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2-7-2007

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Clay Lowery

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Recommended Citation

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U.S. DEPARTMENT OF THE TREASURY

Press Center



Testimony of Treasury Assistant Secretary Clay Lowery before the House Financial Services Committee

2/7/2007

HP-250

Washington, DC – Mr. Chairman, Ranking Member Bachus, and distinguished members of the Committee, I appreciate the opportunity to appear before you to discuss the Committee on Foreign Investment in the United States (CFIUS) and H.R. 556, the "National Security Foreign Investment Reform and Strengthened Transparency Act of 2007". I am here speaking on behalf of the administration, the Treasury Department, and CFIUS.

First, let me assure the Committee that the administration is committed to improving CFIUS in a manner that continues to protect national security and ensures a strong U.S. economy. To this end, an open investment environment in this country serves as a positive example and thereby supports U.S. investment abroad. We believe the Committee shares these goals, and I look forward to working with you to achieve them.

I appreciate the opportunity to appear before the Committee to discuss the current state of the CFIUS process and update the Committee on the many changes we have made to the CFIUS process since I appeared before this Committee last year. Furthermore, I appreciate the opportunity to discuss the legislation introduced by your distinguished colleague, Congresswoman Maloney, as well as the administration's priorities for any CFIUS reform legislation.

Before I discuss CFIUS reform and the importance of an open investment climate, I would like to review briefly CFIUS and Exon-Florio.

CFIUS AND EXON-FLORIO

CFIUS was established by Executive Order in 1975 with the Secretary of the Treasury as its chair. Its central purpose at that time was to monitor foreign investment in the United States. CFIUS was given expanded responsibilities in 1988 following the enactment of the Exon-Florio amendment to the Defense Production Act of 1950. Exon-Florio provides for a national security review of foreign acquisitions of companies engaged in interstate commerce in the United States. It also allows the President to take action, if necessary, to suspend or prohibit a transaction that, in his judgment, threatens the national security if existing laws, other than the International Emergency Economic Powers Act, are not adequate or appropriate to address the threat. The President delegated to CFIUS his authority to investigate transactions under Exon-Florio.

From enactment of Exon-Florio in 1988 through 2006, CFIUS reviewed over 1,700 foreign acquisitions of companies for potential national security concerns. In 2006, CFIUS investigated 113 filings, a 74 percent increase over 2005. This trend appears to continue, as 14 transactions were notified to CFIUS by the end of January 2007. In 2006, CFIUS conducted seven 45-day second stage investigations, the most ever in a single year.

IMPORTANCE OF FOREIGN DIRECT INVESTMENT TO THE U.S. ECONOMY

The administration views investment, including investment from overseas, as vital to continued economic growth, job creation, and building an ever-stronger America. The free flow of capital in open and competitive markets contributes directly to higher productivity, growth and efficiency. When capital is free to flow in response to market demand, it is used most efficiently, thereby maximizing economic growth. As Secretary Paulson has stated, "The U.S. experience illustrates the benefits of openness and competition. Our economy is by far the world's strongest because it is built on openness – openness to people of all nationalities, openness to new ideas, openness to investment, and openness to competition."

In 2005, foreign direct investment (FDI) into the United States totaled almost \$100 billion, double the annual average in the early 1990s. The stock of FDI in the United States reached almost \$1.9 trillion at the end of 2005. The United States is also the largest investor in foreign markets, with the stock of U.S. direct investment overseas totaling nearly \$2.5 trillion at the end of 2005.

U.S. affiliates of foreign-headquartered multinationals perform a major share of many activities central to continued economic growth and rising living standards in the United States. Inward foreign direct investment benefits the foundations of the U.S. economy -- playing a substantial role in our recent productivity boom. Research has shown that multinational firms are more productive than firms focused

primarily on domestic markets. The relatively high productivity of U.S. affiliates of foreign-owned firms is attributable, in part, to their relatively high levels of investment in physical capital, research and development, and exporting and importing. U.S. affiliates account for 5.7 percent of output and 4.7 percent of employment (and one-third of these jobs are in manufacturing); they also account for a major share of U.S. exports (19 percent), imports (26 percent), capital investment (10 percent), and research and development expenditures (13 percent).

A large portion of the benefits of foreign companies' productivity accrues directly to their American workers. Americans working for foreign firms in the United States earned an average annual compensation of over \$63,000, more than thirty percent above average annual compensation for workers in the rest of the economy.

Despite the important and immediate benefits of foreign direct investment in the United States, we have experienced recent controversies relating to particular foreign investments in the United States. These controversies, coupled with some troubling signs that other countries are pursuing barriers to foreign investment, and increasingly negative media coverage of the U.S. investment climate, underscore the need to improve and reform the CFIUS process. It is also important to note that our actions to reform CFIUS are and will continue to be closely watched.

PROTECTION OF NATIONAL SECURITY

The administration regards our nation's security as its top priority and supports efforts to reform the CFIUS process to address more effectively national security imperatives since 9/11. In just the last year, CFIUS has instituted a number of reforms to address concerns about the CFIUS process raised by Congress, several of which are also proposed in your legislation:

- CFIUS now notifies and provides briefings to the Congressional Committees of jurisdiction on every case for which action has concluded under the Exon-Florio amendment.
- To ensure accountability, every case is briefed up to senior policy officials within CFIUS agencies and only individuals confirmed by the Senate can certify the conclusion of a CFIUS review.
- As chair of CFIUS, Treasury encourages parties to transactions to consult with CFIUS and provide a draft notice before filing a formal notice. Pre-filings give CFIUS more time to consider transactions and result in more detailed formal filings that better address CFIUS's concerns.
- Withdrawn transactions are monitored carefully by Treasury and other agencies. Treasury notifies parties that refilings must occur promptly unless the transaction is terminated.
- CFIUS has formalized a longstanding policy that allows agencies to request a notice for any transaction that has not yet been voluntarily notified or that was withdrawn and has not yet been refilled.
- CFIUS has strengthened its communications and deliberations process. Treasury hosts weekly policy level meetings to discuss all pending CFIUS cases.
- The Director of National Intelligence (DNI) has a more formal role. Through the DNI, the intelligence community provides briefings and intelligence summaries on every transaction. Intelligence officials also participate in weekly CFIUS policy meetings.

ADMINISTRATION'S VIEWS ON LEGISLATIVE REFORM

During the last Congress, this Committee was instrumental in shaping a CFIUS reform bill, H.R. 5337, which passed the House of Representatives unanimously. On September 14, 2006, the administration delivered to the Committee Chairman and Ranking Member its views letter on CFIUS reform. In it, we brought to the attention of the Committee a number of areas where we differed in how we should reach our common goal of enhancing national security and preserving the United States as an attractive environment for direct investment.

As the legislation before us is based on H.R. 5337, I believe it would be useful for me to review the administration's views letter, which reflects our priorities for CFIUS reform. Let me reiterate to the members of this Committee that we stand ready to work with you to ensure that the CFIUS process is improved to protect national security while preserving an open investment climate that creates jobs and continues to support economic growth.

Accountability

The administration shares Congress's goal of ensuring senior-level accountability. As noted above, we therefore seek the clearance of Senate confirmed officials at the conclusion of all first-stage (30-day) investigations. We believe decisions at the end of a second stage (45-day) investigation should be made at the secretary or deputy secretary level. We also believe all decisions on foreign-government owned cases should be made at the secretary or deputy secretary level.

Mandatory Second-Stage 45 Day Investigations

The administration believes that a second-stage, 45-day investigation is necessary only if a CFIUS member has identified national security concerns that have not been adequately mitigated during the first-stage investigation or has unresolved questions regarding national security implications by the end of the first-stage investigation. A second-stage investigation should not be required absent these circumstances. It is important that discretion to consider the national security issues raised by any particular transaction is preserved in the legislation.

Factors for Consideration

The administration believes that CFIUS should maintain the discretion to address all issues in a manner that takes into account the relevant facts and circumstances of each case. We support expanding factors for consideration, including, among others, foreign-government control and critical infrastructure.

Ensuring Congressional Oversight

The administration supports enhanced communication with Congress. CFIUS regularly provides your committee information on all cases where action has concluded under Exon-Florio. We have also provided more comprehensive periodic briefings to congressional committees describing the cases investigated and foreign investment trends in the United States. We do not believe it is appropriate, however, to report on the internal deliberations of the Executive Branch, including any positions taken by individual CFIUS members during CFIUS's consideration of a transaction.

Extensions of 45-Day Investigations

The administration believes that the current timeframes for 30- and 45-day investigations are sufficient. Extending these periods may discourage foreign investment or discourage the voluntary filing of notices with CFIUS by generating uncertainty and delay for the parties to a proposed transaction. In addition, our current practice of requesting pre-filing notifications provides additional time and flexibility needed to review transactions.

CFIUS Membership and Deliberations

The President should have the flexibility to determine and adjust CFIUS membership as circumstances develop. We do not believe legislation should mandate the designation of Vice Chairs or mandate that CFIUS include members of the Executive Office of the President (EOP) as statutory members of CFIUS. Legislation should recognize the President's flexibility to designate members of the EOP.

The administration is concerned that additional procedural requirements on CFIUS deliberations, such as roll-call voting, are ill-suited for executive bodies like CFIUS and are inconsistent with the vesting of executive power in the President. Such impediments deter the full and open interagency discussions that are required to consider CFIUS cases properly.

Role of the Intelligence Community

The administration supports the role of the intelligence community as an independent advisor to CFIUS, and thus opposes giving the DNI a policy role, rather than an advisory role. Your legislation does not make DNI a member of CFIUS but would still allow the DNI to trigger a 45-day second-stage investigation, thereby moving them beyond an advisory role to a policy function. As I stated previously, the DNI has a formal role in the process – to coordinate and facilitate the intelligence assessment in each CFIUS investigation. I must also point out that H.R. 556, as currently drafted, retains a timing conflict that was present in H.R. 5337. Both bills state that the DNI "shall be provided no less than 30 days" to complete a threat assessment that will inform CFIUS investigations. This may conflict with the overall structure of the legislation which provides for a first stage (30-day) investigation. We look forward to working with the Congress to provide for a sufficient period of time to conduct the threat analysis and to provide sufficient time for CFIUS to investigate and consider that analysis.

CONCLUSION

The current climate has provoked healthy debate within the investment community, both international and domestic, within CFIUS itself, and among foreign governments. We have listened carefully to the views expressed to ensure that we get CFIUS reform right.

In closing, let me emphasize that the Bush administration is firmly committed to keeping the U.S. economy open to international investment while at the same time protecting our national security. Openness at home encourages other nations to lower their barriers which can help advance prosperity and economic freedom in the rest of the world. In short, a domestic climate conducive to foreign investment strengthens national security.