

Date of 1992 Amendment note under section 2062 of this Appendix.

§ 2170. Authority to review certain mergers, acquisitions, and takeovers

(a) Definitions

For purposes of this section, the following definitions shall apply:

(1) Committee; chairperson

The terms “Committee” and “chairperson” mean the Committee on Foreign Investment in the United States and the chairperson thereof, respectively.

(2) Control

The term “control” has the meaning given to such term in regulations which the Committee shall prescribe.

(3) Covered transaction

The term “covered transaction” means any merger, acquisition, or takeover that is proposed or pending after August 23, 1988, by or with any foreign person which could result in foreign control of any person engaged in interstate commerce in the United States.

(4) Foreign government-controlled transaction

The term “foreign government-controlled transaction” means any covered transaction that could result in the control of any person engaged in interstate commerce in the United States by a foreign government or an entity controlled by or acting on behalf of a foreign government.

(5) Clarification

The term “national security” shall be construed so as to include those issues relating to “homeland security”, including its application to critical infrastructure.

(6) Critical infrastructure

The term “critical infrastructure” means, subject to rules issued under this section, systems and assets, whether physical or virtual, so vital to the United States that the incapacity or destruction of such systems or assets would have a debilitating impact on national security.

(7) Critical technologies

The term “critical technologies” means critical technology, critical components, or critical technology items essential to national defense, identified pursuant to this section, subject to regulations issued at the direction of the President, in accordance with subsection (h).

(8) Lead agency

The term “lead agency” means the agency, or agencies, designated as the lead agency or agencies pursuant to subsection (k)(5) for the review of a transaction.

(b) National security reviews and investigations

(1) National security reviews

(A) In general

Upon receiving written notification under subparagraph (C) of any covered transaction, or pursuant to a unilateral notification ini-

tiated under subparagraph (D) with respect to any covered transaction, the President, acting through the Committee—

(i) shall review the covered transaction to determine the effects of the transaction on the national security of the United States; and

(ii) shall consider the factors specified in subsection (f) for such purpose, as appropriate.

(B) Control by foreign government

If the Committee determines that the covered transaction is a foreign government-controlled transaction, the Committee shall conduct an investigation of the transaction under paragraph (2).

(C) Written notice

(i) In general

Any party or parties to any covered transaction may initiate a review of the transaction under this paragraph by submitting a written notice of the transaction to the Chairperson of the Committee.

(ii) Withdrawal of notice

No covered transaction for which a notice was submitted under clause (i) may be withdrawn from review, unless a written request for such withdrawal is submitted to the Committee by any party to the transaction and approved by the Committee.

(iii) Continuing discussions

A request for withdrawal under clause (ii) shall not be construed to preclude any party to the covered transaction from continuing informal discussions with the Committee or any member thereof regarding possible resubmission for review pursuant to this paragraph.

(D) Unilateral initiation of review

Subject to subparagraph (F), the President or the Committee may initiate a review under subparagraph (A) of—

(i) any covered transaction;

(ii) any covered transaction that has previously been reviewed or investigated under this section, if any party to the transaction submitted false or misleading material information to the Committee in connection with the review or investigation or omitted material information, including material documents, from information submitted to the Committee; or

(iii) any covered transaction that has previously been reviewed or investigated under this section, if—

(I) any party to the transaction or the entity resulting from consummation of the transaction intentionally materially breaches a mitigation agreement or condition described in subsection (l)(1)(A);

(II) such breach is certified to the Committee by the lead department or agency monitoring and enforcing such agreement or condition as an intentional material breach; and

(III) the Committee determines that there are no other remedies or enforce-

ment tools available to address such breach.

(E) Timing

Any review under this paragraph shall be completed before the end of the 30-day period beginning on the date of the acceptance of written notice under subparagraph (C) by the chairperson, or beginning on the date of the initiation of the review in accordance with subparagraph (D), as applicable.

(F) Limit on delegation of certain authority

The authority of the Committee to initiate a review under subparagraph (D) may not be delegated to any person, other than the Deputy Secretary or an appropriate Under Secretary of the department or agency represented on the Committee.

(2) National security investigations

(A) In general

In each case described in subparagraph (B), the Committee shall immediately conduct an investigation of the effects of a covered transaction on the national security of the United States, and take any necessary actions in connection with the transaction to protect the national security of the United States.

(B) Applicability

Subparagraph (A) shall apply in each case in which—

(i) a review of a covered transaction under paragraph (1) results in a determination that—

(I) the transaction threatens to impair the national security of the United States and that threat has not been mitigated during or prior to the review of a covered transaction under paragraph (1);

(II) the transaction is a foreign government-controlled transaction; or

(III) the transaction would result in control of any critical infrastructure of or within the United States by or on behalf of any foreign person, if the Committee determines that the transaction could impair national security, and that such impairment to national security has not been mitigated by assurances provided or renewed with the approval of the Committee, as described in subsection (l), during the review period under paragraph (1); or

(ii) the lead agency recommends, and the Committee concurs, that an investigation be undertaken.

(C) Timing

Any investigation under subparagraph (A) shall be completed before the end of the 45-day period beginning on the date on which the investigation commenced.

(D) Exception

(i) In general

Notwithstanding subparagraph (B)(i), an investigation of a foreign government-controlled transaction described in subclause

(II) of subparagraph (B)(i) or a transaction involving critical infrastructure described in subclause (III) of subparagraph (B)(i) shall not be required under this paragraph, if the Secretary of the Treasury and the head of the lead agency jointly determine, on the basis of the review of the transaction under paragraph (1), that the transaction will not impair the national security of the United States.

(ii) Nondelegation

The authority of the Secretary or the head of an agency referred to in clause (i) may not be delegated to any person, other than the Deputy Secretary of the Treasury or the deputy head (or the equivalent thereof) of the lead agency, respectively.

(E) Guidance on certain transactions with national security implications

The Chairperson shall, not later than 180 days after the effective date of the Foreign Investment and National Security Act of 2007, publish in the Federal Register guidance on the types of transactions that the Committee has reviewed and that have presented national security considerations, including transactions that may constitute covered transactions that would result in control of critical infrastructure relating to United States national security by a foreign government or an entity controlled by or acting on behalf of a foreign government.

(3) Certifications to Congress

(A) Certified notice at completion of review

Upon completion of a review under subsection (b) that concludes action under this section, the chairperson and the head of the lead agency shall transmit a certified notice to the members of Congress specified in subparagraph (C)(iii).

(B) Certified report at completion of investigation

As soon as is practicable after completion of an investigation under subsection (b) that concludes action under this section, the chairperson and the head of the lead agency shall transmit to the members of Congress specified in subparagraph (C)(iii) a certified written report (consistent with the requirements of subsection (c)) on the results of the investigation, unless the matter under investigation has been sent to the President for decision.

(C) Certification procedures

(i) In general

Each certified notice and report required under subparagraphs (A) and (B), respectively, shall be submitted to the members of Congress specified in clause (iii), and shall include—

(I) a description of the actions taken by the Committee with respect to the transaction; and

(II) identification of the determinative factors considered under subsection (f).

(ii) Content of certification

Each certified notice and report required under subparagraphs (A) and (B), respec-

tively, shall be signed by the chairperson and the head of the lead agency, and shall state that, in the determination of the Committee, there are no unresolved national security concerns with the transaction that is the subject of the notice or report.

(iii) Members of Congress

Each certified notice and report required under subparagraphs (A) and (B), respectively, shall be transmitted—

(I) to the Majority Leader and the Minority Leader of the Senate;

(II) to the chair and ranking member of the Committee on Banking, Housing, and Urban Affairs of the Senate and of any committee of the Senate having oversight over the lead agency;

(III) to the Speaker and the Minority Leader of the House of Representatives;

(IV) to the chair and ranking member of the Committee on Financial Services of the House of Representatives and of any committee of the House of Representatives having oversight over the lead agency; and

(V) with respect to covered transactions involving critical infrastructure, to the members of the Senate from the State in which the principal place of business of the acquired United States person is located, and the member from the Congressional District in which such principal place of business is located.

(iv) Signatures; limit on delegation

(I) In general

Each certified notice and report required under subparagraphs (A) and (B), respectively, shall be signed by the chairperson and the head of the lead agency, which signature requirement may only be delegated in accordance with subclause (II).

(II) Limitation on delegation of certifications

The chairperson and the head of the lead agency may delegate the signature requirement under subclause (I)—

(aa) only to an appropriate employee of the Department of the Treasury (in the case of the Secretary of the Treasury) or to an appropriate employee of the lead agency (in the case of the lead agency) who was appointed by the President, by and with the advice and consent of the Senate, with respect to any notice provided under paragraph (1) following the completion of a review under this section; or

(bb) only to a Deputy Secretary of the Treasury (in the case of the Secretary of the Treasury) or a person serving in the Deputy position or the equivalent thereof at the lead agency (in the case of the lead agency), with respect to any report provided under subparagraph (B) following an investigation under this section.

(4) Analysis by Director of National Intelligence

(A) In general

The Director of National Intelligence shall expeditiously carry out a thorough analysis of any threat to the national security of the United States posed by any covered transaction. The Director of National Intelligence shall also seek and incorporate the views of all affected or appropriate intelligence agencies with respect to the transaction.

(B) Timing

The analysis required under subparagraph (A) shall be provided by the Director of National Intelligence to the Committee not later than 20 days after the date on which notice of the transaction is accepted by the Committee under paragraph (1)(C), but such analysis may be supplemented or amended, as the Director considers necessary or appropriate, or upon a request for additional information by the Committee. The Director may begin the analysis at any time prior to acceptance of the notice, in accordance with otherwise applicable law.

(C) Interaction with intelligence community

The Director of National Intelligence shall ensure that the intelligence community remains engaged in the collection, analysis, and dissemination to the Committee of any additional relevant information that may become available during the course of any investigation conducted under subsection (b) with respect to a transaction.

(D) Independent role of Director

The Director of National Intelligence shall be a nonvoting, ex officio member of the Committee, and shall be provided with all notices received by the Committee under paragraph (1)(C) regarding covered transactions, but shall serve no policy role on the Committee, other than to provide analysis under subparagraphs (A) and (C) in connection with a covered transaction.

(5) Submission of additional information

No provision of this subsection shall be construed as prohibiting any party to a covered transaction from submitting additional information concerning the transaction, including any proposed restructuring of the transaction or any modifications to any agreements in connection with the transaction, while any review or investigation of the transaction is ongoing.

(6) Notice of results to parties

The Committee shall notify the parties to a covered transaction of the results of a review or investigation under this section, promptly upon completion of all action under this section.

(7) Regulations

Regulations prescribed under this section shall include standard procedures for—

(A) submitting any notice of a covered transaction to the Committee;

(B) submitting a request to withdraw a covered transaction from review;

(C) resubmitting a notice of a covered transaction that was previously withdrawn from review; and

(D) providing notice of the results of a review or investigation to the parties to the covered transaction, upon completion of all action under this section.

(c) Confidentiality of information

Any information or documentary material filed with the President or the President's designee pursuant to this section shall be exempt from disclosure under section 552 of title 5, United States Code, and no such information or documentary material may be made public, except as may be relevant to any administrative or judicial action or proceeding. Nothing in this subsection shall be construed to prevent disclosure to either House of Congress or to any duly authorized committee or subcommittee of the Congress.

(d) Action by the President

(1) In general

Subject to paragraph (4), the President may take such action for such time as the President considers appropriate to suspend or prohibit any covered transaction that threatens to impair the national security of the United States.

(2) Announcement by the President

The President shall announce the decision on whether or not to take action pursuant to paragraph (1) not later than 15 days after the date on which an investigation described in subsection (b) is completed.

(3) Enforcement

The President may direct the Attorney General of the United States to seek appropriate relief, including divestment relief, in the district courts of the United States, in order to implement and enforce this subsection.

(4) Findings of the President

The President may exercise the authority conferred by paragraph (1), only if the President finds that—

(A) there is credible evidence that leads the President to believe that the foreign interest exercising control might take action that threatens to impair the national security; and

(B) provisions of law, other than this section and the International Emergency Economic Powers Act [50 U.S.C. 1701 et seq.], do not, in the judgment of the President, provide adequate and appropriate authority for the President to protect the national security in the matter before the President.

(5) Factors to be considered

For purposes of determining whether to take action under paragraph (1), the President shall consider, among other factors each of the factors described in subsection (f), as appropriate.

(e) Actions and findings nonreviewable

The actions of the President under paragraph (1) of subsection (d) and the findings of the President under paragraph (4) of subsection (d) shall not be subject to judicial review.

(f) Factors to be considered

For purposes of this section, the President or the President's designee may, taking into account the requirements of national security, consider—

(1) domestic production needed for projected national defense requirements,

(2) 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,

(3) 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,

(4) the potential effects of the proposed or pending transaction on sales of military goods, equipment, or technology to any country—

(A) identified by the Secretary of State—

(i) under section 6(j) of the Export Administration Act of 1979 [section 2405(j) of this Appendix], as a country that supports terrorism;

(ii) under section 6(l) of the Export Administration Act of 1979 [section 2405(l) of this Appendix], as a country of concern regarding missile proliferation; or

(iii) under section 6(m) of the Export Administration Act of 1979 [section 2405(m) of this Appendix], as a country of concern regarding the proliferation of chemical and biological weapons;

(B) identified by the Secretary of Defense as posing a potential regional military threat to the interests of the United States; or

(C) listed under section 309(c) of the Nuclear Non-Proliferation Act of 1978 [42 U.S.C. 2139a(c)] on the “Nuclear Non-Proliferation-Special Country List” (15 C.F.R. Part 778, Supplement No. 4) or any successor list;

(5) the potential effects of the proposed or pending transaction on United States international technological leadership in areas affecting United States national security;

(6) the potential national security-related effects on United States critical infrastructure, including major energy assets;

(7) the potential national security-related effects on United States critical technologies;

(8) whether the covered transaction is a foreign government-controlled transaction, as determined under subsection (b)(1)(B);

(9) as appropriate, and particularly with respect to transactions requiring an investigation under subsection (b)(1)(B), a review of the current assessment of—

(A) the adherence of the subject country to nonproliferation control regimes, including treaties and multilateral supply guidelines, which shall draw on, but not be limited to, the annual report on “Adherence to and Compliance with Arms Control, Nonproliferation and Disarmament Agreements and Commitments” required by section 403 of the Arms Control and Disarmament Act [22 U.S.C. 2593a];

(B) the relationship of such country with the United States, specifically on its record on cooperating in counter-terrorism efforts, which shall draw on, but not be limited to, the report of the President to Congress under section 7120 of the Intelligence Reform and Terrorism Prevention Act of 2004; and

(C) the potential for transshipment or diversion of technologies with military applications, including an analysis of national export control laws and regulations;

(10) the long-term projection of United States requirements for sources of energy and other critical resources and material; and

(11) such other factors as the President or the Committee may determine to be appropriate, generally or in connection with a specific review or investigation.

(g) Additional information to Congress; confidentiality

(1) Briefing requirement on request

The Committee shall, upon request from any Member of Congress specified in subsection (b)(3)(C)(iii), promptly provide briefings on a covered transaction for which all action has concluded under this section, or on compliance with a mitigation agreement or condition imposed with respect to such transaction, on a classified basis, if deemed necessary by the sensitivity of the information. Briefings under this paragraph may be provided to the congressional staff of such a Member of Congress having appropriate security clearance.

(2) Application of confidentiality provisions

(A) In general

The disclosure of information under this subsection shall be consistent with the requirements of subsection (c). Members of Congress and staff of either House of Congress or any committee of Congress, shall be subject to the same limitations on disclosure of information as are applicable under subsection (c).

(B) Proprietary information

Proprietary information which can be associated with a particular party to a covered transaction shall be furnished in accordance with subparagraph (A) only to a committee of Congress, and only when the committee provides assurances of confidentiality, unless such party otherwise consents in writing to such disclosure.

(h) Regulations

(1) In general

The President shall direct, subject to notice and comment, the issuance of regulations to carry out this section.

(2) Effective date

Regulations issued under this section shall become effective not later than 180 days after the effective date of the Foreign Investment and National Security Act of 2007.

(3) Content

Regulations issued under this subsection shall—

(A) provide for the imposition of civil penalties for any violation of this section, in-

cluding any mitigation agreement entered into or conditions imposed pursuant to subsection (l);

(B) to the extent possible—

(i) minimize paperwork burdens; and

(ii) coordinate reporting requirements under this section with reporting requirements under any other provision of Federal law; and

(C) provide for an appropriate role for the Secretary of Labor with respect to mitigation agreements.

(i) Effect on other law

No provision of this section shall be construed as altering or affecting any other authority, process, regulation, investigation, enforcement measure, or review provided by or established under any other provision of Federal law, including the International Emergency Economic Powers Act [50 U.S.C. 1701 et seq.], or any other authority of the President or the Congress under the Constitution of the United States.

(j) Technology risk assessments

In any case in which an assessment of the risk of diversion of defense critical technology is performed by a designee of the President, a copy of such assessment shall be provided to any other designee of the President responsible for reviewing or investigating a merger, acquisition, or takeover under this section.

(k) Committee on Foreign Investment in the United States

(1) Establishment

The Committee on Foreign Investment in the United States, established pursuant to Executive Order No. 11858, shall be a multi agency committee to carry out this section and such other assignments as the President may designate.

(2) Membership

The Committee shall be comprised of the following members or the designee of any such member:

(A) The Secretary of the Treasury.

(B) The Secretary of Homeland Security.

(C) The Secretary of Commerce.

(D) The Secretary of Defense.

(E) The Secretary of State.

(F) The Attorney General of the United States.

(G) The Secretary of Energy.

(H) The Secretary of Labor (nonvoting, ex officio).

(I) The Director of National Intelligence (nonvoting, ex officio).

(J) The heads of any other executive department, agency, or office, as the President determines appropriate, generally or on a case-by-case basis.

(3) Chairperson

The Secretary of the Treasury shall serve as the chairperson of the Committee.

(4) Assistant Secretary for the Department of the Treasury

There shall be established an additional position of Assistant Secretary of the Treasury,

who shall be appointed by the President, by and with the advice and consent of the Senate. The Assistant Secretary appointed under this paragraph shall report directly to the Undersecretary of the Treasury for International Affairs. The duties of the Assistant Secretary shall include duties related to the Committee on Foreign Investment in the United States, as delegated by the Secretary of the Treasury under this section.

(5) Designation of lead agency

The Secretary of the Treasury shall designate, as appropriate, a member or members of the Committee to be the lead agency or agencies on behalf of the Committee—

(A) for each covered transaction, and for negotiating any mitigation agreements or other conditions necessary to protect national security; and

(B) for all matters related to the monitoring of the completed transaction, to ensure compliance with such agreements or conditions and with this section.

(6) Other members

The chairperson shall consult with the heads of such other Federal departments, agencies, and independent establishments in any review or investigation under subsection (a), as the chairperson determines to be appropriate, on the basis of the facts and circumstances of the covered transaction under review or investigation (or the designee of any such department or agency head).

(7) Meetings

The Committee shall meet upon the direction of the President or upon the call of the chairperson, without regard to section 552b of title 5, United States Code (if otherwise applicable).

(I) Mitigation, tracking, and postconsummation monitoring and enforcement

(1) Mitigation

(A) In general

The Committee or a lead agency may, on behalf of the Committee, negotiate, enter into or impose, and enforce any agreement or condition with any party to the covered transaction in order to mitigate any threat to the national security of the United States that arises as a result of the covered transaction.

(B) Risk-based analysis required

Any agreement entered into or condition imposed under subparagraph (A) shall be based on a risk-based analysis, conducted by the Committee, of the threat to national security of the covered transaction.

(2) Tracking authority for withdrawn notices

(A) In general

If any written notice of a covered transaction that was submitted to the Committee under this section is withdrawn before any review or investigation by the Committee under subsection (b) is completed, the Committee shall establish, as appropriate—

(i) interim protections to address specific concerns with such transaction that

have been raised in connection with any such review or investigation pending any resubmission of any written notice under this section with respect to such transaction and further action by the President under this section;

(ii) specific time frames for resubmitting any such written notice; and

(iii) a process for tracking any actions that may be taken by any party to the transaction, in connection with the transaction, before the notice referred to in clause (ii) is resubmitted.

(B) Designation of agency

The lead agency, other than any entity of the intelligence community (as defined in the National Security Act of 1947 [50 U.S.C. 3001 et seq.]), shall, on behalf of the Committee, ensure that the requirements of subparagraph (A) with respect to any covered transaction that is subject to such subparagraph are met.

(3) Negotiation, modification, monitoring, and enforcement

(A) Designation of lead agency

The lead agency shall negotiate, modify, monitor, and enforce, on behalf of the Committee, any agreement entered into or condition imposed under paragraph (1) with respect to a covered transaction, based on the expertise with and knowledge of the issues related to such transaction on the part of the designated department or agency. Nothing in this paragraph shall prohibit other departments or agencies in assisting the lead agency in carrying out the purposes of this paragraph.

(B) Reporting by designated agency

(i) Modification reports

The lead agency in connection with any agreement entered into or condition imposed with respect to a covered transaction shall—

(I) provide periodic reports to the Committee on any material modification to any such agreement or condition imposed with respect to the transaction; and

(II) ensure that any material modification to any such agreement or condition is reported to the Director of National Intelligence, the Attorney General of the United States, and any other Federal department or agency that may have a material interest in such modification.

(ii) Compliance

The Committee shall develop and agree upon methods for evaluating compliance with any agreement entered into or condition imposed with respect to a covered transaction that will allow the Committee to adequately assure compliance, without—

(I) unnecessarily diverting Committee resources from assessing any new covered transaction for which a written notice has been filed pursuant to subsection (b)(1)(C), and if necessary, reach-

ing a mitigation agreement with or imposing a condition on a party to such covered transaction or any covered transaction for which a review has been reopened for any reason; or

(II) placing unnecessary burdens on a party to a covered transaction.

(m) Annual report to Congress

(1) In general

The chairperson shall transmit a report to the chairman and ranking member of the committee of jurisdiction in the Senate and the House of Representatives, before July 31 of each year on all of the reviews and investigations of covered transactions completed under subsection (b) during the 12-month period covered by the report.

(2) Contents of report relating to covered transactions

The annual report under paragraph (1) shall contain the following information, with respect to each covered transaction, for the reporting period:

(A) A list of all notices filed and all reviews or investigations completed during the period, with basic information on each party to the transaction, the nature of the business activities or products of all pertinent persons, along with information about any withdrawal from the process, and any decision or action by the President under this section.

(B) Specific, cumulative, and, as appropriate, trend information on the numbers of filings, investigations, withdrawals, and decisions or actions by the President under this section.

(C) Cumulative and, as appropriate, trend information on the business sectors involved in the filings which have been made, and the countries from which the investments have originated.

(D) Information on whether companies that withdrew notices to the Committee in accordance with subsection (b)(1)(C)(ii) have later refiled such notices, or, alternatively, abandoned the transaction.

(E) The types of security arrangements and conditions the Committee has used to mitigate national security concerns about a transaction, including a discussion of the methods that the Committee and any lead agency are using to determine compliance with such arrangements or conditions.

(F) A detailed discussion of all perceived adverse effects of covered transactions on the national security or critical infrastructure of the United States that the Committee will take into account in its deliberations during the period before delivery of the next report, to the extent possible.

(3) Contents of report relating to critical technologies

(A) In general

In order to assist Congress in its oversight responsibilities with respect to this section, the President and such agencies as the President shall designate shall include in the annual report submitted under paragraph (1)—

(i) an evaluation of whether there is credible evidence of a coordinated strategy by 1 or more countries or companies to acquire United States companies involved in research, development, or production of critical technologies for which the United States is a leading producer; and

(ii) an evaluation of whether there are industrial espionage activities directed or directly assisted by foreign governments against private United States companies aimed at obtaining commercial secrets related to critical technologies.

(B) Release of unclassified study

All appropriate portions of the annual report under paragraph (1) may be classified. An unclassified version of the report, as appropriate, consistent with safeguarding national security and privacy, shall be made available to the public.

(n) Certification of notices and assurances

Each notice, and any followup information, submitted under this section and regulations prescribed under this section to the President or the Committee by a party to a covered transaction, and any information submitted by any such party in connection with any action for which a report is required pursuant to paragraph (3)(B) of subsection (l), with respect to the implementation of any mitigation agreement or condition described in paragraph (1)(A) of subsection (l), or any material change in circumstances, shall be accompanied by a written statement by the chief executive officer or the designee of the person required to submit such notice or information certifying that, to the best of the knowledge and belief of that person—

(1) the notice or information submitted fully complies with the requirements of this section or such regulation, agreement, or condition; and

(2) the notice or information is accurate and complete in all material respects.

(Sept. 8, 1950, ch. 932, title VII, § 721, as added Pub. L. 100-418, title V, § 5021, Aug. 23, 1988, 102 Stat. 1425; amended Pub. L. 102-484, div. A, title VIII, § 837(a)-(c), (e), Oct. 23, 1992, 106 Stat. 2463-2465; Pub. L. 102-558, title I, § 163, Oct. 28, 1992, 106 Stat. 4219; Pub. L. 103-359, title VIII, § 809(d), Oct. 14, 1994, 108 Stat. 3454; Pub. L. 110-49, §§ 2-7(b), 8-10, July 26, 2007, 121 Stat. 246, 252-257, 259.)

REFERENCES IN TEXT

For the effective date of the Foreign Investment and National Security Act of 2007, referred to in subsecs. (b)(2)(E) and (h)(2), see section 12 of Pub. L. 110-49, set out as an Effective Date of 2007 Amendment note under section 5315 of Title 5, Government Organization and Employees.

The International Emergency Economic Powers Act, referred to in subsecs. (d)(4)(B) and (i), is title II of Pub. L. 95-223, Dec. 28, 1977, 91 Stat. 1626, which is classified generally to chapter 35 (§ 1701 et seq.) of Title 50, War and National Defense. For complete classification of this Act to the Code, see Short Title note set out under section 1701 of Title 50 and Tables.

Section 7120 of the Intelligence Reform and Terrorism Prevention Act of 2004, referred to in subsec. (f)(9)(B), is section 7120 of Pub. L. 108-458, title VII, Dec. 17, 2004, 118 Stat. 3803, which is not classified to the Code.

Executive Order 11858, referred to in subsec. (k)(1), is set out as a note under this section.

The National Security Act of 1947, referred to in (l)(2)(B), is act July 26, 1947, ch. 343, 61 Stat. 495, which is classified principally to chapter 44 (§ 3001 et seq.) of Title 50, War and National Defense. For complete classification of this Act to the Code, see Tables.

AMENDMENTS

2007—Subsec. (a). Pub. L. 110-49, § 2, added subsec. (a) and struck out former subsec. (a). Prior to amendment, text of subsec. (a) read as follows: “The President or the President’s designee may make an investigation to determine the effects on national security of mergers, acquisitions, and takeovers proposed or pending on or after the date of enactment of this section by or with foreign persons which could result in foreign control of persons engaged in interstate commerce in the United States. If it is determined that an investigation should be undertaken, it shall commence no later than 30 days after receipt by the President or the President’s designee of written notification of the proposed or pending merger, acquisition, or takeover as prescribed by regulations promulgated pursuant to this section. Such investigation shall be completed no later than 45 days after such determination.”

Subsec. (b). Pub. L. 110-49, § 2, added subsec. (b) and struck out former subsec. (b). Prior to amendment, text of subsec. (b) read as follows: “The President or the President’s designee shall make an investigation, as described in subsection (a), 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. Such investigation shall—

“(1) commence not later than 30 days after receipt by the President or the President’s designee of written notification of the proposed or pending merger, acquisition, or takeover, as prescribed by regulations promulgated pursuant to this section; and

“(2) shall be completed not later than 45 days after its commencement.”

Subsec. (d). Pub. L. 110-49, § 6, added subsec. (d) and struck out former subsec. (d). Prior to amendment, text of subsec. (d) read as follows: “Subject to subsection (d), the President may take such action for such time as the President considers appropriate to suspend or prohibit any acquisition, merger, or takeover, of a person engaged in interstate commerce in the United States proposed or pending on or after the date of enactment of this section by or with foreign persons so that such control will not threaten to impair the national security. The President shall announce the decision to take action pursuant to this subsection not later than 15 days after the investigation described in subsection (a) is completed. The President may direct the Attorney General to seek appropriate relief, including divestment relief, in the district courts of the United States in order to implement and enforce this section.”

Subsec. (e). Pub. L. 110-49, § 6, added subsec. (e) and struck out former subsec. (e). Prior to amendment, text of subsec. (e) read as follows: “The President may exercise the authority conferred by subsection (c) only if the President finds that—

“(1) there is credible evidence that leads the President to believe that the foreign interest exercising control might take action that threatens to impair the national security, and

“(2) provisions of law, other than this section and the International Emergency Economic Powers Act (50 U.S.C. 1701–1706), do not in the President’s judgment provide adequate and appropriate authority for the President to protect the national security in the matter before the President.

“The provisions of subsection (d) of this section shall not be subject to judicial review.”

Subsec. (f). Pub. L. 110-49, § 4(1), struck out “among other factors” after “consider” in introductory provisions.

Subsec. (f)(4)(B), (C). Pub. L. 110-49, § 4(2)(A)–(C), added subpar. (B) and redesignated former subpar. (B) as (C).

Subsec. (f)(6) to (11). Pub. L. 110-49, § 4(2)(D)–(4), added pars. (6) to (11).

Subsec. (g). Pub. L. 110-49, § 7(a), amended subsec. (g) generally. Prior to amendment, text of subsec. (g) read as follows: “The President shall immediately transmit to the Secretary of the Senate and the Clerk of the House of Representatives a written report of the President’s determination of whether or not to take action under subsection (d), including a detailed explanation of the findings made under subsection (e) and the factors considered under subsection (f). Such report shall be consistent with the requirements of subsection (c) of this Act.”

Subsec. (h). Pub. L. 110-49, § 9, amended subsec. (h) generally. Prior to amendment, text of subsec. (h) read as follows: “The President shall direct the issuance of regulations to carry out this section. Such regulations shall, to the extent possible, minimize paperwork burdens and shall to the extent possible coordinate reporting requirements under this section with reporting requirements under any other provision of Federal law.”

Subsec. (i). Pub. L. 110-49, § 10, amended subsec. (i) generally. Prior to amendment, text of subsec. (i) read as follows: “Nothing in this section shall be construed to alter or affect any existing power, process, regulation, investigation, enforcement measure, or review provided by any other provision of law.”

Subsec. (k). Pub. L. 110-49, § 3, added subsec. (k) and struck out former subsec. (k) which defined “critical technologies” and required the President and such agencies as the President shall designate to submit quadrennial reports, which could be classified, to Congress concerning credible evidence of a coordinated strategy by 1 or more countries or companies to acquire U.S. companies involved in critical technologies or foreign industrial espionage activities directed at obtaining commercial secrets related to critical technologies.

Subsec. (l). Pub. L. 110-49, § 5, added subsec. (l).

Subsec. (m). Pub. L. 110-49, § 7(b), added subsec. (m).

Subsec. (n). Pub. L. 110-49, § 8, added subsec. (n).

1994—Subsec. (k)(1)(B). Pub. L. 103-359 inserted “or directly assisted” after “directed”.

1992—Subsecs. (b) to (e). Pub. L. 102-484, § 837(a), added subsec. (b) and redesignated former subsecs. (b) to (d) as (c) to (e), respectively. Former subsec. (e) redesignated (f).

Subsec. (f). Pub. L. 102-484, § 837(a)(1), (b), redesignated subsec. (e) as (f) and added pars. (4) and (5). Former subsec. (f) redesignated (g).

Subsec. (g). Pub. L. 102-484, § 837(c), amended subsec. (g) generally. Prior to amendment, subsec. (g) read as follows: “If the President determines to take action under subsection (c), the President shall immediately transmit to the Secretary of the Senate and the Clerk of the House of Representatives a written report of the action which the President intends to take, including a detailed explanation of the findings made under subsection (d).”

Pub. L. 102-484, § 837(a)(1), redesignated subsec. (f) as (g). Former subsec. (g) redesignated (h).

Subsecs. (h), (i). Pub. L. 102-484, § 837(a)(1), redesignated subsecs. (g) and (h) as (h) and (i), respectively.

Subsec. (j). Pub. L. 102-484, § 837(e), added subsec. (j).

Subsec. (k). Pub. L. 102-558 added subsec. (k).

EFFECTIVE DATE OF 2007 AMENDMENT

Amendment by Pub. L. 110-49 applicable after the end of the 90-day period beginning on July 26, 2007, see section 12 of Pub. L. 110-49, set out as a note under section 5315 of Title 5, Government Organization and Employees.

EFFECTIVE DATE OF 1992 AMENDMENT

Amendment by Pub. L. 102-558 deemed to have become effective Mar. 1, 1992, see section 304 of Pub. L.

102-558, set out as a note under section 2062 of this Appendix.

DELEGATION OF FUNCTIONS

For delegation of functions of President under subsecs. (b)(1)(A), (D), (h), and (m)(3)(A) of this section, see section 4(a), (b) of Ex. Ord. No. 11858, May 7, 1975, 40 F.R. 20263, set out below.

STUDY AND REPORT ON FOREIGN DIRECT INVESTMENTS IN UNITED STATES

Pub. L. 110-49, §7(c), July 26, 2007, 121 Stat. 258, provided that:

“(1) **STUDY REQUIRED.**—Before the end of the 120-day period beginning on the date of enactment of this Act [July 26, 2007] and annually thereafter, the Secretary of the Treasury, in consultation with the Secretary of State and the Secretary of Commerce, shall conduct a study on foreign direct investments in the United States, especially investments in critical infrastructure and industries affecting national security, by—

“(A) foreign governments, entities controlled by or acting on behalf of a foreign government, or persons of foreign countries which comply with any boycott of Israel; or

“(B) foreign governments, entities controlled by or acting on behalf of a foreign government, or persons of foreign countries which do not ban organizations designated by the Secretary of State as foreign terrorist organizations.

“(2) **REPORT.**—Before the end of the 30-day period beginning upon the date of completion of each study under paragraph (1), and thereafter in each annual report under section 721(m) of the Defense Production Act of 1950 [50 U.S.C. App. 2170(m)] (as added by this section), the Secretary of the Treasury shall submit a report to Congress, for transmittal to all appropriate committees of the Senate and the House of Representatives, containing the findings and conclusions of the Secretary with respect to the study described in paragraph (1), together with an analysis of the effects of such investment on the national security of the United States and on any efforts to address those effects.”

EX. ORD. NO. 11858. FOREIGN INVESTMENT IN THE UNITED STATES

Ex. Ord. No. 11858, May 7, 1975, 40 F.R. 20263, as amended by Ex. Ord. No. 12188, Jan. 2, 1980, 45 F.R. 989; Ex. Ord. No. 12661, Dec. 27, 1988, 54 F.R. 779; Ex. Ord. No. 12860, Sept. 3, 1993, 58 F.R. 47201; Ex. Ord. No. 13286, §57, Feb. 28, 2003, 68 F.R. 10629; Ex. Ord. No. 13456, §1, Jan. 23, 2008, 73 F.R. 4677, provided:

By the authority vested in me as President by the Constitution and the laws of the United States of America, including section 721 of the Defense Production Act of 1950, as amended (50 U.S.C. App. 2170), and section 301 of title 3, United States Code, it is hereby ordered as follows:

SECTION 1. Policy. International investment in the United States promotes economic growth, productivity, competitiveness, and job creation. It is the policy of the United States to support unequivocally such investment, consistent with the protection of the national security.

SEC. 2. Definitions. (a) The “Act” as used in this order means section 721 of the Defense Production Act of 1950, as amended.

(b) Terms used in this order that are defined in subsection 721(a) of the Act shall have the same meaning in this order as they have in such subsection.

(c) “Risk mitigation measure” as used in this order means any provision of a risk mitigation agreement or a condition to which section 7 of this order refers.

SEC. 3. Establishment. (a) There is hereby established the Committee on Foreign Investment in the United States (the “Committee”) as provided in the Act.

(b) In addition to the members specified in the Act, the following heads of departments, agencies, or offices shall be members of the Committee:

(i) The United States Trade Representative;
 (ii) The Director of the Office of Science and Technology Policy; and
 (iii) The heads of any other executive department, agency, or office, as the President or the Secretary of the Treasury determines appropriate, on a case-by-case basis.

(c) The following officials (or their designees) shall observe and, as appropriate, participate in and report to the President on the Committee’s activities:

(i) The Director of the Office of Management and Budget;

(ii) The Chairman of the Council of Economic Advisers;

(iii) The Assistant to the President for National Security Affairs;

(iv) The Assistant to the President for Economic Policy; and

(v) The Assistant to the President for Homeland Security and Counterterrorism.

SEC. 4. Duties of the Secretary of the Treasury.

(a) The functions of the President under subsections (b)(1)(A) (relating to review and consideration after notification), (b)(1)(D) (relating to unilateral initiation of review and consideration), and (m)(3)(A) (relating to inclusion in annual report and designation) of the Act are assigned to the Secretary of the Treasury.

(b) The Secretary of the Treasury shall perform the function of issuance of regulations under section 721(h) of the Act. The Secretary shall consult the Committee with respect to such regulations prior to any notice and comment and prior to their issuance.

(c) Except as otherwise provided in the Act or this order, the chairperson shall have the authority, exclusive of the heads of departments or agencies, after consultation with the Committee:

(i) to act, or authorize others to act, on behalf of the Committee; and

(ii) to communicate on behalf of the Committee with the Congress and the public.

(d) The chairperson shall coordinate the preparation of and transmit the annual report to the Congress provided for in the Act and may assign to any member of the Committee, as the chairperson determines appropriate and consistent with the Act, responsibility for conducting studies and providing analyses necessary for the preparation of the report.

(e) After consultation with the Committee, the chairperson may request that the Director of National Intelligence begin preparing the analysis required by the Act at any time, including prior to acceptance of the notice of a transaction, in accordance with otherwise applicable law. The Director of National Intelligence shall provide the Director’s analysis as soon as possible and consistent with section 721(b)(4) of the Act.

SEC. 5. Lead Agency. (a) The lead agency or agencies (“lead agency”) shall have primary responsibility, on behalf of the Committee, for the specific activity for which the Secretary of the Treasury designates it a lead agency.

(b) In acting on behalf of the Committee, the lead agency shall keep the Committee fully informed of its activities. In addition, the lead agency shall notify the chairperson of any material action that the lead agency proposes to take on behalf of the Committee, sufficiently in advance to allow adequate time for the chairperson to consult the Committee and provide the Committee’s direction to the lead agency not to take, or to amend, such action.

SEC. 6. Reviews and Investigations.

(a) Any member of the Committee may conduct its own inquiry with respect to the potential national security risk posed by a transaction, but communication with the parties to a transaction shall occur through or in the presence of the lead agency, or the chairperson if no lead agency has been designated.

(b) The Committee shall undertake an investigation of a transaction in any case, in addition to the circumstances described in the Act, in which following a review a member of the Committee advises the chair-

person that the member believes that the transaction threatens to impair the national security of the United States and that the threat has not been mitigated.

(c) The Committee shall send a report to the President requesting the President's decision with respect to a review or investigation of a transaction in the following circumstances:

(i) the Committee recommends that the President suspend or prohibit the transaction;

(ii) the Committee is unable to reach a decision on whether to recommend that the President suspend or prohibit the transaction; or

(iii) the Committee requests that the President make a determination with regard to the transaction.

(d) Upon completion of a review or investigation of a transaction, the lead agency shall prepare for the approval of the chairperson the appropriate certified notice or report to the Congress called for under the Act. The chairperson shall transmit such notice or report to the Congress, as appropriate.

SEC. 7. *Risk Mitigation.* (a) The Committee, or any lead agency acting on behalf of the Committee, may seek to mitigate any national security risk posed by a transaction that is not adequately addressed by other provisions of law by entering into a mitigation agreement with the parties to a transaction or by imposing conditions on such parties.

(b) Prior to the Committee or a department or agency proposing risk mitigation measures to the parties to a transaction, the department or agency seeking to propose any such measure shall prepare and provide to the Committee a written statement that: (1) identifies the national security risk posed by the transaction based on factors including the threat (taking into account the Director of National Intelligence's threat analysis), vulnerabilities, and potential consequences; and (2) sets forth the risk mitigation measures the department or agency believes are reasonably necessary to address the risk. If the Committee agrees that mitigation is appropriate and approves the risk mitigation measures, the lead agency shall seek to negotiate such measures with the parties to the transaction.

(c) A risk mitigation measure shall not, except in extraordinary circumstances, require that a party to a transaction recognize, state its intent to comply with, or consent to the exercise of any authorities under existing provisions of law.

(d) The lead agency designated for the purpose of monitoring a risk mitigation measure shall seek to ensure that adequate resources are available for such monitoring. When designating a lead agency for those purposes, the Secretary of the Treasury shall consider the agency's views on the adequacy of its resources for such purposes.

(e)(i) Nothing in this order shall be construed to limit the ability of a department or agency, in the exercise of authorities other than those provided under the Act, to:

(A) conduct inquiries with respect to a transaction;

(B) communicate with the parties to a transaction; or

(C) negotiate, enter into, impose, or enforce contractual provisions with the parties to a transaction.

(ii) A department or agency shall not condition actions or the exercise of authorities to which paragraph (i) of this subsection refers upon the exercise, or forbearance in the exercise, of its authority under the Act or this order, and no authority under the Act shall be available for the enforcement of such actions or authorities.

(f) The Committee may initiate a review of a transaction that has previously been reviewed by the Committee only in the extraordinary circumstances provided in the Act.

SEC. 8. *Additional Assignments to the Committee.* In addition to the functions assigned to the Committee by the Act, the Committee shall review the implementation of the Act and this order and report thereon from time to time to the President, together with such recommendations for policy, administrative, or legislative proposals as the Committee determines appropriate.

SEC. 9. *Duties of the Secretary of Commerce.* The Secretary of Commerce shall:

(a) obtain, consolidate, and analyze information on foreign investment in the United States;

(b) monitor and, where necessary, improve procedures for the collection and dissemination of information on foreign investment in the United States;

(c) prepare for the public, the President or heads of departments or agencies, as appropriate, reports, analyses of trends, and analyses of significant developments in appropriate categories of foreign investment in the United States; and

(d) compile and evaluate data on significant transactions involving foreign investment in the United States.

SEC. 10. *General Provisions.* (a) The heads of departments and agencies shall provide, as appropriate and to the extent permitted by law, such information and assistance as the Committee may request to implement the Act and this order.

(b) Nothing in this order shall be construed to impair or otherwise affect:

(i) authority granted by law to a department or agency or the head thereof;

(ii) functions of the Director of the Office of Management and Budget relating to budget, administrative, or legislative proposals; or

(iii) existing mitigation agreements.

(c) This order shall be implemented consistent with applicable law and subject to the availability of appropriations.

(d) Officers of the United States with authority or duties under the Act or this order shall ensure that, in carrying out the Act and this order, the actions of departments, agencies, and the Committee are consistent with the President's constitutional authority to: (i) conduct the foreign affairs of the United States; (ii) withhold information the disclosure of which could impair the foreign relations, the national security, the deliberative processes of the Executive, or the performance of the Executive's constitutional duties; (iii) recommend for congressional consideration such measures as the President may judge necessary and expedient; and (iv) supervise the unitary executive branch.

SEC. 11. *Revocation.* Section 801 of Executive Order 12919 of June 3, 1994, is revoked.

INTERIM DIRECTIVE REGARDING DISPOSITION OF CERTAIN MERGERS, ACQUISITIONS, AND TAKEOVERS

Memorandum of the President of the United States, Oct. 26, 1988, 53 F.R. 43999, provided:

Memorandum for the Secretary of the Treasury
By virtue of the authority vested in me by the Constitution and statutes of the United States, including without limitation Section 301 of Title 3 of the United States Code, the Defense Production Act of 1950, as amended (50 U.S.C. App. 2061 *et seq.*), and the Omnibus Trade and Competitiveness Act of 1988 (Pub. L. 100-418, August 23, 1988) (the "Act") [see Tables for classification], it is ordered as follows:

Pending the issuance of an Executive order to implement the Act, the Secretary of the Treasury is hereby designated and empowered to perform the following-described functions of the President: The authority vested in the President by Section 721 of the Defense Production Act of 1950, as amended [this section], relative to mergers, acquisitions, and takeovers proposed or pending on or after the date of enactment of the Act [Aug. 23, 1988] by or with foreign persons which could result in foreign control of persons engaged in interstate commerce in the United States.

The Secretary of the Treasury shall consult with the Committee on Foreign Investment in the United States, established pursuant to Executive Order No. 11858 [set out above] and chaired by the representative of the Secretary of the Treasury, to take such actions or make such recommendations as requested by the Secretary of the Treasury.

The delegation provided herein shall terminate, and this interim directive shall be without any further ef-

fect, except as may be provided in the Executive order implementing the Act, upon the effective date of such order.

This interim directive shall be published in the Federal Register.

RONALD REAGAN.

§ 2170a. Prohibition on purchase of United States defense contractors by entities controlled by foreign governments

(a) In general

No entity controlled by a foreign government may merge with, acquire, or take over a company engaged in interstate commerce in the United States that—

(1) is performing a Department of Defense contract, or a Department of Energy contract under a national security program, that cannot be performed satisfactorily unless that company is given access to information in a proscribed category of information; or

(2) during the previous fiscal year, was awarded—

(A) Department of Defense prime contracts in an aggregate amount in excess of \$500,000,000; or

(B) Department of Energy prime contracts under national security programs in an aggregate amount in excess of \$500,000,000.

(b) Inapplicability to certain cases

The limitation in subsection (a) shall not apply if a merger, acquisition, or takeover is not suspended or prohibited pursuant to section 721 of the Defense Production Act of 1950 (50 U.S.C. App. 2170).

(c) Definitions

In this section:

(1) The term “entity controlled by a foreign government” includes—

(A) any domestic or foreign organization or corporation that is effectively owned or controlled by a foreign government; and

(B) any individual acting on behalf of a foreign government,

as determined by the President.

(2) The term “proscribed category of information” means a category of information that—

(A) with respect to Department of Defense contracts—

(i) includes special access information;

(ii) is determined by the Secretary of Defense to include information the disclosure of which to an entity controlled by a foreign government is not in the national security interests of the United States; and

(iii) is defined in regulations prescribed by the Secretary of Defense for the purposes of this section; and

(B) with respect to Department of Energy contracts—

(i) is determined by the Secretary of Energy to include information described in subparagraph (A)(ii); and

(ii) is defined in regulations prescribed by the Secretary of Energy for the purposes of this section.

(Pub. L. 102-484, div. A, title VIII, § 835, Oct. 23, 1992, 106 Stat. 2461.)

CODIFICATION

Section was enacted as part of the National Defense Authorization Act for Fiscal Year 1993, and not as part of the Defense Production Act of 1950 which comprises sections 2061 to 2170, 2171, and 2172 of this Appendix.

§ 2170b. Reports on foreign industrial espionage

(a) In general

(1) Submission and contents

In order to assist Congress in its oversight functions with respect to this Act and to improve the awareness of United States industry of foreign industrial espionage and the ability of such industry to protect against such espionage, the President shall submit to Congress a report that describes, as of the time of the report, the following:

(A) The respective policy functions and operational roles of the agencies of the executive branch of the Federal Government in identifying and countering threats to United States industry of foreign industrial espionage, including the manner in which such functions and roles are coordinated.

(B) The means by which the Federal Government communicates information on such threats, and on methods to protect against such threats, to United States industry in general and to United States companies known to be targets of foreign industrial espionage.

(C) The specific measures that are being or could be undertaken in order to improve the activities referred to in subparagraphs (A) and (B), including proposals for any modifications of law necessary to facilitate the undertaking of such activities.

(D) The threat to United States industry of foreign industrial espionage and any trends in that threat, including—

(i) the number and identity of the foreign governments conducting foreign industrial espionage;

(ii) the industrial sectors and types of information and technology targeted by such espionage; and

(iii) the methods used to conduct such espionage.

(2) Date of submission

The President shall submit the report required under this subsection not later than six months after the date of the enactment of this Act [Oct. 14, 1994].

(b) Repealed. Pub. L. 112-87, title III, § 311(c)(1), Jan. 3, 2012, 125 Stat. 1886

(c) Form of reports

To the maximum extent practicable, the report referred to in subsection (a) shall be submitted in an unclassified form, but may be accompanied by a classified appendix.

(d) Omitted

(e) Definition

For the purposes of this section, “foreign industrial espionage” means industrial espionage conducted by a foreign government or by a foreign company with direct assistance of a foreign government against a private United States