

109TH CONGRESS
2^D SESSION

S. 2400

To transfer authority to review certain mergers, acquisitions, and takeovers of United States entities by foreign entities to a designee established within the Department of Homeland Security, and for other purposes.

IN THE SENATE OF THE UNITED STATES

MARCH 13, 2006

Ms. COLLINS (for herself, Mr. LIEBERMAN, Mr. COLEMAN, Mr. AKAKA, Mr. TALENT, and Mr. GRAHAM) introduced the following bill; which was read twice and referred to the Committee on Banking, Housing, and Urban Affairs

A BILL

To transfer authority to review certain mergers, acquisitions, and takeovers of United States entities by foreign entities to a designee established within the Department of Homeland Security, and for other purposes.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*

1 **SECTION 1. TRANSFER OF AUTHORITY TO REVIEW CER-**
 2 **TAIN MERGERS, ACQUISITIONS, AND TAKE-**
 3 **OVERS.**

4 (a) REPEAL OF DEFENSE PRODUCTION ACT PROVI-
 5 SION.—Section 721 of the Defense Production Act of
 6 1950 (50 U.S.C. App. 2170) is repealed.

7 (b) TRANSFER TO HOMELAND SECURITY.—Title II
 8 of the Homeland Security Act of 2002 (6U.S.C. 121 et
 9 seq.) is amended by adding at the end the following:

10 **Subtitle E—Review of Mergers, Ac-**
 11 **quisitions, and Takeovers by**
 12 **Foreign Entities**

13 **“SEC. 241. AUTHORITY TO REVIEW CERTAIN MERGERS, AC-**
 14 **QUISITIONS, AND TAKEOVERS.**

15 “(a) REVIEW AND INVESTIGATION.—

16 “(1) IN GENERAL.—The President or the Presi-
 17 dent’s designee may undertake an investigation to
 18 determine the effects on national security or home-
 19 land security of mergers, acquisitions, and takeovers
 20 proposed or pending on or after the date of enact-
 21 ment of this section by or with foreign persons
 22 which could result in foreign control of persons en-
 23 gaged in interstate commerce in the United States.

24 “(2) REVIEW.—For purposes of determining
 25 whether to undertake an investigation under this

1 subsection, the President or the President’s designee
2 shall conduct a review of the proposed or pending
3 merger, acquisition, or takeover, which review shall
4 be completed not later than 30 days after the date
5 of receipt by the President or the President’s des-
6 ignee of written notification of the proposed or pend-
7 ing merger, acquisition, or takeover.

8 “(3) TIMING.—If it is determined that an in-
9 vestigation should be undertaken under this sub-
10 section, such investigation—

11 “(A) shall commence at such time as the
12 determination is made under paragraph (2),
13 and not later than 30 days after the date of re-
14 ceipt by the President or the President’s des-
15 ignee of written notification of the proposed or
16 pending merger, acquisition, or takeover, as
17 prescribed by regulations promulgated pursuant
18 to this section; and

19 “(B) shall be completed not later than 45
20 days after the date of its commencement.

21 “(4) INTELLIGENCE ASSESSMENT REPORTS.—
22 With respect to any investigation undertaken under
23 this subsection, the Director of National Intelligence
24 shall create a report that consolidates the intel-
25 ligence findings, assessments, and concerns of each

1 of the relevant members of the intelligence commu-
2 nity. Such report shall be considered as part of the
3 investigation, provided to all members of the Com-
4 mittee, and included as part of any recommendation
5 to the President.

6 “(b) MANDATORY INVESTIGATIONS.—

7 “(1) IN GENERAL.—The President or the Presi-
8 dent’s designee shall undertake an investigation, as
9 described in subsection (a)(1), in any instance in
10 which an entity controlled by or acting on behalf of
11 a foreign government seeks to engage in any merger,
12 acquisition, or takeover which would result in control
13 of a person engaged in interstate commerce in the
14 United States.

15 “(2) TIMING.—An investigation undertaken
16 under this subsection—

17 “(A) shall commence not later than 30
18 days after the date of receipt by the President
19 or the President’s designee of written notifica-
20 tion of the proposed or pending merger, acquisi-
21 tion, or takeover, as prescribed by regulations
22 promulgated pursuant to this section; and

23 “(B) shall be completed not later than 45
24 days after the date of its commencement.

25 “(c) COMMITTEE FOR SECURE COMMERCE.—

1 “(1) ESTABLISHMENT.—There is established
2 the Committee for Secure Commerce, which shall
3 serve as the President’s designee for purposes of this
4 section.

5 “(2) CHAIRPERSON.—The Secretary, or the
6 designee thereof, shall serve as the chairperson of
7 the Committee.

8 “(3) VICE CHAIRS.—The Secretary of Defense,
9 or the designee thereof, and the Secretary of the
10 Treasury, or the designee thereof, shall serve as vice
11 chairs of the Committee.

12 “(4) MEMBERSHIP.—The standing members of
13 the Committee shall—

14 “(A) be made up of the heads of those ex-
15 ecutive departments, agencies, and offices as
16 the President determines appropriate; and

17 “(B) include the Director of National In-
18 telligence.

19 “(5) ASSISTANCE FROM OTHER FEDERAL
20 SOURCES.—The chairperson of the Committee may
21 seek information and assistance from any other de-
22 partment, agency, or office of the Federal Govern-
23 ment, and such department, agency, or office shall
24 provide such information or assistance, as the chair-

1 person determines necessary or appropriate to carry
2 out the duties of the Committee under this section.

3 “(6) REVIEW PROCESS; DOCUMENTATION.—

4 “(A) COMMITTEE REVIEW PROCESS.—The
5 chairperson of the Committee shall establish
6 written processes and procedures to be used by
7 the Committee in conducting reviews and inves-
8 tigations under this section in any case in which
9 the Committee is acting as the President’s des-
10 ignee, including a description of the role and re-
11 sponsibilities of each of the member depart-
12 ments, agencies, and offices in the investigation
13 of foreign investment in the United States.

14 “(B) DEPARTMENTAL REVIEW PROCESS.—

15 The head of each department, agency, or office
16 that serves as a member of the Committee shall
17 establish written internal processes and proce-
18 dures to be used by the department, agency, or
19 office in conducting reviews and investigations
20 under this section, and shall provide such writ-
21 ten procedures to the Committee.

22 “(7) INDEPENDENT AGENCY REVIEWS RE-
23 QUIRED.—In any case in which the Committee is
24 acting as the President’s designee under this section,
25 each member of the Committee shall conduct, within

1 the department, agency, or office of that member, an
2 independent review of each proposed merger, acqui-
3 sition, or takeover described in subsection (a) or (b),
4 and shall timely provide to the Committee written
5 findings relating to each such review.

6 “(8) DETERMINATIONS NOT TO CONDUCT AN
7 INVESTIGATION.—A determination by the Committee
8 not to conduct an investigation under subsection (a)
9 shall be made only after a review required by sub-
10 section (a)(2), and shall be unanimous.

11 “(d) ACTION BY THE PRESIDENT.—

12 “(1) IN GENERAL.—Subject to subsection (e),
13 the President may take such action for such time as
14 the President considers appropriate to suspend or
15 prohibit any acquisition, merger, or takeover of a
16 person engaged in interstate commerce in the United
17 States proposed or pending on or after the date of
18 enactment of this section, by or with a foreign per-
19 son so that such control will not threaten to impair
20 the national security or homeland security.

21 “(2) ANNOUNCEMENT BY THE PRESIDENT.—

22 The President shall announce the decision to take
23 action pursuant to this subsection not later than 15
24 days after the investigation described in subsection
25 (a) is completed. The President may direct the At-

1 torney General to seek appropriate relief, including
2 divestment relief, in the district courts of the United
3 States in order to implement and enforce this sec-
4 tion.

5 “(e) FINDINGS OF THE PRESIDENT.—The President
6 may exercise the authority conferred by subsection (d)
7 only if the President finds that—

8 “(1) there is credible evidence that leads the
9 President to believe that the foreign interest exer-
10 cising control might take action that threatens to
11 impair the national security or homeland security;
12 and

13 “(2) provisions of law, other than this section
14 and the International Emergency Economic Powers
15 Act, do not, in the judgment of the President, pro-
16 vide adequate and appropriate authority for the
17 President to protect the national security or home-
18 land security in the matter before the President.

19 “(f) ACTIONS AND FINDINGS NONREVIEWABLE.—
20 The actions of the President under subsection (d) and the
21 findings of the President under subsection (e) shall not
22 be subject to judicial review.

23 “(g) FACTORS TO BE CONSIDERED.—For purposes
24 of this section, the President or the President’s designee
25 shall, taking into account the requirements of national se-

1 curity and homeland security, consider among other fac-
2 tors—

3 “(1) critical infrastructure, the control of which
4 is important to homeland security;

5 “(2) domestic production needed for projected
6 national defense and homeland security require-
7 ments;

8 “(3) the capability and capacity of domestic in-
9 dustries to meet national defense requirements, in-
10 cluding the availability of human resources, prod-
11 ucts, technology, materials, and other supplies and
12 services;

13 “(4) the control of domestic industries and
14 commercial activity by foreign citizens as it affects
15 the capability and capacity of the United States to
16 meet the requirements of national security or home-
17 land security;

18 “(5) the potential effects of the proposed or
19 pending transaction on sales of military goods,
20 equipment, or technology to any country—

21 “(A) identified by the Secretary of State—

22 “(i) under section 6(j) of the Export
23 Administration Act of 1979, as a country
24 that supports terrorism;

1 “(ii) under section 6(l) of the Export
2 Administration Act of 1979, as a country
3 of concern regarding missile proliferation;
4 or

5 “(iii) under section 6(m) of the Ex-
6 port Administration Act of 1979, as a
7 country of concern regarding the prolifera-
8 tion of chemical and biological weapons; or

9 “(B) listed under section 309(c) of the Nu-
10 clear Non-Proliferation Act of 1978, on the
11 ‘Nuclear Non-Proliferation-Special Country
12 List’ (15 C.F.R. Part 778, Supplement No. 4)
13 or any successor list; and

14 “(6) the potential effects of the proposed or
15 pending transaction on United States international
16 technological leadership in areas affecting United
17 States national security or homeland security.

18 “(h) CONFIDENTIALITY OF INFORMATION.—Any in-
19 formation or documentary material filed with the Presi-
20 dent or the President’s designee pursuant to this section
21 shall be exempt from disclosure under section 552 of title
22 5, United States Code, and no such information or docu-
23 mentary material may be made public, except as may be
24 relevant to any administrative or judicial action or pro-
25 ceeding. Nothing in this subsection shall be construed to

1 prevent disclosure to either House of Congress or to any
2 duly authorized committee or subcommittee of Congress.

3 “(i) REPORTS TO CONGRESS.—

4 “(1) REPORTS ON INVESTIGATION.—The Presi-
5 dent, or the President’s designee, shall immediately
6 upon completion of an investigation under subsection
7 (a) or (b) transmit to the members of Congress
8 specified in paragraph (3) a written report of the re-
9 sults of the investigation, before any determination
10 by the President on whether or not to take action
11 under subsection (d), including a detailed expla-
12 nation of the findings made under subsection (e), de-
13 tails of any legally binding assurances provided by
14 the foreign entity that were negotiated as a condi-
15 tion for approval, and the factors considered under
16 subsection (g). Such report shall be prepared in a
17 manner that is consistent with the requirements of
18 subsection (h).

19 “(2) QUARTERLY SUBMISSIONS.—The Presi-
20 dent, or the President’s designee, shall transmit to
21 the members of the Congress specified in paragraph
22 (3) on a quarterly basis, a detailed summary and
23 analysis of each merger, acquisition, or takeover that
24 is being reviewed, was reviewed during the preceding
25 90-day period, or is likely to be reviewed in the com-

1 ing quarter by the President or the Committee
2 under subsection (a) or (b). Each such summary and
3 analysis shall be submitted in unclassified form, with
4 classified annexes, as the Secretary determines are
5 required to protect company proprietary information
6 and other sensitive information. Each such summary
7 and analysis shall include an appendix detailing dis-
8 senting views.

9 “(3) MEMBERS OF CONGRESS.—The reports re-
10 quired by this subsection shall be transmitted to—

11 “(A) the Majority Leader and the Minority
12 Leader of the Senate;

13 “(B) the chairs and ranking members of
14 the Committee on Homeland Security and Gov-
15 ernment Affairs, the Committee on Armed
16 Services, and the Committee on Banking, Hous-
17 ing, and Urban Affairs of the Senate;

18 “(C) the Speaker and the Minority Leader
19 of the House of Representatives; and

20 “(D) the chairs and ranking members of
21 the Committee on Homeland Security, the Com-
22 mittee on Armed Services, and the Committee
23 on Financial Services of the House of Rep-
24 resentatives.

1 “(j) REGULATIONS.—The Secretary shall issue regu-
2 lations to carry out this section. Such regulations shall,
3 to the extent possible, minimize paperwork burdens and
4 shall to the extent possible coordinate reporting require-
5 ments under this section with reporting requirements
6 under any other provision of Federal law.

7 “(k) EFFECT ON OTHER LAW.—Nothing in this sec-
8 tion shall be construed to alter or affect any existing
9 power, process, regulation, investigation, enforcement
10 measure, or review provided by any other provision of law.

11 “(l) TECHNOLOGY RISK ASSESSMENTS.—In any case
12 in which an assessment of the risk of diversion of a critical
13 technology is performed by a person designated by the
14 President for such purpose, a copy of such assessment
15 shall be provided to each member of the Committee for
16 purposes of reviewing or investigating a merger, acquisi-
17 tion, or takeover under this section.

18 “(m) QUADRENNIAL REPORT.—

19 “(1) IN GENERAL.—In order to assist the Con-
20 gress in its oversight responsibilities with respect to
21 this section, the President and such agencies as the
22 President shall designate shall complete and furnish
23 to the Congress, not later than 1 year after the date
24 of enactment of this section and every 4 years there-
25 after, a report which—

1 “(A) evaluates whether there is credible
2 evidence of a coordinated strategy by 1 or more
3 countries or companies to acquire critical infra-
4 structure within the United States or United
5 States companies involved in research, develop-
6 ment, or production of critical technologies for
7 which the United States is a leading producer;
8 and

9 “(B) evaluates whether there are industrial
10 espionage activities directed or directly assisted
11 by foreign governments against private United
12 States companies aimed at obtaining commer-
13 cial secrets related to critical technologies or
14 critical infrastructure.

15 “(2) RELEASE OF UNCLASSIFIED STUDY.—The
16 report required by this subsection may be classified.
17 An unclassified version of the report shall be made
18 available to the public.

19 “(n) EXEMPTION.—Notwithstanding any other provi-
20 sion of law, the provisions of section 872 do not apply to
21 the Committee or with respect to any provision of this sub-
22 title.

23 “(o) DEFINITIONS.—As used in this section—

24 “(1) the term ‘critical technologies’ means tech-
25 nologies identified under title VI of the National

1 Science and Technology Policy, Organization, and
2 Priorities Act of 1976, or other critical technology,
3 critical components, or critical technology items es-
4 sential to national defense identified pursuant to this
5 section;

6 “(2) the term ‘Committee’ means the Com-
7 mittee for Secure Commerce, established under sub-
8 section (c);

9 “(3) the term ‘foreign person’ means any for-
10 eign organization or any individual resident in a for-
11 eign country or any organization or individual owned
12 or controlled by such an organization or individual;
13 and

14 “(4) the term ‘intelligence community’ has the
15 same meaning as in section 3 of the National Secu-
16 rity Act of 1947 (50 U.S.C. 401a).”.

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