THE NEED FOR CFIUS TO ADDRESS HOMELAND SECURITY CONCERNS

FULL HEARING

BEFORE THE

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Wednesday, May 24, 2006

U.S. HOUSE OF REPRESENTATIVES,
COMMITTEE ON HOMELAND SECURITY,
Washington, DC.

The committee met, pursuant to call, at 1:38 p.m., in Room 311, Cannon House Office Building, Hon. Peter King [chairman of the committee] presiding.

Present: Representatives King, Smith, Souder, Lungren, Gibbons, Simmons, Rogers, Reichert, McCaul, Dent, Thompson, Sanchez, Dicks, DeFazio, Lofgren, Jackson-Lee, Pascrell, Christensen, Etheridge, and Langevin.

Chairman KING. [Presiding.] The Committee on Homeland Security will come to order.

The committee is meeting today to hear testimony on the need for reforms to the Committee on Foreign Investments in the United States, or CFIUS, to adequately address homeland security concerns.

Let me at the outset apologize to our witnesses for the delay. Certainly, the previous hearing went on longer than we expected, and I want to thank you for your patience and thank you for being here today, and also thank you for the service you give to our country. Because of the delays we have had, I will make my opening remarks very brief.

All of us went to the Dubai ports issue, and on one side of the issue we happened to come out on, the reality was that it showed a need, I believe, for reform of the process to adequately take into account the unique homeland security concerns that we have in the post-9/11 era. There has been legislation introduced. We will be hearing from Congressman Blunt and Congresswoman Maloney who will be testifying on that legislation, in addition to other experts that we have here today.

I will limit my remarks to again thanking the witnesses for being here today, expressing my belief that there is a need for legislation, and also to express to all the members of the CFIUS panel, even if it is reconstituted, we will be working closely with them.

I now recognize the gentleman from Mississippi, the ranking member, Mr. Thompson.

PREPARED STATEMENT OF HON. PETER T. KING

Despite the horrific attacks of 9/11 being over four years behind us, we continue to find processes in government that fail to recognize the difference between threats to national security and threats to homeland security.

These processes were created before 9/11, but have not yet transformed to acknowledge that we live in a new and different world.

The Committee on Foreign Investment in the United States is such a process.

When I first heard of the pending purchase of P&O by Dubai Ports World, I thought it was a joke. Who would allow such a purchase to go forward? Weren't the United Arab Emirates one of only three nations to recognize the Taliban government of Afghanistan as legitimate? Didn't the terrorists from 9/11 funnel their money through the UAE? It simply didn't add up.

I then learned of this mysterious entity called CFIUS, which it seemed few, if anyone, ever heard of.

As we moved forward, I asked many questions about the Dubai Ports World acquisition, and slowly the information began to flow.

Let me take a moment to recognize our first panel. This afternoon we have:

Mr. Clay Lowery, Assistant Secretary for International Affairs at the Department of the Treasury; and

Mr. Stewart Baker, Assistant Secretary for Policy at the Department of Homeland Security.

I want to thank Assistant Secretaries Lowery and Baker for coming to testify on the record before my Committee. We first spoke in my office over three months ago when this issue first raised its ugly head during the Dubai Ports World acquisition, and I'm pleased to see that despite some heavy punches from Members of Congress, myself included, you both appear to be holding up rather well.

Thank you for answering our Committee's inquiries and providing the files I requested. After reviewing the intelligence data gathered by the Director of National Intelligence following his 4-week investigation, I can honestly say that I feel comfortable that the Dubai Ports World acquisition was not a threat to our national security.

Unfortunately, it took a thorough assessment conducted by the Intelligence Community to convince me of this—an assessment that was not conducted to any great detail prior to April of this year. It begs the question, why wasn't this **thorough** investigation conducted beforehand?

I am concerned that the current CFIUS process does not adequately consider homeland security threats and I support reforms that will address these CFIUS shortcomings. That said, I believe Congress must work to ensure that we do not deter foreign investment. I have always supported free trade and will continue to do so. However, in the post-9/11 world, there are other factors we must take into account.

Since 1998, the Committee on Foreign Investment in the United States has conducted over 1,600 reviews, of which some 25 posed some level of national security concern. Of these 25, over half were withdrawn before the investigation was completed, and only one went to the President for a decision in accordance with the Exon-Florio provisions.

How is it possible that only one purchase in 1,600 actually raised sufficient national security concerns to be forwarded to the President for action?

I suspect much of it revolves around how you define national security. How does CFIUS define it?

I look forward to your testimony this afternoon as I seek the answer to these and other questions.

Mr. THOMPSON. Thank you very much, Mr. Chairman.

I, too, will limit my remarks in that we have three panels for this afternoon, and we are some 40 minutes late getting started. We all know that this process came to light because of the Dubai concerns as to whether or not the due diligence required under the existing legislation was performed. And what we all want at the end of the day is for any of these transactions, not only to have the financial security, but we want to make sure that from a terrorist standpoint or security standpoint also we have not created a vulnerability by approving these processes.

So in the interest of time, I will submit my written statement for the record and yield back and I look forward to the testimony.

PREPARED STATEMENT OF HON. BENNIE G. THOMPSON

Good afternoon.

I want to thank Chairman King for agreeing to hold these hearings.

When I sent you that letter in February, the CFIUS process was just starting to come to light. Though CFIUS hasn't been in the news a lot recently, I still believe that it's a vital issue for this Congress and our Committee to consider, and I thank you for putting it on our agenda.

Mr. Chairman, when Congress passed the Exon-Florio statute in 1988, we vested the authority to investigate and review mergers, acquisitions, and takeovers *with the President of the United States.*

At the time, Congress believed that the President was the only one who could adequately balance the country's need for foreign investment with our demands for national security.

The President is in a unique position to be able to assess both sides and make a judgment about whether our national security will be threatened by such acquisitions.

President Reagan designated CFIUS to be the Committee to review these deals. The Secretary of the Treasury became the enforcer of Exon-Florio.

But it has become painfully clear that in the 18 years since Exon-Florio, the President's designee *has failed* to conduct the kind of careful, thoughtfull review that the drafters of Exon-Florio envisioned.

The President has ceded his authority to a Committee *that has repeatedly violated the provisions of Exon-Florio.*

First, according to statute, CFIUS is required to conduct a mandatory investigation in any instance in which a foreign government acquires a company that affects national security.

It is clear to me that the acquisition of 6 major ports by DP World, a UAE-owned company, would meet that standard.

Unfortunately, it was only after the CFIUS process became public and Congressional pressures were exerted upon the Committee that a more rigorous investigation began.

We know from a GAO report that only 8 investigations have taken place since 1997. Given the facts that have recently come to light over DP World, I wonder how many mandatory investigations has CFIUS failed to under take during these years?

How many times has this Committee failed to undertake careful scrutiny if a acquisition affecting our national security?

Second, CFIUS failed to comply with § 2170(k) of Exon-Florio which requires a quadrennial review to Congress.

Only one report has ever been submitted under this provision, and that was back in 1994.

How can this Congress or the American people trust CFIUS to do the kind of careful, intelligent review of these deals when the Committee has failed to live up to its statutory requirement?

How do we know whether there has been a coordinated strategy by one or more countries or companies to acquire United States companies involved in research, development, or production of critical technologies?

More importantly, how can the President—our Commander in Chief—trust this Committee as his designee to carry out the statutory demands of the Exon-Florio Act?

Mr. Chairman, I want to be clear when I say that we need to have a fair and balanced policy when it comes to promoting foreign investment and ensuring our national security in this country.

Foreign investment in this country drives our economy. Foreign nations have invested billions in America—it is neither sound economics nor sound politics to place blanket limitations on foreign investment.

But foreign investors need to know that this country follows a fair but rigorous balancing test that ensures the safety of the American public, while promoting foreign investment in the United States.

I have my doubts about whether it's happening today. But I hope that we can come to some solution in the upcoming months as we consider legislation to reform the process.

I'd like to thank the witnesses for appearing before us today, and I look forward to hearing their testimony.

Chairman KING. The gentleman yields back.

If we could just take a moment to recognize the first panel and to ask them to begin their testimony. First is Mr. Clay Lowery, the assistant secretary for international affairs at the Treasury Department, and Mr. Stewart Baker, the assistant secretary for policy at the Department of Homeland Security.

Your statements will be made part of the record. If you could possibly limit your remarks to 5 minutes. As you can see, the committee runs very much on time, but we do ask our witnesses to.

Mr. KING. But seriously, Secretary Lowery, you are recognized.

STATEMENT OF THE HONORABLE CLAY LOWERY, ASSISTANT SECRETARY OF INTERNATIONAL AFFAIRS, DEPARTMENT OF TREASURY

Mr. LOWERY. Mr. Chairman, Ranking Member Thompson and distinguished members of the Homeland Security Committee, first of all, I appreciate the opportunity to be here today.

Secondly, I want to thank you for your indulgence and Secretary Baker for letting me go first. This is sort of the batting order we have been using for a while when our testimony is involved. It has not always been a lucky batting order, but it has been ours.

I am here speaking on behalf of the administration, the Department of Treasury, and the Committee on Foreign Investments in the United States. While we do not have a formal administration position on pending CFIUS legislation, I will address the two principles that guide us as we work to update CFIUS process.

We believe that reforms should address two broad principles. First, U.S. national security imperatives in the post-9/11 environment; and secondly, the need to continue welcoming investment in the United States, which creates good jobs for American workers. In that context, I would like to highlight some specific areas that we believe get at some of the concerns of Congress.

First, the administration supports efforts to update CFIUS to reflect the post-9/11 security environment. Two factors that should always be taken into account in CFIUS assessments are the nature of the acquiring entity and the nature of the assets to be acquired. In other words, CFIUS must consider the ultimate ownership and control of the acquirer and the possible foreign acquisition of critical infrastructure or other sensitive assets when reviewing any transaction.

Second, CFIUS's focus must remain national security. A wide range of agencies comprise CFIUS and each brings its own unique expertise and perspective on national security. I want to be clear about how CFIUS operates. The initial 30-day review period is a thorough investigation in which a comprehensive threat and vulnerability assessment is conducted across agencies. If national security concerns are raised that cannot be addressed, CFIUS undertakes a 45-day extended investigation.

However, many transactions do not raise national security issues and requiring extended investigations in such cases would divert resources and thereby diminish CFIUS's ability to protect national security.

Third, the administration believes we should strengthen the role of the intelligence community in the CFIUS process. We have formalized the role of the DNI, but we do not think that the DNI

should vote on CFIUS matters because the DNI's role is to provide intelligence support, not to make policy judgments.

Fourth, we must also continue to emphasize the importance of preserving the attractiveness of the United States to overseas investors. FDI is critical to the U.S. economy. Majority-owned U.S. affiliates of foreign companies employ over 5 million Americans. These jobs on average are higher paying jobs and roughly 40 percent of these jobs are in the manufacturing sector, about four times the national average.

Fifth, the administration shares the view that we need to improve our communication with Congress to help Congress meet its oversight responsibilities. We are now promptly notifying Congress of every transaction upon completion and are committed to conducting quarterly briefings on CFIUS matters.

While reforms of the CFIUS process should advance our shared goal of improved communication, we must always keep in mind that proprietary business information must be adequately protected. The integrity of the executive branch's decision-making process must be preserved, and security reviews must not expose intelligence information or become politicized.

Finally, we should look at ways to increase Congress' confidence in the process by enhancing accountability in terms of CFIUS decisions and monitoring mitigation agreements. The administration is committed to ensuring that senior, Senate-confirmed officials play an integral role in examining every transaction. CFIUS agencies are now briefing transactions at the highest levels. However, requiring a Presidential determination or Cabinet-level certification on every transaction would introduce unnecessary delays and divert attention from transaction that raise possible national security issues.

Mr. Chairman, I would like to reiterate in closing that the administration supports reforms of the CFIUS process. We believe that CFIUS can best serve U.S. interests through examinations that protect the national security, while maintaining the credibility of an open investment policy and the confidence that U.S. investors abroad will not be subject to retaliatory discrimination.

I thank you for your time and would be happy to answer any questions.

[The statement of Mr. Lowery follows:]

PREPARED STATEMENT OF HON. CLAY LOWERY

Mr. Chairman, Ranking Member Thompson, and distinguished members of the Homeland Security Committee, I appreciate the opportunity to appear before you today. I am here speaking on behalf of the Administration, the Department of the Treasury, and the Committee on Foreign Investment in the United States ("CFIUS" or the "Committee") to discuss our work and ways to improve the CFIUS process.

Improving the CFIUS Process

The Homeland Security Committee and CFIUS share the common objective to protect our national and homeland security. In my recent testimony before the House Financial Services Committee's Subcommittee on Domestic and International Monetary Policy, Trade and Technology, I laid out the key principles that will guide CFIUS as we work with the Congress to integrate further America's national and homeland security interests. Reforms should address two broad principles: U.S. national security imperatives in the post-9/11 environment and the need to continue welcoming investment in the U.S. and creating good jobs for American workers.

To advance those principles, the Administration supports improving communications with Congress on CFIUS matters. The Administration also welcomes other re-

forms to the CFIUS process, including those that ensure due consideration of the nature of the acquirer and assets to be acquired, focus resources on transactions that present national security issues, strengthen the role of the intelligence community, improve CFIUS monitoring of mitigation agreements, preserve the attractiveness of the United States for foreign investment, and enhance accountability. The CFIUS process should first and foremost ensure U.S. national security but should not unnecessarily discourage legitimate investment in U.S. businesses that will provide income, innovation, and employment for Americans. In today's testimony, I plan on addressing these reform principles. Of particular interest to the Homeland Security Committee will be our focus on those transactions that raise national and homeland security issues. The Administration looks forward to a dialogue with Congress regarding reforms to the CFIUS process. Let me first provide a paragraph or two on the historical context.

The Committee examines foreign acquisitions of U.S. companies pursuant to section 721 of the Defense Production Act of 1950. Commonly known as the Exon-Florio Amendment, section 721 gives the President the authority to investigate such acquisitions and to suspend or prohibit a transaction if credible evidence leads him to believe that the acquirer might take action that threatens to impair the national security and if, in his judgment, existing laws, other than the International Emergency Economic Powers Act and the Exon-Florio Amendment, do not provide adequate and appropriate authority for him to protect the national security. After the enactment of the Exon-Florio Amendment, the President delegated certain of his authorities to the Committee. Pursuant to an Executive Order of the President and subsequent Treasury regulations, the Committee receives notices of transactions subject to the Exon-Florio Amendment and conducts thorough interagency reviews and investigations to identify potential national security issues. The President retains the authority to suspend or prohibit transactions.

Focusing on the Nature of the Acquirer and the Assets to be Acquired

The Exon-Florio Amendment is nearly two decades old, and the Administration supports efforts to update it to reflect the post-9/11 security environment. The Committee considers a broad range of national security issues when reviewing transactions, and its assessment of threats and vulnerabilities should remain flexible in order to meet changing circumstances and conditions that relate to national security. Two factors that should always be taken into account in CFIUS assessments are the nature of the acquiring entity and the nature of the assets to be acquired. These are essential in weighing the national security implications of any acquisition. The Administration does and will continue to support the Committee's consideration of the ultimate ownership and control of the acquirer and the possible foreign acquisition of sensitive assets when reviewing any transaction under the Exon-Florio Amendment, both of which are factors the Committee already considers when reviewing transactions.

Focusing on Transactions that Raise National Security Issues

CFIUS's appropriate focus is and will remain national security. One of the focuses of the Exon-Florio amendment is, indeed, on transactions that could impact the U.S. defense industrial base. There is a wide range of agencies involved in CFIUS, including DHS, each bringing its own unique perspective and its own definition of national security. This enables us to consider all aspects of transactions ranging from energy and transportation to information technology and telecommunications. The intelligence community also provides thorough threat assessments as part of its analysis.

This process allows us to focus the most resources and highest level of oversight on those cases that pose the greatest potential threat to national security. Many transactions notified to the Committee do not raise national security issues. In other cases, the national security issues are mitigated by the end of the 30-day review so do not require an extended investigation. Requiring an investigation of every transaction involving a foreign government-controlled acquirer would result in scores of investigations each year in which no national security concerns are present. This would diminish the Committee's ability to protect the national security and send the wrong message that the United States does not welcome foreign investment.

Strengthening the Role of the Intelligence Community

The Administration also believes that the Committee can carry out its role more effectively by strengthening the role of the intelligence community in the CFIUS process, which is essential in a complex and changing national security environment. The Director of National Intelligence (DNI) has begun to do so by assigning an all-threat assessment responsibility to the National Intelligence Council and en-

suring that all relevant intelligence community agencies and activities participate in the development of final intelligence assessments provided to the Committee. The Committee recently formalized the role of the Office of the DNI, which plays a key role in all CFIUS reviews and investigations by participating in CFIUS meetings, examining every transaction notified to the Committee, and providing broad and comprehensive threat assessments. The DNI already contributed greatly to the CFIUS process through reports by the Intelligence Community Acquisition Risk Center concerning transactions notified to the Committee, but formalizing its place in the process—and strengthening the threat assessments provided to the Committee—represent an enhancement of the intelligence community's role. The DNI does not vote on CFIUS matters and should not, because the role of the DNI is to provide intelligence support and not to make policy judgments based upon that intelligence.

Improving the Monitoring of Mitigation Agreements

A further key to improving the CFIUS process is to strengthen the monitoring of mitigation agreements entered into between entities filing notice under the Exon-Florio amendment and members of the Committee. Typically, the members of the Committee with the greatest relevant expertise assume the lead role in examining any national security issues related to a transaction and, when appropriate, developing appropriate mechanisms to address those risks. Mitigation agreements implement security measures that vary in scope and purpose according to the particular national security concerns raised by a specific transaction. Monitoring parties' adherence to mitigation agreements after the conclusion of the CFIUS process is an important part of protecting the national security. The Administration supports reforms that reinforce the authority and provide resources for agencies that negotiate mitigation agreements to improve existing enforcement practices.

Promoting Legitimate Investment in the United States

The Administration also emphasizes the importance of preserving the attractiveness of the United States to overseas investors. The intent of the Exon-Florio Amendment is not to discourage foreign direct investment (FDI) generally, but to provide a mechanism to review and, if the President finds necessary, to restrict investment that threatens the national security. FDI is critical to the U.S. economy. Majority-owned U.S. affiliates of foreign companies employed 5.1 million U.S. workers in 2004. Capital expenditures in 2004 by these affiliates totaled $108 billion and their sales totaled $2,302 billion. In 2003, these affiliates spent $30 billion on R&D and accounted for 21 percent of total U.S. exports. Roughly 40 percent of those jobs were in manufacturing, four times the national average. If foreign companies were to reduce their spending in the U.S. as a result of perceptions that the United States was less welcoming of FDI, lower investment would cost American workers good jobs, reduce innovation, and lower the growth of the U.S. economy.

Reforms to the CFIUS process should send a signal that the United States is serious about national security and welcomes legitimate FDI. The Committee must examine each transaction thoroughly, but the timeframes for examination should not be unnecessarily long. In addition, the process should not require investigation of transactions that could not possibly impair the national security. Last year, the Committee received 65 notices of transactions under the Exon-Florio Amendment. This year, CFIUS filings are on a pace to total roughly 90. Improvements to the CFIUS process should promote filing of notice with respect to appropriate transactions but should not delay or deter FDI with no nexus to the national security. The Committee can best serve U.S. interests through thorough examinations that protect the national security while maintaining the credibility of the U.S. open investment policy for overseas investors and the confidence of U.S. investors abroad that they will not be subject to retaliatory discrimination.

Improving Communication with Congress

It is clear that improvements in the CFIUS process are still required, particularly with respect to communication with Congress and political accountability. The Administration is committed to improving communication with Congress concerning CFIUS matters and shares the view that Congress should receive timely information to help meet its oversight responsibilities. Treasury is now promptly notifying Congress of every review upon its completion, and the Administration is working hard to be responsive to Congressional inquiries. The Administration has committed to conducting quarterly briefings for Congress on CFIUS matters. These quarterly briefings were scheduled to begin before the issues with respect to the DP World transaction became the subject of Congressional and media attention. The Administration is also actively preparing the 2006 quadrennial report on possible foreign efforts to conduct economic espionage in the United States or acquire critical U.S.

technologies. We regret that a quadrennial report has not been prepared since 1994, and the Administration will issue the 2006 report in a timely and thorough manner. I look forward to your suggestions on how to foster better communication.

While reforms of the CFIUS process should advance our shared goal of improved communication, they should also reflect the importance of protecting proprietary information and the integrity of the executive branch's decision-making process. First, reforms to the CFIUS process should encourage companies to file with the Committee by ensuring that proprietary information they provide to the Committee is protected from public disclosure and will not be used for competitive purposes. Full disclosure of information by companies is critical to the Committee's ability to analyze thoroughly the national security risks associated with a transaction. Second, it is important to protect both the executive branch's deliberative process and classified methods and sources, and avoid possible politicization of CFIUS reviews and investigations for partisan purposes or at the behest of special interests. Third, reporting requirements should take into account the need for CFIUS member agencies to focus their limited resources on examining transactions notified to the Committee. I am confident that the Committee can provide Congress with the information it requires to fulfill its oversight role while respecting these important principles.

Enhancing Accountability

The Administration supports a high level of political accountability for CFIUS decisions and is committed to ensuring that senior, Senate-confirmed officials play an integral role in examining every transaction notified to the Committee. Improvements to the CFIUS process should also ensure that senior U.S. officials are focused on national security issues. I know that CFIUS agencies are now briefing at the highest levels in their respective agencies. However, the President and Cabinet-level officials should focus their attention on the cases that merit the greatest scrutiny. The President should focus on transactions that at least one member of the Committee recommends he suspend or prohibit. Requiring the President to make a determination when all CFIUS members agree that a transaction does not threaten to impair the national security would potentially divert his attention from transactions that could pose security risks.

Similarly, requiring Cabinet-level certification of CFIUS decisions on transactions that do not raise potential national security concerns would lengthen and delay the process, presenting an unnecessary impediment to legitimate investment. Such a requirement would also dilute the resources that the most senior U.S. officials could devote to transactions that do pose national security risks. This would impede the Committee's ability to protect the national security as effectively as possible. I am confident that the Committee can carry out its obligations in a manner that guarantees high-level political accountability while focusing senior officials on transactions that raise possible national security threats.

Conclusion

Mr. Chairman, the Administration appreciates your leadership and attention to the protection of America's national and homeland security both in terms of the CFIUS role and more broadly. To reiterate, the Administration does and will continue to support CFIUS considering the ultimate ownership of the acquirer and the possible foreign acquisition of sensitive assets when reviewing any transaction, both of which are factors the Committee already considers when reviewing transactions. The Administration has taken a number of steps to improve the CFIUS process and to address concerns raised by Congress, and supports continued reforms to the CFIUS process. Sound legislation can ensure that the Committee reviews transactions thoroughly, protects the national security, conducts its affairs in an accountable manner, and avoids creating undue barriers to foreign investment in the United States. All members of CFIUS are committed to working with Congress to improve the process, understanding that their top priority is to protect our national security.

I thank you for your time today and am happy to answer to any questions.

Chairman KING. Secretary Baker?

STATEMENT OF THE HONORABLE STEWART BAKER, ASSISTANT SECRETARY POLICY, PLANNING, AND INTERNATIONAL AFFAIRS, DHS

Mr. BAKER. Thank you, Chairman King, Ranking Member Thompson, members of the committee. It is a pleasure to be here to talk about this very important issue.

We are the newest member of CFIUS, joining in March of 2003, but I think it is fair to say we have already carved out a unique role as the Department of Homeland Security in CFIUS. Just three points about that.

First, given the origins of the department, the attacks of September 11, we have had to take a very different and untraditional view of what national security is. We have had to define it in terms of homeland security and in terms of unconventional threats. We have done that. We have looked very hard at a wide range of transactions.

I think the second point that I would make is that we have been very aggressive compared to many members of CFIUS in saying we see a homeland security element to this transaction, and we want some kind of protection. Either we want to stop the transaction or more often we want to enter into some kind of mitigation agreement that addresses the concerns that we have.

I think we have participated in about 170 transactions, and in more than 30 of them we have joined or been the sole parties participating in some form of national security agreements. So about one-fifth of them have led us to ask for additional protections for homeland security.

The third point is that CFIUS is a very high priority for the Department of Homeland Security and has been since it started. As this committee knows quite well, our office, the policy office was just created in October. I just was confirmed in October. One of my highest priorities was to stand up a CFIUS policy office, and the first person that I hired to be a career employee in the policy department was someone who is a specialist in CFIUS. So we have made it a high priority within the department and within the policy office.

Three additional points about CFIUS reform, very quickly. It is quite obvious from the House bill dealing with CFIUS that this committee and many of the members here are cosponsors have already had a substantial impact on that bill. We appreciate it. It is a responsible and thoughtful bill and we look forward to working with you as it moves through Congress.

Two other points. I completely agree with Assistant Secretary Lowery about the principles that ought to govern CFIUS reform. We have had a very cooperative working relationship with the Treasury Department. We have gone through a lot together in the last several months.

Finally, I would extend to this committee a pledge of all the cooperation you would like in terms of information about our practices under CFIUS or our views on details of the legislation as it moves through.

Thank you very much.

[The statement of Mr. Baker follows:]

PREPARED STATEMENT OF HON. STEWART BAKER

I thank Chairman King, Ranking Member Thompson, and all of the distinguished members of this Committee.

I appreciate the opportunity to speak briefly today regarding the Department of Homeland Security's role as a member of the Committee on Foreign Investment in the United States and DHS's support for CFIUS reform.

DHS's CFIUS Background

The Department of Homeland Security is the newest member of CFIUS. We became a member in March 2003, soon after DHS began as an organization of 22 diverse agencies whose common mission is the protection and security of our nation and people. Since that time, we have participated in the review of more than 170 foreign acquisitions involving some of the nation's critical infrastructure, technology, and other assets vital to our national security.

I mention our origins to stress what I believe is a key strength of the Department—we bring to the CFIUS a diversity of viewpoints, expertise, and skills. The government agencies from which we were formed give DHS a broad perspective, informed by an understanding of infrastructure threats, vulnerabilities and consequences. DHS generally leads CFIUS reviews of transactions involving critical infrastructure, and we also have entered into dozens of agreements to mitigate national security risks that may arise from CFIUS transactions. When we enter into these important agreements, DHS is careful to monitor compliance, and we do so in coordination with other CFIUS agencies who are parties to the agreements.

I think my CFIUS colleagues will vouch for the fact that we take our role in CFIUS seriously and interpret our security mandate broadly. We ensure that components throughout DHS review each and every transaction. DHS's forward-leaning stance on security issues sometimes gives rise to debate within CFIUS, but it is a healthy debate that ultimately enhances national security and investment. A substantial portion of DHS was formed out of the Treasury Department and we have no doubt our dual mission requires us to protect homeland security while maintaining an open investment policy.

In case it is not clear from my remarks so far, I should say explicitly that the CFIUS process is one of DHS's highest priorities, and senior officials in the Department are involved in every case. We are also cognizant of the fact that the number of CFIUS cases is on the rise, and our staffing plan is responsive to that fact. When I became Assistant Secretary for Policy, one of the first individuals I hired was someone whose primary responsibility is to help manage the Department's CFIUS program, and we are continuing to build our CFIUS staff.

CFIUS Reform

As to reform of the CFIUS process, I'll briefly make three points. *First,* let me commend the members of this committee for your thoughtful and productive work in your efforts to balance national security and open investment principles.

Second, DHS fully subscribes to the principles for further improvement that were articulated by my Treasury colleague. While DHS functions as an autonomous agency within CFIUS, the Treasury reform principles have our complete support.

Third, DHS is pleased to be involved in this dialog about the reform of the CFIUS process and to lend our expertise and experience in the reform process. We hope that you will continue to reach out to us, and we stand ready to provide our technical expertise in helping to ensure that national security and open investment principles are balanced in a manner that benefits our nation.

Chairman KING. Thank you, Secretary Baker.

Mr. Lowery, on February 21 of this year, I requested a copy of the CFIUS review relating to Dubai Ports. I received the documents yesterday. As I go through them, it was 500 pages of background material, but no actual report.

Is that the way it is usually done? Is there no actual report done for the transaction, no official report?

Mr. LOWERY. No, sir. The documents that you received are background on the filing itself, and the report is usually internal oral discussions and written discussions through e-mails between agencies, and then eventually a decision is made.

The key issue was that there were some security concerns that were raised and the Department of Homeland Security had worked

out an agreement between Dubai Ports World and the United States government. That was one of the key documents. After that, the CFIUS Committee decided that this transaction did not raise national security concerns that had not been addressed, and therefore there was a letter that basically told the companies that we were fine with the transaction.

Chairman KING. Is that going to be the continued policy? There will be no reports made, no final reports, no official report?

Mr. LOWERY. I think that basically one of the key things that we want to do going forward is to make sure that Congress does receive reports after transactions are completed. That is something that we are broadly supportive of. I mentioned it in my testimony, and we want to work very closely with this committee and other committees on how best to do that.

Chairman KING. Thank you.

Secretary Baker indicated that he has looked at legislation; the main sponsors are Congressman Blunt and Congresswoman Maloney. I would ask Secretary Lowery if he has had a chance to look at that legislation and what he thinks of it, and also compare it to the other two main pieces of legislation. Congressman Barrow, I believe, has legislation, and also Senator Shelby.

So. Secretary Lowery, if you could comment on Congressman Blunt's legislation, and if the two of you could then comment on the other two, Congressman Barrow's and Senator Shelby's.

Mr. LOWERY. Yes, sir. We have not taken a specific position on each of the different pieces of legislation. I think there is some other legislation out there as well. I agree with Secretary Baker that the legislation that we have seen from Representatives Blunt and Maloney is very constructive. We look forward to working with the committees on that legislation.

I actually have not read Congressman Barrow's legislation. I have read Senator Shelby's and we are also making sure that we are working very closely with the Senate. But in terms of comparison, I think what we have tried to do is lay out the different types of principles that we have. We would like to work with Congress through those principles, and what is the best way to structure legislation around them.

Chairman KING. Secretary Baker?

Mr. BAKER. Yes, I also would say that I would not like to get into the specifics of the other body's legislation. We believe there are a lot of commonalities between that and the bill that was cosponsored by Mr. Blunt. We think that the commonalities in many cases are constructive. We would like to work with both committees to try to resolve them in a way that is workable for the future for CFIUS.

We do have to have a functioning process that meets certain deadlines and is responsive to both Congress and to investors, as well as national security.

Chairman KING. Thank you, Secretary.

Now, I would recognize the gentleman from Mississippi, Mr. Thompson, who actually was one of the main impetus for this meeting and requested it several months ago. The gentleman from Mississippi?

Mr. THOMPSON. Thank you, Mr. Chairman. I appreciate the opportunity to have the witnesses before us today.

Mr. Pascrell raised a question about human capital and the fact that there is always this revolving door happening. Have you had that problem with your department, Mr. Baker?

Mr. BAKER. I am too new to leave, so I have not seen a lot of departures. Inevitably in government, there is turnover. By and large, my experience has been very good in terms of people being willing to stay when we have asked them to stay.

Mr. THOMPSON. Well, in respect to the CFIUS process, how many people in your office work on that process?

Mr. BAKER. Of the staff, I would say three at this point are working on CFIUS principally. That is an increase from one a few months ago, so we have been increasing the staff. We have a request for 10 in the administration's budget for next year, so this was something that we asked for even before the Dubai Ports World episode. So we have intended to expand that pretty substantially.

Mr. THOMPSON. So how many compliance agreements does the department enter into with other companies?

Mr. BAKER. We have entered into a little over 30 in the last 3 years, so 10 a year.

Mr. THOMPSON. Ten a year, using somewhere between one to three staffers?

Mr. BAKER. Yes. Because my office didn't exist prior to October of last year, much of the CFIUS work was done by other offices prior to the reorganization. But I think drawing on a couple of lawyers in the general counsel's office, we probably have had three to six people working on CFIUS over the years.

Mr. THOMPSON. So your testimony is based on budget requests and your own analysis that you really need more people than what you have right now to adequately do the job?

Mr. BAKER. Yes. I think that that is right.

Mr. THOMPSON. Thank you.

Now, taking the chairman's comment about this voluminous information we received at 4 o'clock yesterday afternoon, Mr. Lowery, it is very difficult for us to conduct oversight getting that much information less than 24 hours before a hearing.

Mr. Chairman, I would hope that however we can enforce any rules that it really is not enough time for us to go through that much information, and then we find that it is not as complete as we need.

So I am not certain how we work on that, but it limits our ability and effectiveness as members of Congress when we get it so late.

Chairman KING. If the gentleman would yield?

Mr. THOMPSON. Yes.

Chairman KING. I would work with the ranking member to ensure that we get more compliance in the future, and also I would note that we made the initial request back on February 21.

Mr. THOMPSON. That is correct.

Mr. LOWERY. Can I comment?

Chairman KING. Yes, sure, Secretary Lowery.

Mr. LOWERY. We apologize for the delays in getting that documentation to you. Just to make sure that everyone is clear, we

have to be very careful sometimes because of some of the proprietary information and the deliberative documents that were involved. So because of that, it was a fairly extensive process that was handled by the general counsel's office.

Because CFIUS is made up of 12 different agencies, we have to clear it with every single one of those agencies. That does take time. We apologize, though, for the delays. We should have gotten it up faster than we did. Just so you know, I received that telephone book full of information just last week, and I was traveling. I got back and got it soon as I possibly could.

Mr. THOMPSON. Thank you very much, Mr. Chairman.

I yield back.

Chairman KING. The gentleman from Indiana, Mr. Souder?

Mr. SOUDER. Perhaps one legislation we could look at is how to expedite executive branch clearance processes. Over in Government Reform, we very seldom get documents prior to the night before a hearing. Often, it is this multi-agency internal discussions. We deal with classified material all the time. If it needs to be classified, it should be classified. If it is proprietary, tell us it is proprietary. But we can't do our work in oversight, and this is building to a crisis in multiple committees that I am part of.

I have a more particular question. Does this cover leases and management, as well as purchase?

Chairman KING. If the gentleman would yield? The gentleman from Washington actually asked the question. We can keep going with the questions, but so maybe we will go vote, and then we will come back and take the hearing back. We will have to move quickly on that.

The gentleman from Indiana?

Mr. SOUDER. Does the process include leases and management contracts, as well as purchases?

Mr. LOWERY. To my knowledge, no. I think that it is about acquisitions.

Mr. SOUDER. Because in Indiana, we are having a big discussion about Cintras and Macrey, Australian and Spanish companies, are managing the Indiana toll road for 75 years. They took a lease. They manage the Chicago Skyway. So for that infrastructure, none of the legislation, nor your process, would impact a lease arrangement?

Mr. LOWERY. I am not an attorney, but to my knowledge, no, it would not. It is specifically about acquisitions.

Mr. SOUDER. All right. So the similar thing would be if it is an airport, because the British are managing the Indianapolis Airport, looking at once again leasing it to a management. Would the Department of Homeland Security be looking at something like that?

I don't have a problem with it. I am thrilled that they are bringing investment to Indiana, quite frankly. I am just wondering what kind of process goes through lease management because particularly a major airport would be critical infrastructure.

Mr. BAKER. Certainly the Department of Homeland Security would have an interest, particularly in who is operating airports, but I agree with Assistant Secretary Lowery that CFIUS would not by itself cover that unless the company that is actually administering that lease is then acquired by another foreign company.

The question from our point of view would be what other legal authorities might we have to deal with a company that is running an airport, and typically to draw on the experience of the ports, we have some regulatory authority over security activities. That does not necessarily allow us to exclude a particular foreign company, but it can allow us to look closely at their security practices.

Mr. SOUDER. General Electric, Magnavox, many American companies were downsizing over the years. In my district, BAE bought the GE aircraft controls that does defense contracting in the Air Force. USSI bought what was Magnavox-Raytheon-Sonavoys operation, which is a British company making defense parts, which conceivably, depending on how the structure goes, could be impacted here.

Michelin is the largest employer in my district, which is French, making tires that go into all sorts of equipment, not to mention that I have Dreyfus building the largest biodiesel plant in the United States, second-largest in the world, in my district, which is also French, while Bruna Steel from Italy bought a company from Canada in my district that makes steel.

Now, some of these companies are structured where they have an American division. Some of them are straight ownership. Could you explain a little bit where the lines here are on military, parts that go into military, steel that would go into military, or even energy structures there where Dreyfus is actually impacting. Because without this investment, we are going to really dry up American jobs.

Mr. LOWERY. I don't know all of those transactions, but many of them, I would guess, have actually gone through the CFIUS process. What happens is that companies, especially in the defense industrial base, but also in critical infrastructure, realize that they need to come in and do CFIUS. I know that BAE has come through CFIUS many times. I can't speak for the specific transactions in your district.

We agree with you. It is very important to the U.S. economy that we continue to get this foreign direct investment. That is why we have tried to keep the CFIUS process as professional and rigid with timelines as it possibly can be so that we can address these issues. If there is a national security concern with a CFIUS case, we can address those issues through means of the CFIUS process.

But a lot of times, these transactions do not raise those national security concerns. We should look at them from the national security perspective and get them out of the system, quite frankly.

Mr. SOUDER. Does steel qualify as a national security concern? Obviously military parts would directly, but what about the raw products that go into those parts?

Mr. LOWERY. I think that it probably would. I know that in my time we have actually looked at some steel cases.

Mr. SOUDER. In Homeland Security, do energy companies constitute something that Homeland Security would review?

Mr. BAKER. Yes, sir, they do. They are part of the critical infrastructure.

Mr. SOUDER. Okay. Thank you.

I yield back.

Chairman KING. The gentleman yields back.

There is about 6 minutes to go on the vote, so the gentlelady from California can begin her questioning. The gentlelady is recognized for 5 minutes.

Ms. SANCHEZ. Thank you, Mr. Chairman.

This whole Dubai issue obviously brought this to the forefront. I think the really big issue of Dubai was what is so critical to the United States that we have to hold it in our own hands, and what is it of the assets that we hold that would be available for lease or operation or sale to foreign companies?

This is an incredibly important issue, given the trade deficit and the desire of our American companies to own assets around the world. I think Europeans, well anybody, Asian, anybody is looking at this and saying, you know what, what is the United States going to do? So obviously, we have this process now.

Under the critical infrastructure protection arena, as the law currently is, could you go through what would fall under that as far as a review process?

Mr. BAKER. We define the critical infrastructure the way the Homeland Security Act does, which is very broadly. It includes agriculture, food production, power production, telecommunications, a wide variety of industries. We have tended to take the lead in taking a look at transactions that affect those sectors.

When we find a transaction that falls into one of those sectors, the first question we ask is is there some other authority that would allow us to regulate the national security risks, the homeland security risks, without blocking the transaction? If there is, then we don't need to use CFIUS.

But if there isn't, then if we see a risk in the transaction, what we will do is ask the companies that are engaged in it to come in and sit down with us and to negotiate an agreement in which they will agree to take actions that will minimize the risk that we see in the transaction. In fact, that is what we did in the Dubai Ports World case, where we identified some risks that we wanted to protect against.

Ms. SANCHEZ. Let's say a telecom company like AT&T or one of these, has a buy-out proposed. Would we look at that as a critical infrastructure piece?

Mr. BAKER. We would indeed. We have and we have negotiated national security agreements with a number of foreign buyers of telecommunications companies.

Mr. SANCHEZ. Okay. Do you have anything to add?

Mr. LOWERY. I agree completely.

Ms. SANCHEZ. Okay. After 9/11, the criteria changed for national security and what we were looking at in infrastructure. Right? Do you think that is adequate? Or do you think we have to look at one of these bills that would address a broader scope of what might be included as critical to our national security as far as assets, any type of assets?

Mr. BAKER. DHS, working within the existing statute, has made it clear that we take a very broad view of what our national security requires. The bills that we are looking at tend to include homeland security as part of national security. We are fully supportive of that idea. So in our view, our current practice is that, but it would be very helpful to have the law match our practice.

Ms. SANCHEZ. Thank you, Mr. Chairman.

Chairman KING. Yes. The gentlelady yields back.

I am going to call a recess of the committee for about 5 minutes. The committee stands in recess.

[Recess.]

Mr. ROGERS. [Presiding.] I would like to call the hearing back to order.

At this time, I recognize Mr. Dicks for any questions he may have.

Mr. DICKS. Let me ask you a question about this letter, Mr. Lowery, that you wrote to the committee. In the letter, it says, "CFIUS member agencies provide their position on a transaction to Treasury staff, informing Treasury whether the CFIUS member agency will request an extended investigation with respect to the reviewed transaction."

Is that done in writing?

Mr. LOWERY. Yes, sir, usually via e-mail.

Mr. DICKS. Is that part of the information that you sent to the committee?

Mr. LOWERY. I don't think so, sir.

Mr. DICKS. Why is that?

Mr. LOWERY. I would have to ask the general counsel, but I believe that there was some concern about deliberative process, sir.

Mr. DICKS. So you are claiming executive privilege here, is that correct?

Mr. LOWERY. I believe so, sir.

Mr. DICKS. Mr. Chairman, I think the committee has a right to see this. I would hope that we would at least consider what ever steps we can. I think without that, all we have is a series of e-mails and documents that don't seem to mean very much.

I am also surprised, by the way, and we may have to change the legislation here, I think there ought to be a report written about the decision of the CFIUS group. The secretary or whoever is in charge of this should have to write a report that could be reviewed.

Why is that not done?

Mr. LOWERY. Sir, we actually think that that is a good thing to look at going forward. Right now, basically, the report that we would do to Congress would be in any cases that go to the president. There was a recent case where we did a report to Congress on a transaction.

On a regular basis, we have not done that, but we think that it is something that should be explored because we do want to improve communications with Congress. We do realize that this has been a problem, and we need to correct it. That is one of the reforms that we are looking at very carefully.

Mr. DICKS. I am trying to find my notes here. There is a report that you are supposed to do on a quadrennial basis, and there has only been one of them submitted, and that was in I believe 1994. Why is it that this quadrennial report has not been filed in the last 12 years?

Mr. LOWERY. Sir, we regret that the quadrennial report has not been filed in 1998 and 2002. We are committed to getting it done.

Mr. DICKS. Then why isn't it done, if you are committed to it? Did you just figure out before this hearing that it wasn't done? You must have known it wasn't done.

Mr. LOWERY. Sir, basically we looked and found out that it hadn't been done for all this time, and what we have done is put together an interagency working group, as well as working with the DNI. It is a very labor-intensive report to get a lot of data and do the analysis of that data. We are committed to getting that report done in 2006.

Mr. DICKS. In the fiscal year or calendar year?

Mr. LOWERY. This year, sir, as soon as possible.

Mr. DICKS. Okay. So this in your mind is an oversight?

Mr. LOWERY. Yes, sir.

Mr. DICKS. Well, Congress should have maybe proper oversight, we should have asked for this report to be submitted. What kind of information would be in this report? Can you characterize it?

Mr. LOWERY. Yes. There are two parts to the report. One is about counter-espionage issues, which actually is a report that has been picked up and been done on an annual basis by the national counterintelligence unit of DNI. So that actually has been going on on an annual basis.

The part that has not been going on is analysis of trends in mergers and acquisitions to see if there has been anybody that has been specifically targeting. That part has not been happening and that is the part that we need to address during this quadrennial report, the one that we are working on right now.

Mr. DICKS. Does the administration, even though they haven't sent the report up, does the administration follow these trends, and what these other countries like the Peoples Republic of China and others?

Mr. LOWERY. We do follow these trends in the general sense. We just haven't done it with the type of data analysis that would be needed in order to do the quadrennial report.

If you look over most of the transactions that have been done, some involve Japanese companies, but European and Canadian companies constitute the bulk of the transactions. We have not really found any definitive trends that show any targeting by specific countries.

That said, we do need to do a deeper analysis than we have done before. That is why it is going to take us a while, but we are committed to getting it done this year.

Mr. DICKS. I appreciate that.

I thank you, Mr. Chairman, and I yield back.

Mr. ROGERS. The gentleman yields back.

The gentleman from New Jersey is recognized for any questions he may have.

Mr. PASCRELL. Mr. Lowery, you mentioned in your testimony that typically the members of the committee with the greatest relevant expertise assume the lead role in examining any national security issues which are related to the particular transaction, and when appropriate, developing appropriate mechanisms to address those risks.

Would the Department of Homeland Security not take the lead on many of these transactions? And do you think that they have the personnel capable to fulfill this duty?

Mr. LOWERY. In terms of your question about lead agencies, there are a variety of agencies that take lead responsibilities. Sometimes it is the Department of Homeland Security; sometimes it is the Department of Defense; sometimes it is Justice; and sometimes it is the Energy Department, which is actually not a CFIUS agency, but we bring them in if there is an energy asset at stake.

There have been times where others like Commerce or the Treasury Department will take some of the lead responsibilities, but it is usually those agencies. I would have to defer to Secretary Baker as to the abilities of the Department of Homeland Security to conduct their business. In the CFIUS process, they are always very active and very rigorous about their job, but in terms of all the follow-up, I would have to defer.

Mr. PASCRELL. Do these members of the committee inquire? Do they ever discuss this with Homeland Security? Would they reach out, the members of the committee that are reviewing these transactions? Or are the members of the committee who are expert in the specific area, they are looked to examine the proper activities of the transaction?

Mr. LOWERY. Each agency reviews the transaction. It is just that there is sometimes deference because of the specifics of a transaction. For instance, if there is a defense part that is being purchased by an acquisition firm, we are going to look to the Department of Defense because they are going to know things a lot better than the rest of us.

However, Homeland Security, Justice and Treasury and others on the committee are also reviewing it and they are making sure that it addresses any concerns that they might have about that specific transaction.

Mr. PASCRELL. Did Homeland Security review the Dubai transaction?

Mr. LOWERY. Absolutely. In fact, they were the lead agency, basically.

Mr. PASCRELL. And they concluded?

Mr. LOWERY. It is probably better for Secretary Baker to speak on behalf of his group.

Mr. BAKER. I am glad to. Thank you, Clay.

We looked at that and for the first time in any port deal, we decided we wanted additional security guarantees from what we ordinarily would ask for in a transaction. We asked for assurances. We were able to get them from the company.

So we did look at it closely. We did ask for assurances to go beyond what the other members of CFIUS would have asked for because it was a part of the critical infrastructure.

Mr. PASCRELL. Reports have it, Mr. Secretary, that you were the sole dissenter in the beginning in reviewing the Dubai transaction. What made you change your mind to go along with the other members of the committee in unanimously accepting this transaction as not being in any manner, shape or form a reflection on the security of this nation? What is it that got you over the top?

Mr. BAKER. I think the reports are a little misunderstood. We did not object to the transaction, but we did raise our hand and say we would like to look at this more closely. We believed that it would be appropriate to ask for additional assurances from the company.

Mr. PASCRELL. Why?

Mr. BAKER. Because we wanted to make sure, this was a government-owned corporation, we wanted to make sure that the companies which up to that point had a very good security reputation, didn't change that policy later on. We wanted to lock them in in their current relatively high level of security.

Mr. DICKS. Would the gentleman yield just for a brief moment?

Mr. PASCRELL. Sure.

Mr. DICKS. One of the things that, there was an unclassified Coast Guard report that said that there were intelligence gaps concerning the potential for DPW or PNO assets to support terrorist organizations, which preclude an overall threat assessment of the potential DPW and PNO merger.

Were you concerned about this Coast Guard report?

Mr. BAKER. The Coast Guard was asked for its evaluation of the transaction. The Coast Guard internally commissioned that intelligence report. It was not actually sent to DHS headquarters. It was for their own purposes in deciding how they would vote on the transaction.

Once we had the assurances, with the assurances in hand, as well as that intelligence report, which actually came to the conclusion that while there were gaps, the transaction should go forward, the Coast Guard voted to let the transaction go forward.

So I didn't actually see the report.

Mr. PASCRELL. Can I reclaim my time, Mr. Chairman?

Mr. Secretary, I want to ask you a question. I want you to explain to everybody in this room what you see as the difference between a foreign company running the operations at any of our ports, which happens right now, and a foreign company owned by a foreign country running the operations of a port.

Because the administration confused that and melded the two together in trying to defend their decision about Dubai. I want you to tell us if you see any essential, not quantitative differences, essential differences between the one and the other, and why we should be concerned in our oversight capacity.

Mr. BAKER. I do see a difference. A foreign company is likely to be acting out of profit motivation most or the time, not always, but most of the time. You might still have concerns, but the profit motivation often allows you to predict how they will behave.

When it is a foreign government-owned corporation, you sometimes worry that the government will take actions that are not profit-motivated. And so it is important to take a look at that particular risk.

Mr. PASCRELL. How do you know if the country is not going to interfere in the operations of that particular company since they are on our soil?

Mr. BAKER. One of the thing that we did in this transaction was to try to lock in some things that had been done by the companies, as private companies, to provide good security and to maintain

high security standards so that if there were a change in policy that was not profit-motivated, but motivated by a government policy, we would be able to say that is a violation of the agreement.

Mr. ROGERS. The gentleman's time has expired.

The gentleman from North Carolina is recognized for 5 minutes.

Mr. ETHERIDGE. Thank you, Mr. Chairman.

Mr. Baker, let me follow that line a little bit further because we were talking about foreign versus domestic, what works out. How do you evaluate the risk of a foreign-owned company when these days there is really no clear designation of what companies are foreign?

Let me say what I am talking about, for instance, most large companies are multi-international today. I am told both Exxon-Mobil and BP have almost half of their ownership is American, is U.S. now, and a lot of it overseas.

How does the department weigh the risk of these so-called foreign-owned companies?

Mr. BAKER. I am not sure I would characterize Exxon-Mobil yet as foreign-owned.

Mr. ETHERIDGE. But if you look at the ownership within the corporation?

Mr. BAKER. Yes. There is no doubt that the long-term trend is toward a lot more confusion about what country a particular company is from. The number of governments who have the ability to influence the behavior of a company continues to grow.

We are not the only ones who are seeing that. The Canadians, who used to have very aggressive inward investment programs, have begun to recognize that they can't maintain that. So that confusion is going to continue to grow.

Mr. ETHERIDGE. So how do you evaluate the risk?

Mr. BAKER. We must nonetheless ask in particular transactions, is the risk so significant that even though it is harder to tell whether someone is influenced by foreign governments or an outsider, we can't take the risk of letting the transaction go forward, perhaps because of tight relations between the buyer and a foreign government, so that we have every reason to believe that this particular company is very beholden to a foreign government, and they are buying into a particularly sensitive sector.

So there are still cases where the risks and the relationship with the government is quite significant. In many cases, though, in fact almost all the time, it is better to rely on regulations than trying to block transactions. As we talked about earlier, there are many ways in which foreign companies can come to exercise control over assets in the United States without ever buying a U.S. company.

So in most cases, having regulations such as our port security regulations is a better way to control what happens by way of port security than trying to block transactions on an individual basis.

Mr. ETHERIDGE. That being said, then, I guess leads to the next question. Did you consider the UAE's ties to the Taliban to be a red flag? Was that something you considered in the deal?

Mr. BAKER. There is no doubt that before September 11 the United Arab Emirates did have close ties to the Taliban, or at least they recognized the government. We said at the time that we thought that was a very bad idea. We have reiterated that view

since September 11. They did make substantial changes in policy after September 11 and they have been enormously helpful to the United States in a wide variety of ways on an international basis.

Mr. ETHERIDGE. So the answer is yes?

Mr. BAKER. We took that into account. It was not a positive factor, obviously. What that shows is they are not the United States and never will be, and we have to take that into account as one of the reasons we said that we want some assurances about the policies on security that you are going to follow up.

Mr. ETHERIDGE. So do I gather from that that the answer is?

Mr. BAKER. All I can say is, you have to take these things into account and make a decision after weighing all of them.

Mr. ETHERIDGE. Are you telling me it was one of the factors that was considered?

Mr. BAKER. Certainly. It was.

Mr. ETHERIDGE. Okay.

Thank you, Mr. Chairman. I yield back.

Mr. ROGERS. The gentleman's time has expired.

The gentlelady from the Virgin Islands, Ms. Christensen, is recognized for any questions she may have.

Mrs. CHRISTENSEN. Thank you, Mr. Chairman.

I would like to ask a question based on the purpose of the program being to identify those foreign investments in U.S. critical infrastructure and industrial-based technology companies that may pose a national security risk. I have seen some of our early critical infrastructure lists, and then you would have been reviewing golf courses, country clubs and all of those kinds of things.

Do you think we have sufficiently come to a point where our critical infrastructure is identified specifically enough and accurately in a relevant fashion so that it gives the proper guidance to this process?

Mr. BAKER. I think that is a very good question. We have taken a very broad view of what is critical infrastructure. It depends on what purpose you are asking the question for, or what you want to put in there. We, for example, treat agriculture and food production as critical infrastructure, as they would be if someone wanted to insert ricin into the food supply.

That does not mean that we should be reviewing every transaction in which a European buys a farm in Iowa. So how you define "critical infrastructure" for purposes of reviewing an inward investment may be quite different from how you would interpret it if you were worried about a terrorist attack on a particular facility.

So in this case, we keep the definition broad so that we can respond to new threats or particular intelligence that we may receive about a buyer, but generally we are focused on transactions that could give a foreign company or foreign government insight into very important technology or an ability to influence the way our infrastructure works in a fashion that could hurt us.

Mrs. CHRISTENSEN. Okay. How do you evaluate the risk of a foreign company when these days sometimes there is not a clear designation of what companies are foreign?

For example, large-scale companies are multinational. I could talk about Exxon-Mobil or I could talk about Hovensa in my district, which has half U.S. ownership, both of them. So how does the

department weigh the risk of these kinds of so-called "foreign-owned" companies?

Mr. BAKER. Again, we try to leave ourselves a lot of room so that we have not locked out a case that we clearly want to meet. There are circumstances where just 25 percent ownership interest in a large publicly held company would be enough to give a foreign government or person control of the company. We would not want to say, well, it has to be 51 percent foreign before we decide that the transaction ought to be reviewed.

But in many cases, all we have to decide in the end, if we think that there is not a risk to homeland security and national security, is that the transaction does not need to be further reviewed. We don't say it is because you are not foreign. We simply say that is fine; we are not going to review this transaction further. And that allows us some discretion in a later case where we think there is a risk of abuse, to say this transaction needs to come in and be reviewed.

Mrs. CHRISTENSEN. Mr. Lowery, would you have anything to add to this?

Mr. LOWERY. No, I think the secretary described it very well.

Mrs. CHRISTENSEN. I have no other questions of this panel, Mr. Chairman. Thank you.

Thank you for your responses.

Mr. ROGERS. The gentleman from Pennsylvania, Mr. Dent, is recognized for any questions he may have.

Mr. DENT. Thank you, Mr. Chairman.

Mr. Baker, my question is really directed to you. At what point in this process do you typically receive the intelligence review from the Community Action Risk Center?

I noticed from the timeline on these yellow sheets that this assessment was completed on December 6, but the parties did not officially file until December 16. The question is, how is that possible? How does that process work?

Mr. BAKER. That is a little unusual. It is a very good question. Typically, it will take the intelligence community several weeks, 3 weeks to put together a report.

We were actually lucky in the Dubai Ports World case because the company was well advised and they did something that we very strongly encourage companies to do, which is they came in well before they filed with CFIUS and said, "we are thinking about doing this transaction." They briefed the transaction. They answered our questions. We were able to get the intelligence community started on the assessment well before the actual filing of the CFIUS petition.

Usually, we don't have that much time. And usually, if we don't have too much time, it will take us until day 21, day 22, day 23 in the 30-day process before we see the fruits of the intelligence analysis.

Mr. DENT. Thank you.

Mr. Lowery, do you have anything to add to that?

Mr. LOWERY. No, I think that that is correct. I know that there was a lot of criticism of us in the Dubai Ports World case, that we didn't take the extra 45 days. We actually took 75 days in the case of Dubai Ports World, or closer even to 90, just because they came

in very early and gave us a lot of information, and then we just were able to get the intelligence people working in advance.

This is something that we have been trying to get. There is kind of a small community of people that represent companies on these cases, and we have been trying to get the word out that coming in early helps the process along. I know that for instance in the last seven cases that have been filed with us, five of them have come in early. So we are able to get the intelligence community doing its work in advance because obviously their work is vital to us.

Mr. DENT. And my follow-up question is this. Some legislation has been proposed limiting the time for the director of national intelligence to review these acquisitions to 15 days. Are you supportive of those proposals, and how would that improve or affect our national security?

Mr. BAKER. I am not aware of proposals to limit it to 15 days. I would say that the intelligence community analysis of the transaction is vital, but it is only part of what we have to do. If we have a 30-day review window, and the intelligence community takes 29 days, there really isn't time for us to do the analysis that we need to do, or to ask for the protection measures that we need to take.

So there is always a tension. I think it is probably a bad idea to try to set it legislatively. We push the intelligence community to give us preliminary or as much information as they can as early as possible so we can begin deciding whether we want to ask for additional assurances. But it is going to be a tension no matter how that particular issue is resolved, legislatively or administratively.

Mr. DENT. And finally, what changes have been made to the CFIUS process since the post-9/11 world? I would just be curious to get your take on that.

Mr. LOWERY. Yes, sir. I think there have been a few things, a lot of it based on the lessons we learned from 9/11 and then Dubai Ports World. The first big change was we added the Department of Homeland Security.

Mr. DENT. Other than that.

Mr. LOWERY. What we are now doing is we have much more formalized the process of using the intelligence community. They are at every meeting. They are observers. They are an input valve. It was always kind of an informal process that has become much more formalized.

Secondly, I think each agency is briefing up at the highest levels of their agencies because of the concern that there was not as much accountability as there should have been in the Dubai Ports World case.

Thirdly, we are trying to work with the oversight committees on keeping them informed about how the cases are coming out, with some notifications obviously. This is something that is in a variety of different legislative bills. We are going to work with Congress to try to keep you better informed about how the process works and also the results of the process. So those are a few off the top of my head.

Mr. ROGERS. The gentleman's time has expired.

The gentleman from Oregon, Mr. DeFazio, is recognized for any questions he may have.

Mr. DEFAZIO. Thank you, Mr. Chairman.

I would assume on the list of critical infrastructure would be our airline industry. Would that be correct?

Mr. BAKER. Which industry?

Mr. DEFAZIO. Airline.

Mr. BAKER. Yes, sir.

Mr. DEFAZIO. Yes, especially since they provide the civilian reserve air fleet. What would trigger a review?

The administration is currently proposing that foreign interests, despite the legal restrictions on ownership in the Federal Aviation Act, they want to creatively reinterpret the meaning of "control" to allow foreign interests to actually have a controlling interest in a U.S. airline, but somehow internally draw some firewalls and say, well, you can hire and fire the management; you can set the schedules; you can buy or sell equipment; choose routes; use your personnel, the existing personnel, foreign pilots, whatever. But we are going to wall off safety and security.

Now, the most credible analysts say that doesn't really seem like it is going to work too well, especially since we had the director of security from Continental say, well, look, I mean the President say, "I hire the head of security and safety. The board of directors tells me they want something, I am going to deliver it. I will fire him and get someone who will do what I want."

So I guess the question is, if this rule goes through, they won't technically be buying more than a 50 percent share, but they will be buying under the rules that are being proposed a controlling interest in a substantial portion of the airline through super-voting majorities of certain kinds of stock, otherwise they won't make the investments.

Would that trigger a review?

Mr. BAKER. A couple of thoughts on that.

The first, I think CFIUS, as I said earlier, is kind of a blunt instrument in that in this case it seems to me that we have a great deal of much more specific regulatory authority, including the authority under the provisions of law that you were just talking about. So that the debate will take place, rather than in CFIUS, about how to interpret and apply the airline-specific rules.

We are aware of the proposal that you are talking about, and of the tensions that you just described, and are still examining that proposal to see whether we believe that it will protect homeland security and the security generally sufficiently. We are in the midst of that, so I would not like to comment in more detail.

Mr. DEFAZIO. Okay. So you have been asked to review the proposed rule?

Mr. BAKER. Yes.

Mr. DEFAZIO. Okay. In what venue will that review be made available? Will it be made available to members of Congress on a need-to-know basis, on a secure basis? Is it being made public? What will you do with that?

Mr. BAKER. The administration will arrive at a conclusion and then once that conclusion is arrived at, I am sure that we are not going to be the principal interlocutor on that issue because it is not our regulation, but I expect that it will then be explained in whatever supporting detail is necessary and made available.

Mr. DEFAZIO. I mean, their attempt to end-run Congress has been very specific. They are saying the word "control" means, you know, something else, which means they are going to create this artificial fire wall.

Are you saying, what about the idea that a foreign interest can appoint all the management; board of directors direct the company, and yet somehow internally within this corporate structure we are going to say, oh, safety and security are over here, don't worry, despite what we have heard from airline execs saying that is not really the way an airline works.

You are saying, what about this? Do you think this is?

Mr. BAKER. If I said I was saying that, I would probably be making a decision. It is a little early.

Mr. DEFAZIO. Well, it isn't early. Any day, they could pop this rule out. They proposed it. They get a little flak. They just changed it cosmetically. It is still the same rule. They are trying to end-run Congress because they couldn't get this in the last Federal Aviation reauthorization. And there is obviously somewhat of a reluctance on the part of the Republican leadership to challenge the White House on this issue, and some of the financial interests involved.

But this would include any country with an open skies agreement, which just in case you don't know that, it would include Indonesia, for instance. I don't think that would be a really good idea.

Mr. BAKER. I think we understand precisely the tensions you are describing, and are building those into our analysis of the proposal.

Mr. DEFAZIO. Okay. And your analysis is only going to be available to the executive and not to Congress? Or if Congress asks?

Mr. BAKER. I am not suggesting that we are writing a 500-page report. We are examining this and the legal and factual issues that go into it because we have been asked for our views.

Mr. DEFAZIO. Thank you, Mr. Chairman.

Mr. ROGERS. The gentleman yields back.

The gentleman, Mr. Langevin, is recognized for any questions he may have.

Mr. LANGEVIN. Thank you, Mr. Chairman.

Actually, in addition to my committee work here, I also sit on the House Armed Services Committee. Mr. Lowery and Mr. Baker appeared before me there, and I have had the opportunity to question them. So I don't have any questions for the panel at this time. I will hold those for the record potentially.

I will just say that during the consideration of the SAFE Ports Act, I offered an amendment to require more transparency in the CFIUS process. The amendment that I offered would require CFIUS to notify congressional leaders of both parties of any foreign acquisition dealing with critical infrastructure. In addition, it would have ensured open lines of communication between Congress and CFIUS.

So I am going to continue to work for those opportunities to enhance those reporting requirements, but at the time Chairman King had indicated that he would work with me to address this issue, and so I am proud to be a part of this hearing today and I want to thank the panel for their testimony.

Thank you. I yield back.

Mr. ROGERS. I thank the gentleman.

Are there any additional questions by the Members?

I want to thank both of you for your time. It has been very helpful.

At this time, we will dismiss this panel and call up our second panel.

Thank you very much.

Joining us today is Daniella Markheim, the Jay Van Andel senior analyst in trade policy at The Heritage Foundation's Center for International Trade and Economics; and Mr. Stuart Eizenstat, a legal expert on CFIUS and former deputy secretary of the Treasury.

Welcome to both of you. We look forward to hearing your testimony.

The chair now recognizes Ms. Markheim for any statement she may have.

STATEMENT OF DANIELLA MARKHEIM, JAY VAN ANDEL SENIOR ANALYST IN TRADE POLICY, CENTER FOR INTERNATIONAL TRADE AND SECONOMICS

Ms. MARKHEIM. Thank you, Mr. Chairman and distinguished members. I am honored to testify before the House Committee on Homeland Security today.

In my testimony, I would like to describe the contribution of foreign investment to the U.S. economy, discuss the efficacy of the current foreign investment approval process, and recommend improvements to the CFIUS process to preserve both an open investment climate and America's national security.

Today, the United States is the world's dominant economy. Because of the promise of America's economic potential and the openness of its markets, the U.S. is a major destination for foreign direct investment or FDI. Foreign investment introduces new technologies and skills to America's economy, helping to promote U.S. competitiveness abroad.

FDI also supports over 5 million U.S. jobs from California to New York, and Texas to Ohio. Moreover, the benefits of FDI extend beyond the industries receiving investment and into the American economy as a whole. Increased investment and competition generate higher productivity and more efficient resource use.

Ultimately, this culminates in greater economic growth, job creation and higher living standards for all. Any new rules that restrict, delay or politicize foreign investment will result in the loss of FDI as greater uncertainty and delays add to the cost of foreign firms doing business in the U.S. Consequently, America will pay for higher investment barriers with lower growth and fewer jobs.

The CFIUS process serves as an objective nonpartisan mechanism to review, and if the president finds necessary, to restrict or prohibit foreign investment that may threaten America's security. With a few exceptions, the current CFIUS process minimizes the cost of such legislation on the U.S. economy, while preserving the intent: protecting America from those that would cause the country harm.

The process is effective in that it is nonpartisan and nonpolitical. It concludes its reviews in a timely manner, and because it extends an investigation only if merited, rather than as a rule or for bu-

reaucratic convenience. While today's CFIUS process is generally effective, it could be improved. The recent Dubai Ports controversy is the latest example demonstrating that the investment approval process needs to be better defined and more transparent.

First, successful congressional oversight of the CFIUS process relies in part on having reliable information describing the extent of foreign commercial misconduct in the U.S. As such, the administration should immediately resume the practice of providing quadrennial reports to Congress of credible evidence of foreign efforts to acquire critical U.S. technologies or commercial secrets.

Second, CFIUS investigations that result in presidential action are also subject to reporting to Congress. However, because firms may withdraw and re-file notifications in order to avoid extended reviews, few reports are actually submitted. As a result, Congress has little insight into the effectiveness of the CFIUS process during investigations. To fill this gap, Congress should receive regular general reports of committee investigations in addition to the required case-by-case reports on any extended examinations.

Third, while the option to withdraw and re-file provides additional time for companies to resolve national security concerns, the option may actually increase those risks if the transaction is completed during the withdrawal period and the foreign firm inappropriately gains control of a U.S. asset until it re-files with CFIUS. To mitigate this risk, provisions should be incorporated into the process that establish interim protections in cases where security issues have been raised, and to specify clear and reasonable time limits to limit the duration between withdrawal and re-filing.

Finally, left undefined in the Exon-Florio provision, member agencies have generally determined that a risky transaction involves a U.S. company that possesses export-controlled technologies or products, a company that has classified contracts, or specific derogatory intelligence on foreign companies. This narrow definition of what is a threat should be more explicitly and firmly incorporated into the process. Leaving "threat" undefined in the legislation keeps the door open for mis-using the process to protect domestic industry from foreign competition.

In conclusion, the notion that precluding foreign ownership of U.S. assets offers a measure of security or saves American jobs is flawed. Erecting barriers to foreign investment would stifle innovation, reduce productivity, undermine economic growth, and cost jobs, all without making America any safer. The government's role is not to decide how the marketplace operates, but to perform due diligence to ensure that vital national interests are looked after.

Thus, reform should address the heart of the CFIUS problem: appropriate reporting and transparent, well-defined rules, without opening the door to protectionism and without chancing the economic and political consequences of politicizing foreign investment in the U.S.

A successful strategy for improving national security must include an ongoing commitment to free trade and investment policy.

Thank you for the opportunity to address the committee. I do look forward to any questions you may have on this issue.

[The statement of Ms. Markheim follows:]

PREPARED STATEMENT OF DANIELLA MARKHEIM

Mr. Chairman, and other distinguished Members, I am honored to testify before the House Committee on Homeland Security today.[1] In my testimony, I would like to (1) describe the contribution of foreign investment to the U.S. economy; (2) discuss the efficacy of the current foreign investment approval process; and (3) recommend improvements to the CFIUS process to preserve both an open investment climate and America's national security.

Foreign Investment in the United States

Today, the United States is the world's dominant economy. Because of the promise of America's economic potential and the openness of its markets, the U.S. is a major destination for foreign investment. According to the Commerce Department's Bureau of Economic Analysis, net inflows of foreign direct investment (FDI) increased by almost 50 percent between 1996 and 2005, growing from $86 billion to $128 billion. Between 2004 and 2005 alone, the level of FDI in the U.S. increased by $21.8 billion, or 20 percent.[2]

Foreign investment introduces new technologies and skills to America's economy, helping to promote U.S. competitiveness abroad. About 20 percent of all U.S. exports originate from U.S. affiliates of foreign-owned companies.[3]

FDI supports about 5.3 million U.S. jobs from California to New York, and Texas to Ohio.[4] U.S. subsidiaries support an annual payroll of $317.9 billion with average compensation per employee worth almost $60,000—more than one-third more than the average American salary.

Moreover, the benefits of FDI extend into the American economy as a whole. Increased investment and competition generate higher productivity and more efficient resource use. Ultimately, this culminates in greater economic growth, job creation and higher living standards for all.

Any new rules that restrict, delay, or politicize foreign investment, will result in the loss of FDI as greater uncertainty and delays in investment transactions add to the cost of foreign firms' doing business in the U.S. Consequently, America will pay for higher investment barriers with lower growth and fewer jobs. FDI restrictions would undermine America's chances of remaining an economic superpower in an increasingly competitive global economy.

Moreover, there may be secondary consequences of enacting new foreign investment barriers. America could face less market access and opportunity abroad, as countries enact retaliatory policies that result in ever higher barriers to global investment. With over $2 trillion of direct investment abroad the U.S. is the world's biggest investor—foreign retaliation to new U.S. investment restrictions would be costly for many Americans.[5]

The CFIUS Process Today

The United States generally welcomes foreign investors and provides them equitable and nondiscriminatory access to investment opportunities. While the bulk of

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[2] Bureau of Economic Analysis, U.S. International Transactions, at *http://www.bea.gov/bea/newsrel/transnewsrelease.htm* (May 21, 2006).

[3] William J. Zeile, "U.S. Affiliates of Foreign Companies: Operations in 2003," Bureau of Economic Analysis, at *http://www.bea.gov/bea/ARTICLES/2005/08August/0805__Foreign__WEB.pdf* (May 21, 2006).

[4] Organization for International Investment, Insourcing Statistics, at *http://www.ofii.org/insourcing-stats.htm* (May 21, 2006).

[5] Bureau of Economic Analysis, Balance of Payments and Direct Investment Position Data, at *http://www.bea.gov/bea/international* (May 21, 2006).

foreign investment in America generates no threat to national security, the Exon-Florio provision was implemented in 1988 to insure that FDI remain benign.[6] The intent of Exon-Florio is to provide an objective, non-partisan mechanism to review and, if the President finds necessary, to restrict or prohibit foreign investment that may threaten America's security.

The Exon-Florio provision is implemented by the Committee on Foreign Investment in the United States (CFIUS), an inter-agency committee chaired by the Secretary of Treasury. The Departments of Defense, Justice, Commerce, and Homeland Security are part of the 12 agencies that participate in CFIUS. The Committee's task is "to suspend or prohibit any foreign acquisition, merger or takeover of a U.S. corporation that is determined to threaten the national security of the United States." In 1992, Congress amended the statute through section 837(a) of the National Defense Authorization Act for Fiscal Year 1993, requiring CFIUS to also review transactions where the acquirer is controlled or acting on the behalf of a foreign government.

Once notified of a potential transaction, the CFIUS process begins with a 30-day review of the planned foreign acquisition, followed by an additional 45-day review for exceptional cases. At the end of an extended review, a report is provided to the President, who then has up to 15 days to announce whether the investment is approved. In total, the process can not exceed 90 days.

The amending legislation set in 1992 requires the President to report every 4 years to Congress on whether there is credible evidence of foreign efforts to acquire critical U.S. technologies or commercial secrets. Additionally, a report is to be made to Congress regarding any transaction that required Presidential action.

Through the Exon-Florio provision, CFIUS is directed to consider the following factors in evaluating the security risk of a foreign acquisition or merger:

- domestic production needed for projected national defense requirements;
- the capability and capacity of domestic industries to meet national defense requirements, including the availability of human resources, products, technology, materials, and other supplies and services;
- the control of domestic industries and commercial activity by foreign citizens as it affects the capability and capacity of the United States to meet the requirements of national security;
- the potential effects of the proposed or pending transaction on sales of military goods, equipment, or technology to any country that supports terrorism or proliferates missile technology or chemical and biological weapons; and,
- the potential effects of the proposed or pending transaction on United States international technological leadership in areas affecting United States national security.[7]

A transaction may be voluntarily notified to CFIUS by the companies involved in the acquisition, or by CFIUS member agencies. The incentive for firms to voluntarily notify the CFIUS process is strong; firms that should, but do not notify CFIUS of an acquisition remain subject indefinitely to divestment or other negative actions by the President. In order to protect proprietary commercial data, notifications to CFIUS are confidential.

Balancing Act

With a few exceptions, the current CFIUS process minimizes the cost of such legislation on the U.S. economy, while preserving the intent—protecting America from those that would cause the country harm. Favorably, the process:

- Is designed to be non-partisan and non-political because these decisions should not be based on political considerations, but solely on the merits of the transaction and appropriate security concerns consistent with U.S. policies. Congress does not receive comprehensive notification in any other administrative procedure. Congress sets the law, establishes procedures to implement and enforce the law, and oversees the successful fulfillment of those procedures. As such, Congress plays no collaborative role in anti-trust decisions, patent and trademark awards, or International Trade Commission reviews. Likewise, a successful CFIUS process depends on Congress playing its oversight role, without becoming a part of procedure.
- Reduces the risk and economic cost of delayed foreign investment by concluding its reviews in as timely a manner as possible.
- Subjects investment transactions involving foreign government-owned companies to additional investigation only if merited, rather than as a rule. Transactions involving companies where the foreign government is a minority share-

[6] 50 U.S.C. app 2170.
[7] *Ibid.*

holder should not necessarily be evaluated with the same scrutiny as those transactions involving companies that are wholly owned and operated by foreign governments. Likewise, the potential threat to U.S. national security interests by foreign governments is not the same around the world. CFIUS is, and should remain, flexible enough to differentiate the level of investigation needed for each case. The foreign government-owned company headquartered in an ally country that competes fairly and according to market-based rules should not automatically face a more stringent investment approval process.

• Relies on a traditional and narrow definition of what constitutes a threat to national security. Left undefined in the Exon-Florio provision, member agencies have generally associated risky transactions with those involving, (1) a U.S. company that possesses export-controlled technologies or items; (2) a company that has classified contracts and critical technologies; or (3) specific derogatory intelligence on the foreign companies.[8] This narrow definition of what constitutes a threat reduces the likelihood that barriers will be erected, inappropriately protecting domestic industries from foreign competition. Investigations should remain focused on evaluating security concerns.

While today's CFIUS process is generally effective in balancing an open investment climate with national security, it could be improved. The recent Dubai ports controversy is the latest example demonstrating that the investment approval process needs to be better defined and more transparent.

• Amendments to Exon-Florio set in 1992 require the President to provide quadrennial reports to Congress of credible evidence of foreign efforts to acquire critical U.S. technologies or commercial secrets. In 1994, the first and last 4-year report was provided to Congress.[9] Successful Congressional oversight of the CFIUS process relies, in part, on having reliable information describing the extent of foreign espionage and attempts to circumvent sensitive technology controls. The administration should immediately resume the practice of providing this report.

• Any CFIUS investigations that result in presidential action are also subject to reporting to Congress; however, few reports are actually submitted.[10] As a result, Congress has little insight into the CFIUS process and deliberations that occur during investigations. Few reports are made to Congress because firms are allowed to withdraw a notification that would result in an extended investigation. Companies may then refile the notification of acquisition after previously identified security concerns are addressed. Refiling restarts the clock on the duration of the investigation and reduces the chance that the transaction will fall under presidential review. While this allows greater flexibility in the process and promotes investment, it has resulted in less information reaching Congress about CFIUS operations. To fill this gap, Congress should receive regular, general reports of Committee investigations, in addition to the required reports on any extended investigations. The content of these reports should focus on CFIUS proceedings, without compromising confidential information.

• While the option to withdraw and refile provides additional time for companies to resolve national security concerns pertaining to an acquisition, withdrawal may increase national security risks if the transaction is completed during the withdrawal period. In this scenario, a foreign firm may inappropriately gain control of a U.S. asset until it refiles a notification with CFIUS. To mitigate this risk, provisions should be incorporated into the process that, (1) establish interim protections in cases where security issues have been raised, (2) specify clear and reasonable time tables to limit the duration between withdrawal and refiling, and (3) establish penalties for non-compliance.[11]

• The current definition of what foreign investment may constitute a threat to national security should be formally incorporated into the CFIUS process. Leaving "threat" undefined in the legislation keeps the door open for misusing the process to erect protectionist barriers to foreign investment. The CFIUS process is solely concerned with identifying the national security risks of foreign investment. CFIUS should not be used as a vehicle for conducting industrial policy.

Conclusion

A strong economy, bolstered by free trade and investment, is a pillar of national defense. The Bush Administration's National Security Strategy correctly identifies

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[8] United States Government Accountability Office, "Defense Trade: Implementation of Exon-Florio," GAO–06–135T, October 6, 2005.
[9] *Ibid,* p.9.
[10] *Ibid,* p.9.
[11] *Ibid,* p.8.

"free markets" as the key to a secure America and a necessary component of our national security strategy.

The notion that merely precluding foreign ownership of U.S. assets offers a measure of security or saves American jobs is flawed.[12] Erecting barriers to foreign investment would stifle innovation, reduce productivity, undermine economic growth and cost jobs—without making America any safer. The government's role is not to decide how the marketplace operates, but to perform due diligence to ensure that vital national interests are looked after.

Thus, improving the transparency of the CFIUS process is appropriate; provoking a wave of anti-trade, anti-investment policy is not. Reform should address the heart of the CFIUS problem—appropriate reporting and consideration of investment by government-owned firms—without opening the door to protectionism and without chancing the economic and political consequences of politicizing foreign investment in the U.S.

Protectionism would endanger U.S. prosperity—the very cornerstone of security—as well as strain relationships with important allies in the war on terror, and make it more difficult to use open markets to spread American values and bolster U.S. interests around the world. A successful strategy for improving national security must include an ongoing commitment to free trade and investment policies.

Thank you for the opportunity to address this vital issue.

Mr. ROGERS. I thank you, Ms. Markheim.

The chair now recognizes Mr. Eizenstat for any statement he may have.

STATEMENT OF THE HONORABLE STUART EIZENSTAT, PARTNER AT COVINGTON AND BURLING AND FORMER DEPUTY SECRETARY OF THE TREASURY

Mr. EIZENSTAT. I appreciate the bipartisan way in which this committee is proceeding. We are at a strategic crossroads on international investment around the world, and we live in what threatens to be a protectionist era.

There is a clear and present danger that the recent Dubai Ports World controversy will be used as a platform to fundamentally change the rules governing foreign investments in the United States in ways that will in my opinion threaten investments that are a lifeblood for a healthy economy.

Little direct foreign investment comes from the Middle East. Ninety-four percent of the foreign assets in America are owned by the companies from 25 OECD industrialized democracies, and 73 percent of all foreign investments in the U.S. are made by European companies. At a time when we are all concerned about outsourcing, foreign investment represents a vote of confidence, insourcing in the United States.

In-sourcing foreign companies employ more than 5 million people, and at a time when our manufacturing employment is hemorrhaging, 35 percent of all foreign investment is in the manufacturing sector. When we have a 7 percent current account deficit, we need to keep the arteries of foreign investment open to fund this record deficit.

As former ambassador to the European Union, under secretary of commerce, under secretary of state and deputy treasury secretary, I want to make one point very clear. That is, what you do in the next several weeks will reverberate around the world. It will not be isolated. Congressional action to tighten restrictions on for-

[12] James J. Carafano, Tim Kane, Dan Mitchell, and Ha Nguyen, "Protectionism Compromises America's Homeland Security," Heritage *Backgrounder* No. 1777, July 9, 2004.

eign investment in this country will invite and encourage similar action abroad. This is not an idle concern.

Already in response remarkably to PepsiCo's attempt to buy Group Danone, which manufactures Dannon yogurt, the prime minister of France called the Dannon Group a jewel of French industry that had to be defended, and his government has proposed legislation establishing 11 strategic sectors to be shielded from foreign investment.

France is not alone. Spain, Poland and Germany all have restrictions. President Putin has recently proposed a new law to protect what he called "strategic industries" in Russia from foreign investment, and China has many restrictions already in important sectors.

We obviously should never compromise national security, but please realize that any restrictions you impose on foreign investments in the U.S. will invite similar restrictions on our companies investing abroad.

I will also ask you to recognize as you look at the legislation that even now, because of the aftershocks from Dubai Port World, that the administration is changing in a profound way, as is the private sector, the way in which the CFIUS process is proceeding. Applications are being filed by companies that would have never thought that there was any national security concern.

In addition, more of the CFIUS cases are going to the second 45-day phase simply because of fear that there will be political criticism, even though few of them have national security implications. Senior officials are more directly involved now than ever before.

I believe that the fundamental principle that should guide you as you look at the legislation is that CFIUS should be given by the Congress all the tools and all the time to identify, scrutinize and act upon the tough cases that present real national security issues, while ensuring that the overwhelming number who do not can proceed efficiently with a process that will not be clogged down.

With few adjustments, I believe that the reform bill before the House Financial Services Committee that has been cosponsored by Chairman King and I believe Congressman Thompson has also been involved in this, but I know Congressman Crowley and Maloney have as well, will do much to restore confidence in the integrity of CFIUS, reassure our global allies, but at the same time keep America open for business.

Having said that, permit me to briefly suggest a few modifications that the committee might consider if it gets a sequential referral from the Financial Services Committee to this legislation.

First, I understand the political concerns about government-owned companies, but all government-owned companies are not created alike. And yet this legislation, like the Senate legislation, lumps all government-controlled companies together and would impose additional time requirements upon them.

Since time is money, it puts them at a disadvantage. Now, certainly there are certain government-controlled companies that are subsidized or from less friendly governments that should go into that type of extended process, but there are others from friendly governments which operate purely by market principles and shouldn't be arbitrarily lumped together with government-owned

firms that otherwise raise national security concerns. Therefore, optimally all transactions by companies that operate on market principles and don't raise national security concerns, should go through a 30-day review.

Second, I understand the desire for additional accountability. Having served at senior levels in three departments, may I say that the requirement that secretaries or deputy secretaries at Treasury and Homeland Security should personally approve and sign each and every review and investigation is unnecessary. It will create bureaucratic delays and overload CFIUS for those cases where it ought to be focusing senior-level attention.

Third, CFIUS should never act if the director of national intelligence doesn't have adequate time to analyze and correct intelligence relating to a particular transaction. However, by creating, as the legislation does, a 30-day minimum for the DNI's intelligence review and requiring that the DNI review be completed no less than 7 days before the end of the CFIUS review period, the bill effectively establishes a de facto 37-day process even for transactions raising no national security issues, and I hope this can likewise be attended to in the legislative process.

And last, I believe that the existing review and investigation periods are appropriate for CFIUS to do its work. If an extension is necessary, this bill gets it right. Instead of adding it to the front end, put it at the back end, and that is a better way of proceeding.

The last point is critical infrastructure. This has become a very sensitive issue, and of course something that this committee is particularly concerned about. But what may be important to protect critical infrastructure from terrorism is a very different set of issues from what should be involved in the CFIUS process for foreign investment.

There are three approaches. The first is offered by Chairman Hunter in H.R. 4881, which essentially would prohibit foreign investment in critical infrastructures defined so broadly that 25 percent of the entire U.S. economy would be walled off. This is a duplication of what French Prime Minister Villepin is doing. I cannot conceive that we would want to go down the French road. They have proven that they do not have the kind of viable, flexible economy we do, and we hardly should be emulating what the French prime minister is doing.

The Senate bill, the Shelby-Sarbanes bill, creates a de facto presumption that all foreign investment in critical infrastructure creates a security risk and also should go to the 45-day period, and I think this is ill-advised. The bill that Chairman King and Congressman Crowley and others have cosponsored has it right. It requires CFIUS to consider whether a public transaction has a national security-related impact on critical infrastructure in the U.S. as a factor in deliberations, and that is the way it should go.

I would also suggest to members of this committee that additional work needs to be done by this committee with the administration to define what is meant by "critical infrastructure." There are varying definitions in the Patriot Act and by the Department of Homeland Security. Before one legislates in this area, we ought to make sure we know what we mean by "critical infrastructure."

So let me close by applauding your contribution to the process. I believe that Chairman King and Ranking Member Thompson have done a great service by taking a very careful bipartisan look, and I will be glad to take your questions.

Thank you.

[The statement of Mr. Eizenstat follows:]

PREPARED STATEMENT OF HON. STUART E. EIZENSTAT [1]

Chairman King, Ranking Member Thompson and Members of the Committee:

Thank you for the opportunity to testify today. It is a privilege to appear before you. I applaud your leadership, Mr. Chairman, and that of Ranking Member Thompson, on the vital issues affecting our nation's homeland security. In particular, I want to thank you for your contribution to the careful, considered, prudent approach that the House of Representatives is taking towards reform of the Exon-Florio Amendment and CFIUS. This is a very heated political environment in an election year. Because of your leadership, I believe that the House is moving towards adopting tough, effective, and truly bi-partisan legislation that would restore Congress's confidence in CFIUS, enhance protection of national security, and maintain the United States' longstanding open investment policy.

Importance of Foreign Direct Investment

We live in what threatens to be a protectionist era. There is a clear and present danger that the recent Dubai Ports World controversy will be used as a platform to fundamentally change the rules governing foreign investments in the U.S., in ways that will threaten investments that are a lifeblood for a healthy economy.

We need to be clear-eyed about our vital national interests. Little direct foreign investment comes from the Middle East: 94% of foreign assets in America are owned by companies from the 25 industrialized, democratic OECD member countries, and 73% of all foreign investments in the U.S. are made by European companies. Our traditionally open investment climate has greatly benefited the American people. At a time when concerns are raised about the "outsourcing" of jobs abroad, foreign investment represents "in-sourcing," a vote of confidence by foreign firms and investors in the openness, flexibility and strength of the U.S. economy.

In-sourcing foreign companies employ more than five million Americans, some 5% of private industry employment. At a time when U.S. manufacturing employment is hemorrhaging, almost 35% of the jobs created by foreign firms in this country are in manufacturing. Foreign direct investment often saves a struggling American company, which might otherwise be shut down or moved abroad. Foreign-owned U.S. operations account for 21% of our total exports and in 2004 plowed $45 billion in profits back into the American economy. Foreign-owned affiliates purchase 80% of their intermediate components from U.S. firms; they also spend $30 billion on R&D and over $100 billion on plant and equipment annually in the U.S.

Moreover, we also need to keep the arteries of foreign investment open to fund our record current account trade deficit, now at 7% of our GDP, and compensate for our low savings rates; foreign capital flows keep long-term interest rates lower.

Global Impact of CFIUS Reform

As Congress looks at changing the rules for foreign investment I hope you will recognize that your actions will reverberate around the world. Congressional action to tighten restrictions on foreign investment in the United States could invite similar action abroad, limiting opportunities for outward investment by American companies. This is not an idle concern:

- Last summer, French politicians reacted to mere rumors of PepsiCo's potential interest in acquiring Danone, the French yogurt and water company. French Prime Minister Dominique de Villepin made the extraordinary statement that "The Danone Group is one of the jewels of French industry and, of course, we are going to defend the interests of France." The French government

[1] Stuart E. Eizenstat, was President Carter's Chief White House Domestic Policy Adviser, and in the Clinton Administration was U.S. Ambassador to the European Union, Under Secretary of Commerce for International Trade, Under Secretary of State for Economic, Business & Agricultural Affairs, and Deputy Secretary of the Treasury, as well as Special Representative of President Clinton on Holocaust-Era Issues. He heads the international trade and finance practice at Covington & Burling, and has and continues to represent U.S. and foreign companies before CFIUS. Mr. Eizenstat is also co-chair of the European American Business Council, an organization with 58 American and European businesses committed to an open investment climate, and is appearing on the Council's behalf.

has followed up by publicly opposing the purchase of the steelmaker Arcelor by Mittal Steel, and pushing for the recent merger of the water utility Suez and the national gas company GDF to pre-empt an Italian energy company from acquiring Suez. Most recently, the de Villepin's government has proposed legislation establishing a list of eleven "strategic sectors" that will be shielded from foreign investment.[2] It is hard to see how yogurt is a strategic industry.

- France is not the only European nation engaging in such protectionist machinations. Since the beginning of the year, the Spanish government has prevented a German company from taking over a Spanish energy concern; the Polish government has blocked Italians from acquiring several Polish banks, while Italy has done the same for some time; and Germany continues to insist on its "Volkswagen law,", which insulates its auto industry from foreign competition.[3]
- In his State of the Union speech, President Putin called for a new law to protect "strategic industries" in Russia, including the oil sector. A draft of that law is expected to be put forward shortly.
- The Canadian Parliament is now considering amendments to the Investment Canada Act to permit the review of foreign investments that could compromise national security.
- China continues to restrict investment in a number of important sectors.

Permit me to give you a recent, and more tangible, example in which a foreign government's proposed restrictions on U.S. investors seems to be directly linked to security commitments imposed by CFIUS on a company from that country. Specifically, the Indian government, recently announced its intention to impose extremely broad security restrictions on foreign investments in the telecommunications sectors. These security restrictions were announced alongside a proposal to raise the ceiling on permitted foreign investment in the telecommunications sector, from 49% foreign ownership to 74% foreign ownership. In this case, it appears that the Indian government's proposed new restrictions were provoked in part by the experience of an Indian company, VSNL, which itself had a difficult time clearing CFIUS, and ultimately signed a Network Security Agreement related to one of its investments in the United States. In a letter publicly filed with Indian regulatory officials, VSNL wrote, "[we] propose that TRAI [the Indian regulatory authority] consider whether, in the interests of a level competitive playing field as well as regulatory symmetry, a similar security agreement process should exist in India for U.S. and other foreign carriers who desire a license to provide domestic or international services." VSNL further wrote, "While we certainly do not recommend that the Indian Government force foreign carriers to wait as long as VSNL has been made to wait for its license to enter the U.S. telecommunications market, we believe that the existence of these agreements in India and other countries will have a beneficial result by moderating the willingness of the U.S. government to impose burdensome conditions and requirements in their own security agreements, which of course hinder the ability of VSNL and other foreign carriers to compete fairly against U.S. carriers who are not subject to such requirements."[4]

Mr. Chairman, this letter proves the old maxim, "what goes around, comes around." We should never compromise national security, but Congress needs to realize that restrictions imposed on foreign companies in the United States will invite similar restrictions in foreign countries against U.S. companies. We need to be careful not to encourage other countries to impose restrictions that hurt American investors, nor should we chill the foreign investment that is so vital to the American economy.

Comments on H.R. 5337

I believe that the fundamental principle that should guide Exon-Florio reform is to ensure that CFIUS has all the tools and all of the time it needs to identify, scrutinize, and act upon the tough cases that present real national security issues, while ensuring that CFIUS has the necessary flexibility to recognize and efficiently process the majority of transactions that present no national security concerns. Ensuring that the overwhelming majority of transactions that do not raise national security issues can obtain Exon-Florio approval in 30 days is essential to avoid discriminatory treatment of foreign investors that would chill the investment our economy needs. American companies that make acquisitions need to secure antitrust approval under the Hart-Scott-Rodino Act, which also has an initial 30-day review period. Preserving two 30-day, parallel regulatory processes for both domestic and for-

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[2] *See* Patrick Sabatier, *Globalization a la carte,* Int'l Herald Trib., May 18, 2006.

[3] *Id.*

[4] Edward M. Graham and David M. Marchick, *US National Security and Foreign Direct Investment* 164 (2006).

eign acquisitions of U.S. companies ensures that foreign bids for U.S. companies are not discounted or ignored because of longer regulatory timeframes.

With a few adjustments, I believe that the CFIUS reform bill currently before the House Financial Services Committee, and that you co-sponsored, Chairman King, is the right way to reform Exon-Florio. The bill will implement structural reforms that address Congress's DP World-related concerns, restore confidence in the integrity of the CFIUS process, and reassure our global allies and partners that America is still open for business. Specifically, the bill facilitates identification of the tough cases by requiring CFIUS to consider additional factors during the review and investigation process, including whether a transaction has a security-related impact on critical infrastructure.

The House bill ensures that CFIUS will have the information it needs by giving the Committee greater investigatory authority. It defines the appropriate role of the intelligence agencies as an information resource, as opposed to a policy role. It enhances accountability for both CFIUS and the transacting parties by requiring certification of notices, reports, and decisions, and by establishing procedures for control and continued monitoring of withdrawn transactions. The bill ensures CFIUS is focused and competent to fulfill its mission by maintaining Treasury leadership of the Committee and authorizing the designation of competent agencies to take the lead on particular transactions: investments in critical infrastructure, for example, should principally be reviewed by the Department of Homeland Security. It maintains voluntary, as opposed to mandatory, notices. And it enhances transparency of the process by requiring CFIUS to collect and share more data, on an aggregate basis, through semi-annual reports to Congress, without creating unduly burdensome notice and reporting requirements that will politicize the process or risk leakage of business proprietary data. Congress needs to recognize that imposing excessive reporting requirements on CFIUS may actually complicate and distract CFIUS's focus from its principal mission of protecting U.S. national security through efficient review of foreign investments. The House bill's provisions represent important substantive and procedural improvements to the CFIUS process.

I do, however, have several concerns with specific provisions of the bill in its current form.

First, I understand the dynamics that led to the provision in the bill tightening the so-called "Byrd Amendment" for government-owned companies, particularly in the wake of the Dubai Ports Controversy. In my view, acquisitions by some government-owned companies raise unique national security issues and should receive enhanced scrutiny. U.S. companies are put at a competitive disadvantage against those government-owned companies that receive subsidized or concessional government financing. But not all government acquisitions create the same national security risk, and CFIUS should have discretion to distinguish between transactions that raise issues and those that do not. Companies affiliated with friendly governments which operate by market principles should not be arbitrarily lumped together with government-owned firms that otherwise raise substantial national security concerns. Optimally, all transactions that involve parties that operate on market principles and do not raise national security concerns should be considered by CFIUS in the same, existing 30 day review period. But if political realities are such that mandatory investigations of all foreign government-controlled transactions are necessary, I think it would be useful for Congress to clarify the intent of the legislation, perhaps in its report, that CFIUS can allow such acquisitions to go straight to the investigation stage and that CFIUS has discretion to close the investigation if no real issues exist or if any national security concerns have been mitigated.

Second, I also understand Congress's desire for additional accountability. But the requirement that the Secretaries or Deputy Secretaries of both the Treasury and Homeland Security personally approve and sign each and every review and investigation may create bureaucratic delays and impede CFIUS's ability to efficiently implement Exon-Florio. Perhaps the Congress could explore ways to require a high-level sign-off for transactions that raise real national security issues, while allowing an Undersecretary or Assistant Secretary to approve other transactions. From my own experience in public service, very important decisions are regularly made at the Undersecretary and Assistant Secretary level.

Third, CFIUS should never act if the Director of National Intelligence does not have adequate time to collect and analyze intelligence relating to a particular transaction. But again, the policy underpinning CFIUS reform should be to create a process that is tough enough for the complex cases and flexible enough for the easy cases. Some intelligence reviews might take 30, 45 or even 60 days. Reviews of companies that frequently go through the CFIUS process could simply be updated in a matter of days. But by creating a 30-day minimum for the DNI's intelligence review, and requiring that the DNI review be completed no less than 7 days before

the end of the initial CFIUS review period, the bill establishes a de facto 37 day process, even for transactions that raise no national security issues. Time is money; the longer a deal takes to approve, the more it costs and the more variables can affect the underlying transaction. I am confident that a provision can be fashioned to allow the DNI to do his job well without slowing down the entire process with a requirement for extended analysis of cases that present no national security concerns.

Finally, I believe the existing review and investigation time periods are appropriate for CFIUS to do its work. But if some extension is inevitable, it is much preferable to add additional time to the end of the investigation period, as the bill does, rather than extending the process after the initial 30-day period. Thus, the Senate Banking Committee bill would extend the initial 30 day review period if only one CFIUS agency requests it. This House bill would allow an extension of the 45 day investigation period if requested by either the President or two-thirds of the agencies involved in the CFIUS process. Generally, CFIUS can determine in the initial 30 day period if a transaction is likely to cause significant concerns from a national security standpoint.

Protection of Critical Infrastructure

The final subject I would like to address is protection of "critical infrastructure." I know that this is a topic that this Committee has a particular interest and expertise in, and that "critical infrastructure" has also become a significant issue in the debate over CFIUS reform. It will continue to be an important subject as any House bill moves into conference committee work with the Senate. The focus on protection of critical infrastructure is a relatively new and evolving national security objective, and may have different implications in different regulatory contexts. CFIUS needs the flexibility to focus its scarce attention, time, and resources on those foreign direct investments that create real national security risks. Forcing CFIUS to scrutinize every foreign investment in critical infrastructure will compromise CFIUS's ability to focus on the transactions that matter from a national security perspective. Three different approaches have been proposed with respect to the protection of "critical infrastructure."

H.R. 4881, offered by Chairman Hunter and other Members, would essentially prohibit foreign investment in critical infrastructure unless the particular investment is put in a "US Trust" run by American citizens and walled off from the foreign parent. If the Department of Homeland Security's (DHS) current list of "'critical infrastructure" activities were used, close to 25 percent of the U.S. economy would be off limits to foreign investment under this proposal. This bill is the mirror image of Prime Minister Villepin's legislation shielding 11 sectors of the French economy from foreign investment, which I described earlier. I believe that the last thing we need to do with CFIUS reform is emulate the French government and move our economy closer to the French statist model.

- The Senate bill, offered by Chairman Shelby and Senator Sarbanes, requires that foreign investments in critical infrastructure go to the "investigation" stage unless CFIUS determines that "any possible impairment to national security has been mitigated by additional assurances during" the review period. This approach creates a de facto presumption that all foreign investment in critical infrastructure creates a security risk because it must go to an "investigation" unless the risk is mitigated. In my view, some investments in critical infrastructure do create real national security risks; but other investments should not even be filed with CFIUS because they create no risk whatsoever.
- The bill you co-sponsor, Mr. Chairman, requires CFIUS to consider whether a "covered transaction has a national security-related impact on critical infrastructure in the United States" as a factor in its deliberations. I think you have it right. It should be a factor CFIUS should consider. How significant a factor it should be will vary on a case-by-case basis.

One of the reasons that your approach makes sense is because the focus on protection of critical infrastructure is a relatively new and evolving security objective. In contrast to the area of foreign investments in the defense sector, an area where DOD has extensive institutional experience and protocols dealing with what aspects of foreign investments present security issues (and which do not), "critical infrastructure" remains a relatively fluid regulatory concept. Additional work needs to be done, in my view, to define what exactly is meant by critical infrastructure. For example, the Patriot Act defines "critical infrastructure" to be

"[S]ystems and assets, whether physical or virtual, so vital to the United States that the incapacity or destruction of such systems and assets would have a de-

bilitating impact on security, national economic security, national public health or safety, or any combination of those matters."[5]

This definition creates a high threshold and implies a relatively narrow list of assets that would "have a debilitating effect" on security. By contrast, the Department of Homeland Security has identified twelve extremely broad sectors that it considers to be critical infrastructure, including agriculture and food, water, public health, emergency services, the defense industry, telecommunications, energy, transportation, banking and finance, chemicals, postal services and shipping, and information technology.[6] This definition may work for physical protection of critical infrastructure; it does not work for foreign investment considerations.

But beyond specifying these sectors, the Department of Homeland Security has not publicly identified the types of companies, or even subsectors, for which acquisition by a foreign firm would be deemed a high risk to national security. Nor has anyone explained why foreign ownership of these sectors would necessarily create a national security risk. Thirty percent of value added in the U.S. chemical sector is already produced by U.S. affiliates of foreign owned firms. In the energy sector, it would seem fairly clear that foreign acquisitions of US nuclear energy companies should be reviewed by CFIUS. What about foreign acquisitions of US firms operating in other segments of the energy sector? Many foreign companies own electric distribution companies. Do these raise national security issues? What about foreign ownership of a wind farm? Similar questions certainly apply in the other sectors, including the food, transportation (including ports), and financial sectors, where foreign ownership of US firms is common.

In my view, the Administration and Congress should work together to determine how best to protect critical infrastructure, regardless of who owns a particular company. Security policies and guidance could be developed on a sector-by-sector basis. A baseline level of security requirements should be established. If there are particular national security issues associated with foreign ownership in a particular asset, CFIUS is well equipped to mitigate that risk—or block the investment.

In sum, until policies and doctrines with respect to critical infrastructure have been further developed, it is both unsound and unnecessary to do anything beyond adding "critical infrastructure" as a factor that CFIUS should consider. Creating an outright ban on foreign investment in "critical infrastructure" would both harm job creation and undermine national security, because foreign investment in these sectors has both increased research and development and spurred additional competition and innovation. Further, it would be unwise to create a presumption that foreign investment in critical infrastructure creates a national security risk. Rather, CFIUS should be given the discretion to deal with these issues on a case-by-case basis, examining both the trustworthiness of the acquirer and the sensitivity of the asset being acquired.

Conclusion

Let me close by applauding your contribution to this reform process, Mr. Chairman and Ranking Member Thompson, along with the efforts of so many of your colleagues. Doing Exon-Florio reform right is critically important. The open character and continued vibrancy that define our national economy is at stake. These are among the fundamental characteristics of our great nation, which I know this Committee is dedicated to securing. The bi-partisan bill that you are co-sponsoring is the correct approach to the problem at hand. I am grateful for the opportunity to testify and look forward to working with you as you deliberate on this important subject.

Mr. ROGERS. I thank both of you. Those are very good opening statements.

I would make the point that I agree wholeheartedly with your observation about the French. I don't think we ought to be emulating France in anything. But I do want to talk a little bit about the length of the review period.

In the previous panel, you heard Mr. Lowery talking about how there was a relatively small universe of folks that brought these

[5] Section 1016(e) of the Patriot Act, codified at U.S.C. 5195c.

[6] *See* National Strategy for the Physical Protection of Critical Infrastructure and Key Assets, (February 2003), *available at* www.whitehouse.gov (last visited May 20, 2006); HSPD–7 (December 2003), *available at* www.whitehouse.gov (last visited May 20, 2006).

petitions, and that they had been encouraging them to pre-file early. What do you think we can do to facilitate this pre-filing?

Both of you have addressed this length of review as an issue. I would ask you, Mr. Eizenstat, what do you think we can do to encourage pre-filing?

Mr. EIZENSTAT. It is already being encouraged, but certainly because all those representing companies before the CFIUS process now realize that if they don't go through a pre-filing formula where they sit down before they file to find out where the kinks are, where the problems are, whether the transaction is likely to pass muster, they know that they face in this current environment the likelihood of rejection or at the very least going to the 45-day period.

I certainly would have no opposition at all, quite the contrary, to committee report language or even bill language which would encourage companies to do this pre-filing so that you don't jam the CFIUS process and force them to act within 30 days. The fact is, as Mr. Baker and Mr. Lowery said, that already most transactions go through a much longer pre-filing process before the first 30-day review process. But if you wanted to reinforce that and encourage it, it certainly would be a sound thing to do.

Mr. ROGERS. In your opinion, if we did put in some bill language that required a pre-filing period, what would you think the appropriate time length would be?

Mr. EIZENSTAT. I am not sure I would require a pre-filing period, because then you are adding additional time. If you give 30 days or 45 days, then the CFIUS process will take that long, and you don't want to, again, have elongated processes for most of these cases which don't really involve national security. So I would simply encourage the pre-filing with sufficient time for the intelligence agencies to make an initial determination.

Mr. ROGERS. What is a sufficient time for the DNI?

Mr. EIZENSTAT. It can vary. I think sometimes 30 days; sometimes 45 days; sometimes 15 days. It depends on the complexity of the issue. But again, what is happening now is many transactions are being filed simply out of fear that with the current political environment, the transaction is going to be turned down and unscrambled later on national security grounds when there is no national security interest.

So rather than put a specific time, I would simply encourage the pre-filing to give the agency sufficient time before the 30-day review process starts.

Mr. ROGERS. Ms. Markheim, I want to talk to you for a minute about congressional notification. In a recent Web note you coauthored with James Carafano, you argue that any congressional notification prior to approval of the acquisition would "politicize the approval process."

In the intelligence community, select Members are briefed on highly sensitive programs. What would the downside be to having a similar process in place whereby the chairmen and ranking members from select committees were briefed prior to approval? Your thoughts on that?

Ms. MARKHEIM. The concern that we have with that is fairly simple. These are business transactions. And frankly, at time it might

be the case that American firms, a U.S. firm has lost out in the fight to take over that transaction or what have you. By incorporating Congress into the process, by pre-notifying them or including them along with the investigation, that opens the door to allowing information, proprietary data, what have you, to potentially be leaked or be used in a way that would then be counterproductive to the most effective result for what we would hope for from foreign investment coming in.

Our concern wasn't so much that no one should be pre-notified. Our concern was that the breadth of or the amount of notification would extend such that it could actually cause a threat to allowing the investigation to be conducted appropriately. If the Congress were to become a part of the process, ideally the members that would be notified of this and briefed on this would be kept to an extreme minimum.

Mr. ROGERS. That is my point. If it was chairmen and ranking members, that is pretty restrictive of select committees. What I found striking is you use the word that it would "politicize" the process. In my view, if that practice had been used in this Dubai Port situation, you would have defused a political problem.

Ms. MARKHEIM. Aside from the Dubai Ports issue, in general this could politicize the problem simply because members are bringing in their own interests and their own incentives that are part of their agenda. By opening this door to allowing their input into the investigation, that might taint the overall objective way the CFIUS does handle investigations now. I am not saying that it would, but that it could. This is looking at the process over time, not just today and in one instance, but over all types of cases that could come up.

So we could see down the road a reversal of what happened when we saw Pepsi Company looking at buying Danone in France. What if this were reversed? If there was some sort of concern of a French company buying Pepsi from America would be a problem, that could become an issue that it wouldn't necessarily become had CFIUS remained external from Congress.

Mr. ROGERS. I thank you. My time has expired.

The Chair recognizes the Ranking Member of the Full Committee, Mr. Thompson of Mississippi.

I just went blank. I am looking at your name. Thank you.

Mr. THOMPSON. It might be that French wine.

[Laughter.]

Mr. ROGERS. That is right.

[Laughter.]

Mr. THOMPSON. Thank you both, witnesses.

Mr. Eizenstat, you talked a little bit about how it might be necessary to have a parallel process going for the process of review of foreign and domestic acquisitions. Do you foresee the time, especially for foreign transactions, that we might need to provide a little more time for that process to take place?

Mr. EIZENSTAT. No, sir, only if there is a national security threat and it goes into the second phase. Otherwise, the 30-day period should be the same. Under the Hart-Scott-Rodino, a domestic company has to go through that process with the Justice Department to see if there is any competition issues, any antitrust issues.

The CFIUS process has been structured to try to give foreign companies that same window in most cases. In 90 percent, 95 percent of the cases, Congressman Thompson, that is sufficient. And that 10 or 15 percent where there is a sensitive issue, the additional 45 days is appropriate.

I want to just make another point, if I may. With our current account deficit, that means that we are sending a tremendous amount of excess dollars abroad, petro-dollars to the Arab countries, additional dollars to the Chinese. What are they going to do with those dollars? There are two things they can do with them. One is they are investing them in treasury bills, and that helps lower our interest rates.

It also means, however, that huge percentages of our debt are held by foreign countries that may decide to unload them at some point. It is far better to have them recycle those excess dollars that we are sending abroad for everything from T-shirts to cars, back into fixed assets in the United States where it actually creates jobs. That is why we have to be so careful not to have different processes for foreign acquisitions of U.S. assets, except again in the rare situations where there is a national security threat, than domestic acquisitions.

Mr. THOMPSON. But you do see that the public would want to know that there is an assurance that this process takes into consideration any extenuating circumstances on the acquisition itself. I am talking about the Dubai dilemma that more or less precipitated a lot of discussion here on the Hill, and whether or not the process that was used in that situation provided as much transparency as was needed, because when questions started bubbling up, it was not as clear-cut in the eyes of the public as one would want.

I think for whatever reason we have to have a process that is thorough and complete, but also has to stand the scrutiny of the public at some point. I think part of it is the public felt that the process was a little less transparent than perhaps one would want.

Mr. EIZENSTAT. You are quite right. I think that the Treasury and other departments, and I say this in a completely bipartisan way because I sat in the same seat that they did, and I know the pressures that they were under. I think they realized that they didn't do the kind of base-touching that they should of, and that had they done so, and had they explained the transaction; had they explained that this was not the ownership of a port; it was the ownership of a terminal, and done a more thorough education process, that we wouldn't be sitting here today.

So yes, the public has a right to be concerned about national security. The current CFIUS process provides for that. I think with the kinds of additional provisions that you have put in here, by and large in the House bill, you are giving an additional assurance without at the same time shutting down foreign investment in a way that I fear the Senate bill will do.

Again, I think even here, as I have suggested with government-owned companies, don't consider all government-owned companies the same. If a British company is owned by the government, or from another ally, and they are run purely by private market principles, they shouldn't be necessarily automatically extended into the 45-day period unless there is a real national security threat. So

I think you are headed in the right direction. You are going to give more transparency to the process.

But I want to say, as Ms. Markheim said, one has to be very careful about the notice requirements. What is good about the House bill is the notice requirements are given after the deal is done, so you could judge and then grill the agencies if they didn't do their job. But by doing it, as the Senate bill does, before the deal, what it will encourage, and I can assure you as soon as I am sitting here that it will, the losing bidder in an acquisition will go to his member of Congress, his governor, and lobby you to try to block that deal. That politicizes the investment process in ways we don't want.

Mr. THOMPSON. Thank you very much.

I yield back.

Mr. ROGERS. We need to ask for unanimous consent to bring up Representatives Blunt and Maloney out of order. They are going to be out of here before 4 o'clock. I know we would like to hear their statements and ask them some questions before they have to leave. So I would ask unanimous consent to call them up out of order.

Mr. EIZENSTAT. Should we stay, or are we excused?

Mr. ROGERS. No, you are not excused. We would like for you to move back one row. We want to ask you some more questions.

There being no objection, the next panel is called up.

Thank you. The Chair now calls on Mr. Blunt from Missouri for any statement he may have.

STATEMENT OF THE HONORABLE ROY BLUNT, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF MISSOURI

Mr. BLUNT. Mr. Chairman, thank you, and thank you for the consideration the committee, based on the other schedule we are on, and certainly I am appreciative of the assistance we are all getting from the testimony you heard and the questions being answered by the people who were at the table before and will be again.

I am also very pleased to be here with Carolyn Maloney, who is the ranking member on the subcommittee in Financial Services. Ms. Maloney, along with the chairman of that subcommittee, Ms. Price, and Mr. Crowley and I, were the principal sponsors, are the principal initial sponsors of this legislation, but Chairman King and Chairman Hoekstra and others have joined us. I certainly appreciated the positive comments made about our legislation by the earlier witnesses.

Obviously, this is a process where we want to have input from outside. I do think that the legislation we have filed is a good response to what we all saw happen, and I think was well-explained again by the earlier witnesses, in the Dubai Ports situation. I thought particularly at that time when the chairman of this committee, along with the president, appeared to learn the information he got from the news media that there needed to be a new look at this. Obviously, in a post-9/11 world, the world has changed. At the same time, protectionism is not the answer, getting into a situation where other countries decide they have to reciprocate by making it

difficult for American companies to invest in their country is not the answer.

I think that the work that Chairman Price and Congresswoman Maloney and Congressman Crowley and I have done is a reasonable response and meets the needs of a post-9/11 world without providing the troubles that we could get into if we go further than we need to to secure the country.

Let me make three or four points here, and then I am sure we want to hear from Carolyn and have some time to answer questions.

I think, as has been stated earlier today, our legislation really clarifies the so-called "Byrd rule" that was in CFIUS. I do think there is a difference in a government-owned entity and that that 45 extra days is a reasonable thing to expect. Government-owned entities have many advantages in an acquisition. The extra 45 days may be a slight disadvantage to them, but I think generally they have advantages and this 45 days will not offset those advantages, and clearly would have provided the additional time that Dubai Ports World did not have or that deal didn't take.

Secondly, what happened exposed a lack of accountability. I think because of that, we maintained the structure where the secretary of the treasury is the chairman of CFIUS, but we have added to that as the vice chair the secretary of homeland security. We have required that that be delegated no lower than the deputy secretary level, so this is clearly a high-level of accountability in those two critical departments, and both of those individuals or their designee have to sign-off on the CFIUS process as it develops.

We develop a regular order process for notifying CFIUS records and we record and monitor withdrawals from the process. Our legislation develops a process for any needed extension of an investigation. You have a process to extend an investigation. If there is an investigation, any member of the CFIUS panel can require the decision be made by the president. Any member on that panel can say, we don't agree with the decision that has been made after the investigation, if that was triggered during the review, and the president has to look at this. I don't think that will happen often, but clearly it is important that that capacity be there to happen.

Our legislation establishes a formal analysis by the director of national intelligence for every transaction. There is a formal method for tracking and enforcing post-transaction compliance, where we have asked mitigation to occur. This legislation for the first time really develops a system where you follow that mitigation and see that it did occur. We give formal enforcement authority for compliance to the agreements in a way that allows that the committee members of the relevant committees keep track of the general trend.

I do, as Mr. Eizenstat mentioned earlier, the idea that this is in virtually all cases post-decision, but very responsive to the committees so the committees have an opportunity if CFIUS is headed in the wrong direction to say, look, we don't like the report that we received; we question these specific moves you are taking; and we want to have that explained to us further. I think that is the right way to approach that.

Congressional oversight is more important than a congressional veto. Involving the Congress too early in this process I think would be a mistake, and I think the nature of that mistake has been well explained by the earlier panel already today.

Lastly, the CFIUS process post-Dubai Ports World will create a degree of certainty that was not there. This bill creates statutory protection of proprietary business information and certainly has the potential to see an extended investigation when that is necessary. Chairman King and Mr. Thompson were both actively involved, particularly Chairman King, before the bill was finally filed. We benefited from having that input and hope that we continue to have that kind of a relationship with your committee as this bill moves forward.

Thank you, Mr. Chairman.

[The statement of Mr. Blunt follows:]

PREPARED STATEMENT OF HON. ROY BLUNT

Many Americans were outraged when they first learned of the Dubai Ports World (DPW) deal to take over the management of commercial operations at six ports along the Eastern seaboard and Gulf of Mexico. CFIUS, the Committee on Foreign Investment in the United States, an inter-agency panel designed to review and investigate mergers and acquisitions from foreign investors taking America's national security into account, approved the Dubai Ports World acquisition on behalf of the Bush Administration, yet no cabinet officer was willing to be held accountable for the approval. Equally concerning, the President learned of the deal through press reports rather than agency briefings. No one in Congress seemed to have any answers either. When Homeland Security Committee Chairman King was caught off guard by the lack of coordination with Congress, it became clear to me that the CFIUS process needed to be updated. As you might expect, Congress reacted to their constituents concerns and voted to scuttle the deal by forcing a vote on a free standing amendment to the Emergency Supplemental Appropriations Act.

The attacks of September 11th changed the world we live in. Any reform in CFIUS must take this into account. Congress has no more important duty than to ensure the security of our nation. However, protectionism is not the answer. Chairman Pryce, Congresswoman Maloney, Congressman Crowley and I have introduced a responsible bipartisan bill which addresses the problems exposed in the CFIUS process during the Dubai Ports World incident. Striking the right balance between protecting America from those who wish to harm us, while preserving our open engagement with the global economy was our goal. Avoiding unintended consequences by not creating new burdens for normal business acquisitions or new diplomatic or business problems for the United States is equally important.

H.R. 5337 deals specifically with the main political issues the Dubai Ports World incident exposed.

First, it reaffirms Congressional intent relating to the "Byrd Rule", which mandates a 45-day investigation for companies controlled by foreign governments. Any state owned enterprise will trigger an automatic CFIUS investigation. DPW a United Arab Emerites owned enterprise falls into this category. However, due to the Byrd loophole, the acquisition failed to trigger a more intensive investigation by CFIUS. Blunt, Pryce, Maloney, Crowley would solve this problem.

Secondly, DPW exposed a lack of accountability. It was widely reported that President Bush, and Secs. Snow, Rumsfeld and Chertoff were all unaware of the CFIUS approval of DPW. H.R. 5337, our legislation establishes CFIUS in statute and adds the Secretary of Homeland Security as vice-chair. Additionally, the signature of the chair (Secretary of Treasury) and vice chair are required for all decisions. This signature requirement cannot be delegated below the Deputy Secretary level, ensuring accountability. Blunt, Pryce, Maloney, Crowley develops a regular-order process for notifying CFIUS; records and monitors withdrawals from the process; develops a process for any needed extension of investigation (roll-call votes of 2/3 of Committee); and after investigation sends the decision to the President with the dissenting vote of any single Committee member.

Our legislation establishes a formal analysis by the Director of National Intelligence of every transaction. If for any reason the DNI is unable to complete its

threat assessment within the 30 day review process, a 45-day CFIUS investigation is triggered.

Additional requirements relating to CFIUS accountability include:

- A formal method for tracking and enforcing post-transaction compliance with mitigation agreements and for tracking any post-transaction changes in such agreements.
- Gives formal enforcement authority for compliance with such agreements to Committee member with greatest expertise in subject.
- Assures an objective review of a proposal, followed by certain notification of responsible presidentially-appointed officials.

Thirdly, DPW highlighted the lack of Congressional oversight in the CFIUS process. I strongly feel that the CFIUS process should not be politicized by a Congressional veto. However, certain committees and Members need to be aware of the impact of foreign investment as it relates to our national security. H.R. 5337, ensures that notices be sent to bipartisan Members of leadership and to every committee with jurisdiction over any aspect of a transaction after each investigation. Any Member receiving such notice may request a classified briefing on the transaction. Blunt, Pryce, Maloney, Crowley requires thorough and regular (semi-annual) reporting to Congress on activities of CFIUS, including trend analysis of foreign investments and of industrial espionage or attempts to control a type of asset or sector.

Lastly, the CFIUS process post DPW has created a lack of certainty and predictability for our potential global business partners. More than ever it is important that we provide clarity and regular-order certainty in consideration of applications. H.R. 5337 does exactly this by mandating statutory protection of proprietary business information and certainty on the potential for any extensions of CFIUS investigations.

In sum, H.R. 5337 would have prevented the political fallout associated with the Dubai Ports World fallout.

1. DPW a state owned enterprise would have automatically triggered an intensive 45 day investigation by the CFIUS panel. Unfortunately, no such investigation ever took place.
2. As Chair and Vice Chair, Secs. Snow and Chertoff would have been required to sign a certification that CFIUS completed and approved of the DPW deal. The DPW acquisition only rose to the assistant secretary level.
3. Had just one CFIUS member expressed concerns related to the DPW transaction, relevant congressional leaders and Committee Members would have received notification of the approved DPW deal 15 days prior to Presidential signature. This would have given Congress the ability to request classified briefings and learn of the intricacies of the transaction before jumping to conclusions. In the case of DPW, every Member learned more from press accounts than from the administration.

Chairman King, thank you for taking a leadership role on this issue. I appreciate your support of H.R. 5337. Your contributions have made it much stronger legislation. I would also like to thank Ranking Member Thompson. It would be easy to allow CFIUS Reform to become a politically charged issue. It is my hope to continue to work with the Committee on Homeland Security in a bipartisan fashion to pass a bill the United States House of Representatives can be proud of.

Mr. ROGERS. I thank the gentleman from Missouri.

The chair now recognizes the gentlelady from New York, Ms. Maloney.

STATEMENT OF THE HONORABLE CAROLYN B. MALONEY, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF NEW YORK

Mrs. MALONEY. Thank you, Mr. Chairman and Ranking Member Thompson, for inviting us to testify before the committee today on the bipartisan CFIUS bill that we have introduced with Majority Whip Blunt and Representatives Price and Crowley.

As a ranking member on the Financial Services subcommittee that has jurisdiction over the CFIUS process, we have held three hearings to date on it. At these hearings, we have heard from the administration, the business community, and experts in academia

about the need to reform the process and their suggestions on how to accomplish it.

At our hearings, especially the first hearing that focused on the Dubai Ports World transaction, it was astonishing how tone-deaf the CFIUS board was as they reviewed national security concerns related to this transaction. The fact that CFIUS did not consider critical infrastructure as a factor potentially impacting national security certainly does not represent a post-9/11 view of the world and backs up the GAO's prior finding that CFIUS was too narrowly defined in what constitutes a threat to national security.

In March following our first hearing, I introduced H.R. 4915. The Committee on Foreign Investment in the United States Reform Act. This legislation enacts reforms suggested by the GAO in a report they prepared before the Dubai Ports problem. So they were very concerned about the problem even before Dubai Ports.

Following the introduction of this legislation, I was very pleased to work in a bipartisan manner with the chair of the committee, Deborah Price and Mr. Crowley and Mr. Blunt, on H.R. 5337, which is under consideration today. This legislation incorporates many of the provisions included in my first bill and the GAO report.

I believe it is a very strong common sense approach that makes the process more transparent and accountable, while protecting our national security. I am pleased to note that one of my colleagues from New York, Chairman King, has joined as a cosponsor of this legislation. He has been deeply involved in the post-9/11 recovery of New York and the steps that we have taken as a state to become more secure, and 30 of our colleagues have joined us on this bill.

The remainder of my testimony really went through the various provisions that ensures national security needs are met and restores accountability and transparency, and the bill improves congressional oversight, but my colleague Mr. Blunt went through those points. I don't think I should go through them again. I will put them into the record.

Dubai Ports surely showed that we need to reform the CFIUS process, and our legislation is a balanced and deliberative piece of legislation that will examine the national security risks of all transactions, while making sure we do not chill foreign investment in the United States. I believe that the bill strikes an appropriate balance of protecting our national security, while increasing transparency and accountability in the process.

So I thank the committee for their concern and for having us today.

PREPARED STATEMENT OF HON. CAROLYN B. MALONEY

I would like to thank Chairman King and Ranking Member Thompson for inviting me to testify before the committee today on the bipartisan CFIUS (Committee on Foreign Investment in the United States) reform legislation that I have introduced with Majority Whip Blunt and Representatives Pryce and Crowley.

As Ranking Member of the Financial Services Subcommittee on Domestic and International Monetary Policy, Technology and Trade, we have held three hearings into the CFIUS process. At these hearings we have heard from the Administration, the business community, experts and academia about the need to reform the CFIUS process and their suggestions on how to accomplish this.

At our hearings, especially the first hearing that focused on the Dubai Ports World transaction, it was astounding how tone-deaf the CFIUS board was as they

reviewed national security concerns related to this transaction. The fact that CFIUS did not consider "critical infrastructure" as a factor potentially impacting national security certainly does not represent a post-9/11 view of the world and backs up the GAO's prior finding that CFIUS can too narrowly define what constitutes a threat to national security.

In March, following our first hearing, I introduced H.R. 4915, the Committee on Foreign Investment in the United States Reform Act. This legislation enacts reforms suggested by the Government Accountability Office (GAO) in a report they prepared ***before*** Dubai Ports World was a household name.

Following the introduction of this legislation, I was pleased to work in a bipartisan manner to develop H.R. 5337, the Reform of National Security Reviews of Foreign Direct Investments Act. This legislation incorporates many of the provisions included in H.R. 4915 and the GAO report.

H.R. 5337 is common sense legislation that makes the CFIUS process more transparent and accountable while protecting our national security.

Specifically, H.R. 5337:

Ensures that National Security Needs are met by:

- Mandating a 45-day investigation for all transactions that would result in control by a foreign government.
- Adding the Department of Homeland Security as the vice-chair of the CFIUS board.
- Establishing a formal analysis by the Director of National Intelligence of every transaction. This legislation gives the DNI 30-days to complete his review, but requires the review to be completed 7-days before the end of the 30-day review.
- Expanding the definition of homeland security by requiring the CFIUS board to consider "critical infrastructure" as a factor in any review.

This legislation also restores accountability and adds transparency to the process by:

- Establishing CFIUS in statute.
- Requiring the signature of the chair and vice chair on all decisions and only allows this authority to be delegated to the deputy secretary at each agency.
- Requiring that withdrawal requests are in writing and that they receive the approval of the Chair in consultation with the Vice Chair.
- Establishing a formal method for tracking and enforcing post-transaction compliance with mitigation agreements and for tracking any post-transaction changes in such agreements.
- Providing specific funding to the process ($10 million over four years) to make sure that reviews are not abbreviated for lack of resources.

This legislation also improves Congressional Oversight by:

- Requiring notice to bipartisan leadership and to every committee with jurisdiction over any aspect of a transaction after each investigation.
- Allowing any Member receiving such notice to request that his or her chamber receive a classified briefing on the transaction.
- Requiring thorough and semi-annual reporting to Congress on activities of the Committee, including trend analysis of foreign investments and of industrial espionage or attempts to control a type of asset or sector. These provisions strike the appropriate balance between proper oversight while not politicizing the process.

As the Dubai Ports World deal showed, the CFIUS process is in desperate need of reform. It is our responsibility to ensure that this is done in a deliberative manner that will effectively examine the national security risk of all transactions, while making sure we do not chill foreign investment in the United States.

As I said at the beginning of my testimony, I believe H.R. 5337 strikes the appropriate balance of protecting our national security while increasing the transparency and accountability of the CFIUS process.

I thank the Committee for allowing me to testify, and I look forward to your questions.

Mr. ROGERS. I thank the gentlelady.

I would like to state for the record how much I appreciate the bipartisan nature in which you have worked on building this piece of legislation, and note that the Chairman of this Committee, the Full Committee Chairman, who is not present, Mr. King, is a cosponsor.

The fact that this Committee works on a regular basis in such a bipartisan nature, I know that everybody shares my view that it is good to see this come to us in this fashion.

I have no questions. I would be happy now to call on the Ranking Member for any questions he may have.

Mr. THOMPSON. Thank you very much, Mr. Chairman.

I, too, want to thank the two witnesses for bringing their piece of legislation forward. I just wish we could do more things in a similar manner.

I yield back.

Mr. ROGERS. The Chair recognizes the gentleman from Washington, Mr. Dicks.

Mr. DICKS. Do you want any questions or not? I am trying to get the read on this thing. I want to get back to Mr. Eizenstat. But let me ask you two quick things, since I can't resist.

You feel that there should be a 40-day additional investigation on all transactions where there is a foreign government involved. Shouldn't there be some threshold? Shouldn't there be some thought about if it doesn't have anything to do with national security, why would you have an additional 45-day investigation?

Mr. BLUNT. Yes. In response to your first question about whether we wanted questions or not, we only want easy questions and we will glad for Mr. Eizenstat and the other panel to take the hard questions.

As I said, Mr. Dicks, the government-owned entities I think are harder in many ways to evaluate the impact that that governmental entity has in this kind of transaction. I think they have advantages in the process and this may in fact be a slight disadvantage, but I think it is only that. Frankly, this is I think almost a minimal response to the concern about a government-owned entity running a port, even though it was a terminal facility rather than owning the port, as has well been explained.

I think it is a reasonable thing, and frankly as we look at the Senate alternative, I believe it is a step we need to take.

Carolyn, do you have a comment?

Mrs. MALONEY. I feel that when a foreign government buys the infrastructure of the United States, it should be held to a higher standard. The requirement really grew out of the Dubai World example where the committee made the decision that having the terminals owned and operated by a foreign government was not a national security concern.

I would think that everyone on your committee and certainly on our committee believed that it was a national security concern and should have been reviewed the additional 45 days. So it takes out any decision-making and requires a 45-day review.

Mr. DICKS. What if it was clearly not? What if it was something that was involved in an agriculture facility in Iowa? If I have an additional 45 days, you have two of these things every week and you have the top people in the government now you are going to make review them. I mean, there has to be some tie-in with national security, I think.

Mrs. MALONEY. Mr. Dicks, that is why the CFIUS process is maintained as a voluntary process so that if you are buying an ice

cream station, you obviously will not go before the CFIUS process. And 45 days is the maximum, not the minimum.

Mr. DICKS. So what you are saying is if the company thinks there is a national security implication, that is the only reason they would go through the CFIUS process.

Mrs. MALONEY. Yes. And also I think that businesses want certainty. By going through the CFIUS process, you have more certainty. They cannot dissolve it. They cannot revoke it. It is looked at. I think most businesses would like the stamp of approval from the government going forward with an investment.

I must mention something that came out in Financial Services that was a concern to many members, which was the advantage that foreign-owned governments have in buying infrastructure. In this case they did 20 percent more than anyone else because they were a government; they could afford to do it. And so there was a sense that there should be a higher standard for a foreign-owned entity buying infrastructure.

Mr. DICKS. What about critical infrastructure in the United States? How do you deal with that in your bill?

Mrs. MALONEY. We very loosely define it because it is changing every day. One of the things that we do is we kick up the decision-making to the secretary of homeland security and treasury so that they are making the decisions, not assistant secretaries which was the case in the prior CFIUS decision with Dubai World Ports.

Mr. BLUNT. I think the point to emphasize there, too, is that we specifically thought it was best not to try to define "critical infrastructure," that that has such changing potential that the CFIUS board itself, particularly a board that includes the director of homeland security, as well as a representative of the Department of Defense and the others on the CFIUS board, are better at any moment to determine what is the current critical infrastructure of the country than a Congress might be trying to determine how that definition will work in the future. I would hope that the flexibility stays with the CFIUS board as opposed to be firmly defined in legislation, as some would argue.

Mr. DICKS. Thank you.

Thank you, Mr. Chairman.

Mr. ROGERS. Do any other Members have questions for these Members?

The gentlelady from Texas is recognized.

Ms. JACKSON LEE. Thank you.

Let me thank both of the members for their presence and also acknowledge that I think in this business it is necessary to be tedious and meticulous. And so the timeframe that you have, or the framework that you have, may in some instances seem to be prolonged, but I think it is crucial. I particularly think it is important that you have a balance between the flow of commerce, but also our security.

The provisions that you have regarding inclusion of the Secretary of Homeland Security, does that then provide jurisdiction to the Homeland Security Committee?

Mr. BLUNT. I would assume it does. I am not an expert on jurisdiction and don't purport to be the parliamentarian, but I assume

it does and I think it would be valuable for this committee to have a level of jurisdiction.

Carolyn?

Mrs. MALONEY. I believe there should be a level of jurisdiction from the Homeland Security Committee.

Ms. JACKSON LEE. And with the provisions that deal with the signatures of both the Secretary of Treasury and Homeland Security, do you think those provisions are particularly secure enough? I don't know if it is going out of Financial Services, but will they last the passage to the floor? If this bill gets to the floor, will those provisions stay in tact the dual signatures of the chair and the vice chair as you have constructed it?

Mrs. MALONEY. I believe they will. Yes.

Ms. JACKSON LEE. Okay. Let me just thank you.

I do, Mr. Chairman, want to ensure Homeland Security jurisdiction. I think this is a very good effort, and I hope we will have the opportunity to mark it up and have the opportunity to support it.

I yield back. Thank you.

Mr. ROGERS. I thank the gentlelady.

I thank the Members for this effort. I appreciate your time, and I am glad we were able to get you out of here before your 4 o'clock deadline.

This panel is dismissed, and we re-call the second panel.

The gentleman from New Jersey, Mr. Pascrell, is recognized for any questions he may have.

Mr. PASCRELL. Thank you, Mr. Chairman.

Ms. Markheim, Article I, Section 8 of the Constitution of the United States says that the Congress shall have the power to lay and collect the taxes, et cetera, to regulate commerce with foreign nations and among the several states and with Indian tribes. The Constitution is a very important document to you, to me, to everybody here in this room. I carry it with me at all times.

But when I read your testimony, and particularly on page four, I am aghast. You say that this process is designed to be nonpartisan and nonpolitical because these decisions should not be based on political considerations, but solely on the merits of the transaction and appropriate security concerns consistent with the United States' policies. Congress does not receive comprehensive notification in any other administrative procedure. This is what you wrote.

I have to take exception with that because it would seem to me that we have relegated the potential of political interference with the Congress, while we have not even suggested the contrary with the administration. It is unacceptable. And unless the business community understands that we are all in this together trying to find ways for security as well as investment, and that we are not isolationist, those of us who ask questions about such things as the Dubai incident like we kind of disrupted business, when we have as our oversight capabilities, the entire Congress that is, a duty, in fact indeed an obligation and responsibility to check into these matters.

The fact that so few of these transactions ever have come in front of us and that all of them except one have been rejected before us I find to be incredible. I think we have a right in this Congress to

know what in God's name is going on. And that is why we are having these hearings.

If I take what you say, I would ask you this question. Foreign companies and CFIUS want the entire process to be settled in 30 days, and usually settle matters in negotiations before the official review. I even heard that today. What kind of oversight can the Congress have over this process when there is such a lack of transparency? You tell us.

Ms. MARKHEIM. I think Congress has not had the opportunity to have the appropriate level of oversight of these transactions. That is why we are here today. What is important here, and I think what I was trying to say in that particular memo and in the brief was that fundamentally Congress needs to have greater oversight, without however becoming part of the process itself.

So the important thing is to determine where is the process and where does oversight begin. The problem is that over the years, oversight has not been facilitated by the CFIUS process. Congress has not received regular reports; has not received the quadrennial reports even. That is a problem, as I did state.

What we would like to see and what we do recommend is that Congress do start receiving regular reports on these sort of non-special cases that don't go before the president so that Congress does get some insight as to what does go on.

Mr. PASCRELL. But wouldn't you agree, Ms. Markheim, if we did not have the Dubai situation, we still wouldn't know what was going on out there. This kind of crystallized it, and that is why we are having this hearing, or else we wouldn't be having this hearing. Wouldn't you agree?

Ms. MARKHEIM. I do agree with that. However, I do think, again going back to a report that was referenced that was out in October, the problem with CFIUS transparency has been known and it has been something that has been discussed, but it certainly has not been the focus of attention that it is today.

Mr. PASCRELL. When you understand that when we talk about port security, we are concerned about the relationships we have with other countries so that those items in those containers are checked before they leave the other country, before they leave the other ports, and before they come into the United States. It makes things a lot easier.

So we have to have cooperation. We must have, all of us now, we are talking about a global strategy. You know, chapter 12 of the 9/11 Commission report, we are talking about a global strategy. And we need to be very protective of the people in this country who are wondering what is coming into this country and what is coming over our borders. And that is why we want to take the extra added precaution of finding out what is in these containers and who is in charge.

Now, when we said who is in charge of operations at the ports, the administration was very, very adamant in saying these companies owned by these countries don't own the ports, we understand that, they control the operations and manage the ports, and they don't even take care of security at the ports. But they do name who is in charge of security at the ports.

If I may, Mr. Chairman, I have one more question, if I can ask it this go-round. I have to leave.

Mr. SIMMONS. [Presiding.] I will yield 1 more minute, but mindful that Charlie Allen is also waiting to testify at the next hearing.

Mr. PASCRELL. I am sorry?

Mr. SIMMONS. Secretary Allen is waiting to testify for the next subcommittee hearing. So you are making excellent points.

Mr. PASCRELL. There is another subcommittee after this?

Mr. SIMMONS. Yes, there is. It was scheduled for 3:30, but we are postponing it, waiting to finish.

Mr. PASCRELL. Okay. Just a quick question, Mr. Eizenstat.

You mentioned in your testimony the difficulty in determining what is critical infrastructure in the United States, and how foreign investment in critical infrastructure should be determined you suggest by a case-by-case basis. Should the purchase of American port operations by a Dubai-owned company have received more intense scrutiny by CFIUS? And the second question is, should this deal have gone to the investigative level?

Mr. EIZENSTAT. Let me answer two questions at once here, your last question and then the one you just asked.

On the transparency, congressional oversight, H.R. 5337 goes a long way to accomplishing what you are properly concerned about, because it requires that CFIUS give the Congress a written report on any findings of actions that they make on any investigation they do. You can have personal briefings for the members who get that, and then there are semiannual reports that will have to be issued to the Congress on what has happened during the previous 6 months, which transactions have been approved, what were they like and so forth. That will give you the opportunity to determine if you think CFIUS is doing the right job.

Now, in terms of the DP World issue, optimally what should have happened, I believe, is that this should have raised a lot of red flags. I do not believe it was a national security threat. But I do believe that it would have been better to take to the 45-day investigation period. I think had that been done, it would have satisfied a lot of people in Congress who felt that by not taking it to the second phase, that the process was somehow rushed through.

The fact is, it wasn't because there was a long pre-application period, but in terms of optics, optics certainly for the public and for Congress which had no information about it, seemed to indicate that it was being rushed through. So I think in an optimal way, it might have gone to the 45-day period and diminished some of the political opposition. I think ultimately the result might have been the same from my perspective.

Mr. PASCRELL. Thank you both.

Mr. Chairman, I would contend that if it wasn't for the Dubai incident coming before the Congress of the United States, that many in the Congress of the United States would not have known that countries like China control and operate many of our ports. Now, I will make that statement and I will stand by it unless I hear different information.

So I am aghast when people talk about the possibilities of politics in these issues.

Thank you.

Mr. SIMMONS. I thank the gentleman for his questioning. For the record, I will yield my 5 minutes to him, and that 5 minutes has now expired.

The Chair recognizes the distinguished gentlelady from the Virgin Islands, Dr. Christensen.

Mrs. CHRISTENSEN. Thank you both, Ms. Markheim and Mr. Eizenstat, for your patience with us this afternoon. Mr. Eizenstat, it is nice to see you again.

You noted in your testimony, Mr. Eizenstat, that the bill, H.R. 5337, which requires that the secretaries or deputy secretaries of both Treasury and Homeland Security personally approve and sign each review and every review and investigation, that it could create bureaucratic delays and impede the CFIUS's ability to efficiently implement Exon-Florio.

So my question is, what would be the solution to the problem that we saw during the Dubai Ports World deal when no high-ranking official, Rumsfeld, Chertoff, claimed to have ever signed-off on the deal? They were where the buck stopped, but they didn't sign off. So shouldn't they have some show of having knowledge of the investigatory process and the outcome before it goes to the president?

Mr. EIZENSTAT. That is a very good question. I would just start by saying that I have spent an enormous amount of time in the Virgin Islands. It is a wonderful part of the United States.

A couple of things. First, if I may just say one way to deal with this government-owned company issue, permit the companies to try to go directly to the 45-day investigative process if they are going to be put into that. If you are going to insist that even a British government-owned company has to go through this, and I am urging you to distinguish between friendly governments with companies that are owned by those governments that operate on market principles from those that don't. But if you have to insist on treating them all alike, let them go straight to the 45-day period rather than going to the 30-day period.

Now, second, on the signature issue, one of the first things we learn on the first day of law school is bad facts make bad law. And we had a bad series of facts with the Dubai Ports World issue. This should have had more scrutiny. It should have gone to the secretary or deputy secretary level simply because of the optics, not the reality, of the deal.

Had that been done, optimally the deputy secretary or secretary might have looked at it. But what I am urging is because of that one isolated issue, don't require, as this legislation does, that every single one of these transactions has to be checked off by the deputy or the secretary. It will clog them down from doing much more important work. It only should be in the most sensitive cases where there is really a national security impact. This is much broader than that. It requires it in virtually every case.

Mrs. CHRISTENSEN. Thank you. I don't have any other questions. Thank you for the answer.

Mr. SIMMONS. I thank the gentlelady for her questions.

Do any other members have questions for this panel?

Hearing none, I would like to thank the witnesses for their valuable testimony.

And I thank the members, of course, for their questions.

The members of the committee may have some additional questions for all of the witnesses, and I will ask that you respond to these in writing. The hearing record will be held open for 10 days, and again the chair thanks the members of the committee and our witnesses.

Without objection, the committee stands adjourned.

Mr. EIZENSTAT. May I just ask that my full testimony be put in the record? Thank you.

Mr. SIMMONS. Without objection.

[Whereupon, at 4:03 p.m., the committee was adjourned.]

APPENDIX

FOR THE RECORD

PREPARED STATEMENT OF THE HONORABLE GINNY BROWN-WAITE

Thank you Chairman King for holding this important hearing. Like many of my colleagues here today, I was appalled at the missteps in the recently failed Dubai Ports World transaction. A United Arab Emirates-owned company, DPW's proposed buyout of the British-owned Peninsular Oriental Steamship Navigational Company (P&O) raised serious security concerns, not the least of which was that the UAE was one of the few governments to officially recognize the Taliban. Yet this proposed takeover somehow did not trigger the thorough 45-day investigation that should occur whenever there is a question of our nation's security at critical infrastructure.

To be perfectly frank, when I first read about this takeover in a news story, I thought it was a hoax. I could not believe that officials at the Department of Defense or Department of Homeland Security could be so careless as to play Russian roulette with port security for the sake of a smooth business transaction. I was further appalled to read that the Coast Guard expressed serious concerns in a report to DHS officials, yet even that did not jumpstart the additional investigation.

At the time, I wrote to Department of Homeland Security Secretary Michael Chertoff, Department of Treasury Secretary John Snow, and President Bush to demand an immediate investigation. However, instead of assurances that they would carefully scrutinize the deal before continuing forward, I received bland letters. Congress had to rely on the Dubai Ports World company itself to ask for an investigation, and then to later stop the transaction. To me, that indicates something is wrong with our vetting system.

As a member of this Committee I have a responsibility to keep Americans safe, and I take that responsibility very seriously. When our government makes poor decisions, I want an accounting. There is no excuse for ceding management of our ports to a foreign nation with as questionable of a record as the United Arab Emirates, despite their recent attempts to play nice. So today, I would like to hear from our witnesses how the CFIUS process has been improved to address these issues, as well as your thoughts on legislation to give homeland security a more prominent role in CFIUS deliberations.

Thank you Mr. Chairman and I look forward to hearing from our witnesses today on this vital issue.

QUESTIONS FROM HON. PETER KING

RESPONSES FROM HON. STEWART BAKER

1 You have described the Department's engagement in the CFIUS process in previous hearings. You told the Senate Banking Committee that the Department analyzes each agreement to which it is a signatory and extracts the timetables, policies, and deliverables that must be tracked to determine the companies' current compliance status. Unfortunately, we know from previous hearings that the Department has a serious human capital problem. The following questions are designed to address those concerns:

- **How many people in your office work on CFIUS?**

Response: Under my supervision, there currently are six people who work on CFIUS matters full-time. Of these, three are contractors and two are temporary detailees. We are in the process of hiring three more government employees to work full-time on CFIUS matters. Others in my office provide CFIUS support as needed. Outside my office, the offices of Intelligence Analysis and Infrastructure Protection in their joint fusion center, the Homeland Infrastructure Threat and Risk Analysis Center (HITRAC), have another team of three full-time individuals analyzing the

risks associated with CFIUS transactions and providing analytical support to my office. In addition, there are dozens of people throughout DHS who review and provide input on CFIUS transactions.

• How many compliance agreements does the Department enter into with other companies?

Response: Since DHS began operations in 2003, DHS has entered into twenty CFIUS mitigation agreements and an approximately equal number of risk mitigation agreements in the context of the Federal Communications Commission's telecommunications licensing process.

2. H.R. 5337 allows for the appointment of "an appropriate Federal department or agency" to negotiate, modify, monitor, and enforce any mitigation agreement reached by the Committee. **Isn't the Department of Homeland Security, given the breadth of its jurisdiction over domestic security concerns, the appropriate agency to take on this responsibility?**

Response: DHS believes that there is no single agency that can negotiate mitigation agreements for every case, and a legislative requirement that the negotiation and enforcement be carried out by a single agency would reduce the current protection for homeland and national security. For some national security concerns raised by a particular case, DHS may be the appropriate agency; for other national security concerns raised by the same case, other CFIUS agencies may be more appropriate. Accordingly, DHS believes that each agency, in consultation with CFIUS, should be authorized to negotiate mitigation agreements as each agency deems appropriate. This is consistent with past practice.

In your opinion, if, under H.R. 5337, the Department of Homeland Security becomes the Federal entity empowered with negotiating, modifying, monitoring, and enforcing, mitigation requirements reached by the committee, do they have adequate personnel and resources to effectively assume this additional responsibility?

Response: As indicated above, DHS believes that no agency should be designated to negotiate mitigation agreements for every case; rather, each agency should be authorized to negotiate mitigation agreements, in consultation with CFIUS, as each agency deems appropriate. DHS is increasing its personnel and resources dedicated to negotiating, modifying, monitoring and enforcing the mitigation agreements to which DHS decides to become a party. To the extent DHS were required to assume responsibility for all mitigation agreements, contrary to views of what constitutes sound policy, substantial additional personnel and resources would be necessary.

What additional resources would the Department of Homeland Security require to undertake this potential additional responsibility?

Response: As indicated above, DHS is increasing its personnel and resources dedicated to negotiating, modifying, monitoring and enforcing the mitigation agreements to which DHS decides to become a party. Additional resources beyond those already planned are not required for DHS to fulfill its responsibilities with respect to those mitigation agreements to which DHS decides to become a party.

3. You testified before the Senate Banking Committee that the Department implemented an early warning program soon after joining the CFIUS. You said that the purpose of the program is to identify those foreign investments in U.S. critical infrastructure and industrial base technology companies that may result in CFIUS filings or may pose a national security risk, and you share this information with CFIUS members. Unfortunately, as Mr. Eizenstat, a witness on the second panel, notes in his written testimony, "critical infrastructure" remains a relatively fluid regulatory concept, and very difficult to identify specific "critical infrastructure" that may pose a national security risk. For instance, the Department has identified twelve extremely broad sectors that it considers to be critical infrastructure, including agriculture and food, water, public health, emergency services, the defense industry, telecommunications, energy, transportation, banking and finance, chemicals, postal services and shipping, and information technology.

How can the Department really identify foreign investment in critical infrastructure when it has not yet publicly identified the types of companies, or even sub-sectors, for which acquisition by a foreign firm would be deemed a high risk to national security? How can you make a judgment about foreign ownership of these sectors?

Response: An analysis of which transactions would pose a high risk to national security must be made on a case-by-case basis, given the number of factors involved in making such a determination. The current broad operational concept of "national security" gives DHS wide discretion to act in appropriate cases, and DHS does not

believe it is practical or prudent to assess national security risk other than by case-specific examination. Creating abstract categories of critical infrastructure might unhelpfully narrow discretion to mitigate national security risks.

4. You told Reuters that the Department of Homeland Security could not find anything concrete that led you to believe that the transaction ought to be stopped for national security reasons. Yet according to news reports, you were originally the sole dissenting voice in the transaction. According to the AP, you eventually changed your mind and the Committee approved the deal without dissent after Dubai Ports World agreed to the security conditions that CFIUS negotiated.

How many other times have you voiced dissent on CFIUS only to change your mind later? Is it problematic for the current process that CFIUS tries to build universal consensus among all members? Do you ever feel pressured into changing your dissenting opinion?

Response: The premise of the question is flawed: DHS did not change its views regarding the Dubai Ports World transaction. DHS determined that it should get certain risk-mitigating assurances from the companies and that, with those assurances, DHS would approve the transaction. DHS's ability to obtain the assurances was never in doubt.

Like each CFIUS agency, DHS determines for itself whether a transaction may adversely impact national security and whether to request risk-mitigating assurances.

5. How do you evaluate the risk of a foreign-owned company when, these days, there is no clear designation of what companies are foreign? For instance, most large-scale companies are multinationals—case-in-point: both Exxon-Mobil and BP have about half U.S. ownership. How does the Department weigh the risk of these so-called "foreign owned companies?"

Response: The Treasury Department, as Chair of the CFIUS, is better positioned to explain the CFIUS determination of whether a company is or will be subject to foreign control so as to confer CFIUS jurisdiction over a transaction. As in other matters, the risk presented by companies that are partly foreign-owned and partly is analyzed on a case-by-case basis, taking into account factors such as the nature of the assets at issue and the nature of the foreign ownership and control, among other factors.

6. What changes have been made to the CFIUS process, aside from adding DHS as a member agency, to reflect the post-911 world?

Response: In general, the level of scrutiny in the CFIUS process has increased in the post-9/11 world. The Treasury Department, as Chair of the CFIUS process, is better positioned to provide a detailed comparison between the pre-and post-9111 eras, especially in light of the fact that DHS did not exist before 2003.

7. What changes have been made to the process following the DP World transaction?

Response: Again, as CFIUS Chair, the Treasury Department is better positioned to discuss changes. Within DHS, we have hired (and are continuing to hire) more CFIUS staff and our review process has become more formal.

8. Considering that the proposed Congressional reforms would relegate information gathering to the Director of National Intelligence, would you plan on performing separate analysis on investigations through DHS?

Response: DHS does not interpret any of the proposed Congressional reforms to relegate all information gathering solely to the DNI, and DHS would strongly oppose any effort to do so because such limitation would impede our ability to fulfill our departmental responsibilities. DHS does and, under virtually any conceivable circumstances, will continue to engage in substantial information gathering and analysis.

DHS, through its Office of Intelligence and Analysis, is a key participant in the development of the Intelligence Community's threat assessments, prepared by the Office of the DNI with input from all elements of the Intelligence Community. Although DHS does not develop an independent threat assessment as part of this process, information and analysis are fully considered. If DHS (or any other element of the IC) were to conclude, on the basis of its own analysis, that it should disagree with the position of the Intelligence Community, then it may state its dissent in the IC assessment.

In addition to its participation in the development of the IC threat assessment, DHS, through its Infrastructure Protection and HITRAC components, performs vulnerability assessments and risk-mitigation assessments in support of CFIUS.

9. Under the current process, is the Director of National Intelligence given sufficient time to examine transactions pending before CFIUS?

Response: The DNI is the appropriate entity to which this question should be addressed.

10. To what extent do you plan on integrating the policies of DHS in CFIUS?

Response: DHS has integrated its CFIUS policy process. All DHS components receive notice of CFIUS transactions, and their analyses and concerns are consolidated by the DHS Policy Development office.

11. Does Congress have any concerns that an investigation process that involve Congress, the Senate, and the President, along with quarterly and semi-annual reports, will slow CFIUS down?

Response: Congress, rather than DHS, is best positioned to determine whether "Congress has any concerns. . ." To the extent the question is whether DHS has concerns, it is reasonable to think that additional reporting requirements, whether to the Congress, the Senate, the President, or any other body, will require resources that might otherwise be devoted to analysis of CFIUS cases, and that a possible resultant diminution of resources associated with such analysis would negatively impact the CFIUS process. In any case, reports to Congress should be provided only after a CFIUS case is completed. Pre-decisional reporting would impinge inappropriately upon the Executive Branch deliberative process.

QUESTIONS AND RESPONSES FROM THE HON. CLAY LOWERY

1. Mr. Lowery, you say in your testimony that the Administration "supports improving communications with Congress on CFIUS matters." **Why did this Administration wait until recently to decide to improve its communications with Congress? What efforts have you made to engage in outreach with Congress? If communicating with Congress is a priority, why then has it taken so long to produce documents that have been requested by this Committee months ago? Would you support a statute that would increase reporting requirements from CFIUS to Congress? What would such a regime look like?**

Response: The Administration is committed to improving communications with Congress and agrees that Congress should receive timely information about CFIUS matters to help meet its oversight responsibilities. Indeed, CFIUS has met with Members and Congressional committee staff whenever requested to do so to answer questions about the CFIUS process. To ensure improved communications, Treasury is promptly notifying Congress of all CFIUS cases upon completion. Treasury is also, on behalf of CFIUS, briefing the Senate Banking and House Financial Services Committees quarterly on completed CFIUS cases. When appropriate, CFIUS suggests that its oversight committees invite other potentially interested members and committees with jurisdiction over areas affected by decisions under to attend these briefings. It should be noted that these briefings were scheduled to begin before the issues with respect to the DP World transaction garnered media attention. We believe that these steps will enable Congress to meet its oversight responsibilities.

With respect to the provision of information to the committee on the DP World case, I spoke to this point during the hearing. As I noted, compiling the information and consulting interagency with those engaged in CFIUS, as well as providing for the clearance of our General Counsel's office, takes a certain amount of time. This was also done in the context of an increasing CFIUS case load. We provided you with these documents as soon as was possible. I would further note that Treasury officials participated in 7 hearing with 7 committees and has conducted approximately 25 briefings with Congressional committees regarding DP World.

The House CFIUS reform bill, H.R. 5337, would require that CFIUS provide semi-annual reports to Congress. While we believe that an annual report would be more appropriate, as it will be more comprehensive and better identify the trends designated in the legislation, the reporting requirements would provide Congress additional information important to conducting its oversight responsibilities. However, to prepare such reports properly, the Administration needs sufficient time and resources to conduct a thorough interagency process.

2. During your testimony, Rep. Collins asked you whether an adequate review of DP World was done, given recently declassified portions of a Coast Guard report that highlighted "many intelligence gaps, concerning the potential for DPW or [its subsidiary] P&O assets to support terrorist operations." According to the declassified portions of the report, those gaps precluded "an overall threat assessment of the potential DPS and P&O Ports merger." **How were you able to close those gaps so quickly? And how can the speed with which you apparently closed**

those gaps square with the 2005 GAO report, which discussed the need for longer periods of time for CFIUS review because agencies could not conduct timely threat analysis?

Contrary to many accounts, the DP World transaction was not rushed through the review process in early February. In total, members of CFIUS staff spent nearly 90 days investigating this transaction due to early notification of the transition to CFIUS by the companies. National security issues raised during this process were addressed to the satisfaction of all members of CFIUS.

During the investigation period, which lasted nearly 3 months, members of the CFIUS staff were in contact with one another and the companies. As part of this process, the Department of Homeland Security (DHS) negotiated an assurances letter that addressed port security concerns. The companies committed to maintain no less than their current level of membership in, cooperation with, and support for the Customs-Trade Partnership Against Terrorism, the Business Anti-Smuggling Coalition, and the Container Security Initiative (CSI). They also committed to their current level of membership in, cooperation with, and support for the March 2005 Memorandum of Understanding with the U.S. Department of Energy to support CSI by cooperating with other signatories and restricting trafficking in nuclear and radioactive materials. The companies committed to provide advance written notice to DHS before making any material change with respect to their cooperation/membership support, and to meet with any DHS designated U.S. Government officials prior to implementation. In fact, the DHS agreement with DP World provides assurances with respect to law enforcement, public safety, and national security that DHS does not currently have with other terminal operators.

The referenced concerns in the Coast Guard report must be placed in context. While this question is best addressed to the Department of Homeland Security, DHS considered not only the Coast Guard's assessment, but also the assessment of the broader intelligence community as a whole. The U.S. Coast Guard resolved its initial concerns in the context of the broader dialog about this case; that dialog took place during the investigation of the transaction, which ended on January 17,2006.

3. You mentioned in your testimony that "Typically, the members of the Committee with the greatest relevant expertise assume the lead role in examining any national security issues related to a transaction and, when appropriate, developing appropriate mechanisms to address those risks." **Would DHS not take the lead on many of these transactions? Do you think that they have the personnel capable to fulfill this duty?**

Each CFIUS agency determines the resources to be dedicated to its CFIUS responsibilities and chooses its own staff. Depending on the nature of the transaction and the business of the U.S. target company, an agency may utilize resources several offices in its agency to investigate and analyze the national security implications from its agency's perspective.

Given DHS's expertise, it takes the lead on many cases, as do the Departments of Defense and Justice. Questions as to the level of resources available in DHS to devote to its CFIUS responsibilities are best directed to DHS. However, DHS has been a valuable addition to CFIUS and performs its responsibilities thoroughly and diligently.

4. The Byrd Amendment—§ 2170(b) of the Defense Protection Act—States that "The President or the President's designee shall make an investigation. . .in any instance in which an entity controlled by or acting on behalf of a foreign government seeks to engage in any merger, acquisition, or takeover which could result in control of a person engaged in interstate commerce in the United States that could affect the national security of the United States." **Why didn't CFIUS engage in an investigation of the Dubai Ports World deal—a foreign government-owned company engaged in port operations? By not conducting these investigations, aren't you, in the words of the frustrating the intent of the legislation?**

In February, the State of New Jersey filed a lawsuit challenging CFIUS's conclusion that the Byrd Amendment did not require a formal "investigation" of the DP World acquisition. The Department of Justice filed a responsive brief in the lawsuit, which set forth the Administration's interpretation of the Byrd Amendment. The brief states that "(1) the Byrd Amendment requires an investigation only when the transaction at issue is determined to be one that 'could affect the national security of the United States,' and (2) the determination of whether a particular transaction 'could affect the national security of the United States' is a determination that is anything but ministerial and non-discretionary—requiring as it does the collection and analysis of facts regarding both the proposed transaction and the nation's security." The brief further notes that "this textually compelled, commonsense reading

of the Byrd Amendment has been followed by the Executive Branch since that provision was first enacted" in 1992.

The fact that the DP World case did not go into a 45-day extended investigation period did not affect ability to conduct a thorough investigation. There is a general misunderstanding that CFIUS conducts in-depth work only during the 45-day period. This is not the case. During the 30-day period, CFIUS thoroughly analyzes transactions for their effects on national security and carefully considers input from the intelligence community, other CFIUS agencies, and agencies with relevant expertise. Often a significant amount of analysis is performed even before the 30-day period begins. In the case of DP World, as previously noted, members of CFIUS staff spent nearly 90 days investigating this transaction, and a mitigation agreement was negotiated with DP World to provide assurances with respect to law enforcement, public safety, and national security.

5. If changes to CFIUS were made in light of September llth, then why did it take so long to begin enforcing the legislation, and why did it take such a case as DP World to jumpstart the legislation?

Actually, CFIUS has reviewed 268 cases since September 11th, 2001, and made many important changes well before the DP World transaction. Since September 11th, an important change to the CFIUS process was the addition of DHS to CFIUS membership. DHS brings to the CFIUS process its own unique perspective of the potential impacts of cases on our homeland security. Other efforts have been made to improve the CFIUS process, drawing on comments Members of Congress, the recommendations of the GAO, and the recommendations received from the member agencies of CFIUS.

Some of the changes I would note:

- Accountability: All cases in CFIUS are being briefed at the highest levels at Treasury, and clearances on transactions are at the Senate-confirmed level.
- DNI: The role of the intelligence community has been formalized. The Office of the Director of National Intelligence (DNI) plays a key role in all CFIUS cases by participating in CFIUS meetings, examining every transaction notified to the Committee, and providing broad and comprehensive threat assessments.
- Communications with Congress: We are taking steps to improve communications with Congress, including promptly notifying Congress of every CFIUS case upon its completion, and committing to conducting quarterly briefings for Congress on CFIUS matters, which we recently conducted for oversight committees.
- Pre-filing: CFIUS is encouraging pre-filings notifications; companies are more frequently informing CFIUS of transactions well before filing notice, which allows additional time for the Committee's consideration.

6. Since your two primary goals are to (1) increase Congressional oversight of CFIUS and (2) maintain a friendly environment for foreign businesses, would it be possible to have CFIUS report all of its informal dealings with foreign businesses to Congress rather than deal away the entire process?

The principles that guide CFIUS are protecting U.S. national security and maintaining an open investment policy. To advance those principles, the Administration supports improving communications with Congress on CFIUS matters, among other process reforms.

We believe it is possible to have increased Congressional oversight of CFIUS without tightening the rules for foreign investment, if done correctly. We are taking steps to improve communications with Congress, including promptly notifying Congress of every CFIUS transaction upon its completion, and committing to conducting quarterly briefings for Congress on CFIUS matters. We have recently met with oversight committees to provide a quarterly report on cases.

CFIUS does not notify Congress until a CFIUS case is complete in order to protect the Executive Branch's deliberative processes, and also to avoid the disclosure of proprietary information that could undermine a transaction or be used for competitive purposes.

7. One of the major problems with the DPW transaction was that neither the relevant Secretaries nor the President were aware of the transaction. Yet in recent testimony before the House Financial Service Committee, you opposed Cabinet-level certification of transactions. **If such certifications were allowed, then wouldn't they ensure that the transaction receives the proper amount of scrutiny?**

The Administration supports the Secretary or the Deputy Secretary of the Treasury signing the report on a transaction at the conclusion of a 45-day extended investigation. Furthermore, at the conclusion of a CFIUS 30-day investigation, the Administration supports requiring the case to be approved by an official nominated by

the President and confirmed by the Senate, with an assurance that appropriate senior agency officials received a briefing on the transaction. Mandating the personal involvement of department heads or deputies in order to finalize all 30-day investigations is not practical for a process that—while it needs to be thorough, responsible and accountable—also needs to be efficient and timely in the disposition of cases that may vary greatly in degree of complexity and significance to national security. Under this standard, foreign transactions that do not present national security issues will be approved in a manner consistent with our open investment policy, while CFIUS resources and attention will be focused where they are most needed.

Presently, the Administration is ensuring high-level accountability in the CFIUS process. Treasury officials at the highest levels are briefed on a regular basis on all CFIUS cases. Presidentially appointed, Senate-confirmed officials are responsible for clearing transactions at the conclusion of CFIUS 30-day investigations. Officials at the Deputy level make decisions about putting cases into an extended 45-day investigation. Finally, transactions that need to go to the President are decided at the Principal level.

8. Considering that foreign firms acquiring US firms accounted for 13% of all mergers and transactions in 2005, how do you seek to maintain a friendly environment for foreign businesses, while mitigating the discretion of CFIUS? Is it possible to allow for increased oversight of CFIUS by Congress, but without tightening the rules for foreign investment?

The Administration supports the efforts to improve the CFIUS process in a manner that protects national security and does not diminish national security by negatively impacting the nation's economy.

Reforms to the CFIUS process should send a signal that the United States continues to be serious about national security and welcomes legitimate foreign direct investment (FDI). CFIUS must examine each transaction thoroughly, but the timeframes for examination should not be unnecessarily long and should not be discriminatory. Therefore, the process should not require 45-day extended investigations of transactions that do not impair the national security. Improvements to the CFIUS process should promote filing of notice with respect to appropriate transactions but should not delay or deter FDI with no nexus to the national security.

It is possible to have increased Congressional oversight of CFIUS without tightening the rules for foreign investment, if done correctly. We are taking steps to improve communications with Congress, including promptly notifying Congress of every CFIUS case upon its completion, and committing to conducting quarterly briefings for Congress on CFIUS matters. We have recently met with Congressional oversight committees to provide a quarterly report on cases. At the same time, reforms of the CFIUS process should also reflect the importance of protecting proprietary information and the integrity of the Executive Branch's decision making process.

9. Considering the fears that many businesses have of the public scrutiny that comes with being involved in a CFIUS investigation, what steps can Congress take to ease these concerns?

Reforms to the CFIUS process should encourage companies to file with the Committee by ensuring that any information they provide to CFIUS is protected from public disclosure and will not be used for competitive purposes. Full disclosure of information by companies is critical to the Committee's ability to analyze thoroughly the national security risks associated with a transaction. It is also important to protect the Executive Branch's deliberative process and to avoid possible politicization of CFIUS cases.

To keep Congress informed adequately and regularly about the CFIUS process without causing businesses undue concern, Treasury has offered, on behalf of CFIUS, to brief the Senate Banking and House Financial Services Committees quarterly on completed reviews. Treasury is also promptly notifying Congress of all CFIUS cases upon completion. Federal law prevents proprietary corporate information from being revealed to the public, and Congress and the Executive Branch have an excellent record of protecting this information and preserving confidence in the process. It is necessary that both continue to treat all such information as confidential.

10. How frequently are mitigation agreements used to quell national security concerns? What is the current procedure for monitoring mitigation agreements?

Mitigation agreements and assurances letters are used on a fairly regular basis to address potential national security risks.

Typically, members of the Committee with the greatest relevant expertise take the lead role, in consultation with CFIUS, in negotiating and ultimately concluding

mitigation agreements when appropriate or requesting assurance letters. Such agreements implement security measures that vary in scope and purpose according to the particular national security concerns raised by a specific transaction.

There are remedies built into mitigation agreements to address concerns that arise after the case concludes. The "lead" agency or agencies are and should be responsible for monitoring the parties' compliance, in consultation with CFIUS. Procedures for monitoring an agreement may, for example, include annual reporting by the company to the lead agency or the authority to conduct on-site visits by the lead agency.

For a material breach of any representation or commitment in the mitigation agreement, the lead agency would, in consultation with be able to seek any available legal remedy.