, 32 *HASTINGS L.J.* 251 (1980).

⁶¹ *Id.*

⁶² S. GORDON & F. LEES, *FOREIGN MULTINATIONAL INVESTMENT IN THE UNITED STATES: STRUGGLE FOR INDUSTRIAL SUPREMACY* 20 (1986)[hereinafter *FOREIGN MULTILATERAL INVESTMENT*].

⁶³ M. & S. TOLCHIN, *BUYING INTO AMERICA: HOW FOREIGN MONEY IS CHANGING THE FACE OF OUR NATION*, 17-18 (1988)[hereinafter *BUYING INTO AMERICA*].

A system of disclosure would not have been of much use in these situations, but disclosure could have revealed other investors, who would otherwise remain anonymous to the government or who might be tempted to influence politics. A corporation could, by all appearances, be "American," yet, actually be owned by a foreign investor. Working behind that "corporational" mask, that investor could then attempt to influence a political outcome. An unwitting politician could think that by listening to this corporation, he was answering to his voters, but this response, for all practical purposes, would be to a foreign investor.

This scenario was nearly played out in Washington D.C., when Toshiba pressured its American employees to lobby their politicians and start a letter writing campaign in an effort to have the trade sanctions against the Japanese relaxed.⁶⁴ If large numbers of employees, responding to the wishes of management, lobbied Congress to change a law, Congress might not know that these employees worked for a corporation owned by a foreign investor whose motives might not be the same as those of an American investor. While a foreign investor has the right to lobby Congress, such lobbying should be done without deceit or fraud. Otherwise, Congressional decisions could be made based on incorrect information.

Koreans started publishing a newspaper in the nation's capital with the express intent of changing the political climate.⁶⁵ The results of this and similar actions are tantamount to investors hiding behind a corporate name. If the publishers attempted to hide their nationality, then Congress could misinterpret what was being written in the newspaper. Instead of listening to the wishes of their voters, the Congressmen would be listening to the wishes of the Korean investors.⁶⁶

FDI cannot only affect national security through political pressure, it can also directly compromise security. Foreign investment in the defense industry has a frightening potential. America must be able to defend itself and to do so requires a strong defense industry. If the defense industry falters, then America's physical well-being could falter as well. In 1987, two major investment opportunities shed light on the vulnerability of the nation's defense. Fujitsu Limited tried to purchase a controlling interest in Fairchild Semiconductor, while James Goldsmith did the same to Goodyear. The sale of these two companies to foreign investors could have had serious ramifications if the United States went to war.

⁶⁴ Fry, *Foreign Direct Investment in the United States: The Differing Perspectives of Washington, D.C. and the State Capitals*, 1989 B.Y.U. L. REV. 373, 385 (1989).

⁶⁵ BUYING INTO AMERICA, *supra* note 63, at 18.

⁶⁶ The Korean publishers and investors did not attempt to deceive the public as to their motives. However, their situation is useful as an example. Another example that follows this line of reasoning occurred when the Japanese investors in an Alaskan mill played an integral role in the defeat of the Clean Water Act through their lobbying efforts. *Id.* at 21-23.

Their owners could have shut down, cut off the supply of critical parts, and crippled a war effort. While the government could probably compensate for this loss through the laws of expropriation, it might not ever be able to recover any military secrets or technology that a foreign investor might lift from this country by virtue of his investment in a sensitive field. This fear has, to an extent, been alleviated by the Exon-Florio Amendment to the Omnibus Trade Act of 1988.⁶⁷

B. Domestic Corporate Behavior

The behavior of domestic corporations is an immediate concern of the American worker. Proponents of FDI maintain that over three million workers are employed through FDI.⁶⁸ The question is how those workers are being treated. There are allegations that foreign businesses are notoriously anti-union,⁶⁹ which results in fears of worker oppression not seen since before the Depression. While this fear may be unfounded, disclosure would allow study of FDI employees in order to determine if American workers are truly being exploited.

Another allegation is that the parts used in manufacturing, which had been domestically produced while the business was American owned, are now being imported,⁷⁰ thus reducing the number of available jobs for other American laborers. Disclosure would allow the government to identify which businesses might be performing this practice, bringing to its attention a problem that previously would have gone undiscovered. At that point, Congress would have enough information and data on which to base a decision that might affect such practices.

Other concerns have been stated. "Basic industries such as steel and motor vehicles provide an income for a large part of the population. The replacement of these industries with lower paid employment opportunities would lead to a serious reduction in the U.S. standard of living."⁷¹ If the investor then flounders, will the American locations be the first to shut down? Even if these concerns are unfounded, the question remains of how the country is affected when the investors remove the profits of a bought-out business and return them to the investor's home country.⁷²

⁶⁷ Exon-Florio allows the President to void a sale of American business to a foreign investor if that sale could jeopardize national security. However, there are still ways for a foreign investor to avoid this provision.

⁶⁸ Most of these jobs are "saved" by foreign investors rescuing floundering American corporations. An example of this is Bridgestone's buyout of Firestone Tire. Richardson, *United States Policy Toward Foreign Investment: We Can't Have It Both Ways*, 4 AM. U.J. INT'L L. & POL'Y 281, 293-94 (1989).

⁶⁹ BUYING INTO AMERICA, *supra* note 63, at 27.

⁷⁰ *Id.*

⁷¹ FOREIGN MULTINATIONAL INVESTMENT, *supra* note 62, at 4.

⁷² *Id.*

That, in itself, merits study of FDI.

C. *Global Monopoly*

The third concern is that competition, both domestically and globally, could be jeopardized by global monopolies.⁷³ If a foreign investor were effectively to corner a market in a product, other rival American companies could be put at a serious disadvantage competitively. This concern, admittedly, is not as pressing as the others. As FDI grows, though, the concern could become much more relevant.

D. *Transfers of Technology*

The last concern is highly controversial. By investing in American businesses, foreign investors would be privy to America's superior technological base.

The acquisition of U.S. technology companies by foreign state-owned enterprises could give these enterprises an advantage that would threaten the remaining members of the industry sector. It could also create problems relating to the protection of national defense technology and other sensitive sectors closely linked to national interests.⁷⁴

An example of this is the Japanese investment in Boeing which brought out fears that America might lose control of the aerospace industry.⁷⁵ Critics of FDI also point to the Fujitsu offer discussed earlier. "Technology leadership is required of a superpower. Continued leadership is not possible unless America properly blends together research and development (R&D), industrial investment, and policies on international trade and investment."⁷⁶

III. THE PROBLEM OF DEFINING OWNERSHIP

Garnering vast amounts of information facilitates solving the illusive issue of FDI. However, when trying to structure a system that would reveal the scope of FDI, the question of ownership is of paramount importance. The concerns about foreign investment are related directly to the actions of a corporation. When an investor has a loud enough voice in the managerial process of a corporation, he has the ability to manipulate that investment so as to further his own desires. This possibility mandates that attention be paid to determining what level of investment gives the investor the ability to control a corporation. While foreign investment has generally been considered to be direct when an

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ BUYING INTO AMERICA, *supra* note 63, at 11-12.

⁷⁶ FOREIGN MULTINATIONAL INVESTMENT, *supra* note 62, at 4.

investor has ten percent of the voting securities,⁷⁷ that definition might well need to be amended.

The concerns enumerated in the previous section possess the common thread that a foreign investor will use his investment to disadvantage Americans. The decisions regarding corporate action come from the ability to direct the course of the corporation. Because of this, those who have the ability to control the assets of a corporation, and thereby the course of the corporation, are the primary targets for disclosure. While creditors may be able to exert substantial control over the use of assets, their interests are often secondary to that of the investor. The investor is concerned primarily with the disposition of the real assets whereas a creditor is more interested in the financial assets. It is the disposition of the real assets that more readily affect the concerns about FDI. The debt market is not as important to those who are alarmed by FDI. Consequently, the definition of ownership needs to reveal those who can control the real assets of the corporation.

A. *The Exon-Florio Amendment*

The Exon-Florio amendment to the Omnibus Trade Act of 1988 attempts to reveal those who control real assets. The Exon-Florio amendment gives the President the authority to nullify an acquisition of an American business if that acquisition would threaten national security.⁷⁸ Because of the need to determine which acquisitions merit attention, the Treasury Department needed to create a process that would reveal the type of ownership that would enable the investor to engage in the type of behavior that Congress feared. The Treasury Department decided that the right to determine use and disposition of assets was the crucial ownership attribute. The definition, in a proposal stage at this point, concentrates on the word "control."⁷⁹

The term "control" means the power, direct or indirect, whether or not exercised, and whether or not exercised or exercisable through the ownership of a majority or a dominant minority of the total outstanding voting securities of an issuer, or by proxy voting, contractual arrangements or other means, to formulate, determine, direct or decide matters affecting the entity; in particular, but without limitation, to formulate determine, direct, take, reach or cause decisions regarding:

(a) The sale, lease, mortgage, pledge or other transfer of any or all of the principal assets of the entity, whether or not in the ordinary course of business;

⁷⁷ See *supra* notes 7-9 and accompanying text.

⁷⁸ Liebeler, *Foreign Investment in the U.S. After Exon-Florio*, L.A. LAW., Dec. 1989, at 12 [hereinafter *Exon-Florio*].

⁷⁹ See 54 Fed. Reg. 29,744 (1989) (to be codified at 31 C.F.R. § 800) (proposed Jul. 14, 1989).

- (b) The dissolution of the entity;
 - (c) The closing and/or relocation of the production or research and development facilities of the entity;
 - (d) The termination or non-fulfillment of contracts of the entity;
- or
- (e) The amendment of the Articles of Incorporation or constituent agreement of the entity with respect to the matters described at (a) through (d) above.⁸⁰

This definition of control removes the mechanical aspect of the previous definitions by simply saying that ten percent of the voting stock creates a control problem. Restricting the definition to focus on those who invest in a business and receive, in return, the ability to regulate or affect how the business is run is a more realistic approach. This definition is not, however, intended to affect more remote investments.

The fear that a foreign investor could gain ownership, that is, the right to control the assets, of a business that could affect national security necessitates being able to determine who controls the assets. The regulation is concerned with who is able to control the corporation.⁸¹ The question remains, though, even after § 800.213 is implemented, can the government discover the ultimate beneficial owner (UBO) behind a maze of corporations. While the issue of the UBO has long been a thorn in the side of those who wish to study FDI, § 800.213 circumvents the issue in two ways. First, it examines who controls the assets and, second, it states that such control may be either direct or indirect. By looking beyond who owns how much stock and focusing on who is able to control the business, the Treasury Department has seemingly created a test that would reveal the UBO. If an investor were to shield his investment through a maze of corporations, he would still be able control assets and direct matters "affecting the entity."

B. The Securities and Exchange Commission

Another strategy is taken by the Securities and Exchange Commission (SEC). Section 13(d) of the Exchange Act requires, basically, that the beneficial owner of five percent of stock disclose his identity to the SEC.⁸² However, the SEC zeroes in on the element of control as well. If it appears to the SEC that the investment was made "in the ordinary course of business and w[as] not acquired for the purpose of and do[es] not have the effect of changing or influencing the control of the issuer nor

⁸⁰ 54 Fed. Reg. 29,751 (1989) (to be codified at 31 C.F.R. § 800.213)(proposed Jul. 14, 1989).

⁸¹ "[T]he intent of the regulations is to indicate that notice, while voluntary, is clearly appropriate when, for example, a company is being acquired that provides product or key technologies essential to the U.S. defense industrial base." 54 Fed. Reg. 29,746 (1989) (Comments to the regulation).

⁸² 15 U.S.C. § 78(M)(d) (1988).

in connection with or as a participant having such purpose of effect,"⁸³ then the investment is not of concern. This test includes, unlike the test in Exon-Florio, the identification of most types of control, including creditors. It separates into two groups those who invest with the purpose of simply making money and those who attempt to gain control of their acquisition. This then identifies the UBO.

The SEC has also proposed a different form of this test. In its proposed rule, anyone "who contributes more than ten percent of the equity capital of the filing person or who, directly or indirectly, has a right to receive, through an ownership interest, capital contribution or otherwise, more than ten percent of the profits or the assets (upon liquidation or dissolution) . . ." would be required to register under the Exchange Act.⁸⁴ Although this is better than the customary ten percent of stock test, it is not perfect. Paying attention to the capital contribution is a mechanical approach that is similar to prior definitions. Attaching importance to who puts up or receives the money assumes that immediate financial gain is the goal of all investors. What happens if someone invests in a corporation solely for the purpose of influencing American politics? That investor may control the corporation, according to § 800.213, but may not have contributed capital or have rights to the profits. This is an unlikely scenario, admittedly, but one that is possible.

IV. CURRENT REPORTING REQUIREMENTS IN THE UNITED STATES

Various agencies of the federal government do require some limited disclosure. The United States does not have one all-encompassing disclosure law as most other industrialized countries do.⁸⁵ There are sixteen different governmental entities which require some sort of limited registration.⁸⁶ This information is insufficient to serve as an adequate and accurate registration of foreign investors because it tends to be incorrect and highly fragmented across numerous governmental organizations. The main accounting agency of the government, the General Accounting Office (GAO), has little effective information on foreign investment.⁸⁷

⁸³ 15 U.S.C. § 78(m)(d)(5) (1989).

⁸⁴ Disclosure of Equity Participants in Control Transactions, F. Sec. L. Rep. Transfer Binder (CCH) para. 84,411 (Exchange Act Release No. 26599, Mar. 6, 1989).

⁸⁵ Ironically, President Reagan, along with other western industrialized nations and Japan, signed a recommendation by the Organization for Economic Cooperation and Development endorsing the disclosure and registration of foreign investment. "Most would report only who they are, where they live, interest held, and the US assets' value . . ." Bryant, *Let's Have Disclosure by Foreign Investors*, CHRISTIAN SCIENCE MONITOR, Mar. 28, 1989, at 9 (discussing the Organization for Economic Cooperation and Development's 1984 "Declaration and Decisions on International Investment and Multinational Enterprises").

⁸⁶ *Id.* See also 135 CONG. REC., *supra* note 11, at H9589 (daily ed. Oct. 5, 1988) (statement by Rep. Bryant).

⁸⁷ I have requested an assessment by the GAO to help us so we could be more effective in

The two agencies primarily responsible for data collection are the Department of Commerce and the Treasury Department.⁸⁸ The Bureau of Economic Analysis (BEA) collects data on foreign investment, but there are many problems with the data. The data is published, often rather slowly, in the aggregate form only⁸⁹ and is classified by industry rather than by enterprise;⁹⁰ the BEA will not release the information about individual businesses. The Treasury Department collects data through four entities: the Office of Data Management in the Office of the Assistant Secretary, International Affairs; the Office of the Comptroller of the Currency; the Office of Thrift Supervision; and the Internal Revenue Service (IRS).⁹¹ All IRS filings are confidential.⁹² FIRPTA requires annual tax filings by foreigners, but that information is also kept confidential by the IRS.⁹³ However, FIRPTA allows the use of strawmen.⁹⁴ "What good does it do to have a law on the books, as we do now, which does not require the ultimate beneficial owner of the property be disclosed?"⁹⁵ The other three offices collect data on portfolio, or indirect, investment which is then published in the aggregate only and does not reveal the UBO. The Treasury Department's benchmark surveys, from which the data is derived, are not very timely. They are conducted every five years.⁹⁶ The Treasury Department is also part of the Committee of Foreign Investment in the United States (CFIUS).⁹⁷

The Department of Agriculture collects the AFIDA data. AFIDA requires disclosure of foreign owners of agricultural property to the Secretary of Agriculture. "Again that permits registration in the name of a

trade negotiations with Japan. After a year of study, the GAO produced a report which read as follows. They could not give us the information we wanted on Japanese ownership in this country because private industry was not required to provide us with the information because of the intense competition within the industry which made it impossible to verify much of the information that they were asked to provide.

135 CONG. REC., *supra* note 11, at H9584 (statement of Rep. Latta).

⁸⁸ FOREIGN INVESTMENT, *supra* note 20, at 6.

⁸⁹ Rather than publishing the information by individual, it is published cumulatively so that only the investment totals are announced. *Id.* at 8.

⁹⁰ *Id.* at 7-8.

⁹¹ *Id.* at 13.

⁹² *Id.* at 14.

⁹³ 134 CONG. REC., *supra* note 11, at H9585 (statement by Rep. Latta).

⁹⁴ A strawman is "a person who is put up in name only to take part in a deal. . . . [A] person who purchases property for another to conceal identity of real purchaser." BLACK'S LAW DICTIONARY 1274 (5th ed. 1979).

⁹⁵ 135 CONG. REC., *supra* note 11, at H9585 (statement by Rep. Bryant).

⁹⁶ FOREIGN INVESTMENT, *supra* note 20, at 14.

⁹⁷ CFIUS is responsible for administering the Exon-Florio data collection procedures. CFIUS is an inter-agency committee that was created after the Arab Oil Embargo. "CFIUS is composed of the secretaries of commerce, state, and defense; the attorney general; the U.S. trade representative; the chairman of the Council of Economic Advisors; the director of the Office of Management and Budget and the treasury secretary, who serves as its chairman." *Exon-Florio*, *supra* note 78, at 14.

dummy corporation"⁹⁸ Additionally, there have been compliance problems with foreign-owned land being unreported.⁹⁹

The SEC requires reports on owners, as previously discussed. However, since this requirement is applicable only to publicly traded corporations, it does not include many other investments, such as equity purchases in private businesses and real estate acquisitions.

The Census Bureau collects proprietary business data on businesses in the United States, but does not emphasize foreign investment. Furthermore, this data is also confidential.¹⁰⁰

The Office of Trade and Investment Analysis publishes a list of foreign investment in the United States based upon compilations of news stories. However, because of errors in collection, the publication carries with it a disclaimer of responsibility.¹⁰¹

One of the results of this sketchy and erratic data collection scheme is that errors easily occur and multiply.¹⁰² With the current process provided for disclosure and registration, very little accurate and dependable information is obtainable. The Foreign Ownership Disclosure Act strives to increase the accuracy, timeliness, and dependability of the data.

V. THE FOREIGN OWNERSHIP DISCLOSURE ACT OF 1989

A. *A History of the Bill*

The purpose of the Foreign Ownership Disclosure Act is to provide the government with "a centralized and reliable source of data regarding the rapid increase in foreign ownership of U.S. farms, banks, factories, corporations, and Government securities."¹⁰³ With that knowledge, Congress, theoretically, should be able to make intelligent and thoughtful

⁹⁸ 135 CONG. REC., *supra* note 11, at H9589 (statement by Rep. Bryant).

⁹⁹ FOREIGN INVESTMENT, *supra* note 20, at 10-11.

¹⁰⁰ *Id.* at 9. "The Census Bureau collects, on a computerized file, detailed but proprietary business data on the operation of most U.S. domestic and foreign-owned businesses. Census data contain detailed individual establishment information (such as individual factories), but does not highlight foreign-ownership. . . ." *Id.*

¹⁰¹ *Hearing, supra* note 1, at 26-27 (statement of Rep. Bryant).

¹⁰² I made the point . . . that data [required by the Bureau of Economic Analysis of the Commerce Department], which is thick and which does look good, basically tell us very little. Why? Because they permit foreign investor under the current practices to hide behind dummy corporations by not requiring a list of the ultimate beneficial ownership. Because their data is admittedly, by their own accounting, unreliable, they have a \$223 billion discrepancy between what they claim in writing has been the extent of foreign ownership in America and what they admit is the fact as to currency inflows.

¹⁰³ 134 CONG. REC. 140, H9589 (statement of Rep. Bryant) (Rep. Latta had, previously in the debate, proffered a copy of a Commerce Department report regarding the International Investment and Trader in Services Survey Act. He described the report as being "about a half an inch thick." *Id.* at H9585 (statement of Rep. Latta)). *See also Hearing, supra* note 1, at 25, 27 (statement of Rep. Bryant).

¹⁰³ 135 CONG. REC., *supra* note 21.

decisions regarding FDI. FODA should also help to reveal whether or not foreign investors are attempting to influence political opinion. Proponents of the bill argue there is insufficient data currently because of the inadequate and nonsystematic process for registration and disclosure.

H.R. 5410, the Foreign Ownership Disclosure Act, takes a crucial first step in understanding the circumstances surrounding the huge influx of foreign capital into our country. By requiring the registration of large acquisitions by foreign nationals, we can begin to grasp the extent of their participation in the American economy. And, in the case of a foreign person owning a controlling interest in an American enterprise, it is not too much to ask to receive a copy of the same relevant documents which that national's own country requires disclosed. It is very important that this information be reported to the Congress and the President as the bill requires. . . . Such disclosure in situations of foreign ownership has at least three functions:

First, to identify additional interested parties, including where "front men" and collusive activity are involved;

Second, to indicate our vulnerability to particular lenders within specific industries or sectors of our economy; and

Third, to identify ownership within the United States which could be made possible by involvement in illegal activities, such as drug trafficking.¹⁰⁴

FODA "would establish the first systematic registry — accessible only to policymakers and legitimate researchers — of major foreign investment in the United States."¹⁰⁵ With it, Congress should possess a precise analytical foundation on which to make public opinion.¹⁰⁶

FODA was originally introduced by Texas Congressman John Bry-

¹⁰⁴ *Id.* at H9594 (statement of Rep. Collins). (H.R. 5410 was the Foreign Ownership Disclosure Act of 1988 which is very similar to FODA of 1989. FODA of 1988 was passed by the House on October 5, 1988, but died when the Senate was unable to act upon it before the end of the session. *Hearing, supra* note 1, at 29-30 (statement of Rep. Bryant).

¹⁰⁵ 135 CONG. REC. *supra* note 2, at E1366 (statement of Rep. Bryant).

¹⁰⁶ Our current policy of ignorance handicaps our ability to responsibly manage our own economy. We don't have enough information to even know most of the questions we should be asking, but I will venture to suggest a few I believe we *ought* to be equipped to answer.

First question. Is there a line beyond which it is not in our economic interest to have foreign ownership of a particular industry? Does foreign control in that industry beyond some point begin to endanger our national security? . . .

Second question. How much foreign influence is taking place in the American electoral process? How do we guard against the funneling of campaign contributions in to U.S. political campaigns anonymously from abroad, as we know happened during President Nixon's 1972 reelection campaign? . . .

Third question. When is foreign investment creating jobs and when is it displacing them? When is it increasing opportunities for U.S. businesses and when is it shutting them out?

Hearing, supra note 1, at 28.

ant as an amendment to the Omnibus Trade Act of 1988.¹⁰⁷ It passed the House of Representatives but was dropped as an amendment because of strong Presidential opposition.¹⁰⁸ In its place was inserted the Exon-Florio Amendment, a provision which authorized the President to stop a takeover by a foreign investor if that takeover threatened national security in some manner.¹⁰⁹ However, the Exon-Florio amendment applies only to transactions whose participants notify the government. Such notification is totally voluntary.¹¹⁰ FODA was then reintroduced in the House and passed by a vote of 250 to 170 (with 11 not voting).¹¹¹ The Senate was unable to act on the bill before the end of the Congressional session and, consequently, the bill died. Representative Bryant introduced FODA of 1989 at the beginning of the next Congress.¹¹² Later in the month, Senator Harkin introduced the same bill in the Senate. Both Houses of Congress have sent the bill to committee.¹¹³ The Senate Commerce, Science and Transportation Committee held a hearing on the bill on July 11, 1989.¹¹⁴ FODA already has strong support in the House since the House has passed it twice before.¹¹⁵

¹⁰⁷ *Hearing, supra* note 1, at 26-29.

¹⁰⁸ Both the current and immediately preceding administrations feel that FODA would discourage foreign investment and provide little new information. 135 CONG. REC., *supra* note 11, at H9582 (statements of Rep. Bryant and Rep. Latta). *See also Hearing, supra* note 1, at 29-30 (statement of Rep. Bryant).

¹⁰⁹ *Hearing, supra* note 1, at 30 (statement of Rep. Bryant). "[T]he President may take such action for such time as the President considers appropriate to suspend or prohibit any acquisition, merger, or takeover, of a person engaged in interstate commerce in the United States proposed or pending on or after the date of enactment of this section by or with foreign persons so that such control will not threaten to impair the national security." 50 U.S.C. app. § 2170(c) (1988).

¹¹⁰ *Exon-Florio, supra* note 78, at 15. The element of voluntary compliance is a striking difference from FODA. While the information disclosed would be similar, FODA would also reach beyond the scope of Exon-Florio and would include FDI that does not threaten national security.

¹¹¹ H.R. 5410, 100th Cong., 2nd Sess., 135 CONG. REC. 140, H9581, H9607 (daily ed. October 5, 1988).

¹¹² 135 CONG. REC., *supra* note 21.

¹¹³ 1989 H.R. 5 (Jan. 3, 1989); 1989 S. 289 (Jan. 31, 1989)(LEXIS, LEGIS. library, Archiv. file).

¹¹⁴ *Hearing, supra* note 1, at 29-30.

¹¹⁵ FODA of 1989 currently lists sixty-seven cosponsors. They are, in addition to sponsor Representative Bryant, Bonior (D-MI), Chapman (D-TX), Evans (D-IL), Frost (D-TX), Gaydos (D-PA), Leath (D-TX), Lukens (R-OH), Edwards (R-OK), Coleman (D-TX), Kaptur (D-OH), Heger (R-CA), Martin (R-IL), Eckart (D-OH), Jontz (D-IN), Boxer (D-CA), Gephardt (D-MO), Tallon (D-SC), Johnson (D-SD), Gonzalez (D-TX), Bilbray (D-NV), Durbin (D-IL), Valentine (D-NC), Lipinski (D-IL), Pelosi (D-CA), Traxler (D-MI), Morrison (D-CT), Olin (D-VA), Smith (D-FL), Atkins (D-MA), Akaka (D-KI), DeFazio (D-OR), Clay (D-MO), Lantos (D-CA), Collins (D-IL), Vento (D-MN), Luken (D-OH), Glickman (D-KS), Kildee (D-MI), Mfume (D-MD), Wolpe (D-MI), Hughes (D-NJ), Sangmeister (D-IL), Walgren (D-PA), Penny (D-MN), Roth (R-WI), Fauntroy (D-DC), Roe (D-NJ), Donnelly (D-MA), Ford (D-MI), Parker (D-MS), Bentley (R-MD), Lancaster (D-NC), Bates (D-CA), Long (D-IN), Dorgan (D-ND), Oberstar (D-MN), Sikorski (D-MN), Williams (D-MT), Pallone, Jr., (D-NJ), Kanjorski (D-PA), Poshard (D-IL), Campbell (D-CO),

B. *Explanation of the Bill*

FODA is a relatively simple bill in its construction. It is set up as a broad blanket to cover all foreign investment, above the specified limits.¹¹⁶ The bill requires that all foreigner investors¹¹⁷ who acquire a significant interest¹¹⁸ in a United States property¹¹⁹ disclose, within thirty days, to the Secretary of Commerce the following information:

- (1) The identity, address, legal nature, industry and nationality of the foreign person.
- (2) The date on which the foreign person acquired the interest.
- (3) The relation of the foreign person to the United States property.
- (4) The name, location, and industry of the United States property.
- (5) The market value of (a) the assets of a United States business enterprise or (b) a United States real property.
- (6) The percentage size of the interest acquired.¹²⁰

All foreigners who have a controlling interest¹²¹ in a business enterprise must also disclose:

- (A) a —
 - (i) balance sheet and income statement;
 - (ii) statement of changes in financial condition;
 - (iii) statement of sales, assets, operating income, and depreciation by industrial segment . . . ;

Wise (D-WV), Borski (D-PA), Sabo (D-MN), English (D-OK). Mead Data Central Tracking Report, 1989 H.R. 5 (Jan. 31, 1989).

¹¹⁶ For the specified limits, see *infra* note 118.

¹¹⁷ A foreign investor is defined as (1) any individual who is not a citizen of the United States, (2) any business organized under foreign laws (or any business whose principal place of business is outside of the country), or (3) any foreign government. Furthermore, "foreigners" extends to "any two or more [foreign] persons acting as a group for the purpose of acquiring or holding any interest [described later]." Anyone who falls into groups (1), (2), or (3) above "[who] hold[s] an equity or ownership interest in such group [whose purpose is acquiring or holding any previously described interest] of twenty percent or more, or the equivalent of such an interest" must report. This is to prevent the use of strawmen. H.R. 5, 101st Cong., 1st Sess. § 2(m)(5), 135 CONG. REC. 1, E4, E5 (daily ed. Jan. 3, 1989); S. 289, 101st Cong., 1st Sess. § 2(M)(5), 135 CONG. REC. 8, S854, S857 (daily ed. Jan. 31, 1989) [hereinafter, citations will be only to the House bill (H.R. 5), unless there is a difference in the Senate bill (S. 289)].

¹¹⁸ A "significant" interest is any equity or ownership interest over five percent of the total value for property that has assets (or in the case of real property, is valued) over \$5,000,000, or has gross sales in excess of \$10,000,000. *Id.* § 2(m)(6).

¹¹⁹ "Property" is defined as any American business or real property. *Id.* § 2(m)(4).

¹²⁰ *Id.* § 2(c).

¹²¹ A "controlling interest" is any equity or ownership interest in excess of twenty-five percent of the total equity or ownership interests of a business whose assets are greater than \$20,000,000, based upon "fair market value," or who has a gross sales total larger than \$20,000,000. *Id.* § 2(m)(7).

(B) the location of all facilities within the United States; and

(C) the identity and nationality of each director and executive officer.¹²²

This additional disclosure for foreign investors holding controlling interests must be made only if the foreign person's home country requires such additional public disclosure of him as well.¹²³ The bill would also require this information to be updated yearly.¹²⁴ After the bill is enacted, the Secretary of Commerce will report to Congress and the President detailing the foreign investment in this country made possible by the reporting requirements of this bill.¹²⁵ The Secretary will also prepare a registry of interests reported¹²⁶ to be made available only to those working pursuant to this law, the committees of Congress, the General Accounting Office, applicable state agencies, and anyone performing "qualified research" as determined by the Secretary.¹²⁷ Failure to comply with this act would result in a maximum fine of \$10,000 and/or a

¹²² *Id.* § 2(d)(2).

¹²³ *Id.* § 2(d)(1).

¹²⁴ *Id.* § 2(e).

¹²⁵ The Secretary shall transmit in June of each year, beginning in 1989, a report to the President and the Congress describing

(1) the extent to which foreign persons hold significant or controlling interest in United States properties, the nationality of those foreign persons, the industries in which those interests are concentrated, and the social, economic, and other effects in the United States of such foreign interests;

(2) the effectiveness and efficiency of the registration and reporting requirements contained in this section providing the information required under this section and the extent to which the information provides a comprehensive description of the presence of foreign capital in the United States economy;

(3) other Federal data collection activities that overlap with, duplicate, or complement the registration and reporting requirements established under this section and that could be consolidated or eliminated without compromising the quality of the data collected; and

(4) in the case of the first annual report, the feasibility of establishing a system to track individual transactions representing other capital flows into the United States.

Id. § 2(k).

¹²⁶ "The registry shall index the information for retrieval by:

(A) the name and nationality of any foreign person who registers or reports an interest . . . and the standard industrial classification number or numbers (as issued by the Director of the Office of Management and Budget) of any such foreign person; and

(B) the name of the United States property in which any interest registered or reported under this section is held, the standard industrial classification number or numbers of any such United States property, and the State in which any such United States property is located.

Id. § 2(l).

¹²⁷ *Id.* This is the main difference from FODA of 1988. FODA of 1988 did not provide for such limiting of access to the reported information. See *Hearing, supra* note 1, at 34 (statement of Sen. Harkin).

maximum sentence of one year in jail.¹²⁸ Repeated failure to comply would result in forfeiture of the interest.¹²⁹ Perhaps the most important provision is the investigative powers conferred to the Secretary of Commerce who may do anything necessary, under the Federal Trade Commission guidelines, to monitor compliance with this Act.¹³⁰ When combined with the provision requiring disclosure of the UBO, FODA becomes a powerful tool to discover exactly what pieces of American property foreign investors own.

C. Analysis of the Debate Over the Bill

There are two factions arguing over FODA. Those who are against the bill feel that it will hurt the U.S. economy by discouraging and discriminating against foreign investment. They claim that the current reporting requirements give the United States all the information necessary to analyze foreign investment. Those who are in favor of FODA feel that it is necessary to learn how much foreign investment there is in the United States and, based on other countries' experiences, feel that it will not discourage any foreign investment. The Netherlands,¹³¹ West Germany,¹³² Canada,¹³³ Australia,¹³⁴ France,¹³⁵ and Japan¹³⁶ all have some

¹²⁸ H.R. 5, *supra* note 117, § 2(h)(1).

¹²⁹ *Id.* § 2(h)(2).

¹³⁰ *Id.* § 2(i).

¹³¹ The Netherlands, along with West Germany, is among the most liberal industrialized nation toward foreign investment. CONGRESSIONAL ECONOMIC LEADERSHIP INST., *AMERICAN ASSETS: AN EXAMINATION OF FOREIGN INVESTMENT IN THE UNITED STATES* 20 (1988) [hereinafter *AMERICAN ASSETS*]. It is also the second largest country with foreign direct investment in the United States. *Id.* at 3. There are no major governmental restrictions to foreign investment; in fact, the Dutch government actually provides incentives to foreign investors with a goal of promoting "specific economic goals." *Id.* at 20 (*quoting* *AMERICAN EMBASSY, INVESTMENT CLIMATE STATEMENT FOR THE NETHERLANDS* (1987)). However, in lieu of governmental restrictions, the nature of Dutch business practices act to protect against hostile takeovers. *Id.*

¹³² As one of the strongest industrialized nations of Europe, West Germany monitors foreign direct investment. The West German government has the broad power to restrict foreign investment should it chose to do so. However, it rarely chooses to exercise that power. *AMERICAN ASSETS, supra* note 131, at 23. The government does require, though, that direct investments in excess of DM 100,000 be reported to the Federal Office of Economics; investments in excess of DM 400 million must be referred to the Cartel office for registration. *Id.* The government will only release aggregate information, protecting the identity of the investor. Department of the Treasury, *Survey of G-7 Laws and Regulations on Foreign Direct Investment: Foreign Direct Investment Reporting and Disclosure Requirements of the Group of Seven Countries* 2 (Dec. 7, 1988) [hereinafter *G-7 Laws*].

¹³³ The Canadian government closely monitors foreign investment. The agency Investment Canada requires that all investments in over \$5 million (Canadian) be screened. *AMERICAN ASSETS, supra* note 131, at 22. It is then possible for Investment Canada to impose restrictions that may affect the amount of acquisition, the production techniques, and the transfer of technology. *Id.* The U.S.-Canada Free Trade Agreement will prohibit most performance requirements for American investors. Currently, investment from Canada ranks fourth highest on the list of countries from which

controls over foreign investment. While some controls are quite liberal, such as those of the Netherlands, others are very restrictive, such as those of Japan. In the United States, though, the lack of systematic disclosure system means a lack of quality information. "[T]here is simply no way for us to tell which foreign businesses are buying American stocks, bonds, real estate, businesses, manufacturing plants, and our na-

foreign direct investment comes. *Id.* at 3. However, this will not take place until the current agreements expire, no later than 1996. *Id.* at 22.

The information gathered by Investment Canada is then published. While "sensitive" financial data is not disclosed, the information is published in specific lists. G-7 Laws, *supra* note 132, at 2-3. Furthermore, the Corporations and Labor Unions Returns Act requires that the ownership of companies that issue stock be made available to the public. *Id.* The governmental agency Statistics Canada requires some reporting as well, but releases the information on in the aggregate form. *Id.*

¹³⁴ Australia has strict foreign investment rules. All investments over \$10 million (Australian) must be pre-approved, as do foreign takeovers involving more than \$5 million (Australian) or fifteen percent of the ownership, and all urban real estate acquisitions valued in excess of \$600,000 (Australian). AMERICAN ASSETS, *supra* note 131, at 23. Approval is then based on, among other factors, "industry-specific restrictions" which limit foreign involvement in a particular industry. *Id.*

¹³⁵ The French government, while professing to encourage foreign investment, subjects investment to governmental approval. AMERICAN ASSETS, *supra* note 131, at 24-25. "France's Ministry of the Economy and Finance reviews foreign investment projects to the extent that they first, import new technologies; second, stimulate exports; third, benefit the regional economy, and fourth, create jobs. Approval for most project takes about two months." *Id.* at 25. The government then maintains a registry of foreign direct investment, but it is closely held within the government. G-7 Laws, *supra* note 132, at 2. However, the government does publish aggregate information. *Id.*

¹³⁶ The Japanese are among the most stringent when it comes to foreign investment.

The Japanese require every prospective foreign investor to submit a report, through the Bank of Japan, to the Ministry of Finance and any other relevant ministries. Potential investors must then wait 30 days before proceeding with their investment plans. Sometimes the waiting period is shortened to 15 days; if the authorities wish to conduct a more detailed investigation, the investor may have to wait up to five months for a decision.

AMERICAN ASSETS, *supra* note 131, at 21.

The government then has the authority to reject an investment if it would (1) adversely affect national security interests, (2) adversely affect a Japanese business engaged in a similar effort, or (3) might "disrupt the smooth performance of the Japanese economy. *Id.* Furthermore, a hostile takeover may be rejected because of the government requires "100 percent approval by the targeted firm's Board of Directors." *Id.* (quoting Mr. Richard Heimlich, the Vice President and Director for International Strategy of Motorola).

Additionally, foreign investors in Japan face relentless pressure. This may range from the obvious, governmental pressure to transfer large amounts of technology to the Japanese partner in a joint venture, to more subtle pressure. *Id.* T. Boone Pickens, who invested in Koito Manufacturing, was routinely stonewalled by company management. *Hearing, supra* note 1, at 107-25 (statement by Mr. T. Boone Pickens, Chairman of Boone Company). As the largest shareholder in Koito, Pickens requested representation on the board of directors equal to that of Toyota's. *Id.* at 109 (Pickens' venture bought 32.4 million share of Koito, roughly 20.2 percent of the stock. Toyota was the next largest shareholder with 19.2 percent). At the annual shareholders meeting, they were denied their request, but Matsushita Electronics, a five percent stockholder, received one seat. *Id.* at 112-13.

As far as disclosure is concerned, the Japanese government will release individual foreign direct investment information, as long as the investor has not previously requested confidentiality. G-7 Laws, *supra* note 132, at 3. Beyond that, only aggregate information is readily available. *Id.*

tional debt. There's a frightening lack of information on foreign investment and it's an elusive issue which could come back to haunt us."¹³⁷ FODA attempts to take the first step toward assembling data in one place, in an effort to accurately analyze foreign investment.

The United States Senate Committee on Commerce, Science and Transportation held a hearing on both FODA and S.856, a proposed amendment to the International Investment and Trade in Services Survey Act.¹³⁸ At that hearing, the Department of Commerce Under Secretary for Economic Affairs, Mr. Michael Darby, who is opposed to FODA, outlined the current major reporting requirements in the United States.¹³⁹ He noted that the Bureau of Economic Analysis (BEA), supervised by the Commerce Department, collects data on foreign direct investment in the United States.¹⁴⁰

The BEA's collection is done by surveying all the "U.S. affiliates of foreign companies."¹⁴¹ There are four surveys conducted by the BEA.¹⁴² However, this information is difficult to utilize.

Under the International Investment and Trade in Service Survey Act, the data from BEA surveys are confidential. No one with access to the data may publish them or make them available to the public in a manner that would specifically identify the company furnishing the information or tha [sic] would disclose the data of an individual company. The penalty for willful disclosure is a \$10,000 fine.¹⁴³

Even if the information were available for specific use, such as "persons performing qualified research,"¹⁴⁴ it is inherently flawed; it is possible to

¹³⁷ 135 CONG. REC., *supra* note 11, at H9603 (statement by Rep. Gaydos).

¹³⁸ *Hearing, supra* note 1.

¹³⁹ *Id.* at 55 (testimony of Mr. Michael Darby).

¹⁴⁰ *Id.* at 57.

¹⁴¹ "A U.S. affiliate is defined as a U.S. business enterprise in which a foreign person owns or controls, directly or indirectly, at least 10 percent of the voting securities (or the equivalent interest in an unincorporated business enterprise)." *Id.*

¹⁴² The four surveys are (1) Foreign Direct Investment Position and Balance of Payments Flows, which measures the flow of capital, income, fees, and royalties; (2) U.S. Business Enterprises Acquired or Established by Foreign Direct Investors, which is designed to track the yearly outlay of foreign investors to establish or acquire *new* U.S. affiliates; (3) Foreign Direct Investment in the United States: Operations of U.S. Affiliated of Foreign Companies, whose main purpose is to gauge the value of total assets of U.S. affiliates; and (4) Benchmark Survey of Foreign Direct Investment in the United States, which covers the entire scope of foreign direct investment data. FOREIGN INVESTMENT, *supra* note 20, at 6-7.

¹⁴³ *Hearing, supra* note 1, at 59. In addition to the problem of confidentiality, critics find fault with the data because (1) it is collected on an enterprise level, rather than an establishment level; (2) it is classified at a very rudimentary level, which hides important industry sectors; and (3) the publication often runs up to two years late. FOREIGN INVESTMENT, *supra* note 20, at 8-9.

¹⁴⁴ H.R. 5, *supra* note 117, § 2 (1)(2)(E).

"hide" ownership by the use of strawmen.¹⁴⁵ Mr. Darby feels that the BEA information is sufficient for the United States. He states that not only would FODA reveal no additional worthwhile information, but it would act to discriminate against foreign investors. Such discrimination would then generate a decrease in foreign investment.¹⁴⁶

Congressman Byrant disagrees with the contention that reporting would discourage investment. Legitimate foreign investors, he claims, are here to make money. Simple reporting, as would be required by FODA, would not frighten away any investor. "They [foreign investors] will not find a more open investment climate anywhere in the world. Why would simple disclosure stop them from investing here, if much more onerous requirements have not stopped them and Americans from investing abroad?"¹⁴⁷

Mr. Darby's contention that FODA is discriminatory is not so easily dismissed. In fact, other opponents to the bill have expressed the same concern. The Chairman of the Association for Foreign Investment in America points out that Section 2(a)-(d) would treat foreign investors differently than domestic investors. "The establishment of a public registry [as opposed to a confidential registry, such as that of the IRS] for foreign investors, and only for foreign investors, is discriminatory *per se*."¹⁴⁸ The National Association of Manufacturers agrees.

It [FODA] discriminates against foreign investors, since it would require foreign persons and companies in many cases to disclose a wide range of important and propriety business information that U.S. companies in like circumstances are not required to provide or disclose. The U.S. business community and the U.S. government have opposed discriminatory reporting requirements and investment policies in other countries, because they are frequently used to hamper both trade and the efficient management of international business enterprises.¹⁴⁹

Congressman Bryant, while not directly refuting the accusation of discrimination, looks towards the Organization for Economic Cooperation and Development (OECD) and its 1984 "Declaration and Decisions on International Investment and Multinational Enterprises" which calls for foreign-owned companies to "register and publish" the same information which would be required under FODA.¹⁵⁰ The United States is a

¹⁴⁵ *Hearing, supra* note 1, at 75 (Questions of the Chairman and the Answers Thereto by Mr. Darby).

¹⁴⁶ *Id.* at 61 (statement of Mr. Darby).

¹⁴⁷ *Id.* at 28 (statement of Rep. Byrant).

¹⁴⁸ *Id.* at 163 (statement by Mr. Elliot Richardson, Chairman of the Association for Foreign Investment in America).

¹⁴⁹ *Id.* at 90-91. (statement of Mr. Jerry Jasinowski, Executive Vice President and Chief Economist of the National Association of Manufacturers).

¹⁵⁰ *Id.* at 28 (statement of Rep. Bryant).

signatory to the OECD declaration; "in other words, the United States government has agreed in the international community to the very disclosure that first the Reagan Administration and now the Bush Administration so vigorously opposes."¹⁵¹ As long as other industrialized nations require disclosure, and as long as the United States may have supported such an idea in the past, Congressman Bryant and his supporters seem to feel that the implications of possible discrimination are lessened.¹⁵² When this consideration is coupled with the emotional part of the issue, both historically, given the context of American xenophobia, and currently, given increasing concern over just how vast the range of recent FDI in the United States is, the fear of discrimination is apparently rendered moot.¹⁵³

The contention that the breadth of the information to be revealed is too large is countered by examining the current reporting system. The current system is simply inadequate.

We as Members of Congress are denied access on BEA data on individual investments, but look at the BEA people themselves.

My staff found that the BEA employees handling this data on individual investments are not even cleared. They do not even have a security clearance, and yet those of us who get security clearances who have access to the most secure information of the United States Government, we cannot get the data.

But the BEA employees themselves who get it do not even have a security clearance. They are just simply told every day, do not divulge the data. What kind of sense does that make?¹⁵⁴

Though there is a fair amount of disclosure required for FDI, there re-

¹⁵¹ *Id.*

¹⁵² There is a clear justification for disclosure of multinational business operations — in the very document that upholds the "principle of national treatment." . . . [the Declaration] states that multinational companies are complex organizations, with often circuitous links between offshore affiliates and the corporate parent. We find that "advances made by multinational enterprises in organizing [sic] their operations beyond the national framework may lead to abuse of concentrations of economic power and to conflicts with national policy objectives. In addition, the complexity of these multinational enterprises and the difficulty of clearly perceiving their diverse structures, operations, and policies sometimes give rise to concern." Foreign companies are called on to register with the host nation and supply much more information than the United States presently requires.

Id. at 205-06 (statement of Dr. Douglas Woodward, Professor of Economics, University of South Carolina, quoting *The OECD Guidelines for Multinational Enterprises* 1986, at 11).

¹⁵³ In the coming years, Congress will increasingly hear emotional appeals to restrict foreign investment from people who fear it or oppose it. We will hear other emotional appeals to promote and subsidize foreign investment from people who are desperate for financial assistance. . . . It would be highly irresponsible of us to consciously remain in the dark as public concern continues to mount. We need reliable information, and we need to get it into the hands of the numerous researchers inside and outside of government on which Congress relies for the analytical base on which to make responsible public policy.

Id. at 29 (statement of Rep. Bryant).

¹⁵⁴ *Id.* at 43 (statement of Sen. Harkin).

mains no single uniform system for registering FDI, one of the major reasons for the inadequacy.

As often happens in Washington, D.C., Congress has avoided some of the truly substantive issues surrounding FODA. The process that attempts to define ownership is suspect. The test is limited to a mechanical examination of ownership. Furthermore, ownership is never truly defined. It is vaguely described as "equity or ownership interest."¹⁵⁵ FODA needs to be revised so that it clearly defines which ownership interest is truly of concern. As a basic registration system, FODA is concerned with identifying who possesses enough equity in a corporation so as to be able to direct its actions. The concerns of foreign investment all point to the control of a corporation's assets. By creating a system of registration that needs the information necessary to determine whether or not any of these concerns is truly valid, who controls the corporation is the crucial piece of data. FODA is not specific enough to obtain that vital piece of information.

The Exon-Florio amendment to the Omnibus Trade Act also seeks to determine who controls a corporation (though Exon-Florio is ultimately more concerned with matters affecting national security). Its proposed test for ownership is infinitely more useful than FODA's. By avoiding the mechanical examination of securities ownership and, instead, consciously focusing on the element of control, the Exon-Florio test would obtain the identity of the UBO. Therefore, a revision of FODA which would incorporate the Treasury Department's ideas should be seriously considered by the sponsors of the bill.

An alternative to incorporating the ideas set forth in Exon-Florio would be to incorporate the strategies of the SEC. One of the benefits of these approaches is that the SEC rule provides for the identification of other types of control. Since the major worries focus on the control of assets, the Exon-Florio test should be sufficient. However, if Congress felt that other possible controllers, such as creditors, could inspire anxiety over FDI, then a test such as the SEC's should be considered. Also absent from the debate is an argument over the definition of foreigner. The definition as it exists would appear to be a thorough and workable definition.¹⁵⁶ However, it is inadequate when it tries to define those foreign investors who hide behind a veil of businesses. It seeks to define the UBO as someone who owns at least twenty-five percent of a strawman business. This business then holds the legal (and equitable) title to the investment. The investor of record would then be the strawman business, not the individuals behind it. An investor could, theoretically, create a multi-level strawman investment which eludes the definition of

¹⁵⁵ H.R. 5, *supra* note 117, § 2 (M)(6).

¹⁵⁶ See *supra*, note 117 and accompanying text.

foreigner.¹⁵⁷ Consequently, the disclosed owner would be a strawman. This problem could be avoided by implementation of an inquiry similar to either the SEC's or Exon-Florio's. Either test goes beyond the first level of a corporate veil by their emphasis on control and the use of the "direct or indirect" language. By removing the mechanical tests and replacing them with more flexible ones, fewer loopholes should be available to the rogue foreign investor who wishes to preserve his anonymity.

IV. CONCLUSION

The proponents of FODA stress the importance of knowledge. As Congressman Bryant pointed out at the Senate Hearing,¹⁵⁸ Congress does not currently have the information necessary to adequately formulate questions about foreign investment. Once Congress has enough data to assess the scope of foreign investment, it can use that new-found knowledge to make more intelligent decisions regarding all economic matters which are affected by foreign investment.

The extensive ignorance about foreign direct investment is the greatest deterrent to the passing of FODA. Because so little is really known, debate over the bill has been painfully superficial. Before this bill can be passed, revisions must be made. Its most crucial element, that of defining who needs to register, is flawed. Its current framework is vague. Such ambiguities could easily remove any teeth the law might have. If Congress were to tighten the definition, ideally following the Treasury Department's lead, then FODA would be a stronger, more compelling concept. FODA would then be able to expose those who control the businesses being bought by foreign investors. Identification of those who control the corporations constitutes the most serious concern.

In addition to the apparent semantic flaws of FODA, opponents of the bill still raise other logical objections. FODA's detractors feel it would discourage foreign investment but they are wrong. Most investors spend their money in the United States because of the chances for profitability. Revealing basic information is not enough to scare away a serious investor; it merely becomes part of the process of investing. The claim of discrimination is not as easily discarded because of its emotional aspects. However, there appears, based on the OECD, to be a general, worldwide consensus that registration does not constitute discrimination. Additionally, the knowledge that would be gained by registering foreign investments far outweighs any minor discriminating effects. In a global

¹⁵⁷ Consider the following scenario: The investor of record is a strawman business that itself is owned by five equal businesses, thus falling below the twenty-five percent floor. The five equal businesses could themselves be owned by the same individual investor, who is, in effect, the single owner of the initial investment.

¹⁵⁸ See *supra* note 106 and accompanying text.

economy, growing broader and more complex every day, it is absolutely necessary to have the ability to examine the economic infrastructure of the country. Without knowing who owns what in America, the concerns and fears of FDI may easily come about.

*Christopher M. Ernst**

* J.D. Candidate, Case Western Reserve School of Law (1991).

