

Enclosure 5

**Federal and Foreign Countries' Foreign Investment
and Ownership Provisions**

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Federal and Foreign Countries' Foreign Investment and Ownership Provisions

This enclosure describes and lists Federal and foreign countries' statutory and regulatory foreign investment and ownership provisions.

Federal Provisions Restricting Foreign Investment and Ownership

Although the United States (U.S.) has an overall policy of openness to foreign investment, several Federal statutory restrictions and prohibitions exist to limit foreign investment in U.S. business concerns in several industry sectors and to require disclosure and reporting of certain foreign investment and foreign involvement in the U.S.¹ The predominant rationale for these investment laws is protecting national security or economic concerns. This enclosure organizes these Federal provisions into three categories: (1) provisions that are similar to the Atomic Energy Act (AEA) foreign ownership, control, or domination (FOCD) provision, (2) provisions that restrict or prohibit foreign investment or ownership in specific sectors of U.S. industry, and (3) provisions that do not restrict or prohibit foreign investment or ownership but do establish disclosure and reporting requirements.

Three statutory regimes include foreign investment or ownership provisions that are similar to the AEA FOCD provision. These statutory regimes deal with (1) communications, (2) government contractor access to classified information, and (3) general investment restrictions under the Defense Production Act of 1950, as amended by the Exon-Florio Amendment and the Foreign Investment and National Security Act of 2007. The Committee on Foreign Investment in the United States (CFIUS) conducts reviews under the third category. Generally, these statutes were enacted with the purpose of safeguarding national security. Further, these provisions allow the concerned agencies and committees to consider the home country of the investor, the particulars of the transaction, and the effects on national security. Although there is not a provision in the energy sector similar to the AEA FOCD provision, Presidential Policy Directive 21 identifies the energy sector as critical infrastructure because it provides an "enabling function" across all critical infrastructure sectors. Thus, a company trying to acquire or build a plant in the energy sector may be subject to a review by CFIUS to identify any national security implications of the foreign investment.

In addition to the provisions with similarities to the AEA FOCD provision, several industry-specific statutes restrict or prohibit foreign ownership and investment in certain sectors of U.S. industry. These sectors are: energy, aviation, shipping, maritime vessels, fisheries, mining, and banking.

Finally, some statutes establish foreign investment and involvement disclosure and reporting requirements but do not operate to limit foreign investment. These reporting requirements apply to investment generally and investment in trade and services, certain investment in agricultural lands, and involvement in printed political propaganda.

¹ See generally, U.S. Government Accountability Office, *Sovereign Wealth Funds: Laws Limiting Foreign Investment Affect Certain U.S. Assets and Agencies Have Various Enforcement Processes* (May 2009).

The following tables provide an overview of these three categories of Federal provisions. Table 1, at page 3 of this enclosure, lists the foreign ownership and investment provisions that are similar to the AEA FOCD provision. Table 2, at page 6 of this enclosure, lists the industry-specific foreign ownership and investment provisions. Table 3, at Page 10 of this enclosure, lists foreign investment and involvement disclosure and reporting provisions.

Foreign Countries' Foreign Investment and Ownership Provisions

Many countries have enacted laws and instituted policies regulating foreign investment, generally to address national security concerns.² Most countries have identified particular sectors in which foreign investment requires prior government review and approval. However, because each country has its own concept of national security, restrictions vary widely. For example, restrictions range from requiring approval of investments in a narrowly defined defense sector to broad restrictions on the basis of economic security and cultural policy. The U.S. Government Accountability Office found, in "Laws and Policies Regulating Foreign Investment in 10 Countries," that many of the 10 countries surveyed had in place foreign investment review programs similar to U.S. national security reviews conducted by CFIUS. Of the ten countries discussed in the report, eight countries had a formal review process that was conducted by a governmental body, with national security being a primary factor for the review process. However, while a CFIUS filing is voluntary, some countries' reviews of foreign investment are mandatory if the investment reaches a certain monetary threshold or if the buyer will obtain a controlling or blocking share in the acquired company. In addition, there are some restrictions in place in the energy sector in some countries. For example, in the Netherlands, foreign investment in some public utilities is restricted; in India, foreign investment in the atomic energy sector is prohibited; and some public monopolies in France, including atomic energy monopolies, are not open to foreign investment. Finally, some countries have transparent foreign investment policies and approval procedures and others are not transparent. The staff did not identify any instances where it was clear that the specific country's nuclear safety regulatory body is involved in the review of foreign involvement and ownership provisions.

Table 4, at page 12 of this enclosure, lists foreign countries' laws and regulations governing foreign investment, generally. This data does not specifically address the limitations that foreign countries impose on investment in nuclear power reactors.

² See generally, U.S. Government Accountability Office, *Foreign Investment: Laws and Policies Regulating Foreign Investment in 10 Countries*, (Feb. 2008).

Table 1 Federal Provisions That Are Similar to the AEA FOCD Provision

Sector	Statute(s) or Regulation(s)	Reviewing Body	Statutory and/or Regulatory Provisions
Communications	Federal Communications Act of 1934	Federal Communications Commission (FCC)	<ul style="list-style-type: none"> • No broadcast or common carrier or aeronautical en route or aeronautical fixed radio station license may be granted to or held by <ul style="list-style-type: none"> ○ Any "alien individual" or a representative of any alien ○ Any foreign corporation ○ Any corporation of which more than 20 percent of its stock is foreign owned or voted ○ Any corporation directly or indirectly controlled by any other corporation of which more than 25 percent of the stock is foreign owned or voted <ul style="list-style-type: none"> ▪ With respect to indirect ownership only (the 25-percent threshold), the FCC may permit foreign ownership above this 25-percent threshold unless it finds that such ownership would be inconsistent with the "public interest" • The FCC also will not grant an authorization for public mobile service to any of the above groups.
Government Contractor Access to Classified Information	Executive Order No. 12829 and the National Industrial Security Program, as amended	Department of Defense (DOD) Department of Energy (DOE)	<ul style="list-style-type: none"> • The purpose of the National Industrial Security Program (NISP) is to safeguard Federal government classified information that is released to contractors, licensees, and grantees of the U.S. government. The NISP Operating Manual provides procedures and guidance for applying these safeguards. • Pursuant to the NISP Operating Manual procedures, contractors cannot have access to classified information if they are under foreign ownership, control, or influence (FOCI) unless measures can be

Sector	Statute(s) or Regulation(s)	Reviewing Body	Statutory and/or Regulatory Provisions
			<p>negate or mitigate the FOCI. These measures may include board resolutions, proxy agreements, or special security agreements.</p> <ul style="list-style-type: none"> • A U.S. entity is under FOCI when "a foreign interest has the power, direct or indirect, whether or not exercised, and whether or not exercisable through the ownership of the U.S. company's securities, by contractual arrangements or other means, to direct or decide matters affecting the management or operations of that company in a manner which may result in unauthorized access to classified information or may adversely affect the performance of classified contracts."
<p>Government Contractor Access to Classified Information</p>	<p>National Defense Authorization Act for Fiscal Year 1993</p>	<p>DOD DOE</p>	<ul style="list-style-type: none"> • A U.S. company that is controlled by one or more foreign governments cannot merge with, acquire, or take over a company if that company is performing a DOD contract or a DOE contract under a national security program, if such contract requires access to proscribed information. The Secretary concerned may issue a waiver if the waiver is essential to national security interests, or where a waiver would advance environmental restoration, remediation, or waste management objectives and will not harm national security. • "Entity controlled by a foreign government" includes (1) organizations or corporations effectively owned or controlled by a foreign government, and (2) individuals working on behalf of a foreign government. • This provision does not apply if the transaction is not

Sector	Statute(s) or Regulation(s)	Reviewing Body	Statutory and/or Regulatory Provisions
			suspended or prohibited under the Exon-Florio Amendment.
Investment Generally	Section 721 of the Defense Production Act of 1950, as amended by the Exon Florio Amendment and the Foreign Investment and National Security Act of 2007 (FISIA)	CFIUS	<ul style="list-style-type: none"> • CFIUS reviews “covered transactions”—mergers, acquisitions, or takeovers by or with a foreign person that could result in foreign control of a person engaged in U.S. commerce. • CFIUS reviews determine whether the transaction threatens to impair national security. CFIUS reviews are conducted on a case-by-case basis. • If the transaction threatens to impair national security, then CFIUS can implement and enforce mitigation measures, monitoring. • The President has the authority to suspend or prohibit any covered transaction that threatens to impair national security.

Table 2 Federal Provisions That Restrict Foreign Investment or Ownership in Certain Sectors Industry

Sector	Statute(s) or Treaty	Reviewing Body	Statutory and/or Regulatory Provisions
Energy	Federal Power Act	Federal Energy Regulatory Commission (FERC)	FERC may only issue licenses for the construction, operation, or maintenance of facilities for the development, transmission, and utilization of hydroelectric power facilities and associated transmission facilities on Federal land to U.S. citizens, any association of U.S. citizens, any corporation organized under the laws of the U.S., or to any state or municipality.
Aviation	Federal Aviation Act of 1958	Department of Transportation (DOT)	Under the Federal Aviation Act, only "citizens of the United States" may operate a U.S. air carrier. Per the definition of "citizens of the United States" under the Act, foreign investment in U.S. air carriers is limited to 25 percent of voting interest, no more than one-third of the directors and other managing officers in U.S. air carriers may be non-U.S. citizens, and the president of a U.S. air carrier may not be a non-U.S. citizen. U.S. citizens must have "actual control" of U.S. air carriers. DOT review is on a case-by-case basis.
Aviation	Open Skies Agreement between the U.S. and the European Union	DOT	Under the Open Skies agreement between the European Union (EU) and the U.S., foreign ownership of more than 25 percent of voting equity is prohibited. Actual control by foreign nationals is also prohibited. However, EU ownership of a U.S. airline of as much as 25 percent of voting equity and/or as much as 49.9 percent of the total equity shall not be deemed, of itself, to constitute control of that airline, and EU ownership of 50 percent or more of the total equity shall not be presumed to constitute control of that airline. Such ownership is considered on a case-by-case basis.

Sector	Statute(s) or Treaty	Reviewing Body	Statutory and/or Regulatory Provisions
Shipping	Shipping Act of 1916	DOT	Foreign investment in U.S. flag coastwise trade vessels (those vessels that ship cargo between points in the U.S.) is limited to 25 percent ownership.
Shipping	Deepwater Ports Act of 1974	DOT	No foreign investor may directly obtain a license to construct or operate a deepwater port beyond State seaward boundaries and beyond the territorial limits of the U.S. Only U.S. citizens may obtain deepwater port licenses.
Maritime Vessels	Merchant Marine Act of 1920	DOT	With respect to U.S.-flag ownership in general, a vessel may only be a U.S.-flag vessel if it has not been registered under the laws of a foreign country and it is owned by (1) U.S. government, (2) State government, (3) a U.S. citizen, (4) association, trust, joint venture, or other entity consisting of all U.S. citizens, (5) partnership of all U.S. partners and controlling interest is held by U.S. citizens, or (6) corporation incorporated in the U.S., its chief executive and chairman of the board are all U.S. citizens, and no more of its directors are non-U.S. citizens than a minority of a quorum.
Fisheries	Coast Guard Authorization Act of 1989	DOT	Owners of vessels permitted or documented to operate in the domestic fishing industry must be (1) a U.S. citizen, (2) an association, all of whose members are U.S. citizens, (3) a partnership whose general partners are U.S. citizens, with the controlling interest in the partnership owned by U.S. citizens, (4) a corporation established under U.S. laws, whose president and chairman are U.S. citizens, with no more of its directors noncitizens than a quorum, (5) the U.S. government, or (6) a State government.
Fisheries	American Fisheries Act of 1998	DOT	Foreign investment in U.S. commercial fishing vessels is limited to 25 percent ownership or control.

Sector	Statute(s) or Treaty	Reviewing Body	Statutory and/or Regulatory Provisions
Mining	General Mining Law of 1872	Department of the Interior (DOI)	Except as otherwise provided by law, valuable mineral deposits on Federal lands are open for purchase by U.S. citizens and those who have declared their intention to become U.S. citizens.
Mining	Mineral Leasing Act of 1920	DOI	<ul style="list-style-type: none"> • No foreign investor may directly purchase or own Federal mineral deposits that are open to exploration or other important mineral leases. These leases are only available to (1) U.S. citizens, (2) associations of citizens, (3) municipalities, or (4) U.S. corporations. • Foreign investors may, however, own up to 100 percent of a U.S. company that holds mineral or mining leases <i>if</i> the laws of their country do not deny similar privileges to U.S. citizens or corporations.
Mining	Continental Shelf Lands Act	DOI	Mineral leases for lands located on the Continental Shelf may only be held by (1) U.S. citizens and nationals, (2) resident aliens, (3) private, public, or municipal corporations organized under U.S. law, or any State, D.C., or territory, or (4) associations of the above-mentioned groups.
Mining	Geothermal Steam Act	DOI	Leases for geothermal steam development and utilization and associated geothermal resources on Federal lands may be issued to U.S. citizens, associations of U.S. citizens, corporations organized under the laws of the U.S., or governmental units.
Banking	International Banking Act of 1978, as amended by the Foreign Bank Supervision Enhancement Act of	Federal Reserve Board (FRB) Office of the Comptroller of the Currency (OCC)	<ul style="list-style-type: none"> • U.S. branches of foreign banks are precluded from engaging in domestic retail deposit-taking, except for branches that were insured by the Federal Deposit Insurance Corporation (FDIC) before the FBSEA was enacted

Sector	Statute(s) or Treaty	Reviewing Body	Statutory and/or Regulatory Provisions
	1991 (FBSEA)		<ul style="list-style-type: none"> No foreign bank may establish a branch or an agency, or acquire ownership or control of a commercial lending company, without the prior approval of the FRB. To acquire approval, the foreign bank must be "subject to the comprehensive supervision or regulation on a consolidated basis by the appropriate authorities in its home country."
Banking	National Bank Act	FRB	All directors of national banks must be U.S. citizens.

Table 3 Federal Provisions That Require Disclosure and Reporting of Foreign Investment and Involvement

Sector	Statute(s)	Reviewing Body	Statutory and/or Regulatory Provisions
Investment in Trade and Services	International Investment and Trade in Services Survey Act of 1976 (IITSSA)	Department of Commerce (DOC) Department of Treasury (Treasury)	<ul style="list-style-type: none"> Provides authority for the President to collect information on international investment and U.S. foreign trade in services for the purpose of assessing the impact of such investment and trade. The DOC has authority to study direct investment and the Treasury has authority to study passive investment. Directs the President to regularly publish the statistics collected in surveys on business enterprises, the ownership or control of which by foreign persons is more than 50 percent of the voting securities or other evidence of ownership.
Investment Generally	Tax Equity and Fiscal Responsibility Act of 1982, as amended	Treasury	Domestic corporations that are at least 25 percent foreign owned and foreign corporations doing business in the U.S. must file an informational return with the Internal Revenue Service disclosing reportable transactions.
Investment Generally	Foreign Direct Investment and International Financial Data Improvements Act of 1990: 22 U.S.C. §§3141 <i>et seq.</i>	Bureau of the Census (Census) and Bureau of Economic Analysis (BEA) of the DOC	Provides that the Census and the BEA exchange information collected under the census provisions and the IITSSA (see above) that pertains to a business enterprise operating in the U.S., where appropriate, to augment the data collected under the IITSSA.
Investment Generally	Domestic and Foreign Investment Improved Disclosure Act of 1977 (a requirement added to the Foreign Corrupt Practices Act of 1977): 15 U.S.C. §78m(d).	Securities and Exchange Commission (SEC)	Amended Section 13(d) of the Securities Exchange Act of 1934 to require that anyone who acquires 5 percent or more of the equity securities of a company registered with the SEC must disclose certain specified information, including citizenship and residence. Hearings indicate that this statute is directed at foreign investors to improve the ability of the Federal government to monitor foreign

Sector	Statute(s)	Reviewing Body	Statutory and/or Regulatory Provisions
			investment in the U.S.
Agriculture	Investment Disclosure Act of 1978	Department of Agriculture	<ul style="list-style-type: none"> • Requires any foreign person who acquires or transfers any interest, other than a security interest, in agricultural land to submit a report to the Secretary of Agriculture not later than 90 days after the date of the acquisition or transfer. • U.S. businesses and persons in which foreign persons hold a "significant interest or substantial control" must also provide these reports.
Political Propaganda	Foreign Agents Registration Act	Attorney General (Department of Justice (DOJ))	Requires that agents of foreign principals register with the Attorney General, that printed political propaganda be labeled to show the relationship between the agent and the foreign principal, and that the agent file the material with DOJ.

Table 4 Other Countries' Foreign Investment Reviews³

Country	Relevant Foreign Direct Investment Law(s)	Formal Review	National Security Review	Reviewing Body	Sector Requiring Review	Reasons for Reviews/Restrictions	Review Time Frames	Appeal	Approval Conditions or Mitigation Agreements
Canada	Investment Canada Act, 1985	Yes	No	Industry Canada and Canadian Heritage	Specified	To ensure net benefit to Canada	45 days, with a possible 30-day extension	No	Yes
China	2006 Regulations for Mergers and Acquisitions of Domestic Enterprises by Foreign Investors Catalog for the Guidance of Foreign Investment Industries	Yes	Yes	Ministry of Commerce	Specified	National economic security, protection of critical industries, purchase of famous trademarks or traditional Chinese brands	Not specified	No	Yes

³ The data in this table has been reproduced from Table 3 on page 15 of the following report: U.S. Government Accountability Office, *Foreign Investment: Laws and Policies Regulating Foreign Investment in 10 Countries* (Feb. 2008).

Country	Relevant Foreign Direct Investment Law(s)	Formal Review	National Security Review	Reviewing Body	Sector Requiring Review	Reasons for Reviews/Restrictions	Review Time Frames	Appeal	Approval Conditions or Mitigation Agreements
France	Law 2004-1343; Decree 2005-1739	Yes	Yes	Ministry of Economy, Finance and Employment	Specified	Public order, public safety, national defense	60 days	Yes	Yes
Germany	2004 Amendment to 1961 Foreign Trade and Payments Act	Yes	Yes	Federal Ministry of Economics and Technology	Specified	Essential security interests, disturbance of peaceful international coexistence, disturbance of foreign relations	30 days	Yes	No
India	Foreign Exchange Management Act, 1999	Yes	Yes	Foreign Investment Promotion Board	Specified	National security, domestic, cultural, and economic concerns	30 days; in practice 3 months	Yes	No

Country	Relevant Foreign Direct Investment Law(s)	Formal Review	National Security Review	Reviewing Body	Sector Requiring Review	Reasons for Reviews/Restrictions	Review Time Frames	Appeal	Approval Conditions or Mitigation Agreements
Japan	1991 Amendment to the Foreign Exchange and Foreign Trade Act of 1949	Yes	Yes	Ministry of Finance	Specified	National security, public order, public safety, or the economy	30 days; ministries can extend to 5 months	Yes	Yes
The Netherlands	Financial Supervision Act of 2006	No	No	N/A	N/A	Competition, financial market oversight	N/A	N/A	N/A
Russia	1999 Federal Law on Foreign Investment	Yes	Yes	Federal Anti-Monopoly Service	Not currently specified	Protection of foundations of the constitutional order, national defense and State security, anti-monopoly	30 days for anti-monopoly review (No specified time frames for national security reviews)	Yes	Yes

Country	Relevant Foreign Direct Investment Law(s)	Formal Review	National Security Review	Reviewing Body	Sector Requiring Review	Reasons for Reviews/Restrictions	Review Time Frames	Appeal	Approval Conditions or Mitigation Agreements
United Arab Emirates	Agencies Law of 1981; Companies Law of 1984	No	No	N/A	N/A	Economic and demographic concerns	N/A	N/A	N/A
United Kingdom	Enterprise Act of 2002	Yes	Yes	Office of Fair Trading	Not officially specified	Public interest, control of classified and sensitive technology	6 months; in practice 30 days	No	Yes
United States	Exon-Florio Amendment to the Defense Production Act of 1950, as amended	Yes	Yes	CFIUS	Not officially specified	National Security	30 days, with a possible 45-day investigation	No	Yes