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Foreign Investment in the United States: Major Federal Statutory Restrictions

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Summary

For a number of years foreign investment in the United States has been a matter of congressional concern. Although the issue has not recently received the media attention that it did in the mid and late 1980's, it is an issue that remains. It is believed by some that the United States has an unusually liberal policy which allows foreigners to invest in virtually all American businesses and real estate and that these foreign investments undermine the American economy by making it vulnerable to foreign influence and domination. These critics argue that there is even foreign domination of some key defense-related industries and that the ability of the country to protect itself in a time of national emergency could greatly suffer. These critics further argue that extensive foreign investment in this country drives up prices which Americans have to pay for investments and, even more importantly, for houses and farmland in areas where there is a significant amount of foreign ownership.

However, others argue that the United States should welcome foreign investment because the influx of foreign money contributes to the creation of jobs in this country. Some also believe that the United States should be a kind of sanctuary for foreign money because of the political and economic instability which characterizes much of the rest of the world. It is also argued that, in this age of globalization of the world's economy, United States restrictions on foreign investment will only impair this nation's economy and cause us to appear isolationist.

This report will take a look at some of the major federal statutes which presently restrict investment by foreigners. The report will first give a brief history of foreign investment in the United States. It will then review constitutional justifications and constitutional limitations which exist concerning federal and state statutory restrictions on foreign ownership of property. After that follows a discussion of some of the major federal statutes which limit foreign investment in the United States. Some of these statutes will be looked at in detail, but a detailed treatment of such other laws as the tax laws, the antitrust laws, and the immigration laws is beyond the scope of this report.

The report will be updated as needed.

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History of Foreign Investment in the United States

Traditionally accepted principles of international law state that the sovereign powers of a nation include the power to exclude alien persons and property.[1] However, in most cases, so as to be mutually beneficial to commerce, nations usually do not fully exercise this power of exclusion. Sometimes a nation writes the restraints into its domestic law. For example, Clause XXX of the Magna Carta has the following provision:

> All merchants, if they were not openly prohibited before, shall have their safe and sure Conduct to depart out of England, to come into England, to tarry in, and go through England, as well by land as by water, to buy and sell without any manner of (evil tolts)[2] by the old and rightful Customers, except in time of war; and if they be of a Land making War against Us, and be found in our Realm at the beginning of the wars, they shall be attached without harm of body or goods, until it be known unto Us, or our Chief Justice, how our Merchants be entered therein the Land making War against Us; and if our merchants be well entreated there, theirs shall be likewise with Us.

Treaties and other forms of bilateral and multicultural agreements have also restricted foreign persons and property. For example, the Greek city-states formed agreements which allowed the reciprocal entry of and ownership of property of foreigners from other contracting states.[3]

The United States has through the years accepted both kinds of restraint.[4] The American colonies were formed to realize profits for their English and Continental investors. After the War of Independence, the new government moved quickly to resolve the outstanding foreign claims so as to assure creditworthiness and to provide a favorable climate for foreign investment. The Jay Treaty, for example, stated that

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[1] *See, e.g.*, Bouve, EXCLUSION AND EXPULSION OF ALIENS IN THE UNITED STATES 3 (1912); *United States ex rel. Knauff* v. *Shaughnessy*, 338 U.S. 537 (1950); and *The Schooner Exchange* v. *McFaddon*, 11 U.S. (7 Cranch) 116 (1812).

[2] tolt: In Old English law, a writ whereby a cause depending in a court baron was taken and removed into a county court. BLACK'S LAW DICTIONARY (6th ed. 1990).

[3] Nussbaum, A CONCISE HISTORY OF THE LAW OF NATIONS 27 (1954).

[4] Much of this historical discussion is based on chapter 1 of A GUIDE TO FOREIGN INVESTMENT UNDER UNITED STATES LAW by the Committee to Study Foreign Investment in the United States of the Section of Corporation, Banking and Business Law of the American Bar Association (New York 1979).

the new United States government would compensate the British for any property which had been seized or destroyed and for unpaid debts caused by the Revolution.

In his Report on Manufactures in 1791, Alexander Hamilton urged the new nation to keep investment open to foreigners.

> It is not impossible that there may be persons disposed to look with a jealous eye on the introduction of foreign capital, as if it were an instrument to deprive our own citizens of the profits of our own industry; but, perhaps, there never could be a more unreasonable jealousy. Instead of being viewed as a rival, it ought to be considered as a most valuable auxiliary, conducing to put in motion a greater quantity of productive labor, and a greater portion of useful enterprise, than could exist without it.[5]

Hamilton's ideas prevailed. During the eighteenth and nineteenth centuries, foreign capital contributed enormously to the nation's development.

> As the nation grew, its roads, bridges, canals, banks, and finally railroads were largely financed by state bonds sold overseas. The Erie Canal, the first American canal to achieve commercial success, was made possible by the first state bonds to be quoted on the London market, in 1817. Europe was eager for investments such as these, and a group of Anglo-American banking houses were established in London--led by Baring Brothers--which specialized in American finance. They bought up entire issues for resale in England. In their eagerness for foreign capital, American states and private enterprises sent their agents to Europe. Generals and congressmen turned to bond selling....[6]

By the middle of the nineteenth century, foreigners held half of the federal and state and one-quarter of the municipal debts. The 1849 California Gold Rush sparked even more foreign investment.

It is also interesting to note that American real estate was quite popular with foreign investors. Europeans acquired substantial holdings in such states as New York, Maine, Florida, West Virginia, and Iowa. The state of Texas granted an English company 3,000,000 acres in payment for building the state capitol building in Austin. Some of the titled Europeans, including the German Baron von Richthofen and the British Earl of Dunraven, attempted to create baronial estates in the West.

At the turn of the century, with the invention of the automobile and the increasing importance of oil, foreign oil companies, such as Royal Dutch Shell, began buying American properties. However, World War I made a drastic change in the influx of foreign capital into the United States. The creditor countries of Europe sold many of their American holdings in order to supply their wartime needs.

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[5] 3 Annals of Congress 994 (1791).

[6] Boorstin, *Foreign Investments in America*, 2 Editorial Research Reports 572-573 (1974).

In just a few years the United States shifted from a debtor to a creditor nation, a position which it retained for a number of years.[7]

Throughout the nation's history, there has been criticism of foreign investment in the United States. When the first and second banks of the United States were created in 1791 and 1816, their organic statutes barred the election of aliens as directors. The Know-Nothing Party advocated discriminatory taxation of foreign capital as early as the 1850's. The Alien Land Law of 1887 prohibited aliens from owning land in federal territories.[8] During the 20th century Congress passed a number of statutes aimed at restricting foreign investment in certain industries such as shipping, aviation, and communications. Nevertheless, by the early 1970's foreign investment in the United States began to rise dramatically, and since then there has been frequent congressional debate as to whether there should be more restriction on investment by foreign citizens in American businesses.

Constitutional Justifications and Limitations

Federal constitutional provisions may be interpreted as legal validation of federal statutes restricting investments by foreigners; other constitutional provisions have to be adhered to by the states in imposing additional restrictions on foreign investment.

The federal government is a government of limited powers. There is no express constitutional provision permitting the regulation of foreign investment in the United States. Thus, other federal powers mentioned in the Constitution must be looked at to justify such regulation. Three constitutional bases for such legislation are the federal powers over immigration and naturalization,[9] the federal power to regulate interstate and foreign commerce,[10] and the power to provide for the national defense.[11]

Congress has the exclusive power to establish naturalization and citizenship requirements and to admit and expel aliens.

> That the government of the United States, through the action of the legislative department, can exclude aliens from its territory is a proposition which we do not think open to controversy. Jurisdiction over its own territory to that extent is an incident of every independent nation. It is a part of its independence. If it could not exclude aliens, it would be to that extent subject to the control of another

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[7] A creditor nation may be defined as a country which exports more than it imports; a debtor nation imports more than it exports. A creditor nation may also be defined as a country whose domestic savings are greater than its domestic investment; a debtor nation is a country whose domestic savings are less than its domestic investment.

[8] Act of March 3, 1887, ch. 340, § 1, 24 Stat. 476.

[9] Art. I, § 8, cl. 4.

[10] Art. I, § 8, cl. 3.

[11] Art. I, § 8, cl. 12.

> power.... The United States, in their relation to foreign countries and their subjects or citizens, are one nation, invested with powers which belong to independent nations, the exercise of which can be invoked for the maintenance of its absolute independence and security throughout its entire territory.[12]

Congress has also been held to have the power to regulate the conduct of alien residents and to prescribe the conditions for their admission and residency.[13] Thus, it is arguable that Congress can condition entry and residency of an alien upon his or her not acquiring investments in the United States. Although this might be an extreme condition to apply, no federal case appears to suggest limits to Congress's ability to place substantive conditions upon entry and residency of aliens.

Congress also has the exclusive power to "regulate Commerce with foreign Nations, and among the several States."[14] The Commerce Clause would appear to give Congress the power to restrict the use of instrumentalities of interstate commerce to transact the sale or exchange of property to a foreign citizen or to the representative of a foreign citizen.[15]

Finally, Congress's power to "raise and support Armies" would also appear to be a constitutional basis for restricting foreign investment in the United States. If it is determined that foreign investments impair national preparedness in the event of an emergency, it appears that prohibition of foreign investments could on this basis be construed as constitutional. In the discussion which occurs later in this report, it will be seen that such a basis provides support for the present restrictions concerning government contracting.

Further, it should be noted that the federal government has exclusive authority over foreign relations. In the case *Zschernig* v. *Miller*[16] the Supreme Court held unconstitutional an Oregon statute which provided for the escheat to the state of property which would otherwise pass to a nonresident alien unless the laws of the foreign nation had reciprocal rights for United States citizens. The Oregon statute required the local probate courts to inquire into

> the type of governments that obtain in particular foreign nations--whether aliens under their law have enforceable rights, whether the so-called "rights" are merely dispensations turning upon the whim or caprice of government officials, whether the representation of consuls, ambassadors, and other representatives of foreign nations is credible or made in good faith, whether there is the actual

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[12] *Chinese Exclusion Case (Chae Chan Ping)* v. *United States*, 130 U.S. 581, 603-604 (1889).

[13] *See Fiallo* v. *Bell*, 430 U.S. 787 (1977).

[14] Art. I, § 8, cl. 3.

[15] *See, e.g., North American Company* v. *Securities and Exchange Commission*, 327 U.S. 686 (1946); and *Electric Bond Company* v. *Securities and Exchange Commission*, 303 U.S. 419 (1938).

[16] 389 U.S. 429 (1967).

> administration in the particular foreign system of law any element of confiscation.[17]

The Court found the Oregon statute to be unconstitutional because it infringed upon the exclusively federal authority over foreign relations.

On the other hand, it has been stated that:

> The imposition of any significant investment controls would likely violate both the spirit and the letter of more than forty bilateral treaties regulating trade and investment relations, many of which laws have been signed within the last ten years, as well as derogating our commitment to the OECD Code of Liberalization of Capital Movements.[18]

The treaties mentioned in the above quotation are Treaties of Friendship, Commerce, and Navigation which grant foreign countries the right to enter, trade, invest, or establish and operate businesses in the other signatory country. Thus, any foreign investment statute would need to take into account those Friendship, Commerce, and Navigation Treaties to which the United States is a signatory.

Further, treaties such as the North American Free Trade Agreement (NAFTA) among the United States, Canada, and Mexico provide for foreign investment opportunities. Chapter 11 of NAFTA requires each party to "accord to investors of another Party treatment no less favorable than it accords, in like circumstances, to its own investors with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments."

Other constitutional provisions may be interpreted to protect foreigners from certain acts of state and local governments. Because the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the United States Constitution apply to *persons* instead of to *citizens*, these provisions guarantee that states cannot abridge the rights of foreign nationals within the United States.[19] The Supreme Court has in the past voided state laws which establish classifications in government actions solely on the basis of citizenship. In doing so, the Court has stated that a classification based solely upon citizenship or nationality is inherently suspect and subject to strict scrutiny. For example, in *Graham* v. *Richardson*[20] the Court held that state laws which denied welfare benefits to resident aliens who had not resided in the United States for a required number of years were unconstitutional because they deprived these persons of equal protection of the laws.

> Under traditional equal protection principles, a State retains broad discretion to classify as long as its classification has a reasonable basis [citations omitted]. This is so in "the area of economics and social welfare" [citations omitted]. But

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[17] *Id.*, at 434.

[18] Note, *United States Regulation of Foreign Direct Investment: Current Developments and the Congressional Response*, 15 VA. J. INT'L L. 611, 621 (1975).

[19] *See Plyler* v. *Doe*, 457 U.S. 202 (1982).

[20] 403 U.S. 365 (1971).

> the Court's decisions have established that classifications based on alienage, like those based on nationality or race, are inherently suspect and subject to close judicial scrutiny. Aliens as a class are a prime example of a "discrete and insular" minority [citations omitted] for whom such heightened judicial solicitude is appropriate. Accordingly, it was said in *Takahashi*, 334 U.S. at 420, that "the power of a state to apply its laws exclusively to its alien inhabitants as a class is confined within narrow limits."[21]

As mentioned in the *Takahashi* case[22] in the above quotation, a state must be careful in applying state laws exclusively to aliens. This case challenged a California statute which barred the issuance of commercial fishing licenses to persons ineligible for citizenship. The Supreme Court held that this statute violated the Fourteenth Amendment's Equal Protection Clause and the federal laws concerning citizenship.

Citizenship has also been rejected as a legitimate classification concerning membership in a state bar,[23] complete bans on employment of aliens in the state civil service system,[24] and the granting of educational benefits to aliens.[25] Yet, the Supreme Court has limited the application of these protections in other cases, one concerning a New York statute limiting appointment to the state police force to United States citizens,[26] and another concerning a New York statute forbidding certification of a non-citizen as a public school teacher unless the person had evidenced intent to become a citizen.[27] Therefore, there appears to be an exception to the general rule that a classification based on citizenship is subject to strict judicial scrutiny in situations where the classification relates to an essential governmental, political, or constitutional function. In such situations the less strict, rational basis test may be applied. From this discussion it may be concluded that state laws restricting investments by at least resident aliens may come under strict judicial scrutiny.[28]

Yet, it must be remembered that, in contrast to the states, the federal government has broad authority over naturalization and immigration.

> For reasons long recognized as valid, the responsibility for regulating the relationship between the United States and our alien visitors has been committed

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[21] *Id.*, at 371.

[22] *Takahashi* v. *Fish and Game Commission*, 334 U.S. 410 (1948).

[23] *In Re Griffiths*, 413 U.S. 717 (1973).

[24] *Sugarman* v. *Dougall*, 413 U.S. 634 (1973).

[25] *Nyquist* v. *Mauclet*, 432 U.S. 1 (1977).

[26] *Foley* v. *Connelie*, 435 U.S. 291 (1978).

[27] *Ambash* v. *Norwich*, 441 U.S. 68 (1979).

[28] It is also possible that nonresident aliens, such as a Japanese bank doing business in the United States, are entitled to the same degree of equal protection under the Fourteenth Amendment as resident aliens, but this is an issue which appears not to have been settled by the courts. With respect, however, to actions by the federal government, it appears clear that Congress can discriminate against nonresident aliens so long as the restriction is reasonable and does not violate their procedural rights. *See, e.g.*, statutes discussed later in this report. No major cases challenging their constitutionality were found.

> to the political branches of the Federal Government. Since decisions in these matters may implicate our relations with foreign powers, and since a wide variety of classifications must be defined in the light of changing political and economic circumstances, such decisions are frequently of a character appropriate to either the Legislature or the Executive than to the Judiciary.[29]

The Supreme Court has held, for example, that aliens can be denied Medicare coverage[30] and that the federal government can deny a visa to a Marxist invited to speak on world communism.[31] The power of Congress to exclude aliens from the United States and to prescribe the terms and conditions on which they enter is virtually absolute and is an attribute of the sovereignty of the United States.[32]

Present Federal Restrictions on Foreign Investment

Four major federal statutes which have an impact upon foreign investment in the United States are information-gathering and disclosure statutes, instead of actual restriction statutes. One of these statutes is the International Investment and Trade in Services Survey Act of 1976.[33] Congress intended this act

> to provide clear and unambiguous authority for the President to collect information on international investment and United States foreign trade in services, whether directly or by affiliates, including related information necessary for assessing the impact of such investment and trade, to authorize the collection and use of information on direct investments owned or controlled directly or indirectly by foreign governments or persons, and to provide analyses of such information to the Congress, the executive agencies, and the general public.[34]

The President by executive order delegated responsibility under this act for studying direct investment to the Commerce Department and portfolio investment to the Treasury Department.[35] The act directs the President to conduct a benchmark survey of foreign direct investment in the United States every five years.[36] Amendments to the act in 1990 direct the President to publish for the use of the general public and federal agencies periodic information concerning foreign investment, including information on ownership by foreign governments of United States affiliates of 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 of these enterprises,

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[29] *Mathews* v. *Diaz*, 426 U.S. 67, 81 (1975).

[30] *Id*.

[31] *Kleindienst* v. *Mandel*, 408 U.S. 753 (1972).

[32] *See Chinese Exclusion Case (Chae Chan Ping)* v. *United States*, 130 U.S. 581, 603-604 (1889).

[33] 22 U.S.C. §§ 3101 *et seq*.

[34] 22 U.S.C. § 3101(b).

[35] E.O. 11961 (Jan. 19, 1977), 42 Fed. Reg. 4321.

[36] 22 U.S.C. § 3103(b).

as well as business enterprises the ownership or control of which by foreign persons is 50 percent or less of the voting securities or other evidence of ownership of these enterprises.[37] The 1990 Amendments also provide that the President may request a report from the Bureau of Economic Analysis of the Department of Commerce of the best available information on the extent of foreign direct investment in a given industry.[38]

Another federal statute having an impact upon foreign investment in the United States is the Foreign Direct Investment and International Financial Data Improvements Act of 1990.[39] The purpose of this act is

> to allow the Department of Commerce's Bureau of Economic Analysis (BEA) access to information collected by the Bureau of the Census (Census). This access will improve the accuracy and analysis of BEA's reports to the public and to Congress on foreign direct investment in the United States.[40]

This act, among other requirements, adds chapter 10 to title 13 of the United States Code to provide that the Bureau of the Census shall exchange with the Bureau of Economic Analysis of the Department of Commerce any information that is collected under the census provisions and under the International Investment and Trade in Services Survey Act that pertains to a business enterprise operating in the United States if the Secretary of Commerce determines that the information is appropriate to augment and improve the quality of the data collected under the Survey Act. The Data Improvements Act of 1990 also requires that other reports be prepared by the Secretary of Commerce and the Comptroller General and submitted to Congressional committees.[41] The Bureau of the Census may provide business data to the Bureau of Economic Analysis and the Bureau of Labor Statistics if the information is required for an authorized statistical purpose and the provision is the subject of a written agreement with that Designated Statistical Agency or its successors.[42]

The third of these information-gathering and disclosure statutes is the Agricultural Foreign Investment Disclosure Act of 1978.[43] This act has the following two major requirements: 1. Any foreign person who acquires or transfers any interest, other than a security interest, in agricultural land must submit a report to the Secretary of Agriculture not later than 90 days after the date of the acquisition or transfer.[44] 2. Any foreign person who holds any interest, other than a security interest, in agricultural land on the day before the effective date of this act must submit a report

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[37] 22 U.S.C. § 3103(a)(5).

[38] 22 U.S.C. § 3103(h).

[39] 22 U.S.C. §§ 3141 *et seq*.

[40] S. Rep. No. 101-443, 101st Cong., 2d Sess. 1 (Aug. 30, 1990).

[41] 22 U.S.C. §§ 3142 and 3143.

[42] 13 U.S.C. § 402.

[43] 7 U.S.C. §§ 3501 *et seq*.

[44] 7 U.S.C. § 3501(a).

to the Secretary of Agriculture not later than 180 days after the effective date of the act.[45]

The fourth statute is also a disclosure statute. It is known as the Domestic and Foreign Investment Improved Disclosure Act of 1977 and is a requirement added to the Foreign Corrupt Practices Act of 1977.[46] This provision amended section 13(d) of the Securities Exchange Act of 1934[47] to require that anyone who acquires 5 percent or more of the equity securities of a company registered with the Securities and Exchange Commission must disclose certain specified information, including citizenship and residence. Hearings indicate that this statute is directed at foreign investors in order to improve the ability of the federal government to monitor foreign investment in the United States.[48]

All of the statutes discussed above are information-gathering and disclosure in nature. There are not across-the-board, blanket restrictions on foreign investment in the United States. Instead, over the years Congress has believed that certain industries which could affect national security should have limits on foreign investment. These industries include the maritime industry, the aircraft industry, banking, resources and power, and the various businesses which are parties to government contracts.

Shipping Industry

There are three major maritime laws which have provisions concerning barriers to foreign investment in the maritime industry: Shipping Act of 1916, Merchant Marine Act of 1929, and Merchant Marine Act of 1936, all dispersed throughout Title 46 of the United States Code.

In the area of merchant shipping, there are restrictions on foreign ownership of ships which are eligible for documentation in the United States. Any vessel of at least five tons that is not registered under the laws of a foreign country is eligible for documentation if it is owned by: 1. a United States citizen; 2. an association, trust, joint venture, or other entity, all of whose members are United States citizens and that is capable of holding title to a vessel under the laws of the United States or of a state; 3. a partnership whose general partners are United States citizens and whose controlling interest is owned by United States citizens; 4. a corporation established under federal or state laws, whose chief executive officer and chairman of its board of directors are United States citizens and no more of its directors are noncitizens than a minority of the number necessary to constitute a quorum; 5. the United States government; or 6. a state government.[49]

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[45] 7 U.S.C. § 3501(b).

[46] P.L. 95-213.

[47] 15 U.S.C. § 78m(d).

[48] Hearings on S. 245, the Foreign Investment Act of 1975 Before the Subcomm. on Securities of the Senate Comm. on Banking, Housing, and Urban Affairs, 94th Cong., 1st Sess. (1975).

[49] 46 U.S.C. § 12102(a).

Similarly, coastwise trade (trade between points in the United States) must be performed by vessels built in and documented under the laws of the United States and owned by United States citizens.[50] A certificate of documentation may be endorsed with a coastwise endorsement for a vessel that 1. is eligible for documentation; 2. was built in the United States or, if not built in the United States, was captured in war by United States citizens and lawfully condemned as prize; and 3. qualifies under other federal laws to be employed in the coastwise trade.[51]

A vessel may be issued a certificate of documentation with a coastwise endorsement if: 1. the vessel is owned by a not-for-profit oil spill response cooperative; 2. the vessel is at least 50 percent owned by persons eligible to have a vessel documented under United States laws; 3. the vessel otherwise qualifies to be employed in the coastwise trade; and 4. use of the vessel is restricted to oil spill issues.[52]

A certificate of documentation may be endorsed with a fishery endorsement for a vessel that is: 1. eligible for documentation; 2. was built in the United States; 3. if rebuilt, was rebuilt in the United States; 4. was not forfeited to the United States Government after July 1, 2001, for a breach of the laws of the United States; and 5. otherwise qualifies under the laws of the United States to be employed in the fisheries.[53]

A certificate of documentation with a recreational endorsement may be issued for a vessel that is eligible for documentation.[54]

A vessel shall have preferred mortgage status only if the mortgagee is a state, the United States government, a federally insured depository institution, a United States citizen, a person qualifying as a United States citizen under 46 U.S.C. section 802, or a person approved by the Secretary of Transportation.[55]

The Secretary of Transportation is authorized to acquire any obsolete vessel in exchange for credit towards new vessels.[56] To qualify as obsolete, a vessel must have been owned by a citizen or citizens of the United States for at least three years immediately before the date of acquisition.[57] In the case of a corporation, partnership, or association operating a vessel on the Great Lakes or on bays, sounds, rivers,

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[50] 46 U.S.C. App. § 883.

[51] 46 U.S.C. §§ 12106, 12107, and 12108.

[52] 46 U.S.C. § 12106(d).

[53] 46 U.S.C. § 12108.

[54] 46 U.S.C. § 12109.

[55] 46 U.S.C. § 31322(a)(1)(D).

[56] 46 U.S.C. App. § 1160(b).

[57] 46 U.S.C. App. § 1160(a)(1).

harbors, or inland lakes of the United States, the amount of interest required to be owned by a citizen of the United States shall not be less than 75 percent.[58]

The Secretary of Transportation is permitted to make construction-differential subsidies to aid in the construction of vessels to be used in the foreign commerce of the United States. Only United States citizens or shipyards of the United States are eligible for these subsidies.[59]

The Secretary of Transportation may also award financial aid in the operation of a vessel or vessels which are to be used in an essential service in the foreign commerce of the United States or in authorized cruises.[60]

Federal ship mortgage insurance is available for vessels documented under United States laws.[61] War risk insurance can be obtained, but United States citizenship is required in certain instances.[62] For example, insurance may be provided only on American vessels, foreign-flag vessels owned by United States citizens or engaged in transportation in the water-borne commerce of the United States, or in other transportation by water deemed to be in the interest of the national defense or the national economy of the United States.[63]

Citizenship restrictions also apply to crew members of United States vessels. Licenses and certificates of registry for persons on documented vessels may be issued only to United States citizens.[64] For a passenger vessel which has been granted a construction or operation subsidy, at least 90 percent of the entire crew must be United States citizens.[65]

It is unlawful without the approval of the Secretary of Transportation to sell, lease, charter, deliver, or transfer to any person not a United States citizen any interest in or control of a documented vessel owned by a United States citizen or the last documentation of which was under United States laws.[66] During war or national emergency, it is unlawful to sell, mortgage, lease, charter, deliver, or transfer to any person not a United States citizen any vessel or interest in a vessel, any vessel documented under the laws of the United States, or any shipyard, dry dock, ship-building, or ship-repairing plant or facilities.[67]

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[58] 46 U.S.C. § 1244(c).

[59] 46 U.S.C. App. § 1151(c).

[60] 46 U.S.C. App. § 1171(a).

[61] 46 U.S.C. App. §§ 1271(b) and 1274.

[62] 46 U.S.C. App. §§ 1281 *et seq.*

[63] 46 U.S.C. App. § 1283(a).

[64] 46 U.S.C. § 7102.

[65] 46 U.S.C. § 8103(d).

[66] 46 U.S.C. App. § 808(c).

[67] 46 U.S.C. § 835(b).

In most cases it is unlawful for any contractor receiving an operating-differential subsidy or for any charterer of vessels or any holding company to own, charter, act as agent or broker for, or operate any foreign-flag vessel which competes with any American-flag service determined by the Secretary of Transportation to be essential.[68]

Upon completion of the construction of any vessel in which a construction-differential subsidy is to be allowed, the vessel shall be documented under United States laws. The vessel must remain documented under United States laws for not less than twenty-five years or for so long as there remains due the United States any principal or interest on account of the purchase price.[69]

Any officer or employee of the United States traveling on official business overseas or to or from any possession of the United States shall travel and transport his personal effects on ships registered under the laws of the United States when these ships are available unless the necessity of the mission requires the use of a ship under a foreign flag.[70] Whenever the United States shall furnish equipment, materials, or commodities for a foreign nation without provision for reimbursement, the appropriate agency shall take the steps necessary to assure that at least 50 percent of the gross tonnage of the equipment, materials, or commodities which may be transported on ocean vessels shall be transported on privately-owned United States-flag commercial vessels.[71]

It is unlawful for any vessel not wholly owned by a United States citizen and not having a certificate of documentation to perform various escort functions or provide towing assistance for any vessel other than a vessel in distress.[72] No foreign vessel shall engage in salvaging operations on the Atlantic or Pacific coast of the United States or in other United States waters except when authorized by a treaty.[73] A vessel may engage in dredging in the navigable waters of the United States only if: 1. it meets the requirements for engaging in the coastwise trade; 2. when chartered, the charterer is a citizen of the United States; and 3. for a vessel that is at least five net tons, the vessel is documented with a coastwise endorsement.[74]

No foreign fishing vessel is permitted to fish within United States waters unless the vessel has a valid permit on board.[75] Permits may be issued to vessels of a foreign nation only in certain instances.[76]

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[68] 46 U.S.C. App. § 1222(a).

[69] 46 U.S.C. App. § 1153.

[70] 46 U.S.C. App. § 1241(a).

[71] 46 U.S.C. App. § 1241(b)(1).

[72] 46 U.S.C. App. § 316a.

[73] 46 U.S.C. § 316(d).

[74] 46 U.S.C. App. § 292(a).

[75] 16 U.S.C. § 1824(a).

[76] 16 U.S.C. § 1821.

Loans may be made for financing or refinancing the cost of purchasing, constructing, equipping, maintaining, repairing, or operating new or used commercial fishing vessels or gear.[77] An applicant for a fishery loan must be a citizen or national of the United States.[78]

Aircraft Industry

There appear to be fewer restrictions on foreign investment in the aircraft industry than in the maritime industry. However, restrictions bar a considerable amount of foreign investment in the aircraft industry.

It is unlawful for any person to operate any aircraft unless it is registered.[79] An aircraft is eligible for registration only if it is: 1. not registered under the laws of a foreign country and is owned by a citizen of the United States, a citizen of a foreign country lawfully admitted for permanent residence in the United States, or a corporation not a citizen of the United States when the corporation is organized and doing business under the laws of the United States or a state and the aircraft is based and primarily used in the United States; or 2. an aircraft of the United States Government or a state, the District of Columbia, a territory or possession, or a political subdivision of a state, territory, or possession.[80] A citizen of the United States is defined as: (a) an individual who is a citizen of the United States, (b) a partnership of which each member is a United States citizen, or (c) a corporation or association organized under the laws of the United States or of any state, the District of Columbia, territory, or possession of the United States, of which the president and two-thirds or more of the board of directors and other managing officers are United States citizens, which is under the actual control of United States citizens and in which at least 75 per cent of the voting interest is owned or controlled by persons who are citizens of the United States.[81]

Foreign aircraft which are not a part of the armed forces of a foreign nation may be navigated in the United States by airmen holding certificates or licenses issued or rendered valid by the United States or by the nation in which the aircraft is registered if the foreign nation grants a similar privilege concerning United States aircraft.[82]

Aircraft operators may be subject to restrictions based on citizenship. It is unlawful for a person to operate an aircraft without an airman certificate.[83] The Administrator of the Federal Aviation Administration may restrict or prohibit issuing

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[77] 16 U.S.C. § 742c(a).

[78] 16 U.S.C. § 742c(b)(7).

[79] 49 U.S.C. § 44101.

[80] 49 U.S.C. § 44102.

[81] 49 U.S.C. §40102(a)(15).

[82] 49 U.S.C. § 41703.

[83] 49 U.S.C. § 44711.

an airman certificate to an alien or make issuing the certificate to an alien dependent upon a reciprocal agreement with the government of a foreign country.[84]

The Secretary of Transportation is authorized to provide insurance and reinsurancce against loss or damage arising from the risk of operation of aircraft.[85] Citizenship requirements may be important in obtaining this insurance. For example, some air cargoes may be insured only if they are owned by citizens or residents of the United States.[86]

Mining

All valuable mineral deposits in lands belonging to the United States that are open to exploration and purchase may be purchased by United States citizens and by those who have declared their intention to become United States citizens.[87] Proof of citizenship may consist, in the case of an individual, of his affidavit; in the case of an association of unincorporated persons, of the affidavit of their authorized agent or upon information and belief; and in the case of a corporation organized under the laws of the United States, a state, or territory, by the filing of a certified copy of their charter or certificate of incorporation.[88]

Deposits of coal, phosphate, sodium, potassium, oil, oil shale, gilsonite, or gas and lands containing these deposits owned by the United States, including within national forests and in incorporated cities, towns, villages, and national parks and monuments shall be subject to disposition in the approved manner to United States citizens, associations of United States citizens, or any corporation organized under United States, state, or territorial laws. Citizens of another country whose laws, customs, or regulations deny similar privileges to citizens or corporations of the United States shall not by stock ownership, stock holding, or stock control own any interest in any lease concerning these mineral lands.[89]

The leasing of oil, natural gas, and other mineral deposits is allowed in the submerged lands of the Continental Shelf.[90] Regulations require that only United States citizens, resident aliens, domestic corporations, or associations of one or more of these groups may obtain these leases.[91]

Only United States citizens; associations of United States citizens; corporations organized under the laws of the United States, a state, or the District of Columbia; or

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[84] 49 U.S.C. § 44703(e).

[85] 49 U.S.C. §§ 44301 *et seq*.

[86] 49 U.S.C. § 44303.

[87] 30 U.S.C. § 22.

[88] 30 U.S.C. § 24.

[89] 30 U.S.C. § 181.

[90] 43 U.S.C. §§ 1331 *et seq*.

[91] 30 C.F.R. § 256.35.

governmental units may be granted leases for the development and utilization of geothermal steam and associated resources.[92]

Energy

Licenses for the construction, operation, or maintenance of facilities for the development, transmission, and utilization of power on land and water over which the federal government has control may be issued only to United States citizens and domestic corporations.[93]

A license for nuclear facilities cannot be acquired by a foreign citizen or by a corporation believed to be controlled by a foreign citizen or government.[94]

Lands

There appear to be few federal restrictions on the ownership of land by foreign individuals or by foreign corporations. However, such past acts as the Homestead Act[95] required American citizenship in order to make claims on these lands. Today, the Desert Land Act requires citizenship in order to make claims.[96] Also, the Secretary of the Interior continues to require American citizenship for authorizing permits for grazing on public lands,[97] and, as discussed above, the Agricultural Foreign Investment Disclosure Act requires the disclosure to the Secretary of Agriculture by foreigners of agricultural land purchases in the United States. Further, public lands improved at the expense of funds from a reclamation project can be sold only to United States citizens.[98]

Some of the states, however, have more stringent laws. For example, Kentucky permits aliens who have declared their intent to become citizens to acquire or inherit land, but, if the alien has not become a citizen within eight years, the alien must dispose of the land, under penalty of escheat. Any alien residing within the state may purchase land for the purpose of residence, occupation, business, trade, or manufacture for as long as he remains a resident of the state.[99]

There appears to be an ongoing dispute as to how far states may go in restricting alien ownership of real property. In 1923 the Supreme Court upheld restrictions of some West Coast states against land ownership by Asians on the basis of safety and

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[92] 30 U.S.C. § 1015.

[93] 16 U.S.C. § 797(e).

[94] 42 U.S.C. § 2133(d).

[95] Ch. LXXV, § 1, Stat. 392 (1862).

[96] 43 U.S.C. § 321.

[97] 43 U.S.C. § 315b.

[98] 43 U.S.C. § 375.

[99] Kentucky Revised Statutes, §§ 381.300 and 381.320.

sovereignty.[100] However, a 1948 Supreme Court decision modified and perhaps overruled these decisions by declaring unconstitutional a similar statute which prohibited ownership of land by Asians.[101] It should also be noted that treaty provisions between the United States and foreign countries which assure the right of foreign nationals to purchase and inherit real property would supersede any inconsistent state statutes.[102]

Communications

Federal statutes restrict foreign ownership and operation of mass communications media in the United States. Radio station licenses shall not be granted to or held by any foreign government or representative of a foreign government.[103] No broadcast or common carrier or aeronautical en route or aeronautical fixed radio station license shall be granted to or held by any alien or the representative of any alien, any corporation organized under the laws of a foreign government, any corporation of which more than one-fifth of the capital stock is owned or voted by aliens or their representatives or by a foreign government or representative or by any corporation organized under the laws of a foreign country, or by any corporation directly or indirectly controlled by any other corporation of which any officer or more than one-fourth of the capital stock is owned or voted by aliens, their representatives, or by a foreign government or representative, or by any corporation organized under the laws of a foreign country if the public interest will be served by the refusal or revocation of the license.[104]

A 1981 case challenged on equal protection grounds the Federal Communications Commission bar on issuing commercial operator licenses to aliens.[105] The challenge failed. Although the court did not address whether the federal government could control the public media by franchising the airwaves to protect the national interest, the court upheld the federal restriction on the basis of minimal scrutiny because of the federal powers over immigration and naturalization.

There does not appear to be a federal statute prohibiting the investment by foreign citizens in United States newspapers and magazines. However, the Foreign Agents Registration Act[106] requires that agents of foreign principals must register with the Attorney General of the United States, that informational materials for or in the interests of a foreign principal must be labeled to show the relationship between the agent and the foreign principal, and that the agent must file two copies of the printed

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[100] *Terrace* v. *Thompson*, 263 U.S. 197 (1923); *Webb* v. *O'Brien*, 263 U.S. 313 (1923).

[101] *Oyama* v. *California*, 332 U.S. 633 (1948).

[102] *See, e.g., Zschernig* v. *Miller*, 389 U.S. 429 (1968); *Kolovrat* v. *Oregon*, 366 U.S. 187 (1961); and *DeTenorio* v. *McGowan*, 510 F.2d 92 (5th Cir. 1975), *cert. den.*, 423 U.S. 877 (1975).

[103] 47 U.S.C. § 310(a).

[104] 47 U.S.C. § 310(b).

[105] *Campos* v. *FCC*, 650 F.2d 890 (7th Cir. 1981).

[106] 22 U.S.C. §§ 611 *et seq*.

propaganda with the Justice Department.[107] The statute defines foreign principal to include 1. foreign governments and foreign political parties; 2. persons outside the United States unless it is determined that the person is an individual and a citizen of and domiciled within the United States or that the person is not an individual and is organized under or created by the laws of the United States or a state and has its principal place of business within the United States; and 3. a business organized under the laws of or having its principal place of business in a foreign country.[108] However, agent of a foreign principal does not include any news or press service or association which is a corporation organized under United States or state law or any newspaper, magazine, periodical, or other publication having on file with the United States Postal Service required information so long as it is at least 80 percent beneficially owned by United States citizens, its officers and directors are all United States citizens, and the news or service or association, newspaper, periodical, magazine, or other publication is not owned, controlled, subsidized, or financed and none of its policies is determined by a foreign principal or its agent.[109]

Banking

Before the International Banking Act of 1978,[110] foreign banks which operated in the United States had to comply with a great deal of confusing regulation which was not specifically addressed to them as foreign banks. The International Banking Act allows a foreign bank to enter the United States market by establishing an initial federal branch or agency.[111]

> Except as provided in section 3103 of this title [dealing with interstate banking by foreign banks], a foreign bank which engages directly in a banking business outside the United States may, with the approval of the Comptroller, establish one or more Federal branches or agencies in any State in which (1) it is not operating a branch or agency pursuant to State law and (2) the establishment of a branch or agency, as the case may be, by a foreign bank is not prohibited by State law.[112]

In considering an application for approval of a branch or agency by a foreign bank, the Comptroller of the Currency shall include any condition imposed by the Board of

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[107] 22 U.S.C. § 614.

[108] 22 U.S.C. § 611.

[109] 22 U.S.C. § 611(d).

[110] P.L. 95-369, 92 Stat. 607, codified throughout title 12 of the United States Code but primarily at 12 U.S.C. §§ 3101 *et seq*.

[111] "Agency" means any office or any place of business of a foreign bank located in any State of the United States at which credit balances are maintained incidental to or arising out of the exercise of banking powers, checks are paid, or money is lent but at which deposits may not be accepted from citizens or residents of the United States. 12 U.S.C. § 3101(1).

"Branch" means any office or any place of business of a foreign bank located in any State of the United States at which deposits are received. 12 U.S.C. § 3101(3).

[112] 12 U.S.C. § 3102(a)(1).

Governors of the Federal Reserve System (Board).[113] A foreign bank with a federal branch or agency operating in any state may, (A) with the prior approval of the Comptroller of the Currency, establish and operate additional branches or agencies in the state on the same terms and conditions applicable to the establishment of branches by a national bank if the principal office of the national bank were located at the same place as the initial branch or agency in the state of the foreign bank and (B) change the designation of its initial branch or agency to any other branch or agency subject to the same limitations and restrictions applicable to a change in the designation of the principal office of a national bank if the principal office were located at the same place as the initial branch or agency.[114]

The Board may examine each branch or agency of a foreign bank, each commercial lending company or bank controlled by one or more foreign banks or one or more foreign companies that control a foreign bank, and other office or affiliate of a foreign bank conducting business in any state.[115]

No foreign bank may establish a branch or agency or acquire ownership or control of a commercial lending company without the prior approval of the Board.[116] The Board may not approve such an application unless it determines that the foreign bank engages directly in the business of banking outside the United States and is subject to comprehensive supervision or regulation in its home country and the foreign bank has furnished to the Board information needed to assess the application.[117]

A foreign bank or foreign bank holding company which enters the United States by organizing or acquiring a national bank subsidiary or affiliate[118] is regulated also by the National Bank Act.[119] These requirements appear to have discouraged foreign entry by means of subsidiaries because since 1791 Congress had required that all directors of national banks must be citizens of the United States.[120] However, this citizenship provision was amended to permit the Comptroller of the Currency to waive the citizenship requirement for not more than a minority of the board of directors.[121] Further, at least a majority of the directors of a national bank must have resided in the state in which the association is located or within one hundred miles of the location of the association for at least one year immediately preceding their election, and must be residents of the state or within a one-hundred-mile territory of the location of the

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[113] 12 U.S.C. § 3102(a)(2).

[114] 12 U.S.C. § 3102(h).

[115] 12 U.S.C. § 3105(c)(1)(A).

[116] 12 U.S.C. § 3105(d)(1).

[117] 12 U.S.C. § 3105(d)(2).

[118] A subsidiary of a foreign bank is a bank owned by the foreign bank; an affiliate of a foreign bank is a bank owned by the same parent holding company as the foreign bank.

[119] 12 U.S.C. §§ 21 *et seq*.

[120] Chapter X, 1 Stat. 191 (1791).

[121] 12 U.S.C. § 72.

association during their continuance in office. The Comptroller may waive the requirement of residency.[122]

A foreign bank or foreign bank holding company that organizes or acquires a national or state bank subsidiary must also comply with the Bank Holding Company Act.[123] The Bank Holding Company Act prohibits bank holding companies from engaging in certain non-banking activities but provides some exemptions for foreign bank holding companies.[124] For example, with Federal Reserve Board approval, bank holding companies may hold shares or engage in activities otherwise prohibited if the shares are held or the activities are conducted by any company which is organized under the laws of a foreign country and the greater part of its business is conducted outside the United States.[125] Exemption is provided also to shares or activities conducted by any company which does no business in the United States except as an incident to its international or foreign business.[126]

Government Contracting

Corporations which are controlled or owned by foreign citizens can conduct business with the federal government on generally the same basis as domestic corporations which are owned completely by United States citizens. However, some federal statutes restrict purchases of products by federal agencies to those manufactured in the United States.

For example, the Buy American Act, enacted in the early 1930's,[127] requires that:

> [n]otwithstanding any other provision of law, and unless the head of the department or independent establishment concerned shall determine it to be inconsistent with the public interest, or the cost to be unreasonable, only such manufactured articles, materials, and supplies as have been mined or produced in the United States, and only such manufactured articles, materials, and supplies as have been manufactured in the United States substantially all from articles, materials, or supplies mined, produced, or manufactured, as the case may be, in the United States, shall be acquired for public use....[128]

Although there have over the years been a number of exceptions to the Buy American Act, amendments in 1988 and 1993 attempted to strengthen its

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[122] 12 U.S.C. § 72.

[123] 12 U.S.C. §§ 1841 *et seq*.

[124] 12 U.S.C. § 1843.

[125] 12 U.S.C. § 1843(c)(9). But note that the prohibitions of 12 U.S.C. section 1843 do not apply to shares of any company organized under the laws of a foreign country that is principally engaged in business outside the United States if the shares are held or acquired by a bank holding company organized under the laws of a foreign country that is principally engaged in the banking business outside the United States. 12 U.S.C. § 1841(h)(2).

[126] 12 U.S.C. § 1843(c)(13).

[127] 41 U.S.C. §§ 10a-10d.

[128] 41 U.S.C. § 10a.

provisions.[129] For example, every contract for the construction or repair of a public building or public work shall have a provision that the contractor or supplier shall use only unmanufactured articles or materials mined or produced in the United States unless the head of the department finds that this is impracticable or unreasonably increases the cost.[130] Further, if the Secretary of Defense, after consulting with the United States Trade Representative, determines that a foreign country, which is a party to a reciprocal defense procurement memorandum of understanding with the United States concerning waiver of the Buy American Act for certain products in that country, has discriminated against certain types of products produced in the United States that are covered by the agreement, the Secretary of Defense shall rescind the blanket waiver of the Buy American Act concerning those types of products produced in that foreign country.[131]

Some of the exceptions to the Buy American Act should be noted. For example, the Trade Agreements Act of 1979[132] gives the President the authority to waive application of the Buy American restrictions on the products of our trading partners. However, this does not authorize the waiver of any small business or minority preference.[133]

The National Industrial Security Program establishes a program to safeguard federal government classified information that is released to contractors, licensees, and grantees of the United States Government. This also covers foreign contractors.[134]

An important federal statute concerning contracting with the federal government prohibits the assignment of the duties of a contract.

> (a) No contract or order, or any interest therein, shall be transferred by the party to whom such contract or order is given to any other party, and any such transfer shall cause the annulment of the contract or order transferred, so far as the United States is concerned. All rights of action, however, for any breach of such contract by the contracting parties, are reserved to the United States.
>
> (b) The provisions of subsection (a) of this section shall not apply in any case in which the moneys due or to become due from the United States or from any agency or department thereof, under a contract providing for payments aggregating $1000 or more, are assigned to a bank, trust company, or other financing institution, including any Federal lending agency....[135]

Somewhat similar to an assignment is a novation, which is an agreement in which a federal agency indicates that it is willing to recognize a successor in interest

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[129] P.L. 100-418, Title VII, and P.L. 103-139, Title VIII.

[130] 41 U.S.C. § 10b(a).

[131] 41 U.S.C. § 10b-2(a).

[132] 19 U.S.C. §§ 2501 *et seq*.

[133] 19 U.S.C. § 2511(f).

[134] 48 C.F.R. § 4.402.

[135] 41 U.S.C. § 15(a), (b).

to a contract. A novation is feasible: 1. where the contractor disposes to a third party all of his assets or all of the assets devoted to the performance of a particular government contract; 2. where the contractor's assets are transferred in consequence of a merger or consolidation of corporations; or 3. where a proprietorship or partnership incorporates.[136] In a novation agreement the assignor or transferor is not relieved of liability because one of the conditions of a novation is that the transferor will guarantee performance of the contract.[137] Therefore, if a domestic corporation with a government contract is to be taken over by a foreign company which is not permitted to perform government contract work because of national security reasons, it is possible that the domestic corporation will be unable to be a party to a novation agreement, thus practically prohibiting the takeover, or at least a takeover of that part of the corporation which has the government contract.

Investment Company Regulation

The Investment Company Act of 1940[138] requires registration with the Securities and Exchange Commission (SEC) of an investment company which does business in the United States. Only investment companies organized or created under the laws of the United States or a state are allowed to sell their own securities in interstate commerce in connection with a public offering unless the SEC finds that it is legally and practically feasible to enforce the federal securities laws against the investment company and that the exemption from registration is consistent with the public interest and the protection of investors.[139]

The Trust Indenture Act of 1939[140] prohibits the sale in interstate commerce of certain securities which have not been registered under the Securities Act of 1933 unless the securities have been issued under an indenture.[141] There must be at least one or more trustees under the indenture, at least one of whom shall be a corporation organized and doing business under the laws of the United States, a state, territory, or the District of Columbia or a corporation or other person permitted to act as trustee by the SEC which is authorized to exercise corporate trust powers and is subject to supervision or examination by federal, state, territorial, or District of Columbia authority.[142]

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[136] McBride and Touhey, GOVERNMENT CONTRACTS, 2 § 16.100 (Matthew Bender & Co. 1987).

[137] *Id.*

[138] 15 U.S.C. §§ 80a-1 *et seq.*

[139] 15 U.S.C. § 80a-7(d).

[140] 15 U.S.C. §§ 77aaa *et seq.*

[141] 15 U.S.C. § 77fff(a).

[142] 15 U.S.C. § 77jjj(a)(1).

Presidential Review of Mergers, Acquisitions, and Takeovers

Section 5021 of the Omnibus Trade and Competitiveness Act of 1988,[143] often called the Exon-Florio provision, amended section 721 of the Defense Production Act of 1950 to allow the President or the President's designee to make an investigation to determine the effects on national security of mergers, acquisitions, and takeovers by or with foreign persons which could result in foreign control of persons engaged in interstate commerce in the United States.[144]

Section 837(a) of the National Defense Authorization Act for FY1993,[145] called the Byrd Amendment, amended Exon-Florio to require an investigation when an "entity controlled by or acting on behalf of a foreign government seeks to engage in a merger, acquisition, or takeover which could result in control of a person engaged in interstate commerce in the United States that could affect the national security of the United States."

Exon-Florio lists the following factors that the President or the President's designee may consider in determining the effects upon national security:

> (1) domestic production needed for projected national defense requirements;
> (2) the capability and capacity of domestic industries to meet national defense requirements, including the availability of human resources, products, technology, materials, and other supplies and services;
> (3) the control of domestic industries and commercial activity by foreign citizens as it affects the capability and capacity of the United States to meet the requirements of national security;
> (4) the potential effects of the transaction on the sales of military goods, equipment, or technology to a country that supports terrorism, missile technology proliferation, or chemical and biological weapons proliferation; and
> (5) the potential effects of the transaction on United States technological leadership areas affecting United States national security.[146]

The President may take such action as deemed appropriate to suspend or prohibit any acquisition, merger, or takeover of a person engaged in interstate commerce in the

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[143] 50 App. U.S.C. § 2170.

[144] 50 App. U.S.C. § 2170(a).

[145] 50 App. U.S.C. § 2170(b).

[146] 50 App. U.S.C. § 2170(f).

United States by or with foreign persons so that control will not threaten to impair the national security.[147]

The Committee on Foreign Investment in the United States (CFIUS) was originally established in 1975[148] to monitor and evaluate the impact of foreign investment in the United States. In 1988 the President delegated to CFIUS his responsibilities under Exon-Florio.[149] CFIUS is an inter-agency committee chaired by the Secretary of the Treasury and having as members government officials including the Secretary of State, the Secretary of Defense, the Secretary of Commerce, the Attorney General, and the Secretary of the Department of Homeland Security. CFIUS has the primary continuing responsibility within the executive branch for monitoring the impact of foreign investment within the United States and for coordinating the implementation of United States policy on this investment.

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[147] 50 App. U.S.C. § 2170(d).

[148] E.O. 11858 (May 7, 1975).

[149] E.O. 12188 (Jan. 2, 1980).