THE FINANCIAL SERVICES ROUNDTABLE 

Testimony by the Honorable Steve Bartlett, President
The Financial Services Roundtable
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"CFIUS: One Year After Dubai Ports World"

House Committee on Financial Services
2128 Rayburn House Office Building
Washington, D.C. 20515

Chairman Frank, Ranking member Bachus and members of the Committee, Thank you for the opportunity to testify on foreign investment and the Committee on Foreign Investment in the United States, or CFIUS. I am Steve Bartlett, President of the Financial Services Roundtable.

The Financial Services Roundtable represents 100 of the largest integrated financial services companies providing banking, insurance, and investment products and services to the American consumer. Member companies participate through the Chief Executive Officer and other senior executives nominated by the CEO. Roundtable member companies provide fuel for America's economic engine, accounting directly for $50.5 trillion in managed assets, $1.1 trillion in revenue, and 2.4 million jobs.

The Roundtable is here today because of the importance of the free flow of capital across borders. Foreign investment is important to the United State's economy and the ability of our companies to invest internationally is equally important. The Roundtable supports H.R. 556 and applauds the leadership of Chairwoman Maloney, Ranking Member Pryce and others, who authored this legislation. The Roundtable supports H.R. 556, with limited modification, because it would reintroduce certainty to the CFIUS process by ensuring reviews are transparent, principal based, and not subject to the winds of political change.

Background

It seems lately that the watchwords in international business circles are "global competitiveness." And it is true that the American marketplace will have to continue to

be a place of transparency and innovation if we are to remain global leaders in finance and investment. Regulations and guidance for business must be clear and consistent, with costs commensurate to benefit. This has not always been the case of late and we appreciate the Committee's willingness to look at financial regulation in its totality and make adjustments where warranted. Recent activities including the enactment of regulatory relief legislation as well as administrative actions focused on the Sarbanes/Oxley requirements have been important steps in ensuring that a balance between regulations, regulators and the regulated exists.

In light of the important subject of this hearing, the issue of global competitiveness also applies to the ability to attract foreign investment in the United States; we compete with countries throughout the world to attract foreign investment. Foreign investment is not merely desirable, it is essential to our economy. Foreign investment helps provide capital that allows for the expansion and growth of our economy, which helps preserve and create new jobs. Non-U.S. companies established in the U.S. support nearly 5.3 million jobs in this country – almost 5% of American private-sector jobs are provided by foreign-based companies. Individuals or institutions outside of the U.S. hold U.S. assets valuing $11.5 trillion.[1] No matter how well intentioned, arbitrary requirements on foreign investment serve as a disincentive to foreign investment.

[1] The Washington Post, "Xenophobia's Threat to Prosperity," Charles Prince, March 29, 2006

It is also critical that American companies have the ability to invest in foreign countries in a transparent way. With respect to the financial services industry, our country leads the world in offering innovative products and services, and our companies make investments in countries throughout the world. Roundtable members grow, create jobs and return equity to investors through overseas investment. Arbitrary barriers to foreign investment in the United States may be responded to with similar barriers by our trading partners. This runs counter to our countries long held policy of free and open trade.

Of course, some transactions must pass a test beyond the "approval of the marketplace" for we live in a time in which national security threats of all shapes and sizes are taken appropriately with the utmost seriousness. For this reason, we have the CFIUS process.

The Defense Production Act of 1950 contains the relevant mechanism for national security reviews of transactions involving foreign investment that involve foreign control of interstate commerce in the United States. President Gerald Ford delegated his investigative authority to CFIUS in establishing the Committee in 1975.[2] The Committee's role expanded in the late 1980's with approval of the Exon-Florio amendment which authorized the President to block transactions that threaten to impair U.S. national security. Exon-Florio and the implementing regulations issued by Treasury establish a process of voluntary notification, CFIUS review, CFIUS investigation, and

[2] Executive Order No. 11,858, 40 Fed. Reg. 20,263 (May 7, 1975)

presidential decision for transactions by or with foreign persons that could result in foreign control of U.S. companies.[3] Section 721 of the Defense Production Act (DPA) gives the president the power to investigate such acquisitions and to suspend or prohibit a transaction if credible evidence leads him to believe that the acquirer might take action that threatens national security.[4] It is important to note that although companies submit voluntarily to the CFIUS review process, not doing so carries the threat of divestiture of the transaction at a future date through presidential action. Essentially, the CFIUS review process provides a stamp of approval and creates certainty for individuals involved in covered transactions.

The fact is that the CFIUS process has worked well at protecting our national security interest while allowing for the free flow of capital. However, the December 2005 CFIUS review of the Dubai Ports World (DPW) acquisition of the London-based company Peninsular and Oriental Steam Navigation Co., which would have put DPW in control of operations at six major U.S. ports created a firestorm of controversy, concern and confusion. Deputy Treasury Secretary Kimmit came before this committee, and virtually all others, last year to explain the transaction. In the end, the public learned that many U.S. ports, including the ports involved in the DPW transaction, were already foreign operated and owned, and that with respect to the DPW transaction, that CFIUS had not "rushed through the deal."[5]

[3] Executive Order No. 12,661 54 Fed. Reg. 779 (December, 27 1988)
[4] Testimony of The Honorable Clay Lowery before the House Financial Services Committee, March 17, 2006
[5] The National Journal's Congress Daily, February 23, 2006

A year removed from the heat and light of DPW, there is no reason to believe that had the transaction gone through that we would be any less secure as a nation. However, it is clear the way in which the transaction became public, and the way it was presented to the Congress, calls for more regularized communication between the Administration and the Congress, and greater accountability within CFIUS before, during and after consideration of an application.

HR 556

During the process that led to what is now H.R. 556, The Roundtable communicated principles to the Congress that we hoped would guide the drafting of legislation. We support modifications to bring greater certainty and clarity to the process – but not at the expense of introducing more politics into the process or providing disincentive to foreign investment. The Roundtable believes that any changes must:

- Ensure that reviews are done in a thorough, fact-based and objective manner so that reviews are beyond public reproach;
- Ensure that reviews are focused on national security;
- Provide flexibility taking into account the specifics of each transaction –so they are considered on a case-by-case basis and emerging security threats can be considered;
- Continue to be chaired by the Treasury Department;
- Ensure that reviews are completed in a timely manner;

- Ensure the Administration has the authority to brief Congress after an investigation has been completed, while protecting proprietary business information;
- mandatory investigations should be limited to cases where the acquiring entity is both owned/controlled by a foreign government and the transaction affects national security.

Having reviewed H.R. 556, we believe that it appropriately addresses national security concerns while for the most part meeting the principles articulated above. The bill maintains the existing 30 day initial review while providing additional time for complex transaction, and requires the tracking of withdrawals and resubmissions. The bill also requires notices to congressional leadership and all appropriate congressional committees of significant decisions in each investigation and provides a Member of Congress who receives notice the right to a classified briefing on the transaction. Under the legislation, the Committee designees would be required to monitor and enforce any mitigation agreements, with reporting requirements. Finally, the bill would authorize an additional $10 million solely for the function of CFIUS at the Department of Treasury.

We do suggest two changes to the current bill to ensure certainty. CFIUS should be given leeway to determine whether a foreign government-owned company investing in the United States requires a mandatory investigation. There are many cases where no security threat exists, for example, if a government owned U.S. pension fund such as the California Public Employees' Retirement System (CalPERS), was subjected to a mandatory investigation abroad.

The Roundtable also opposes a provision in Section 6 of H.R. 556 that would allow for a lead agency in monitoring a mitigation agreement, to make modifications to that agreement. The CFIUS review process and any accompanying mitigation agreements provide applicants with assurance that they have received approval from the United States government – a safe harbor – with respect to further requirements (assuming compliance with the mitigation agreements). The Roundtable has even greater concern with respect to such a provision, given the recent action of the Administration in approving the Lucent-Alcatel deal. As part of this transaction, the Administration included a provision, which as we understand it, would allow for the re-investigation of this transaction and for new conditions to be placed on this transaction at a future date.

We do not disagree with the need to monitor mitigation agreements or ensure compliance with conditions put on a transaction, but we do not support providing the Administration with the ability to reopen a completed transaction at a future date. Roundtable member companies finance large business transactions. Changing the parameters of an agreement could change the economic underpinnings on which the financing has been provided. We are concerned that both the Administrations recent actions and the provision contained in H.R. 556 could create greater uncertainty in the marketplace.

Conclusion

The Roundtable supports H.R. 556, which enhances the ability of the CFIUS to protect America's national security interests, while preserving our nation's open investment policies. It is our hope that the Committee will incorporate our changes into this legislation and then act to approve the legislation expeditiously. Without this legislation, capital may not be formed and flow to the most deserving, which ultimately costs Americans jobs.

I wish to again thank the Committee for the opportunity to testify.