THE REAUTHORIZATION OF EXON-FLORIO: A BATTLE BETWEEN SPURRING THE U.S. ECONOMY AND PROTECTING NATIONAL SECURITY

I. FACTS

The United States Congress first enacted the Exon-Florio Amendment (Exon-Florio), part of the Omnibus Trade and Competitiveness Act of 1988, in reaction to the growing influx of direct foreign investment in the United States. Congress, concerned that the federal government would be powerless to stop a foreign takeover of a key industry, passed Exon-Florio in order to give the President the power to review any investment that might threaten national security. By Executive Order on December 28, 1988, President Reagan delegated his authority under Exon-Florio to the Committee on Foreign Investment in the United States (CFIUS). In the four

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2 S. Rep. No. 80, 100th Cong., 1st Sess. 5 (1987); See also European Community: Statement on U.S. Policy on Foreign Direct Investment, 31 I.L.M. 467 (1992) [hereinafter European Community Statement]. The large influx of foreign capital into the United States began in the 1970's as oil money from the Middle East was used to invest in American businesses. Id. By 1990, European Community investors owned over half of the direct foreign investment stocks in the United States, an increase due to the liberal trade rules between the European nations and the United States. Id.

3 Exon-Florio, 50 U.S.C. app. § 2170 (1992) Subsection (a) states: 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. Id.

4 Exec. Order No. 12,661, 54 Fed. Reg. 779 (1988). CFIUS was originally created in 1975 by Executive Order No. 11858 (40 Fed. Reg. 20263) to monitor acquisitions by foreign companies in the United States. Id. This committee currently consists of the Secretaries of State, Treasury, Defense, and Commerce; the Assistant to the President for Economic Affairs; the Executive Director of the Council on International Economic Policy; the Attorney General; and the Director of the Office of Management and Budget. Id.
years following its designation as the enforcer of Exon-Florio, CFIUS has reviewed approximately 700 foreign takeovers. Of these takeovers, only 14 were extensively reviewed, and only one was ultimately blocked by President Bush.

Although enacted as a part of the Omnibus Trade and Competitiveness Act, the provisions that became Exon-Florio were actually codified as Title VII of the Defense Production Act of 1950. This law had a "sunset" clause which caused the entire act to terminate on September 30, 1990, and, therefore, it became necessary for Congress to enact new legislation to ensure continued review of foreign mergers, acquisitions, and takeovers. On August 2, 1991, both the Senate and the House of Representatives passed a conference report exempting Exon-Florio from the automatic termination provisions of the Defense Production Act, making it permanent federal law.

Following the delegation of authority to CFIUS and the reauthorization by the House and Senate, the creation of stringent guidelines was necessary to ensure proper implementation of the

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6 Id. The fourteenth CFIUS review took place this past summer as the French Government owned Thomson-CSF Inc. attempted to acquire the missile division of LTV Corp., a major U.S. defense contractor. Id. However, no presidential decision on the takeover was rendered because Thomson-CSF withdrew its bid after both the Senate and House of Representatives passed legislation effectively blocking the sale. Id.

7 Spiegel, Berg, and Southwick, How Foreign Buyers Can Avoid Exon-Florio Pitfalls, MERGERS & ACQUISITIONS, March/April 1992, at 40. The only Presidential rejection of a proposed takeover occurred when Chinese National Aero-Technology Import & Export Corporation (CATIC), a government owned aerospace firm, attempted to acquire MAMCO Manufacturing Inc., a U.S. manufacturer of metal aircraft parts. Id. President Bush claimed that he forced CATIC to divest its holdings in MAMCO after intelligence information related that CATIC had made questionable technology transfers in the past. Id. However, it is more likely that this rejection was a political maneuver in light of the fact that the decision was reached by the President only a few days after the Tiananmen Square massacre. 138 CONG. REC. S9644 (daily ed. June 16, 1992) (statement of Sen. Riegle).

8 50 U.S.C. app. § 2158 (1982) (stating that the Defense Production Act was initially passed to support mobilization of the defense industrial base of the United States).


Exon-Florio provisions. The Department of the Treasury promulgated the regulations in final form on November 21, 1991. Nevertheless, the final implementation of the Exon-Florio Amendment failed to solve all the problems related to foreign investment in the United States. Rather, the final implementation raised the question of whether current policy on direct foreign investment is strict enough to protect the U.S. economy.

Currently, the United States encourages open direct foreign investment in order to benefit both the national and global economies. However, opposition to this current investment policy is growing based on the weak U.S. economy and an atmosphere of rising protectionist sentiment. These protectionists seek to expand the powers of Exon-Florio in order to assure that all reviews of foreign investments are pursued vigorously so that large, high-tech firms are sure to remain under U.S. ownership. This groundswell of support for increased restrictions on foreign investment in the United States resulted in the introduction of H.R. 2624, The Technology Preservation Act of 1991.

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11 Petraitis & Aberman, supra note 9, at 3.
12 Regulations Pertaining to Mergers, Acquisitions, and Takeovers by Foreign Persons, 56 Fed. Reg. 58,774 (1991) (to be codified at 31 C.F.R. § 800) [hereinafter Regulations for Implementation]. Since the ultimate action following a review of a foreign direct investment must be made by the President, these provisions define the role of CFIUS and establish procedures to be followed whenever notification of such a merger, acquisition, or takeover is received. Id.
13 Petraitis & Aberman, supra note 9, at 6. When creating the regulations for implementation, the Treasury Department rejected a number of proposals that would have resulted in a more lenient approach to foreign investment in the United States. Id.
14 European Community Statement, supra note 2; See also Treasury Reiterates Opposition To Collins' Ideas For Exon-Florio Changes, Int'l Trade Daily (BNA) (Apr. 2, 1992) [hereinafter Treasury Reiterates Opposition]. The President of the United States, the European Community, and the Treasury Department are some of the parties advocating United States maintenance of a policy of free and open direct foreign investment. European Community Statement, supra note 2. The European Community would ideally have Exon-Florio removed from the books altogether so as to prevent any instability in such investments. Id. However, the President and the Treasury Department desire to keep the law as it stands in order to provide a mechanism through which national security can be defended (a policy the EC does not contest). Id.
15 Petraitis & Aberman, supra note 9, at 8.
16 Exon Florio Should Either Be Terminated Or Enhanced, House Banking Panel Advised, Int'l Trade Daily (BNA) (Apr. 3, 1992). In addition to several Congressmen supporting legislation which would strengthen Exon-Florio, the protectionists include leading authorities on foreign investment, such as Susan Tolchin of George Washington University, and executives of several defense contractors, such as Jay Brozost of Martin-Marietta. Id.
II. LEGAL BACKGROUND

Since its birth over two hundred years ago, the United States has relied significantly on foreign direct investment to increase economic growth and to improve the standard of living.\textsuperscript{18} By adhering to the principle that the lack of barriers and other preventative measures against foreign investment allows the global economy to function best, the United States has achieved one of the most open investment policies in the world.\textsuperscript{19} Such policies led to a dramatic sixty-two percent increase in direct foreign investment in the United States in 1987,\textsuperscript{20} and by the end of 1988 direct foreign investment in the United States totalled more than $300 billion.\textsuperscript{21}

Concerned over the sharp rise in direct foreign investment during the 1980's, Congress began to question its ability to block foreign investment in key industrial areas.\textsuperscript{22} During the failed purchase of Fairchild Semiconductor Corporation by Fujitsu, Ltd. of Japan in 1987\textsuperscript{23} and the attempted hostile takeover of the Goodyear Tire \& Rubber Company by British corporate raider Sir James Goldsmith in 1986,\textsuperscript{24} Congress discovered that the federal government did not have authority to prevent transactions which threaten national security.\textsuperscript{25} As a solution to this problem, Senator James Exon (D-Neb.) and Representative James Florio (D-N.J.) introduced the

\begin{itemize}
  \item \textsuperscript{18} United States: President's Statement Announcing United States Foreign Direct Investment Policy, 31 I.L.M. 488 (1992) [hereinafter President's Statement].
  \item \textsuperscript{20} Gene Koretz, The Buying of America: Should We Be Worried?, BUS. Wk., May 9, 1988, at 36. Total direct foreign investment in the United States during 1987 was $40.6 billion, including over five percent of the stock in non-manufacturing industries and almost 10% in manufacturing industries. \textit{Id.}
  \item \textsuperscript{21} Jonathan P. Hicks, The Takeover of American Industry, N.Y. TIMES, May 28, 1989, § 3, at 1.
  \item \textsuperscript{22} S. Rep. No. 80, supra note 2, at 5.
  \item \textsuperscript{23} \textit{Id.} Since 35 to 45% of Fairchild's production was purchased by major U.S. defense contractors, many government agencies expressed concern about the Japanese having access to classified technology. \textit{Id.}
  \item \textsuperscript{24} N.G., Thank You, Ivan!, FIN. WORLD, Dec. 23, 1986, at 108. Sir James Goldsmith, expressing an intent to gain control of Goodyear, purchased 12.5 million shares of the U.S. corporation. \textit{Id.} However, his plan was foiled when Goodyear refused to accept his offer and the Ohio legislature created barriers to protect against the proposed takeover. \textit{Id.}
  \item \textsuperscript{25} S. Rep. No. 80, supra note 2, at 5.
\end{itemize}
amendment to the 1988 Omnibus Trade and Competitiveness Act that eventually became section 5021 (the Exon-Florio Amendment).26 The bill, as originally introduced, granted authority to the Secretary of Commerce to investigate the effects of foreign mergers, acquisitions, and takeovers on U.S. national security and essential commerce.27 However, during congressional conference committee hearings the Amendment underwent significant changes, which gave the power of investigation to the President and removed essential commerce from the area to be protected.28 Congress further modified the bill, following a presidential veto, before its final enactment on August 23, 1988.29

The final version of the Exon-Florio Amendment grants authority to the President or the President’s designee30 to investigate and determine the effects on national security of mergers, acquisitions, and takeovers proposed or pending by or with foreign entities that could result in foreign control of businesses engaged in interstate commerce in the United States.31 Upon receipt of notification of a proposed or pending merger, acquisition, or takeover, the Executive Office has thirty days to determine whether an investigation should be commenced and an additional forty-five days following that determination in which to complete the investigation.32 Should the President find it appropriate to suspend or prohibit any such transaction for the purposes of national security, Exon-Florio grants him the authority to instruct the Attorney General to seek appropriate

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26 New Trade Law Unlikely to Hamper Many Foreign Takeovers, ABA Group Told, 1988 Daily Rep. Exec. (BNA), at 229 (Nov. 29, 1988); See also Nathans, Meet Wall Street’s New Bugaboo: CFIUS, Bus. Wk., June 12, 1989, at 90 (stating that Senator Exon was drawn into the situation because Goodyear has a large plant in his home state of Nebraska and asked Exon to help fend off Goldsmith’s attack).

27 S. Rep. No. 80, supra note 2, at 24-25.

28 H.R. Rep. No. 576, 100th Cong., 2nd Sess., at 338-39 (1988). The members of the committee determined that the new legislation would be more effective if it was enforced by the President and only focused on national security, rather than on both security and economic issues. Id.

29 See 134 CONG. REC. S10,595 (Aug. 2, 1988) for a discussion of the final modifications made to the bill. President Reagan vetoed the original bill due to the inclusion of plant closing notification requirements and export of Alaskan oil provisions. Id.

30 Exec. Order No. 12,661, supra note 4 (granting responsibility for implementing and enforcing the provisions of section 721 to the Committee on Foreign Investment in the United States).


32 Id. Any documentation or evidence filed or gathered during this period must be kept strictly confidential by the President or President’s designee. Id.
relief in the U.S. district courts. In order to determine what constitutes "national security" for the purposes of the investigation, the amendment sets forth the following factors for the President to consider:

1. domestic production needs 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; and
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.

At the time of Exon-Florio’s enactment, Congress intended that national security “be interpreted broadly without limitation to particular industries,” effectively creating an avenue to bar foreign investment.

When President Reagan passed his authority to enforce the provisions of Exon-Florio to CFIUS, new problems arose concerning the implementation of Exon-Florio by way of committee. As chairman of CFIUS, the Secretary of the Treasury, in conjunction with the Treasury Department, published the proposed regulations for

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33 Id. According to subsection (c) of Exon-Florio, the President may take as much time as he considers appropriate in suspending or terminating a merger, acquisition, or takeover. However, pursuant to subsection (d) he can only exercise this authority if he 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.

Id.

34 Id.


36 Id. But see Narrow Interpretation of Statute Hobbles Exon-Florio Reviews, Lawyers Told, Int’l Trade Rep. (BNA) (Feb. 19, 1992) [hereinafter Narrow Interpretation] (reviews of foreign acquisitions under the narrow interpretation of national security passed by lawmakers are not being conducted properly, and as a result the United States national industrial base is inadequately protected).

37 Exec. Order No. 12,661, supra note 4.
implementing Exon-Florio on July 14, 1989. Following a sixty day comment period, the committee revised the regulations and then presented them in final form on November 21, 1991. Though the committee altered certain aspects of the regulations, they made no significant change in the definition of national security, since the Department of the Treasury wanted to avoid a bright-line or multifactor test to determine which transactions affect national security. However, the final regulations did make changes in the treatment of lending transactions, the treatment of joint ventures, and the definition of control over an entity, while also altering several procedural aspects of Exon-Florio.

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39 Regulations for Implementation, supra note 12. Due to the complex nature of the subject area covered, the committee creating the regulations chose to solicit public opinion during a sixty day comment period. Id.
40 Id. As a result of these regulations, CFIUS grew from nothing more than a coordinating unit into an actual investigative unit which makes formal recommendations to the President. See id.
41 Id. at 58,775. The introduction to the regulations indicates that national security is to be applied in investigations in the same manner as it is traditionally defined:

Generally speaking, transactions that involve products, services, and technologies that are important to U.S. national defense requirements will usually be deemed significant with respect to the national security. It is the Committee's view that notice, while voluntary, would clearly be appropriate when, for example, a company is being acquired that provides products or key technologies essential to U.S. defense requirements. On the other hand, the Committee does not intend to suggest that notice should be submitted in cases where the entire output of a company to be acquired consists of products and/or services that clearly have no particular relationship to national security.

Id.
42 Id. at 58,775-76. The taking of a security interest in the voting securities or assets of a U.S. entity by a foreign lender does not subject a transaction to Exon-Florio. Id. at 58,783-84. Additionally, a foreign lender will not be deemed to have control of a debtor if the lender needs majority consent of U.S. participants in the loan syndicate to act or if it does not have a lead role in the loan syndicate. Id.
43 Id. at 58,778-79. According to the new regulations, a joint venture transaction is subject to Exon-Florio if (1) a U.S. person contributes an existing identifiable business in the United States, and (2) the foreign joint venture partners will control that business.
44 Id. at 58,776. The regulations now consider a proxy contest undertaken in order to gain control as an “acquisition” and consider an asset purchase not to be an acquisition if the technology accompanying the asset is “inherent in” the asset (e.g. an instruction manual). Id. at 58,778. The regulations also clarify control in the situation where unrelated foreign parties hold interests in a U.S. person by stating that the Committee will consider the relationship between the parties before
Due to the fact that direct foreign investment in the United States has continued to increase since the enactment of Exon-Florio and since the Department of the Treasury failed to create a bright-line or multi-factor test, support is growing in Congress for a bill that would strengthen the Exon-Florio Amendment. The primary legislation pending in this area is the Technology Preservation Act of 1991, House Resolution 2624 (H.R. 2624), sponsored by Rep. Cardiss Collins (D-Ill.). H.R. 2624 would protect against foreign acquisitions of U.S. high-technology firms as well as those firms with national security concerns. The House Energy and Commerce Committee approved this bill on November 20, 1991. Additionally, H.R. 2624 requires the approval of the House Banking Subcommittee on Economic Stabilization and the House Foreign Affairs International Economic Policy and Trade Subcommittee before the full House of Representatives can vote on it. Although the bill has not yet made its way out of committee, parties such as the President, the U.S. Department of the Treasury, and the European Community are lining up against the proposal because it promises change in the current structure of foreign direct investment in the United States and threatens foreign relations between the countries involved.

determining whether the U.S. person is foreign-controlled. Id. Finally, the regulations narrow the definition of a "foreign person" so that it includes only entities where control by a foreign interest is "exercised or exercisable." Id. at 58,775-78. The basic procedural changes allow CFIUS to extend the thirty day review period if notification was in the wrong form and to invite the parties to a transaction to an issue clarification meeting if necessary. Id. Additionally, the regulations redefine the "material" omissions or misstatements which permit reinvestigation of previously approved transactions. Id.

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45 Petraitis & Aberman, supra note 9, at 6-8. House Majority Leader Richard Gephardt (D-Mo.) stated that "our continued benign analysis of foreign investment practices is rapidly leading to our economic isolation, as we refuse to confront the realities of foreign economic systems, which are not consistent with our view of capitalism." Exon-Florio Reviews Process Gets Mixed Reception at House Hearing, 55 Fed. Cont. Rep. (BNA) 282 (Mar. 4, 1991).

46 Id. at 58,775-78. The basic procedural changes allow CFIUS to extend the thirty day review period if notification was in the wrong form and to invite the parties to a transaction to an issue clarification meeting if necessary. Id. Additionally, the regulations redefine the "material" omissions or misstatements which permit reinvestigation of previously approved transactions. Id.

47 Treasury Reiterates Opposition, supra note 14.

48 Id. The House Banking Subcommittee on Economic Stabilization considered H.R. 2624 during early April, but has not as yet approved the changes. Id. The House Foreign Affairs International Economic Policy and Trade Subcommittee has not yet set its calendar for hearings on H.R. 2624. Id.

50 Id.; See also EC Complains of Uncertainty Associated With Exon-Florio, Int'l Trade Daily (BNA) (Feb. 19, 1992). The President, Treasury Department, and European Community all feel that passage of this bill could end foreign investment in the United States and might destroy foreign relations. Id.
III. Analysis

At the time it was enacted in 1988, the Exon-Florio Amendment established a safeguard against direct foreign investment that threatened national security.\(^{51}\) Congress intended to provide the President with authority to prohibit foreign mergers, acquisitions, and takeovers where credible evidence of a threat to national security exists, while concurrently keeping the United States open to beneficial direct foreign investment.\(^{52}\) However, due to the narrow definition of national security contained in the regulations, direct foreign investment in the United States is growing with little concern for the affects it is having on national security.\(^{53}\) Therefore, a change in the Exon-Florio provisions on direct foreign investment seems imminent, especially in light of changing economic conditions throughout the world.\(^{54}\)

Ironically, the push for an Exon-Florio Amendment providing for greater protection of national security comes at a time when most people would expect less regulation as the national security threat of the Cold War has disappeared.\(^{55}\) Nevertheless, many members of the U.S. Congress and other organizations feel a change is needed to make economic security more of a focus in Exon-Florio investigations.\(^{56}\) A fear exists that "external domination of technology, goods,


\(^{52}\) President's Statement, supra note 18, at 488. In response to proposed changes in Exon-Florio, President Bush issued a statement on December 26, 1991:

The United States welcomes foreign direct investment. Foreign direct investment is beneficial to the U.S. economy. Like domestic investment, foreign investment creates jobs, promotes innovation, generates increases in productivity, and thereby raises U.S. living standards. It strengthens U.S. firms and makes them more competitive in the global economy. . . . While there are exceptions, generally related to national security, such exceptions are few; they limit foreign investment only in certain sectors, such as atomic energy, air and water transport, and telecommunications.

\(^{53}\) Foreign Investment, supra note 5, at d29.

\(^{54}\) Petraitis & Aberman, supra note 9, at 8. The authors cite a weak economy, growing protectionist sentiment, and a presidential election involving trade issues as factors that might lead to change. Id. Additionally, with the construction of the European Community and the downfall of communism, a greater number of foreign nations are looking to invest money in the United States. European Community Statement, supra note 2, at 467.

\(^{55}\) Peter Riddell, Overseas Investors Fight Off Congressional Threats, FIN. TIMES, July 5, 1990, at 13.

and services may well lead to persistent attempts at meddling, manipulation and harassment in the recipients' sovereign affairs, even in peacetime relations among allies. Therefore, since the United States' success in the post-Cold War era depends upon both remaining a power in the global economy and maintaining the proper amount of national security, there is growing sentiment that the rules governing review by CFIUS of foreign acquisitions must be broadened accordingly.

The greatest possibility for change lies in H.R. 2624, the bill currently working its way through the subcommittees in the House of Representatives. This bill, in its introductory form, contemplates a wide definition of national security, creates automatic review of foreign investments that involve "critical technologies" and grants power to the President to take any action necessary against investments that threaten national security. Although the House Subc-
mittee on Commerce, Consumer Protection, and Competitiveness diluted H.R. 2624 to a small degree, it still contains provisions which more broadly define when a review by CFIUS is necessary, thereby increasing the number of potential investigations. As passed by the House Energy and Commerce Committee, H.R. 2624 requires parties to a transaction to notify CFIUS if the acquirer will obtain at least a one-fourth interest in certain U.S. businesses.

(1) access to and control of domestic industries and commercial activity by foreign citizens as such access and control might affect the technological and industrial capability and capacity of the U.S. civilian, as well as defense, sectors;
(2) the concentration of foreign direct investment in the industry in question and the impact of additional investment in such industry;
(3) the U.S. and world market positions of acquired entities and the foreign persons involved in the transaction under investigation, and global concentration in particular industry sectors;
(4) the effect on "critical technologies"; and
(5) whether the acquired person had received U.S. government funds during the preceding ten-year period.

Id. 61 H.R. 2624, supra note 17. The House Subcommittee deleted the "critical technologies" list within the bill and changed the definition of national security to the following form that closely resembles the definition in Exon-Florio itself:

[The capability and capacity of foreign-owned or controlled firms located within the United States to meet the national security requirements, and how such firms might respond to national security needs in time of international crisis; and the capability and capacity of foreign sources of goods and services critical to the national security, including those produced by United States owned or controlled firms operating abroad, and the reliability of continued supplies of such articles in times of international crisis or conflict.

Id. However, the bill provides for broad review by adding a requirement in lieu of the "critical technologies" list, that the Assistant to the President for Science and Technology examine all notified transactions to determine if a technology essential to national security is involved. Id.

62 The Committee defined such a business as one which:
(1) has a contract with the U.S. government which is classified at the top secret level, involves the release of restricted data, or involves the availability to that person of a significant quantity of special nuclear materials;
(2) is engaged in the business of manufacturing or exporting certain defense articles or furnishing defense services;
(3) produces certain goods or possesses certain technology described in the Export Administration Act of 1979; or
(4) engages in any activity requiring a license under the Atomic Energy Act of 1954.

Petraitis & Aberman, supra note 9, at 7-8. Additionally, the committee added the requirement that notification to CFIUS is mandatory if the acquirer is located in a
President Bush refused to endorse H.R. 2624, despite the fact that this legislation would have increased his powers under Exon-Florio and decreased the probability that a direct foreign investment could adversely affect national security. The President claimed that the bill would discourage foreign investment in those sectors of the economy that are most attractive to investors, and therefore would decrease the ability of American firms to compete globally. Since the Bush administration was wary of putting additional restrictions on the influx of foreign investment during a recession in the U.S. economy, senior advisors recommended that the President veto H.R. 2624 had it passed the Congress in its current form.

President Bush was not alone in urging Congress to defeat the proposed changes in the Exon-Florio Amendment. Numerous foreign governments, namely the members of the European Community, continue to protest that the powers under Exon-Florio are already too broad and, if anything, should be decreased. The European Community Chamber of Commerce maintains that enactment of H.R. 2624 would upset the balance between U.S. foreign investment policy and the need to protect national security.

country whose government is determined, under the Export Administration Act of 1979, to have repeatedly provided support for acts of international terrorism. Id. at 8.

63 Special Report: Foreign Investment, supra note 59.

64 Treasury Reiterates Opposition, supra note 14. With the increasing competition among high-tech firms worldwide, any provision restricting investment in this area would take away capital needed to keep U.S. firms at the same level as foreign businesses. Id.

65 Special Report: Foreign Investment, supra note 59 (statement of Treasury Secretary Nicholas F. Brady).


67 EC Chamber of Commerce Registers Opposition To Exon-Florio Changes, Int'l Trade Rep. (BNA), at 653 (Apr. 8, 1992). Of great concern to the EC members is the fact that this proposed amendment comes at a time when the U.S. government is urging the European Community to ensure full access to its new trade and market opportunities. Id.

More specifically, the European Community disapproves of the bill because it will do the following:

1) jeopardize national treatment of foreign-owned firms in that the President can require assurances from foreign investors as to their intentions before they acquire U.S. firms while requiring no such assurances from U.S. investors;

2) give only U.S.-owned firms the right to request information and assistance concerning federal programs and contracts for which such firms
Based upon the reaction received outside of Congress upon the introduction of H.R. 2624, it is clear that any change made in the Exon-Florio Amendment will not come easily. The likely scenario for this bill is that it will be pushed through Congress in some form by the high ranking Democrats who support a tougher policy on foreign direct investment.\(^6\) However, President Clinton, feeling the weight of a weak economy in conjunction with pressure from wealthy nations such as Japan and the members of the European Community, will likely heed the advice of his economic advisors and veto the proposal.\(^6\) Should the President take such action, the chance of a Democratic Congress overriding the veto will be slim, especially considering that few Republicans are likely to support the proposed legislation.\(^7\) Therefore, unless President Clinton decides to change the current U.S. economic and investment policies, it is likely that the Exon-Florio Amendment will remain in its current state.\(^7\)

may be eligible;

(3) require notification in almost every transaction involving a foreign investor where an "essential technology" is implicated; and

(4) potentially require notification of transactions where there is no national security concern other than the involvement of an "essential technology" and where the percentage of the firm acquired is too small to transfer control over that technology.

\(^6\) The bill was introduced by Representative Cardiss Collins of Illinois and has the support of other powerful Democrats such as House Majority Leader Richard Gephardt of Missouri. \(\text{Id.}\)

\(^6\) Special Report: Foreign Investment, supra note 59; See also EC Chamber Registers Opposition to Exon-Florio Changes, supra note 67.

\(^7\) Id. However, there is some recent evidence that a large majority of both the Senate and the House favors tougher foreign investment restrictions. The Senate recently passed an amendment to the Freedom For Russia and Emerging Eurasian Democracies and Open Markets Support Act of 1992 calling for a Presidential rejection of the proposed sale of LTV Corporation's missile division to Thomson-CSF, a French company 58% owned by the government. 138 CONG. REC. S9645, supra note 7. This amendment was passed by a vote of 93 to 4 in the Senate (and a similar bill was passed in the House), clearly showing that there may be adequate support to override the threatened veto of any legislation toughening the Exon-Florio Amendment. \(\text{Id.}\)

\(^7\) President Clinton vowed in a public statement the morning after the election that he intended to maintain continuity in American foreign policy. Thomas L. Friedman, The Transition: Problems Abroad May Force Clinton to Change Agenda, N.Y. Times, Nov. 8, 1992, § 1, at 1. However, Clinton also stated that he will make changes to strengthen America's market system and will spare no effort to restore growth, jobs and incomes to the American people. Transcript of Clinton's Remarks on White House Transition, N.Y. Times, Nov. 5, 1992, at B2. In some foreign markets, investors see Clinton's promise to strengthen the U.S. economy as evidence that he ultimately will adopt a protectionist tone on trade. Tom Petruno, Investors Keep Their Cool After Clinton's Win, L.A. Times, Nov. 5, 1992, at D1.
Failing to implement any change in U.S. direct foreign investment policy could cause serious problems in the future. First, the failure of President Clinton to voluntarily use the power granted to him under Exon-Florio could place the ownership of large U.S. corporations in foreign hands and in turn could jeopardize both military and economic security. If the takeover involves a U.S. defense contractor, the possibility exists that the foreign owner could gain access to sensitive military technology and export it worldwide. Additionally, the foreign owner is likely to move at least some of the production or supply functions of the corporation to its own country, thereby forcing the loss of valuable U.S. jobs. Furthermore, as the law currently stands, no provision exists within Exon-Florio for mandatory notification to be provided to CFIUS when a foreign merger, acquisition, or takeover is about to occur. When this loophole combines with the fact that Exon-Florio provides no straight-forward definition of national security, the possibility exists that a foreign firm could invest in a sensitive, high-tech U.S. business that indirectly relates to national security without CFIUS ever knowing. Although the President has the power to reject such a takeover even after the completion of the transaction, he can only utilize this power if he has credible evidence that national security will be impaired by the transaction.

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73 Id. at 9643. If the reverse situation were to occur, foreign governments are not likely to allow a U.S. corporation to purchase one of their defense firms. Id. The current U.S. situation is another example of how our economic competitors are willing to take advantage of our open markets while carefully protecting their own critical industries. Id.
74 Regulations for Implementation, supra note 12. The text of the regulations created by the Treasury Department states: "A party or parties to an acquisition subject to section 721 may submit a voluntary notice to the Committee of the proposed or completed acquisition by sending ten copies . . . to the Staff Chairman of the Committee on Foreign Investment in the United States . . . ." Id. at 587-84.
75 50 U.S.C. app. § 2170 (1992). According to the text of Exon-Florio: 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 of 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.
Id.
76 Id.; See also supra note 33 (discussing the President's ability to suspend or terminate a transaction under Exon-Florio).
Without broader review of foreign acquisitions under the Exon-Florio Amendment, the potential for foreign governments and firms to penetrate U.S. national security will continue to exist. Moreover, the current combination of an open-door foreign direct investment policy and a generally weak U.S. economy will lead to an increase in foreign investment, which in turn leads to an increased possibility that an important investment will go unreviewed by CFIUS. Fortunately, many individuals, including the President, complain that toughening Exon-Florio will block foreign investment and will harm the global economy. Upon enactment of the Omnibus Trade and Competitiveness Act of 1988, numerous scholars claimed that foreign investment would be slowed and that as a result the U.S. economy would suffer. However, exactly the opposite has been true as Exon-Florio has turned out to be a dull weapon at best, cutting down only one proposed acquisition in four years. Furthermore, groups such as the European Community continue to complain about the strict standards of Exon-Florio, yet their investments in the United States have increased yearly and will likely continue to do so until blocked by legislation completely outlawing direct foreign investment in the United States.

While H.R. 2624 may not be the best vehicle for change in U.S. foreign direct investment policy, since it focuses more on preserving national security than on maintaining economic well-being, clearly some type of legislation must be passed in order to better protect both our economic and national security. Recent history has proven that enactment of restrictions on foreign direct investment will not decrease the influx of capital from foreign nations. More impor-

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77 Treasury Reiterates Opposition, supra note 14.
78 President's Statement, supra note 18.
80 Spiegel, Berg, and Southwick, supra note 7, at 40; see also supra text accompanying note 7 (discussing the single transaction rejected by President Bush).
81 European Community Statement, supra note 2. The amount of direct foreign investment between the European Community nations and the United States over the last ten years is worth more than $400 billion at historical prices and worth much more than that currently. Id.
82 Id.; see also, Treasury Reiterates Opposition, supra note 14. Although foreign investment in the United States has decreased over the last two years, this is the result of the slowdown in the U.S. economy and changes in the situation of potential Japanese investors. Id.
tantly, tougher regulations will ensure that national security will not be compromised at the expense of improving the economy. Therefore, legislation must be enacted which will give increased power to CFIUS to undertake more extensive reviews of foreign mergers, acquisitions, and takeovers, thus preventing the dissolution of U.S. national security.\(^3\)

IV. CONCLUSION

In enacting the Exon-Florio Amendment in 1988, Congress intended to provide a barrier in the United States against foreign investment that threatened national security. However, Exon-Florio proved to be less than adequate protection as the Bush Administration continued to emphasize an open-door direct foreign investment policy. Since the Exon-Florio provisions have not been strictly enforced and, as a result, foreign direct investment in the United States continues to rise, Congress must pass legislation which will toughen the Exon-Florio Amendment.

The consideration of H.R. 2624 is one example that the members of Congress are intent on protecting against a possible penetration of U.S. national security by foreign investors. This bill, if enacted, would strengthen the powers granted to the President under Exon-Florio and would broaden the definition of national security in order to increase the number of foreign investment reviews by CFIUS. As expected, the Bush Administration and many foreign nations, including the members of the European Community, reacted strongly against the proposed restrictions on direct foreign investment. However, there is hope that the new Clinton Administration will see the need to protect against foreign takeovers and will work with Congress to strike a better balance between continued foreign investment and long-term U.S. national security.

Ellison F. McCoy

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\(^3\) French Government Ownership of Thomson Should Bar LTV Acquisition, Panel Told, Int'l Trade Rep. (BNA) 1018 (June 10, 1992). According to Allen I. Mendelowitz, the director of International Trade and Finance Issues at the General Accounting Office, the current "reactive" policy of the CFIUS towards investment proposals does not lend itself to the examination of wider policy issues connected with foreign ownership in the U.S. economy. Id. Mendelowitz claims that middle ground between accepting and rejecting notifications must be found so that CFIUS can make the necessary considerations. Id.