United States Government Accountability Office

GAO

Testimony before the Committee on Homeland Security, Subcommittee on Transportation Security and Infrastructure Protection, House of Representatives

For Release on Delivery Expected
at 10:00 a.m. EDT
Friday, March 23, 2007

DEFENSE TRADE

National Security Reviews of Foreign Acquisitions of U.S. Companies Could Be Improved

Statement of Ann M. Calvaresi-Barr, Director Acquisition and Sourcing Management

Madam Chairwoman and Members of the Subcommittee:

I am pleased to be here today to take part in this hearing on issues related to foreign ownership of U.S. assets and potential effects on national security. As you know, U.S. export control laws, national disclosure policy, the National Industrial Security Program, and other processes and programs have been established to protect defense technologies and other critical assets from falling into the wrong hands, and for other reasons. Similarly, the Exon-Florio amendment to the Defense Production Act of 1950,[1] enacted in 1988, authorized the President to suspend or prohibit foreign acquisitions, mergers, or takeovers[2] of U.S. companies that pose a threat to national security. Exon-Florio is meant to serve as a safety net when laws other than the International Emergency Economic Powers Act[3] may be ineffective in protecting national security.

Exon-Florio is administered by the Committee on Foreign Investment in the United States, currently made up of 12 members: the Department of the Treasury, which serves as Chair; the Departments of Commerce, Defense, Homeland Security, Justice, and State; and six offices in the Executive Office of the President. On the surface, the Exon-Florio review process is fairly straightforward. According to regulations, after a company voluntarily files a notice of a pending or completed acquisition by a foreign concern, the Committee conducts a 30-day review to determine whether there are any national security concerns. If the Committee is unable to complete its review within 30 days, the Committee may either allow the companies to withdraw the notification and refile or initiate a 45-day investigation. If a case undergoes an investigation, the Committee submits a report to the President, including a recommendation for action. Cases that result in a presidential decision are reported to the Congress.

As requested, my comments today will summarize our reports on weaknesses in the Exon-Florio process that GAO has identified over the past decade. Before I begin, however, it is important to provide some context to Exon-Florio. Specifically, implementing Exon-Florio can pose a significant challenge for the

[1]50 U.S.C. app. § 2170.

[2]In the remainder of this statement, acquisitions, mergers, and takeovers are referred to as acquisitions.

[3]The International Emergency Economic Powers Act gives the President broad powers to deal with any "unusual and extraordinary threat" to the national security, foreign policy, or economy of the United States (50 U.S.C. §§ 1701-1706). To exercise this authority, however, the President must declare a national emergency to deal with any such threat. Under this legislation, the President has the authority to investigate, regulate, and, if necessary, block any foreign interest's acquisition of U.S. companies (50 U.S.C. § 1702(a)(1)(B)).

federal government because of the potential for conflict with U.S. open investment policy—a policy that, in recognizing the economic benefits associated with foreign investments, calls for foreign investors to be treated no differently than domestic investors. This challenge has increased significantly since September 2001, when threats facing the nation were fundamentally redefined to include threats against the homeland, including those to our critical infrastructure. At the same time, the economy has become increasingly globalized, as countries open their markets and communicate regularly through the Internet. Government programs established decades ago are often ill-equipped to grapple with these emerging complexities. GAO, therefore, designated the effective identification and protection of critical technologies as a governmentwide high-risk area, which warrants a strategic reexamination to identify needed changes.[4] In terms of Exon-Florio, legislation has been introduced to reform the Exon-Florio process.

Our understanding of the Committee's process is based on our 2005 work but built on our review of the process and our discussions with agency officials for our 2002 report. For our 2005 review, and to expand our understanding of the Committee's process for reviewing foreign acquisitions of U.S. companies, we met with officials from the Departments of Commerce, Defense, Homeland Security, Justice, and the Treasury—the agencies that are most active in the review of acquisitions—and discussed their involvement in the process. Further, we conducted case studies of nine acquisitions that were filed with the Committee between June 28, 1995, and December 31, 2004. We conducted our review from April 2004 through July 2005 in accordance with generally accepted government auditing standards.

To summarize our work in this area, we have found that several aspects of the Committee's process for implementing Exon-Florio may have weakened the law's effectiveness. First, we found a lack of agreement among Committee members about the scope of Exon-Florio—specifically, what defines a threat to national security. Neither the statute nor the implementing regulation defines "national security." However, the statute provides factors that may be considered in determining threats to national security. Despite these factors, some Committee members argued to apply a more traditional definition—one limited to concerns about export-controlled technologies or items, classified contracts, and the existence of specific derogatory intelligence on a foreign company. Other Committee members have argued that a broader view is warranted, and in analyzing the effects of an acquisition, considered the potential vulnerabilities

[4]*High Risk Series: An Update*, GAO-07-310 (Washington D.C.: Jan. 2007).

that an acquisition can create with regard to U.S. critical infrastructure, defense supply, and defense technology superiority. These disagreements may have limited the Committee's analyses of proposed or completed acquisitions.

Second, Committee members also had differing opinions on the criteria that should be used to determine whether an investigation was warranted. The criteria used by Treasury as the Committee Chair and others were essentially the same criteria established in the current law for the President to suspend or prohibit a transaction, or order divestiture—that is, there is credible evidence that the foreign controlling interest may take action that threatens national security and that no laws other than Exon-Florio and the International Emergency Economic Powers Act are adequate to protect national security. Some Committee members have argued that applying these criteria is inappropriate because the purpose of an investigation is to determine whether or not credible evidence of a threat exists.

Third, while most acquisitions are not problematic and the Committee's review can be completed within the 30-day period allowed by Exon-Florio, some more complex acquisitions required more analysis or consideration than the 30-day review period could accommodate. However, the Committee has been reluctant to use the additional 45 days allowed by the legislation because it would require initiating an investigation. The Committee's concern was that the negative perceptions surrounding an investigation could discourage foreign investment in the United States, thereby conflicting with U.S. open investment policy. To avoid investigations, the Committee has in the past encouraged companies to withdraw their notifications of proposed or completed acquisitions and refile them at a later date. Between 1997 and 2004, companies involved in 18 acquisitions were allowed to withdraw their notification and refile at a later time. The new filing is considered a new case and restarts the 30-day clock. While withdrawing and refiling provides additional time for Committee members to review a foreign acquisition while minimizing the risk of chilling foreign investment, it may also heighten the risk to national security in transactions where there are concerns and the acquisition has been completed or is likely to be completed during the withdrawal period. This was the situation in 4 of the 18 acquisitions cited above. One company did not refile for 9 months, another did not refile for 1 year, and 2 had yet to refile at the time of our review.[5]

[5]Given the immediacy of this hearing, we were unable to gather and verify data on the disposition of these cases. However, even if the companies refiled subsequent to our 2005 reporting, the refilings were not timely.

Finally, because very few cases required a presidential decision—the criterion for reporting to the Congress on specific cases—the Congress had little insight into the Committee's process. Further, a 1992 amendment to the legislation requires a report to the Congress every 4 years on certain trends in foreign acquisitions. However, at the time of our work only one report had been submitted, in 1994. I understand that another report, in response to that requirement, has been issued.

Since our 2005 report, the Committee has taken some actions to reform the process, such as increasing communication to interested congressional committees. However, we have not examined how these changes are working. It should be noted that because the law provides for confidentiality of information filed under Exon-Florio, our ability to discuss details of cases we examined is limited.

Background

Enacted in 1988, the Exon-Florio amendment to the Defense Production Act authorized the President to investigate the effects of foreign acquisitions of U.S. companies on national security and to suspend or prohibit acquisitions that might threaten national security. The President delegated investigative authority to the Committee on Foreign Investment in the United States, an interagency group responsible for monitoring and coordinating U.S. policy on foreign investment in the United States.[6] Since the Committee's establishment in 1975, membership has doubled, with the Department of Homeland Security being the most recently added member. In addition to the Committee's 12 standing members, other agencies may be called on when their particular expertise is needed.

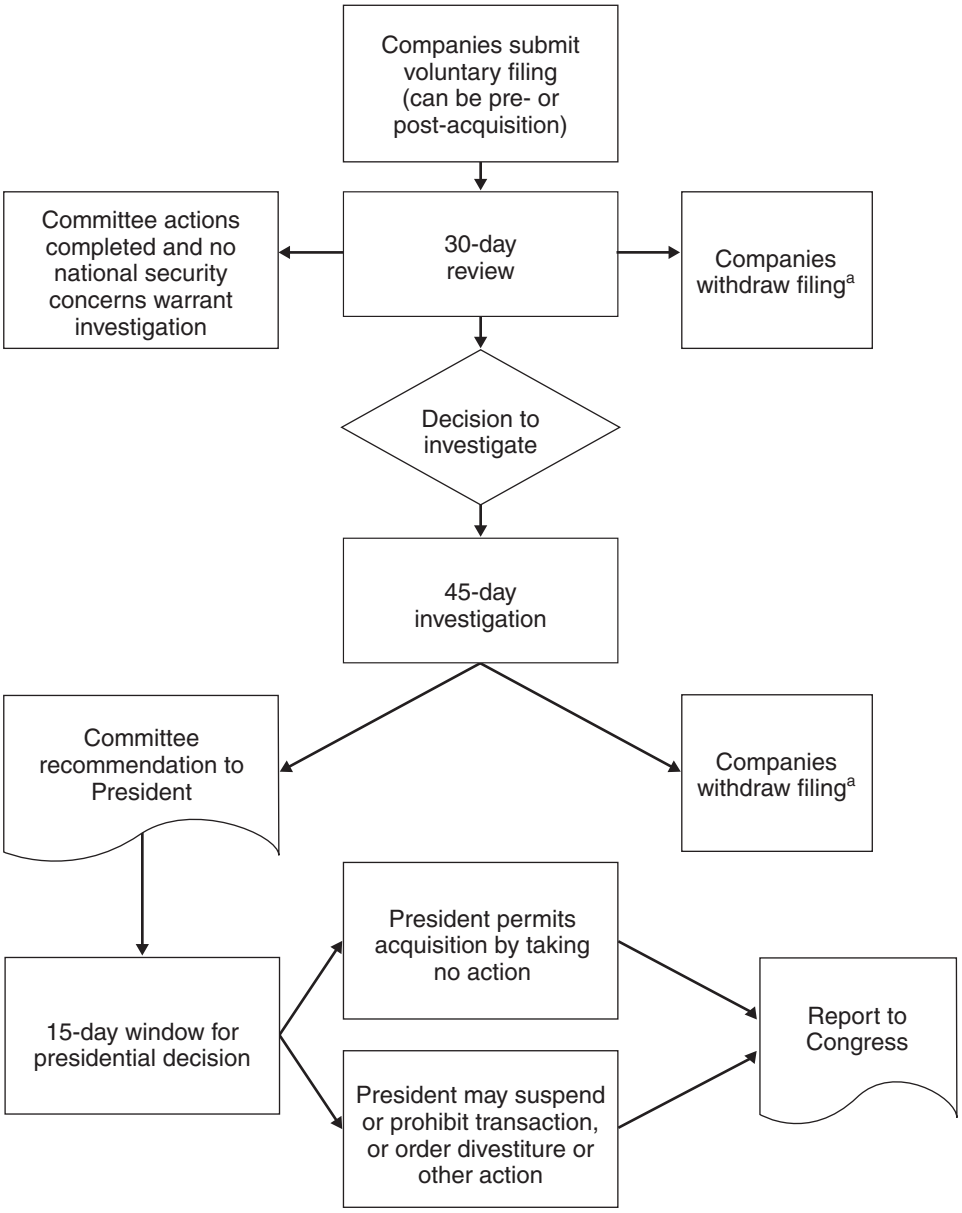
In 1991, the Treasury Department, as Chair of the Committee, issued regulations to implement Exon-Florio. The law and regulations establish a four-step process for reviewing foreign acquisitions of U.S. companies: (1) voluntary notice by the companies;[7] (2) a 30-day review to identify whether there are any national security concerns; (3) a 45-day investigation period to determine whether those concerns require a recommendation to the President for possible action; and (4) a

[6]Executive Order 11858 (May 7, 1975), as amended by Executive Order 12188 (Jan. 2, 1980), Executive Order 12661 (Dec. 27, 1988), Executive Order 12860 (Sept. 3, 1993), and Executive Order 13286 (Feb. 28, 2003).

[7]Notification is not mandatory. However, any member agency is authorized to submit a notification of an acquisition if the companies have not done so. As of our 2005 report, no agency has submitted a notification of an acquisition. Instead, member agencies have informed Treasury of acquisitions that may be subject to Exon-Florio, and Treasury has contacted the company to encourage them to officially notify the Committee of the acquisition to begin a review.

presidential decision to permit, suspend, or prohibit the acquisition (see fig. 1).

Figure 1: Process Used by the Committee on Foreign Investment in the United States to Implement the Exon-Florio Amendment



Source: GAO analysis based on 50 U.S.C. app. § 2170 and 31 C.F.R. Part 800 and case file reviews.

[a]At any point prior to a presidential decision, companies can request to withdraw a notification.

In most cases, the Committee completes its review within the initial 30 days because there are no national security concerns or concerns have been addressed,

or the companies and the government agree on measures to mitigate identified security concerns. In cases where the Committee is unable to complete its review within 30 days, it may initiate a 45-day investigation or allow companies to withdraw their notifications. The Committee generally grants requests to withdraw. When the Committee concludes a 45-day investigation, it is required to submit a report with recommendations to the President. If Committee members cannot agree on a recommendation, the regulations require that the report to the President include the differing views of all Committee members.[8] The President has 15 days after the investigation is completed to decide whether to prohibit or suspend the proposed acquisition, order divestiture of a completed acquisition, or take no action.[9] Table 1 provides a breakdown of notifications and committee actions taken from 1997 through 2004 (the latest date for which data were available at the time of our 2005 review).

Table 1: Notifications to the Committee on Foreign Investment in the United States and Actions Taken, 1997 through 2004

Year	Notifications	Acquisitions[a]	Investigations[b]	Notices withdrawn after investigation begun	Presidential decisions
1997	62	60	0	0	0
1998	65	62	2	2	0
1999	79	76	0	0	0
2000	72	71	1	0	1
2001	55	51	1	1	0
2002	43	42	0	0	0
2003	41	39	2	1	1
2004	53	50	2	2	0
Total	**470**	**451**	**8**	**6**	**2[c]**

Source: Department of the Treasury.

[a]Acquisitions that were withdrawn and refiled are shown in the year of initial notification.

[b]Investigations are shown in the year of their notification.

[c]In both cases the President took no action, thereby allowing the transaction, and sent a report to Congress.

Over the past decade, GAO has conducted several reviews of the Committee's process and actions and has found areas where improvements were needed. In 2000, we found that gaps in the notification process raised concerns about the

[8]31 C.F.R. § 800.504(b).

[9]In 1990, the President ordered a Chinese aerospace company to divest its ownership of a U.S. aircraft parts manufacturer. To date, this is the only divestiture the President has ordered.

Committee's ability to ensure transactions are notified.[10] Our 2002 review, prompted by a lack of congressional insight into the process, again found weaknesses in the process. Specifically, we reported that member agencies could improve the agreements they negotiated with companies under Exon-Florio to mitigate national security concerns. We also questioned the use of withdrawals to provide additional time for reviews.[11] While our most recent work indicated that member agencies had begun to take action to respond to some of our recommendations, concerns remained about the extent to which the Committee's implementation of Exon-Florio had provided the safety net envisioned by the law.[12]

Views Differed over What Constitutes a National Security Threat and When an Investigation Is Warranted

In 2005, we reported that a lack of agreement among Committee members on what defines a threat to national security and what criteria should be used to initiate an investigation may have limited the Committee's analyses of proposed and completed foreign acquisitions. From 1997 through 2004, the Committee received a total of 470 notices of proposed or completed acquisitions,[13] yet it initiated only 8 investigations.

While neither the statute nor the implementing regulation defines "national security," the statute provides a number of factors that may be considered in determining a threat to national security (see fig. 2).

[10]*Defense Trade: Identifying Foreign Acquisitions Affecting National Security Can Be Improved*, GAO/NSIAD-00-144 (Washington, D.C.: June 29, 2000).

[11]*Defense Trade: Mitigating National Security Concerns under Exon-Florio Could Be Improved*, GAO-02-736 (Washington, D.C.: Sept. 12, 2002).

[12]*Defense Trade: Enhancements to the Implementation of Exon-Florio Could Strengthen the Law's Effectiveness*, GAO-05-686 (Washington, D.C.: Sept. 28, 2005).

[13]Nineteen of these notices were refilings.

Figure 2: Exon-Florio Factors That May Be Considered When Determining a Threat to National Security

- 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 national security requirements.
- The potential effects of the proposed or pending transaction on sales of military goods, equipment, or technology to any country identified under applicable law as (a) supporting terrorism or (b) a country of concern for missile proliferation or the proliferation of chemical and biological weapons.
- The potential effects of the proposed or pending transaction on U.S. international technological leadership in areas affecting national security.

Source: 50 U.S.C. app. § 2170(f).

Some Committee member agencies argued for a more traditional and narrow definition of what constitutes a threat to national security—that is, (1) the U.S. company possesses export-controlled technologies or items; (2) the company has classified contracts and critical technologies; or
(3) there is specific derogatory intelligence on the foreign company. Other members, including the Departments of Defense and Justice, argued that acquisitions should be analyzed in broader terms. According to officials from these departments, vulnerabilities could result from foreign control of critical infrastructure, such as control of or access to information traveling on networks. Vulnerabilities can also result from foreign control of critical inputs to defense systems, such as weapons system software development[14] or a decrease in the number of innovative small businesses researching and developing new defense-related technologies.

While these vulnerabilities may not pose an immediate threat to national security, they may create the potential for longer term harm to U.S. national security interests by reducing U.S. technological leadership in defense systems. For example, in reviewing a 2001 acquisition of a U.S. company, the Departments of Defense and Commerce raised several concerns about foreign ownership of

[14]*Defense Acquisitions: Knowledge of Software Suppliers Needed to Manage Risks*, GAO-04-678 (Washington D.C.: May 25, 2004).

sensitive but unclassified technology, including the possibility of this sensitive technology being transferred to countries of concern or losing U.S. government access to the technology. However, Treasury argued that these concerns were not national security concerns because they did not involve classified contracts, the foreign company's country of origin was a U.S. ally, or there was no specific negative intelligence about the company's actions in the United States.

In one proposed acquisition, disagreement over the definition of national security resulted in an enforcement provision being removed from a mitigation agreement between the foreign company and the Departments of Defense and Homeland Security. Defense had raised concerns about the security of its supply of specialized integrated circuits, which are used in a variety of defense technologies that the Defense Science Board had identified as essential to our national defense—technologies found in unmanned aerial vehicles, the Joint Tactical Radio System, and cryptography and other communications protection devices. However, Treasury and other Committee members argued that the security of supply issue was an industrial policy concern and, therefore, was outside the scope of Exon-Florio's authority. As a result of removing the provision, the President's authority to require divestiture under Exon-Florio was eliminated as a remedy in the event of non-compliance.[15]

Committee members also disagreed on the criteria that should be applied to determine whether a proposed or completed acquisition should be investigated. While Exon-Florio provides that the "President or the President's designee may make an investigation to determine the effects on national security" of acquisitions that could result in foreign control of a U.S. company, it does not provide specific guidance for the appropriate criteria for initiating an investigation of an acquisition.[16] At the time of our work, Treasury, as Committee Chair, applied essentially the same criteria established in the law for the President to suspend or prohibit a transaction, or order divestiture: (1) there is credible evidence that the foreign controlling interest may take action to threaten national security and (2) no laws other than Exon-Florio and the International Emergency Economic Powers Act are adequate and appropriate to protect

[15]The regulations provide that the Committee may reopen its review or investigation and revise its recommendation to the President if it determines that the companies omitted or provided false or misleading material information to the Committee (31 C.F.R. § 800.601(e)).

[16]50 U.S.C. app. § 2170(a). Under the statute, investigations are mandatory in those cases in which the acquiring company is "controlled by or acting on behalf of a foreign government" and the acquisition could result in control of the U.S. company and could affect the national security of the United States (50 U.S.C. app. § 2170(b)).

national security.[17] However, the Defense, Justice, and Homeland Security Departments argued that applying these criteria at this point in the process is inappropriate because the purpose of an investigation is to determine whether or not credible evidence of a threat exists. Notes from a policy-level discussion of one particular case further corroborated these differing views.

Committee Allowed Withdrawal of Notifications to Avoid Investigations

Committee guidelines required member agencies to inform the Committee of national security concerns by the 23rd day of a 30-day review—further compressing the limited time allowed by legislation to determine whether a proposed or completed foreign acquisition posed a threat to national security. According to one Treasury official, the information is needed a week early to meet the legislated 30-day requirement. While most reviews are completed in the required 30 days, some Committee members have found that completing a review within such short time frames can be difficult—particularly in complex cases. One Defense official said that without advance notice of the acquisition, time frames are too short to complete analyses and provide input for the Defense Department's position. Another official said that to meet the 23-day deadline, analysts have only 3 to 10 days to analyze the acquisition. In one instance, Homeland Security was unable to provide input within the 23-day time frame.

If a review cannot be completed within 30 days and more time is needed to determine whether a problem exists or identify actions that would mitigate concerns, the Committee can initiate a 45-day investigation of the acquisition or allow companies to withdraw their notifications and refile at a later date.[18] According to Treasury officials, the Committee's interest is to ensure that the implementation of Exon-Florio does not undermine U.S. open investment policy. Concerned that public knowledge of investigations could devalue companies' stock, erode confidence of foreign investors, and ultimately chill foreign investment in the United States, the Committee has generally allowed and often encouraged companies to withdraw their notifications rather than initiate an investigation.

While an acquisition is pending, companies that have withdrawn their notification have an incentive to resolve any outstanding issues and refile as soon as possible. However, if an acquisition has been concluded, there is less incentive

[17] 50 U.S.C. app. § 2170(e).

[18] Exon-Florio's implementing regulations permit companies to request to withdraw notifications at any time up to a presidential decision. After the Committee approves a withdrawal, any subsequent refiling is considered a new, voluntary notice.

to resolve issues and refile, extending the time during which any concerns remain unresolved. Between 1997 and 2004, companies involved in 18 acquisitions withdrew their notification and refiled 19 times. In four cases, the companies had already concluded the acquisition before filing a notification. One did not refile until 9 months later and another did not refile for 1 year. Consequently, concerns raised by Defense and Commerce about potential export control issues in these two cases remained unresolved for as much as a year—further increasing the risk that a foreign acquisition of a U.S. company would pose a threat to national security.

For the other two cases, neither company had refiled at the time we completed our work. In one case, the company had previously withdrawn and refiled more than a year after completing the acquisition. The Committee allowed it to withdraw the notification to provide more time to answer the Committee's questions and provide assurances concerning export control matters. The company refiled, and was permitted to withdraw a second time because there were still unresolved issues. When we issued our report in 2005, 4 years had passed since the second withdrawal without a refiling. In the second case, the company—which filed with the Committee more than 6 months after completing its acquisition—was also allowed to withdraw its notification. At the time we issued our report, 2 years had passed without a refiling.

Lack of Reporting Contributed to the Opaqueness of the Committee's Process and Diminished Oversight

In response to concerns about the lack of transparency in the Committee's process, the Congress passed the Byrd Amendment to Exon-Florio in 1992, requiring a report to the Congress if the President made any decision regarding a proposed foreign acquisition. In 1992, another amendment also directed the President to report every 4 years on whether there was credible evidence of a coordinated strategy by one or more countries to acquire U.S. companies involved in research, development, or production of critical technologies for which the United States is a leading producer, and whether there were industrial espionage activities directed or assisted by foreign governments against private U.S. companies aimed at obtaining commercial secrets related to critical technologies.

While the Byrd Amendment expanded required reporting on Committee actions, few reports have been submitted to the Congress because withdrawing and refiling notices to restart the clock has limited the number of cases that result in a presidential decision. Between 1997 and 2004, only two cases—both involving telecommunications systems—resulted in a presidential decision and a subsequent report to the Congress. Infrequent reporting of Committee deliberations on specific cases provides little insight into the Committee's process to identify concerns raised during investigations and determine the extent

to which the Committee has reached consensus on a case. Further, despite the 1992 requirement for a report on foreign acquisition strategies every four years, at the time of our work there had been only one report—in 1994. However, another report, in response to this requirement, was recently delivered to the Congress.

In conclusion, the effectiveness of Exon-Florio as a safety net depends on how the broad scope of its authority is implemented in today's globalized world—where identifying threats to national security has become increasingly complex. While Exon-Florio provides the Committee on Foreign Investment in the United States the latitude to define what constitutes a threat to national security, the more traditional interpretation fails to fully consider factors currently embodied in the law. Further, the Committee guidance requiring reviews to be completed within 23 days to meet the 30-day legislative requirement, along with the reluctance to proceed to an investigation, limits agencies' ability to complete in-depth analyses. However, the alternative—allowing companies to withdraw and refile their notifications—increases the risk that the Committee, and the Congress, could lose visibility over foreign acquisitions of U.S. companies. The criterion for reporting specific cases to the Congress only after a presidential decision contributes to the opaque nature of the Committee's process.

Our 2005 report laid out several matters for congressional consideration to (1) help resolve the differing views as to the extent of coverage of Exon-Florio, (2) address the need for additional time, and (3) increase insight and oversight of the process. Further, we suggested that, when withdrawal is allowed for a transaction that has been completed, the Committee establish interim protections where specific concerns have been raised, specific time frames for refiling, and a process for tracking any actions being taken during a withdrawal period. We have been told that some of these steps are now being taken.

Madam Chairwoman, this concludes my prepared statement. I will be happy to answer any questions you or other Members of the Subcommittee may have.

For information about this testimony, please contact Ann M. Calvaresi-Barr, Director, Acquisition and Sourcing Management, at (202) 512-4841 or calvaresibarra@gao.gov. Other individuals making key contributions to this product include Thomas J. Denomme, Gregory K. Harmon, Paula J. Haurilesko, John J. Marzullo, Russell Reiter, Karen Sloan, and Marie Ahearn.

Scope and Methodology

Our understanding of the Committee's process is based on our 2005 work but built on our review of the process and our discussions with agency officials for our 2002 report. For our 2005 review, and to expand our understanding of the

Committee's process for reviewing foreign acquisitions of U.S. companies, we met with officials from the Departments of Commerce, Defense, Homeland Security, Justice, and the Treasury—the agencies that are most active in the review of acquisitions—and discussed their involvement in the process. Further, we conducted case studies of nine acquisitions that were filed with the Committee between June 28, 1995, and December 31, 2004. We selected acquisitions based on recommendations by Committee member agencies and the following criteria: (1) the Committee permitted the companies to withdraw the notification; (2) the Committee or member agencies concluded agreements to mitigate national security concerns; (3) the foreign company had been involved in a prior acquisition notified to the Committee; or (4) GAO had reviewed the acquisition for its 2002 report. We did not attempt to validate the conclusions reached by the Committee on any of the cases we reviewed. To determine whether the weaknesses in provisions to assist agencies in monitoring agreements that GAO had identified in its 2002 report had been addressed, we analyzed agreements concluded under the Committee's authority between 2003 and 2005. We conducted our review from April 2004 through July 2005 in accordance with generally accepted government auditing standards.

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