

**TELECOM GLOBALIZATION AND
DEREGULATION ENCOUNTER
U.S. NATIONAL SECURITY AND LABOR
CONCERNS**

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INTRODUCTION

The last Friday in 2006 was hardly an auspicious day for the U.S. federal government to single out the U.S. telecommunications industry by erecting barriers to the globalization of businesses. Many government offices and businesses closed early that day leading into the three-day holiday weekend. Moreover, the U.S. telecom industry had not lobbied for national protectionist barriers and was quite healthy; revenues for the U.S. telecom industry grew in 2006 at about 2.7%, shaking off the multi-year slump of excess capacity and slacking demand.¹ U.S. telecom

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1. See *Accessing the Communications Marketplace: Hearing Before the S. Comm. on Commerce, Science and Transportation*, 110th Cong. 3 (2007) (written statement of Kevin J. Martin, Chairman, FCC), available at

carriers were part of an increasingly global service industry; international telecom traffic rose as Internet usage and broadband connections continued to expand in all countries.²

On December 29, 2006, the Federal Communications Commission (“FCC”) adopted an order with a condition opposing the globalization of operations for U.S. telecom carriers.³ The order approved the merger of AT&T Inc. and BellSouth Corp. After intense pressure from the two Democratic commissioners, the merging companies agreed to various conditions on their operations in order to obtain this approval. While the companies accepted the costs of these conditions in the context of their expected net present value of \$18 billion in merger synergies,⁴ some of the conditions implicated broader public policies.

Among the conditions for FCC approval of this merger is a commitment by the merged company to repatriate 3,000 jobs that were outsourced by BellSouth outside the U.S.⁵ Democratic Commissioner Michael Copps was unmoved by the cost savings BellSouth had found from such outsourcing as well as the global flow of telecom technologies. Instead, in an act favoring organized labor (an important constituent in Democratic politics), Copps made protecting U.S. jobs an important part of the public interest in U.S. communications regulations,

http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-270192A1.pdf (“In 2006, the communications industry experienced record growth and, by most measures, almost all sectors have rebounded remarkably. . . . Markets and companies are investing again, job creation in the industry is high. . . .”); CITIGROUP RESEARCH, CITIGROUP GLOBAL MARKETS, TELECOMMUNICATIONS SERVICES: EMT CONFERENCE AND 4Q PREVIEW - SIGNALS FOR A TELECOM RENAISSANCE? 1 (2007).

2. See CATHY HSU, FCC INT’L BUREAU, 2005 SECTION 43.82 CIRCUIT STATUS DATA (2007), available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-269605A2.doc (56% growth in use of U.S.-international facilities for international calls, private lines services, and other services from the U.S. in 2005); FCC INT’L BUREAU, 2004 INTERNATIONAL TELECOMMUNICATIONS DATA 1 (2006), available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-264309A1.pdf (minutes of facilities-based and facilities-resale traffic between the U.S. and other countries increased 32.5% from 2003 to 2004).

3. AT&T Inc. and BellSouth Corp. Application for Transfer of Control, *Memorandum Opinion & Order*, 22 FCC Rcd. 5662, 5807 (2007) [hereinafter AT&T/BellSouth Order].

4. Press Release, AT&T Inc., AT&T, BellSouth to Merge: Combination Will Speed Innovation, Competition, and Convergence (Mar. 5, 2006), available at <http://www.sec.gov/Archives/edgar/data/732713/000095012306002637/y18291e425.htm> [hereinafter AT&T/BS Press Release].

5. AT&T/BellSouth Order, *supra* note 3, at 5807.

AT&T/BellSouth is committed to providing high quality employment opportunities in the U.S. In order to further this commitment, AT&T/BellSouth will repatriate 3,000 jobs that are currently outsourced by BellSouth outside of the U.S. This repatriation will be completed by December 31, 2008. At least 200 of the repatriated jobs will be located within the New Orleans, Louisiana MSA [metropolitan statistical area].

Id.

and suggested that U.S. businesses must look within the nation's borders for obtaining innovative telecom technologies and associated services:

The revolution in communications that we are witnessing must not come at the expense of America's hard-working communications workers. Indeed, these high-quality, dedicated, and organized workers are key to bringing us the next generation of communications services.⁶

This comes after years of battles by the FCC — under both Democratic and Republican administrations — against barriers imposed by the U.S. and countries around the globe to foreign investment in telecom carriers and to opportunities for telecom companies to operate on a transnational basis.⁷

6. Concurring Statement of Comm'r Michael J. Copps to the *Memorandum Opinion & Order* in AT&T Inc. and BellSouth Corp. Application for Transfer of Control, 22 FCC Rcd. 5662, 5833 (2007) [hereinafter Copps Statement]. Neither the other Democratic commissioner nor any Republican commissioner addressed the jobs repatriation condition in the statements on the AT&T/BellSouth merger approval. See Joint Statement of Chairman Kevin J. Martin and Comm'r Deborah Taylor Tate to the *Memorandum Opinion & Order* in AT&T Inc. and BellSouth Corp. Application for Transfer of Control, 22 FCC Rcd. 5662, 5826 (2007); Concurring Statement of Comm'r Jonathan S. Adelstein to the *Memorandum Opinion & Order* in AT&T Inc. and BellSouth Corp. Application for Transfer of Control, 22 FCC Rcd. 5662, 5835 (2007). For different views, see generally Robert M. Kimmitt, *Why Job Churn is Good*, WASH. POST, Jan. 23, 2007, at A17 (

This flexibility of our job market is one key reason the United States successfully competes in an increasingly interconnected global economy. . . . The dynamism of our workforce helps keep the United States competitive because it increases not only the number of jobs available but also the productivity of those holding jobs.

); BUS. ROUNDTABLE, SECURING GROWTH AND JOBS: IMPROVING U.S. PROSPERITY IN A WORLDWIDE ECONOMY (2004), available at <http://www.businessroundtable.org/pdf/20040330000brsourcing.pdf>; GLOBAL INSIGHT (USA), INC., EXECUTIVE SUMMARY: THE COMPREHENSIVE IMPACT OF OFFSHORE IT SOFTWARE AND SERVICES OUTSOURCING ON THE U.S. ECONOMY AND THE IT INDUSTRY (2004), available at <http://www.ita.org/itserv/docs/execsumm.pdf>; Paul McDougall, *Indian Outsourcer Breaks \$1 Billion Quarterly Sales Barrier*, INFORMATIONWEEK, Jan. 16, 2007, available at <http://www.informationweek.com/outsourcing/showArticle.jhtml?articleID=196901052>.

7. See WHITE HOUSE, A NATIONAL SECURITY STRATEGY FOR A NEW CENTURY (1997), available at <http://clinton2.nara.gov/WH/EOP/NSC/Strategy/> (

We have completed the Information Technology Agreement which goes far toward eliminating tariffs on high technology products and amounts to a global annual tax cut of \$5 billion. We also concluded a landmark [World Trade Organization] WTO agreement that will dramatically liberalize world trade in telecommunications services. Under this agreement, covering over 99 percent of WTO member telecommunications revenues, a decades old tradition of telecommunications monopolies and closed markets will give way to market opening deregulation and competition principles championed by the United States.

); WHITE HOUSE, THE NATIONAL SECURITY STRATEGY sec. X (2006), available at <http://www.whitehouse.gov/nsc/nss/2006/sectionX.html> (“Globalization presents many opportunities. Much of the world's prosperity and improved living standards in recent years

The FCC's repatriation condition to the AT&T/BellSouth merger is in sharp contrast to the contemporaneous news of several developments in globalizing U.S. manufacturing, businesses, and investments. On that same day, Chrysler Group, a large U.S. business that at that time was part of the German company DaimlerChrysler AG, said that it could not make money by manufacturing small cars in the U.S. due to high labor and other costs; it announced a deal with China's Chery Automobile Co. for the Chinese manufacturer to build small cars to be sold at Chrysler dealerships in the U.S., Europe, and elsewhere under a Chrysler brand.⁸ Moreover, on that day the Wall Street Journal reported that the U.S. financial services firm Marsh & McLennan Companies, Inc. agreed in principle to sell Putnam Investments to Power Corp. of Canada for \$3.9 billion; Power Corp. beat out two other foreign firms, the U.K.'s Amvescap and Italy's UniCredito Italiano, in the bidding for the Boston-based asset-management company.⁹ That day also saw the U.S. Treasury Department announce that Americans increased their portfolio holdings of foreign securities by 21.7% in 2005 to a total of \$4.61 trillion.¹⁰

The FCC's action on that day was not an isolated political nod to U.S. labor unions. This Article reviews three sets of restrictions on foreign controls over and foreign operations of U.S. telecom businesses

derive from the expansion of global trade, investment, information, and technology."); FCC INT'L BUREAU, FOREIGN OWNERSHIP GUIDELINES FOR FCC COMMON CARRIER AND AERONAUTICAL RADIO LICENSES (2004); FCC INT'L BUREAU, REPORT ON INTERNATIONAL TELECOMMUNICATIONS MARKETS 2000 UPDATE (2001); Press Release, FCC, Entry into Force of WTO Telecom Agreement (Jan. 26, 1998), available at www.fcc.gov/Bureaus/International/News_Releases/1998/nrin8001.html (Chairman William Kennard:

This agreement allows telecommunications consumers worldwide to enjoy the benefits of improved competition in basic and advanced telecommunications services. It will increase investment and competition in the United States, leading to lower prices, enhanced innovation and better service. At the same time, market access commitments from major trading partners will provide U.S. service suppliers opportunities to expand abroad.

); Rules and Policies on Foreign Participation in the U.S. Telecomms. Market, *Report and Order and Order on Reconsideration*, 12 FCC Rcd. 23,891 (1997).

8. Tom Krisher, *Chrysler Signs China Car Deal*, WASH. POST, Dec. 29, 2006, available at <http://www.washingtonpost.com/wp-dyn/content/article/2006/12/29/AR2006122900526.html>; Gordon Fairclough & Jason Leow, *Chery Assembly Deal Makes Chrysler a Model in Exporting from China*, WALL ST. J., July 5, 2007, at A12; see generally *Behind the Asian Outsourcing Phenomenon*, C/NET NEWS.COM, Feb. 21, 2004, http://news.com.com/Behind+the+Asian+outsourcing+phenomenon/2030-1069_3-5162352.html; *The Problem with Made in China*, ECONOMIST, Jan. 11, 2007, available at www.economist.com/business/displaystory.cfm?story_id=8515811.

9. See *Power Corp. to Buy Marsh & McLennan's Putnam*, CNBC.COM, Dec. 29, 2006, <http://www.cnbc.com/id/16389766>.

10. See Gabriel Madway, *U.S. Holdings of Foreign Securities Up 21.7% in 2005*, MARKETWATCH, Dec. 29, 2006.

adopted in the last two months of 2006. Two such restrictions arose pursuant to national security reviews of foreign acquisitions by the Committee on Foreign Investment in the United States (a coordinated effort of the Departments of Treasury, Homeland Security, Justice, Defense, State, and Commerce as well as the National Security Council, Office of Science and Technology Policy, U.S. Trade Representative, National Economic Council, Council of Economic Advisors, and Office of Management and Budget) (“CFIUS”).¹¹ The other set of restrictions is in the FCC order on the AT&T/BellSouth merger.

The analysis is not intended to challenge the national security and employment security concerns and other public policies underlying these restrictions. Instead, the intent is to contrast these restrictions with the efforts by Congress, the FCC, and other federal agencies to deregulate and globalize the telecom industry, and to point out some of the possible economic costs of these restrictions. In addition, this Article contrasts the U.S. government’s use of transaction-specific restrictions in the telecommunications sector with the industry-wide legislation and regulatory rules applying similar restrictions to several other infrastructure industries. The hope is to focus attention on developing a coherent approach to these issues.

Section I of this Article describes CFIUS reviews and related agreements for two foreign acquisitions of U.S. businesses, one a telecommunications carrier/Internet services provider and the other a manufacturer of telecommunications equipment. The conditions for approval of each transaction are analyzed in the context of related policies, laws, orders, and other governmental actions. Next, Section II addresses the labor condition, and lack of national security conditions, in the FCC’s order approving the AT&T/BellSouth merger, again in the context of related governmental actions. To further establish the context for these U.S. restrictions, Section III describes some foreign responses, reviews, and restrictions. Then, Section IV presents several examples of efforts by the U.S. government to address national security vulnerabilities through industry-wide measures, regardless of whether the business is U.S.-owned or foreign-owned. These vulnerabilities and

11. See Omnibus Trade and Competitiveness Act of 1988, tit. V, pt. II, § 5021, 50 U.S.C.A. app. § 2170 (West 2007) (amending Section 721 of the Defense Production Act of 1950) [hereinafter Exon-Florio Provision]; Exec. Order No. 11,858, 40 Fed. Reg. 20,263 (May 7, 1975); Exec. Order No. 12,661, 54 Fed. Reg. 779 (Dec. 27, 1988); Exec. Order No. 12,860, 54 Fed. Reg. 47,201 (Sept. 3, 1993); 31 CFR pt. 800 (2007). CFIUS reviews were revised by legislation following controversies over China National Offshore Oil Corporation’s unsolicited bid for Unocal (July 2005) and Dubai Port World’s attempt to acquire port facilities in the U.S. (February 2006). Foreign Investment and National Security Act of 2007, Pub. L. No. 110-49, 121 Stat. 246 (codified as amended in scattered sections of 5, 31 U.S.C., and 50 U.S.C. app.) [hereinafter FINSA].

measures are similar to those addressed through the transaction-specific CFIUS reviews that are limited to foreign acquisitions. Finally, Section V presents the conclusion on problems with the U.S. government's actions on the three transactions described in this Article.

This Article makes the following findings regarding U.S. policies and actions: (1) conditions imposed on merging companies to promote national security and labor concerns lack industry-wide application, and conditions required by the U.S. government for some transactions are opposed to legislation and regulations adopted with an industry-wide perspective; (2) the evaluation and negotiation of merger conditions for foreign acquirers of U.S. businesses involve different government entities and processes than for domestic acquisitions, leading to inconsistent conditions even with regard to what may be viewed as industry best practices for national security; (3) Congress, the FCC, and other federal agencies have not acted to promote consistency in national security and labor practices across competing domestic and foreign-owned providers in the telecommunications sector, resulting in security vulnerabilities as well as risks of deterring foreign investments in the U.S. and countermeasures by foreign governments against U.S. companies; and (4) Congress and agencies have adopted industry-wide legislation and rules applying national-security measures — without singling out foreign-owned firms — in several infrastructure industries, including marine ports, airports, and nuclear power plants, but not in the telecommunications sector.

I. NATIONAL SECURITY REVIEWS OF FOREIGN ACQUISITIONS OF U.S. TELECOM BUSINESSES

There are many tensions between areas of communications policies and national security concerns. Yet, U.S. laws and political leaders have long recognized the national security importance of U.S. telecommunications carriers and the need to integrate national security objectives in communications policies. For example, the Communications Act of 1934, as amended, declares the policy of regulating wire and radio communications for, among other purposes, the national defense and to promote safety of life and property.¹² Several other laws establish procedures and requirements for telecommunications carriers to assist law enforcement and national security agencies by implementing wiretaps and providing call records.¹³ The increased focus

12. 47 U.S.C. § 151 (2006).

13. See 47 U.S.C. §§ 229, 1001-1010; 50 U.S.C. §§ 1801-1811, 1841-46 (2006); Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT Act) Act of 2001, Pub. L. No. 107-56, tit. II, 115 Stat. 272, 278 (codified as amended in scattered sections of 18, 22, 28, 47, 50 U.S.C.).

on national security after September 11, 2001 included actions highlighting the importance of telecommunications carriers in efforts to safeguard the country against terrorists (through wiretaps and call records)¹⁴ and as providers of critical infrastructure. In releasing a national security strategy report in 2003, President George W. Bush referred to the reliance of U.S. businesses, government operations, and national defense on “an interdependent network of information technology infrastructures called cyberspace.”¹⁵

The heart of the legislation, executive orders, and rules creating and guiding CFIUS reviews is the belief that some proposed foreign acquisitions of U.S. businesses may pose threats to U.S. national security that would not exist if such businesses continued under U.S. ownership and control.¹⁶ CFIUS has reviewed a range of foreign investments in U.S. telecom businesses in recent years. Among the landmarks in CFIUS’s dealings with telecom transactions are the conditions adopted for Japanese NTT Communications’ acquisition of Internet services provider Verio, Inc. (2000), conditions adopted for German Deutsche Telekom’s acquisition of VoiceStream Wireless Corp. (2001), and rejection of Hong Kong Hutchison Telecommunications’ attempt to acquire a 31 percent interest in Global Crossing Ltd., followed by conditions adopted in Singapore Technologies Telemedia Pte Ltd.’s

14. In addition to passage of expanded authority for wiretaps and call records in the USA PATRIOT Act of 2001, this issue was highlighted in 2005 and 2006 with disclosure of a program by the National Security Agency involving some large telephone carriers and interceptions of international telephone and Internet communications without a warrant or other judicial approval. See *Terkel v. AT&T Corp.*, 441 F. Supp. 2d 899 (N.D. Ill. 2006); *Hepting v. AT&T Corp.*, 439 F. Supp. 2d 974 (N.D. Cal. 2006); *ACLU v. Nat’l Sec. Agency*, 438 F. Supp. 2d 754 (E.D. Mich. 2006), *vacated*, 493 F.3d 644 (6th Cir. 2007); Declaration of Candace J. Morey in Support of Plaintiffs’ Joint Opposition to Motion to Dismiss or, in the Alternative, for Summary Judgment by the United States of America and to State Secrets and Related Arguments in Verizon’s Motion to Dismiss, *In re Nat’l Sec. Agency Telecomm. Records Litigation*, No. MDL 06-1791 VRW (N.D. Cal. Aug. 30, 2007), available at http://www.eff.org/legal/cases/att/06222007_morey_dec.pdf.

15. WHITE HOUSE, THE NATIONAL STRATEGY TO SECURE CYBERSPACE iii (2003), available at http://www.whitehouse.gov/pcipb/cyberspace_strategy.pdf [hereinafter NATIONAL STRATEGY]; see also FINSA, *supra* note 11, at § 4 (directing CFIUS to consider the potential national security-related effects on United States critical infrastructure caused by foreign acquisitions of domestic businesses); sources cited *infra* note 32.

16. See Exon-Florio Provision, *supra* note 11; Henry M. Paulson, U.S. Sec’y of the Treasury, Remarks at Forum on International Investment (May 10, 2007), at <http://www.treasury.gov/press/releases/hp398.htm> [hereinafter Paulson] (

The CFIUS process applies only when a transaction may be related to national security, and that is a very small percentage of foreign investment. . . . When a transaction may relate to national security, our policy remains as it has been since CFIUS was created – to ensure national security first while keeping America open to investment.

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acquisition of a 61 percent interest in Global Crossing (2003).¹⁷

In mid-2006, CFIUS was operating in a highly-charged political environment surrounding its reviews of numerous foreign acquisitions. There was a political furor over the proposed acquisition of U.S. port operations by a Dubai entity, which had cleared CFIUS review, leading the foreign company to drop the U.S. business from the acquisition.¹⁸ There was focus on a bid by the government-backed China National Overseas Oil Corporation for Unocal, which was withdrawn after an outpouring of Congressional opposition.¹⁹ The General Accountability Office released a negative report on the thoroughness of CFIUS's reviews and conditions it imposed on transactions.²⁰ Finally, both houses of Congress were considering numerous bills to revise the standards and review processes for foreign acquisitions, resulting in enactment of the Foreign Investment and National Security Act of 2007.²¹

17. See James A. Lewis, *New Objectives for CFIUS: Foreign Ownership, Critical Infrastructure, and Communications Interception*, 57 FED. COMM. L.J. 457 (2005).

18. See Jessica Holzer, *Was the Law Followed on Dubai Ports Deal OK?*, FORBES, Feb. 23, 2006, available at http://www.forbes.com/business/2006/02/22/logistics-ports-dubai-cx_jh_0223cfius.html; Stephanie Kirchgassner & James Boxell, *Fear Grows Over New Dubai Revolt*, FIN. TIMES, Mar. 21, 2006, available at <http://www.ft.com/cms/s/c8f7de22-b91c-11da-b57d-0000779e2340.html>; *Key Questions About the Dubai Port Deal*, CNN.COM, Mar. 6, 2006, <http://www.cnn.com/2006/POLITICS/03/06/dubai.ports.qa/index.html>.

19. See DICK K. NANTO ET AL., CONG. RESEARCH SERV., CHINA AND THE CNOOC BID FOR UNOCAL: ISSUES FOR CONGRESS (2005), available at <http://digital.library.unt.edu/govdocs/crs/permalink/meta-crs-7905:1>; Matthew R. Byrne, Note, *Protecting National Security and Promoting Foreign Investment: Maintaining the Exon-Florio Balance*, 67 OHIO ST. L.J. 849 (2006); Gaurav Sud, Note, *From Fretting Takeovers to Vetting CFIUS: Finding a Balance in U.S. Policy Regarding Foreign Acquisitions of Domestic Assets*, 39 VAND. J. TRANSNAT'L L. 1303, 1319-26 (2006); Stephanie I. Cohen, *Lawmakers Rip CNOOC's Unocal Bid*, MARKETWATCH, July 13, 2005; David Barboza, *China Backs Away from Unocal Bid*, INT'L HERALD TRIB., Aug. 3, 2005, available at <http://www.iht.com/articles/2005/08/02/business/unocal.php>.

20. U.S. GEN. ACCOUNTABILITY OFFICE, DEFENSE TRADE: ENHANCEMENTS TO THE IMPLEMENTATION OF EXON-FLORIO COULD STRENGTHEN THE LAW'S EFFECTIVENESS (2005), available at <http://www.gao.gov/new.items/d05686.pdf>; see also UNITED STATES GEN. ACCOUNTABILITY OFFICE, DEFENSE TRADE: NATIONAL SECURITY REVIEWS OF FOREIGN ACQUISITIONS OF U.S. COMPANIES COULD BE IMPROVED (2007), available at <http://www.gao.gov/new.items/d07661t.pdf> [hereinafter GAO 2007 Report].

21. See FINSA, *supra* note 11; *Reform of National Security Reviews of Foreign Direct Investments Act: Hearing on H.R. 5337 Before the Subcomm. on Domestic and International Monetary Policy, Trade, and Technology of the H. Comm. on Financial Servs.*, 109 Cong. (2006) (prepared statement of Clay Lowery, Assistant Sec'y for Int'l Affairs, U.S. Treasury Dep't), available at <http://www.ustreas.gov/press/releases/js4269.htm> ("Sound legislation can ensure that the Committee reviews transactions thoroughly, protects the national security, conducts its affairs in an accountable manner, and avoids creating undue barriers to foreign investment in the United States."); Stephanie Kirchgassner, *CFIUS Overhaul Back in Spotlight*, FIN. TIMES, Aug. 23, 2006, available at <http://www.ft.com/cms/s/1523f970-32d0-11db-87ac-0000779e2340.html>; Bill McConnell, *Battle Likely After Rival Bills for Foreign Merger Oversight Reform Approved*, THEDEAL.COM, July 28, 2006, available at <http://www.law.com/jsp/ihc/PubArticleIHC.jsp?id=1153991138266>; Stephen J. Canner, *A Layman's Guide to CFIUS Reform*, POL'Y ADVOC. (U.S. Council for Int'l Bus., New York,

To understand some of the concerns addressed by CFIUS in telecom transactions and the resulting restraints on globalization and regulatory burdens, consider the conditions announced in the last two months of 2006 for two transactions: (A) the sale of a controlling interest in Telecomunicaciones de Puerto Rico, Inc. (“TELPRI”) by Verizon Communications, Inc. to América Móvil, S.A. de C. V. (a Mexican company),²² and (B) the merger of Lucent Technologies, Inc. and Alcatel (a French company).²³

A. Restrictions on Globalization of Operations for a Telecom Services Provider to Promote U.S. National Security

1. Background on the TELPRI Transaction

To clear CFIUS review, América Móvil and TELPRI entered into a Security Agreement with the Departments of Justice and Homeland Security in December 2006.²⁴ The provisions of this agreement illustrate a broad, penetrating role for these executive branch agencies and a nationalistic approach, which conflicts with actions of Congress, the FCC, and other federal agencies on deregulation and globalization over the past decade.

As background, in 2006, TELPRI served approximately 1.1 million landline and 500,000 wireless subscribers in Puerto Rico (which is treated as part of the U.S. for purposes of CFIUS and FCC jurisdiction).²⁵

N.Y.), July 2006, available at <http://www.uscib.org/index.asp?documentID=3506>; Robert M. Kimmitt, Deputy Sec’y of the Treasury, Remarks at the European Institute Luncheon CFIUS Reform and International Investments: Balancing Security and Investment (Oct. 27, 2006), available at <http://www.ustreas.gov/press/releases/hp155.htm>.

22. See América Móvil, S.A. de C.V., Verizon Commc’ns Inc., and Subsidiaries of Telecomunicaciones de Puerto Rico, Inc. Seek FCC Consent to Transfer Control of Licenses and Authorizations and Request a Declaratory Ruling on Foreign Ownership, *Public Notice*, 21 FCC Rcd. 6492 (2006); Press Release, Verizon Commc’ns Inc., Verizon to Sell Caribbean and Latin American Telecom Operations in Three Transactions Valued at \$3.7 Billion (Apr. 3, 2006), available at <http://investor.verizon.com/news/view.aspx?NewsID=731>.

23. See Press Release, Alcatel-Lucent, Alcatel and Lucent Technologies to Merge and Form World’s Leading Communication Solutions Provider (Apr. 2, 2006), available at <http://www.home.alcatel.com/vpr/fullarchive.nsf/Datekey/02042006uk> [hereinafter Alcatel/Lucent Announcement].

24. Petition to Adopt Conditions to Authorizations and Licenses in Verizon Commc’ns, Inc., Transferor and América Móvil, S.A. de C.V., Transferee, WT Dkt. No. 06-113 (filed Dec. 15, 2006), available at http://fjallfoss.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6518713387 [hereinafter TELPRI Security Agreement]. This agreement is attached as Appendix B to the FCC’s order approving the transaction. See Verizon Commc’ns, Inc., Transferor, and América Móvil, S.A. de C.V., Transferee, Application for Auth. to Transfer Control of Telecomunicaciones de Puerto Rico, Inc., *Memorandum Opinion & Order & Declaratory Ruling*, 22 FCC Rcd. 6195, 6230 (2007) [hereinafter Verizon/AM Order].

25. Overview of Transaction/Petition for Declaratory Ruling/Request for Procedural

América Móvil served approximately 100 million wireless subscribers and 2 million landline subscribers in fourteen countries in the Americas, and was under common control with the largest provider of wireline services in Mexico.²⁶

In applying to the FCC for approval of the transaction, América Móvil claimed that it “will be able to take advantage of economies of scope and scale with its existing operations in serving Puerto Rico.”²⁷ The examples provided in this application included lower costs for procuring some types of equipment through volume discounts. América Móvil also pointed to its expertise in operating telecom networks, upgrading technologies, and designing telecom service offerings.

Regional operations offer carriers opportunities for integration and consolidation, resulting in savings in operating expenses and capital expenditures. Some providers across multiple countries in the Americas point to savings from integrated billing services, network monitoring and fault correction, network facilities, network planning, and applications development.²⁸ Moreover, it is common for carriers serving multiple

Considerations in Applications of Verizon Commc'ns Inc., Transferor, and América Móvil, S.A. de C.V., Transferee, WT Dkt. No. 06-113 (filed May 9, 2006), *available at* http://fjallfoss.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6518360185, http://fjallfoss.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6518360186 [hereinafter TELPRI Application].

26. *Id.* at Overview of the Transaction 4; *Id.* at Public Interest Statement 3.

27. *Id.* at Public Interest Statement 1, 3-5.

28. See América Móvil, S.A. de C.V., Annual Report (Form 20-F), at 32 (June 30, 2006), *available at* <http://www.sec.gov/Archives/edgar/data/1129137/000119312506140183/d20f.htm> [hereinafter América Móvil 2005 Form 20-F] (“Speedy Móvil, S.A. de C.V. is a Mexican company that develops mobile data solutions for SMS, wireless Internet (WAP) and voice-activated data applications for Telcel and our other subsidiaries and investments.”); Telefónica Móviles, S.A., Annual Report (Form 20-F), at 79 (Apr. 12, 2006), *available at* <http://sec.edgar-online.com/2006/04/12/0001193125-06-078410/Section6.asp> (“We are capitalizing on the regional management of operations in the region, the integration of operators acquired from BellSouth, our larger scale and Group know-how to enhance operating efficiency across our operations in Latin America.”); SunCom Wireless, Inc., Annual Report (Form 10-K), at 7 (Mar. 16, 2006), *available at* <http://www.sec.gov/Archives/edgar/data/1064735/000119312506056246/d10k.htm> (carrier providing wireless services in the southeastern U.S., Puerto Rico, and U.S. Virgin Islands; “Our network monitoring system provides around-the-clock surveillance of our entire network.”); Centennial Commc'ns Corp., Amendment to Registration Statement (Form S-4/A), at 76-77 (Oct. 1, 2004), *available at* <http://www.sec.gov/Archives/edgar/data/879573/000095012304011679/y94431a1sv4za.htm> [hereinafter Centennial] (

In accordance with our strategy of developing market clusters, we have selected wireless switching systems that are capable of serving multiple markets with a single switch. Where we have deemed it appropriate, we have implemented microwave links and fiber connections in our U.S. wireless telephone systems and Caribbean integrated communication system, which provide ongoing cost efficiency and generally improve system reliability.

regions in a country to implement centralized network operating, customer service, switching, Internet peering, and hosting centers as well as other consolidated operations.²⁹

2. Security Agreement for the TELPRI Transaction

Most conditions imposed on foreign acquisitions pursuant to CFIUS reviews are not publicly disclosed. However, CFIUS's Security Agreement for the TELPRI transaction ("Security Agreement") was filed publicly with the FCC with a request that the FCC make compliance with this agreement a condition for its approval of the transfer of control over TELPRI.³⁰ The Security Agreement recites several reasons why the CFIUS agencies sought restrictions in connection with the foreign

....
 . . . We have outsourced with Convergys [Information Management Group, Inc], a network management and operations support systems provider, to provide billing services, facilitate network fault detection, correction and management, performance and usage monitoring and security for our wireless operations throughout our company.
).
 29. See Dobson Commc'ns Corp., Annual Report (Form 10-K), at 4, 10, 12 (Mar. 16, 2006), *available at* <http://www.sec.gov/Archives/edgar/data/1035985/000095013406005299/d33891e10vk.htm> (wireless operations in sixteen states:

We have integrated the operations of numerous acquired wireless systems into our existing operations to achieve economies of scale. We have generated efficiencies from the consolidation and centralized control of pricing, customer service, marketing, system design, engineering, purchasing, financial, administrative and billing functions.

....
 . . . A large portion of these [customer] services are provided by our national customer service centers, which service all of our markets. At December 31, 2005, we operated three customer service centers, which are located in Oklahoma City, Oklahoma, Duluth, Minnesota and Youngstown, Ohio.

....
 . . . Our network operations are monitored by regional network personnel and our vendors, who provide monitoring on a real-time basis for items, including alarm monitoring, power outages, tower lighting problems and traffic patterns.
); Centennial, *supra* note 28, at 43 (wireless operations in Indiana, Michigan, Texas, Louisiana and Mississippi, with one centralized customer service center and local customer support facilities).

30. See TELPRI Security Agreement, *supra* note 24. In a separate letter to representatives of the Department of Defense, América Móvil made further commitments to safeguard the Department's ability to realign military installations and to ensure appropriate security controls remain in place to protect sensitive military communications. See Dept. of Def. to Adopt Conditions, Verizon Commc'ns Inc., Transferor, and América Móvil, S.A. de C.V., Transferee, WT Dkt. No. 06-113 (filed Dec. 19, 2006), *available at* http://gullfoss2.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6518714878. This agreement is attached as Appendix C to the FCC's order approving the transaction. Verizon/AM Order, *supra* note 24, at 6266.

acquisition of TELPRI, including:

U.S. communications systems are essential to the ability of the U.S. Government to fulfill its responsibilities to the public to preserve the national security of the United States, to enforce the laws, and to maintain the safety of the public;

. . . the U.S. Government has an obligation to the public to ensure that U.S. communications and related information are secure in order to protect the privacy of U.S. persons and to enforce the laws of the United States;

. . . it is critical to the well being of the nation and its citizens to maintain the viability, integrity, and security of the communications systems of the United States; [and]

. . . .

. . . TELPRI subsidiary [Puerto Rico Telephone Company, Inc.] provides telecommunications services to federal government agencies and the Puerto Rico National Guard.³¹

Put differently, the U.S. Government appears to be concerned that the foreign owner of the telecom services provider could do any of the following: (1) disclose to foreign governments or persons information on U.S. telecom subscribers and their calls; (2) disclose to foreigners information on U.S. law enforcement activities such as wiretaps and requests for call records; (3) impair on behalf of foreigners such U.S. law enforcement activities; (4) disrupt telecom services used by U.S. government entities and other U.S. persons; or (5) increase the risk of a foreigner's ability to carry out such adverse activities through the foreign storage of call-related information or foreign routing of traffic.³²

31. TELPRI Security Agreement, *supra* note 24, at 5.

32. See DEP'T OF HOMELAND SEC., COMMUNICATIONS: CRITICAL INFRASTRUCTURE AND KEY RESOURCES SECTOR-SPECIFIC PLAN AS INPUT TO THE NATIONAL INFRASTRUCTURE PLAN 36 (2007), available at http://www.dhs.gov/xlibrary/assets/Communications_SSP_5_21_07.pdf [hereinafter COMMUNICATIONS SECTOR PLAN]; DEP'T OF HOMELAND SEC., NATIONAL INFRASTRUCTURE PROTECTION PLAN 107-21 (2006), available at http://www.dhs.gov/xlibrary/assets/NIPP_Plan.pdf [hereinafter NATIONAL INFRASTRUCTURE PROTECTION PLAN]; GAO 2007 Report, *supra* note 20, at 9 ("According to officials from [the Departments of Defense and Justice], [national security] vulnerabilities could result from

To address these concerns, the Security Agreement includes the following commitments:³³

- All equipment used to transmit, switch, control, manage or supervise “domestic” communications (calls between points in the U.S., including Puerto Rico) must be located in the U.S.;
- All data centers used to provide Internet hosting services for U.S. customers must be located in the U.S.;
- All domestic communications, call records, billing records, and other subscriber information shall be stored exclusively within the U.S. and shall be retained for at least five years;
- All network plans, processes, procedures and other performance information pertaining to the U.S. network shall be maintained in the U.S., but a duplicate copy may be maintained at América Móvil’s headquarters in Mexico City;
- All domestic communications shall be routed within the U.S., and there shall be no remote access outside the U.S. to network elements, any capabilities to conduct electronic surveillance and operational support systems, except as agreed to by the U.S. Government;
- TELPRI shall provide to the U.S. Government a comprehensive description of its network, including the locations of servers, routers, switches, operational systems software, and network security appliances and software, and shall provide updates of such description;
- TELPRI shall implement through a reputable third party a screening process for personnel with access to domestic communications facilities, call information or subscriber records, and shall cooperate with any request by the U.S. Government for further screening or to remove any employee;
- If requested by the U.S. Government, TELPRI shall not appoint or shall remove any foreign member of its board or management person at the vice president level or above;
- TELPRI shall appoint not fewer than two directors on its board who are U.S. citizens having security clearances, or eligible to apply for security clearances and approved by the U.S. Government. These “Security Directors” shall serve on a company Security Committee to oversee the company’s compliance with this agreement. Each meeting of

foreign control of critical infrastructure, such as control of or access to information traveling on networks.”); WHITE HOUSE, A NATIONAL SECURITY STRATEGY FOR A NEW CENTURY 17 (1999), available at http://www.dtic.mil/doctrine/jel/other_pubs/nssr99.pdf (

Our national security and our economic prosperity rest on a foundation of critical infrastructures, including telecommunications. . . . More than any nation, America is dependent on cyberspace. We know that other governments and terrorist groups are creating sophisticated, well-organized capabilities to launch cyber-attacks against critical American information networks and the infrastructures that depend on them.

); NATIONAL STRATEGY, *supra* note 15; Lewis, *supra* note 17, at 468-71; Mark Landler & John Markoff, *In Estonia, What May Be the First War in Cyberspace*, INT’L HERALD TRIB., May 28, 2007, available at <http://www.iht.com/articles/2007/05/28/business/cyberwar.php>.

33. TELPRI Security Agreement, *supra* note 24, at 11-21.

the board or a board committee must include at least one Security Director;

- TELPRI shall appoint a Head of Security who is a U.S. citizen having, or eligible to apply for, a security clearance. That officer shall submit an annual report to the U.S. Government on the company's compliance with this agreement;
- TELPRI shall not outsource functions covered by this agreement except as agreed to by the U.S. Government; and
- TELPRI shall retain a neutral third party telecom engineer to audit its operations annually, including to develop a security vulnerability and risk assessment.

Unlike some other government procedures leading to agreements with parties to a merger, such as antitrust consent decrees, there is no public report assessing the costs and benefits, competitive impacts, or alternatives to the terms of an agreement developed pursuant to CFIUS review.³⁴ América Móvil has not disclosed its expected costs of complying with these conditions. When Global Crossing was required by CFIUS to implement many of the same conditions, it disclosed that its incremental costs related to information storage, network operations, personnel screening, and other company operations would be approximately \$6.5 million in the first year and \$2.5 million in each subsequent year.³⁵

34. See 15 U.S.C. § 16(e) (2006) (applicable to negotiated antitrust consent decrees); *United States v. Microsoft Corp.*, 56 F.3d 1448, 1458-62 (D.C. Cir. 1995); *United States v. SBC Commc'ns, Inc.*, 489 F. Supp. 2d 1 (D.D.C. 2007); *United States v. Am. Tel. & Tel. Co.*, 552 F. Supp. 131, 151 (D.D.C. 1982), *aff'd sub nom. Maryland v. United States*, 460 U.S. 1001 (1983) [hereinafter *Divestiture*]; see also *Verizon/AM Order*, *supra* note 24, at 6226-27 (FCC accords deference to Executive Branch expertise on national security and law enforcement issues); KENNETH J. ARROW ET. AL, *BENEFIT-COST ANALYSIS IN ENVIRONMENTAL, HEALTH, AND SAFETY REGULATION* (1996), available at <http://www.aei-brookings.org/publications/abstract.php?pid=53>; ROBERT W. HAHN & ROBERT E. LITAN, *IMPROVING REGULATORY ACCOUNTABILITY* (1997), available at <http://www.aei-brookings.org/admin/authorpdfs/page.php?id=202>; OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, *2006 REPORT TO CONGRESS ON THE COSTS AND BENEFITS OF FEDERAL REGULATIONS AND UNFUNDED MANDATES ON STATE, LOCAL, AND TRIBAL ENTITIES* (2006), available at http://www.whitehouse.gov/omb/inforeg/2006_cb/2006_cb_final_report.pdf; Jerry Ellig, *Costs and Consequences of Federal Telecommunications Regulations*, 58 FED. COMM. L.J. 37 (2006).

35. Global Crossing Ltd., Annual Report (Form 10-K), at 10 (Dec. 8, 2003), available at <http://www.sec.gov/Archives/edgar/data/1061322/000119312503090817/0001193125-03-090817.txt>.

While our operations were already generally consistent with the requirements of the Network Security Agreement, we have initiated a number of operational improvements in order to ensure full compliance with the Network Security Agreement. These improvements relate to information storage and management, traffic routing and management, physical, logical, and network security arrangements, personnel screening and training, and other matters. Implementation of and compliance with the Network Security Agreement will require significant upfront and ongoing capital and operating expenditures that are incremental to the Company's historical levels of such expenditures. We estimate that these

3. Analysis of the TELPRI Security Agreement

The conditions in the Security Agreement are inconsistent with at least four policies in the Communications Act of 1934, as amended (“Communications Act”) and FCC orders.

a. Unregulated, Widely-Available Internet Services

The Telecommunications Act of 1996 includes a strong policy statement against government regulation of Internet services and Internet services providers:

It is the policy of the United States — (1) to promote the continued development of the Internet and other interactive computer services and other interactive media; (2) to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation³⁶

Another section of this legislation directs the FCC to “encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans.”³⁷ Pursuant to these statutory directions, the FCC in 2005 adopted four policy principles, including promoting competition among Internet network and service providers: “To encourage broadband deployment and preserve and promote the open and interconnected nature of the public Internet, consumers are entitled to competition among network providers, application and service providers, and content providers.”³⁸

Addressing the cross-border nature of the Internet, Congress in the Internet Tax Freedom Act of 1998 directed the President to “seek bilateral, regional, and multilateral agreements to remove barriers to

incremental expenditures will be approximately \$6.5 million in 2004 and approximately \$2.5 million in subsequent years; however, the actual costs could significantly exceed these estimates.

Id.

36. 47 U.S.C. § 230(b); *see also* Vonage Holdings Corp. Petition for Declaratory Ruling Concerning an Order of the Minn. Pub. Utils. Comm’n, *Memorandum Opinion & Order*, 19 FCC Rcd. 22,404, 22,416-17 (2004), *aff’d sub nom.* Minn. Pub. Utils. Comm’n v. F.C.C., 483 F.3d 570 (8th Cir. 2007) (“long-standing national policy of nonregulation of information services . . . [allowing providers of information services to] ‘burgeon and flourish’ in an environment of ‘free give-and-take of the marketplace without the need for and possible burden of rules, regulations and licensing requirements.’”).

37. Telecommunications Act of 1996 § 706(a), 110 Stat. 56, 153 (current version at 47 U.S.C. § 157).

38. Appropriate Framework for Broadband Access to the Internet Over Wireline Facilities, *Policy Statement*, 20 FCC Rcd. 14,986, 14,988 (2005) [hereinafter Internet Policy].

global electronic commerce.”³⁹ Specifically, Congress declared international negotiating objectives to assure that global electronic commerce is free from tariff and nontariff burdens, as well as burdensome and discriminatory regulation and standards; “to accelerate the growth of global electronic commerce,” the President should negotiate to “expand[] market access opportunities” for the following: “(A) the development of telecommunications infrastructure; (B) the procurement of telecommunications equipment; (C) the provision of Internet access and telecommunications services; and (D) the exchange of goods, services, and digitalized information.”⁴⁰

In contrast, the Security Agreement imposes various restrictions on TELPRI’s Internet services. Its Internet hosting services for U.S. customers must use servers and related services located in the U.S. Its handling of Internet traffic between two points in the U.S. must solely use facilities in the U.S., and it must provide to the U.S. government descriptions of its facilities. It must manage in the U.S. its network used to transmit Internet traffic originating or terminating in the U.S. Additionally, it must not store outside of the U.S. its customer and traffic records for Internet services provided to U.S. customers.⁴¹

These conditions comprise federal government regulations that may be detrimental to TELPRI’s ability to provide advanced, cost-effective Internet services for U.S. customers. In particular, América Móvil and its affiliates provide extensive Internet hosting, electronic commerce, transmission, and other services in Mexico and other countries in the Americas.⁴² There are likely to be potential economies of scale and scope regarding servers used in Internet hosting, Internet transmission facilities, managing Internet traffic, and related services.⁴³ Furthermore,

39. Omnibus Consolidated and Emergency Supplemental Appropriations Act of 1998, tit. XII, § 1203(a), 112 Stat. 2681, 2681-727 (1998) (current version at 19 U.S.C. § 2241 (2006)).

40. *Id.* at § 1203(b).

41. In January 2007, in connection with a CFIUS review, Global Crossing agreed to similar restrictions on one foreign-owned provider’s hosting services and data centers. Petition to Adopt Conditions to Authorizations and Licenses in Impsat Fiber Networks, Inc., Transferor, and Global Crossing Ltd., Transferee, WC Dkt. No. 06-215 (filed Feb. 1, 2007), *available at* http://svartifoss2.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6518724528, http://svartifoss2.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6518724527. The FCC approved the merger subject to Global Crossing abiding by these commitments. Domestic 214 Authorization Granted: Application Filed for the Transfer of Control of Impsat USA, Inc. from Impsat Fiber Networks, Inc. to Global Crossing Ltd., *Public Notice*, 22 FCC Rcd. 2491 (2007). Such restrictions on one provider’s Internet services and facilities were not in the CFIUS agreement with Global Crossing in September 2003. Global Crossing Ltd., *Order & Authorization*, 18 FCC Rcd. 20,301, app. D (2003).

42. América Móvil, *supra* note 28, at 22; Teléfonos de México, S.A. de C.V., Annual Report (Form 20-F), at 19, 37, 38 (June 30, 2006), *available at* <http://www.secinfo.com/d14D5a.v48G7.htm>.

43. See Peter Burrows, *Servers as High as an Elephant’s Eye*, BUS. WEEK, June 12,

these conditions are not generally applicable to providers of Internet services in the U.S., including those against which TELPRI competes.

b. Deregulation of Carriers' Facilities and Service Offerings

In the era of monopolistic telecommunications carriers, the FCC required carriers to obtain prior approval for the addition or termination of lines and service offerings.⁴⁴ With the growth of competition, the FCC found that such regulations were not necessary to protect the public interest; on the contrary, such regulations impaired the carriers' ability to satisfy customers' needs, efficiency, and competition.⁴⁵ Accordingly, the FCC gave carriers freedom to make decisions on network facilities, network operations, and service offerings without government review or restrictions.

The Security Agreement takes a conflicting approach by restricting the locations of TELPRI's lines, switches, and network management centers, as well as how TELPRI routes traffic. While the carrier can add lines without prior approval by the U.S. government, all lines used to transmit domestic traffic must be located in the U.S. The Security Agreement bars the likely potential to reduce costs by utilizing network operating centers, lines, or switches outside of the U.S. Such restrictions can impair the efficiency of the carrier's operations and its ability to deploy advanced services.

c. Fostering Economies from Mergers

In determining whether a proposed merger will advance the public interest, the FCC often relies on the benefits of likely economies of scale, scope, and vertical integration resulting from the merger.⁴⁶ Such economies can yield various public benefits including lower prices to users, increased ability to invest in infrastructure upgrades, greater

2006, available at http://www.businessweek.com/magazine/content/06_24/b3988087.htm; Stephanie N. Mehta, *Behold the Server Farm*, FORTUNE, July 28, 2006, available at http://www.money.cnn.com/2006/07/26/magazines/fortune/futureoftech_serverfarm.fortune/index.htm; *Telex Will Offer Integrated Services of "Hosting" in Seven Countries*, TERRA, Nov. 14, 2006, at <http://www.terra.com/noticias/articulo/html/act647858.htm#>.

44. See 47 U.S.C. § 214(a).

45. See *Am. Tel. & Tel. Co. v. F.C.C.*, 978 F.2d 727 (D.C. Cir. 1992); Policy and Rules Concerning the Interstate, Interexchange Marketplace, *Second Report & Order*, 11 FCC Rcd. 20,730 (1996); Policy and Rules Concerning Rates for Competitive Common Carrier Servs. and Facilities Authorizations Therefor, *Fourth Report & Order*, 95 F.C.C.2d 554 (1983); Long-Run Regulation of AT&T's Basic Domestic Interstate Servs., *Notice of Inquiry*, 95 F.C.C.2d 510, 521-23 (1983).

46. See *Verizon Commc'ns Inc. and MCI, Inc. Applications for Approval of Transfer of Control*, *Memorandum Opinion & Order*, 20 FCC Rcd. 18,433, 18,533-35 (2005) [hereinafter *Verizon/MCI Order*].

capability to deploy advanced services, more competition, and increased reliability of services. In fact, the FCC has found that such economies resulting from mergers promote national security.⁴⁷ Unless there are offsetting concerns about anticompetitive conduct or other harms, the FCC generally allows merging carriers to integrate their operations and capture the economies of scale and scope.

The Security Agreement imposes a range of restrictions on América Móvil's ability to integrate TELPRI with its other operations in the Americas. The restrictions cover the following aspects of TELPRI's network: (1) network operating centers and network planning; (2) data processing and storage equipment and operations; and (3) billing and other customer services. The loss of economies of scale and scope could lessen the public benefits ordinarily associated with such a merger.

d. Decreasing Regulatory Burdens on Service Providers

Finally, Congress has directed the FCC to review its regulations and eliminate regulatory burdens which are no longer necessary in the public interest.⁴⁸ Congress determined that reducing regulatory burdens on telecom carriers will serve the public interest by decreasing costs and delays for services. Accordingly, the FCC has reduced various regulatory requirements by, among other things, streamlining license applications, eliminating tariff filings for most carriers, adjusting and limiting accounting standards, reducing rate regulations, cutting reporting requirements, and decreasing service unbundling requirements.⁴⁹

In contrast, the Security Agreement implements new regulatory burdens on one foreign-owned carrier.⁵⁰ These burdens include personnel screening, annual security audits, information storage requirements, information storage restrictions, and reporting requirements.

An argument could be made that the national-security rationale for

47. *Id.* at 18,531-33.

48. 47 U.S.C. § 161.

49. *See, e.g.,* Covad Commc'ns Co. v. F.C.C., 450 F.3d 528 (D.C. Cir. 2006); Unbundled Access to Network Elements, *Order on Remand*, 20 FCC Rcd. 2533 (2004) [hereinafter Unbundled Access]; Implementation of Further Streamlining Measures for Domestic Section 214 Authorizations, 17 FCC Rcd. 5517 (2002).

50. The Security Agreement includes conditions not imposed in the earlier CFIUS agreements with Deutsche Telekom in the VoiceStream Wireless transaction, *see* Applications of VoiceStream Wireless Corp., PowerTel, Inc., Transferors, and Deutsche Telekom AG, Transferee, *Memorandum Opinion & Order*, 16 FCC Rcd. 9779 (2001) [hereinafter DT], or with Telmex in its proposed transaction with XO Communications, *see* Petition to Adopt Conditions to Authorizations and Licenses, XO Commc'ns, Inc., IB Dkt. No. 02-50 (filed Sept. 16, 2002), *available at* http://fjallfoss.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6513291830.

some of these restrictions, such as personnel screening, would apply to a larger set of carriers than those subject to recent foreign acquisitions. The FCC has responsibilities for promoting national defense and safety,⁵¹ and it has broad statutory authority to adopt regulations, or impose conditions on licenses and authorizations, for telecom carriers.⁵² The FCC could make some of the conditions in the Security Agreement, or similar requirements, to promote national security applicable industry-wide or for a category of carriers.

To date, in the context of the long-standing policy of reducing unnecessary regulatory burdens, the FCC has not found that the public interest would be served by imposing these new regulatory burdens on all domestic or foreign-owned carriers. Moreover, neither the Communications Sector Security Plan adopted by the Department of Homeland Security and other signatory agencies nor the best practices recommendations of an FCC advisory group has taken an industry-wide approach to these safeguards.⁵³

51. See 47 U.S.C. § 151 (purpose of FCC regulations includes national defense and promoting safety of life and property). For descriptions of some of the FCC's post-9/11 actions to promote national defense and public safety, see *CyberSecurity: Protecting America's Critical Infrastructure, Economy, and Consumers: Hearing Before the Subcomm. on Telecomms. and the Internet of the H. Comm. on Energy and Commerce*, 109th Cong. (2006) (written statement of Kenneth P. Moran, Director, Office of Homeland Sec., Enforcement Bureau, FCC), available at <http://www.fcc.gov/ola/docs/moran091306.pdf>; *Public Safety Communications from 9/11 to Katrina: Critical Public Policy Lessons: Hearing Before the Subcomm. on Telecomms. and the Internet of the H. Comm. on Energy and Commerce*, 109th Cong. (2005) (written statement of Kevin J. Martin, Chairman, FCC), available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-261417A1.pdf; *Emergency Warning Systems: Ways to Notify the Public in the New Era of Homeland Security, Hearing of the Subcomm. on Emergency Preparedness and Response Before the H. Select Comm. on Homeland Sec.*, 108th Cong. (2004) (written statement of James A. Dailey, Director, Office of Homeland Sec., Enforcement Bureau, FCC), available at <http://www.fcc.gov/homeland/documents/dailey092204.pdf>.

52. See 47 U.S.C. §§ 214(c), 219, 220, 301, 303(r); *F.C.C. v. Nat'l Citizens Comm. for Broad.*, 436 U.S. 775 (1978); *United States v. Midwest Video Corp.*, 406 U.S. 649 (1972) (FCC's ancillary jurisdiction); *United States v. Sw. Cable Co.*, 392 U.S. 157, 177-78 (1968) (same); *Atl. Tel-Network, Inc. v. F.C.C.*, 59 F.3d 1384, 1389 (D.C. Cir. 1995) (FCC could impose condition on license even if no such formal policy existed when the condition was imposed); Applications for the Assignment of License from Denali PCS, L.L.C. to Alaska DigiTel, L.L.C. and the Transfer of Control of Interests in Alaska DigiTel, L.L.C. to Gen. Commc'n, Inc., *Memorandum Opinion & Order*, 21 FCC Rcd. 14,863, 14,915-16 (2006) (adopting conditions restricting access to business records and other information); see generally Bryan N. Tramont, *Too Much Power, Too Little Restraint: How the FCC Expands its Reach Through Unenforceable and Unwieldy "Voluntary" Agreements*, 53 FED. COMM. L.J. 49 (2000).

53. See *infra* Section IV.C.

B. *Restrictions on Globalization of Operations for a Telecom Equipment Provider to Promote U.S. National Security*

1. Background on the Alcatel/Lucent Transaction

On November 30, 2006, Alcatel and Lucent closed a “merger of equals” to create a leading global communications solutions provider.⁵⁴ The merged company is named Alcatel-Lucent and is headquartered in Paris. Post-merger, Alcatel-Lucent had a presence in 130 countries and about 79,000 employees, of which approximately 23,000 were engaged in research and development.

Lucent was the corporate successor to Western Electric Company, Inc., the telecom equipment research, development, manufacturing, and supply arm of the monopoly Bell System before January 1, 1984.⁵⁵ Pursuant to an antitrust consent decree, the Bell Operating Companies (local exchange carriers) were divested from AT&T Company; Western Electric remained with AT&T until it was spun-off to shareholders in 1996 under the Lucent name.⁵⁶ Lucent also owned Bell Laboratories, which was a leading telecom research and development organization based in New Jersey. With operations in the U.S. and several foreign countries, Bell Labs performed work for Lucent’s commercial products as well as projects for the U.S. government.⁵⁷

The telecom equipment industry and Lucent have changed dramatically since the days of Western Electric’s role in the vertically integrated, monopoly Bell System. In the earlier era, Western Electric operated twenty-three major plants scattered around the U.S. and focused on supplying the domestic operations of the Bell System.⁵⁸ Through

54. Press Release, Alcatel-Lucent, Alcatel and Lucent Complete Merger Creating World’s Leading Communication Solutions Provider (Nov. 30, 2006), *available at* <http://www.alcatel-lucent.com> (2006 Archive of Press Releases); Alcatel/Lucent Announcement, *supra* note 23. This transaction to increase the global strength of two leading telecom equipment manufacturers was announced the day before América Móvil announced its regional geographic expansion through an agreement to acquire three Caribbean telecom service providers.

55. Alcatel-Lucent, Lucent Timeline, <http://www.bell-labs.com/history/lucent.html> (last visited Oct. 7, 2007).

56. *Id.*; Divestiture, *supra* note 34. After Lucent’s separation from AT&T, Lucent spun off its enterprise networking group (Avaya Inc.) in 2000 and separated (through an initial public offering) its microelectronics business (Agere Systems) in 2001.

57. Alcatel-Lucent, Research Areas & Projects, <http://www.alcatel-lucent.com/wps/portal/BellLabs> (follow “World-Class Research” hyperlink) (last visited Oct. 7, 2007); Alcatel-Lucent, Global Labs, <http://www.alcatel-lucent.com/wps/portal/BellLabs> (follow “Global Labs” hyperlink) (last visited Oct. 7, 2007).

58. JOHN BROOKS, TELEPHONE: THE FIRST HUNDRED YEARS 12 (1976); ALVIN VON AUW, HERITAGE & DESTINY: REFLECTIONS ON THE BELL SYSTEM IN TRANSITION 200-08 (1983) [hereinafter VON AUW]; Jerry A. Hausman, *The Bell Operating Companies and AT&T Venture Abroad While British Telecom and Others Come to the United States*, in

regulatory and antitrust decisions as well as other market developments, the industry and Lucent became global.⁵⁹ Several foreign-owned telecom equipment manufacturers became major suppliers to U.S. service providers and customers. Similarly, U.S. manufacturers sold in the expanding foreign markets. Moreover, even when U.S.-owned manufacturers sold to U.S. customers, many of their products relied on foreign operations or foreign suppliers for research and development, manufacturing, and support services.⁶⁰

Prior to the merger, both Alcatel and Lucent were operating in the U.S. as well as globally.⁶¹ Neither company provided telecom or Internet services in the U.S. Instead, each company sold products to telecom carriers, Internet services providers, enterprise customers, and other end-users. Each company's U.S. sales involved some products which were, in large part, developed, manufactured, and supported in the U.S. Also, each company's U.S. sales involved some products which were, in large part, developed, manufactured, and supported by its operations outside of the U.S. As global suppliers, each company also sold some products outside the U.S. which were, in large part, developed, manufactured and supported by its operations in the U.S.

In announcing the merger, the companies pointed to "a strategic fit between two experienced and well-respected global communications

GLOBALIZATION, TECHNOLOGY, AND COMPETITION: THE FUSION OF COMPUTERS AND TELECOMMUNICATIONS IN THE 1990S 313, 314 (Stephen P. Bradley et al. eds., 1993).

59. Divestiture, *supra* note 34; Am. Tel. & Tel. Co., 64 F.C.C.2d 1, 26-45 (1977) [hereinafter FCC Docket 19129]; VON AUW, *supra* note 58, at 200-08; Lucent Techs. Inc., Amendment to Registration Statement (Form S-1/A) (Apr. 1, 1996) (discussion of competition and markets).

60. See Lucent Techs. Inc., Annual Report (Form 10-K), at 6 (Dec. 14, 2005) [hereinafter Lucent 2005 Form 10-K]; INT'L TELECOMM. UNION, WORLD TELECOMMUNICATION DEVELOPMENT REPORT 1996/97: TRADE IN TELECOMMUNICATIONS (1998); ORG. FOR ECON. CO-OPERATION AND DEV., TELECOMMUNICATIONS EQUIPMENT: CHANGING MARKETS AND TRADE STRUCTURES (1991), available at <http://www.oecd.org/dataoecd/56/54/1909439.pdf>.

61. Lucent 2005 Form 10-K, *supra* note 60, at 17 (

We are a global company. Our foreign operations include integration, manufacturing and test facilities, engineering centers, sales personnel and customer support functions. For fiscal 2005 and 2004, we derived approximately 37% and 39%, respectively, of our revenues from sales outside the U.S., including in China, Europe, India and various countries in the Middle East, such as Iraq and Israel. We are committed to expanding our business outside the U.S.

); Alcatel, Annual Report (Form 20-F), at 19 (Mar. 31, 2005) (

We have administrative, production, manufacturing and research and development facilities worldwide. A substantial portion of our production and research activities in all business areas is conducted in France and China. We also have operating affiliates and production plants in many other countries, including Germany, Italy, Spain, Belgium, Denmark, the United Kingdom, Canada, the United States and Mexico.

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leaders who together will become the global leader in convergence” for next-generation networks.⁶² The companies expected the merger to produce about \$1.7 billion in annual cost synergies.⁶³

2. Security Agreements for the Alcatel/Lucent Transaction

On November 17, 2006, President George W. Bush accepted the recommendation of CFIUS that he not suspend or prohibit the Alcatel/Lucent transaction, provided that the companies execute a certain National Security Agreement and a certain Special Security Agreement.⁶⁴ The White House release calls these conditions “robust and far-reaching agreements designed to ensure the protection of our national security.”⁶⁵

Like most conditions accepted by companies in order to terminate a CFIUS review or investigation, the terms of these agreements were not made public. Nor is there much public information on the national security concerns identified by CFIUS with regard to this transaction. Clearly, this secrecy impairs the following analysis.

Nevertheless, one piece of public information about this National Security Agreement points to what appear to be inconsistencies or conflicts with several communications policies in order to address national security concerns. In a filing with the Securities and Exchange Commission, Lucent said that this agreement “provides for certain undertakings with respect to the U.S. businesses of Lucent and Alcatel relating to the work done by Bell Labs and to the *communications infrastructure in the United States*.”⁶⁶ In other words, Alcatel and Lucent agreed to some conditions not generally applicable through U.S. laws and regulations affecting their supply of products to U.S. carriers and other customers. This statement also indicates that the National Security Agreement addresses operations going beyond Lucent’s classified and other work for the U.S. government, to supplying the communications

62. Alcatel/Lucent Announcement, *supra* note 23, at 2.

63. *Id.* at 3.

64. Press Release, White House, Statement on CFIUS Recommendation Regarding Proposed Merger of Lucent Technologies, Inc., and Alcatel (Nov. 17, 2006), *available at* <http://www.whitehouse.gov/news/releases/2006/11/20061117-13.html> [hereinafter White House Release]; *see also* Stephanie Kirchgaessner, *Washington Slaps Review on Nokia-Siemens Venture*, FIN. TIMES, Jan. 7, 2007, *available at* <http://www.ft.com/cms/s/e07c2be8-9e86-11db-ac03-0000779e2340.html>. The Special Security Agreement addresses classified and other work for the federal government. *See* Defense Security Service, Special Security Agreement, *available at* https://www.dss.mil/portal/ShowBinary/BEA%20Repository/new_dss_internet/index.html (search for ‘Special Security Agreement’) (last visited Oct. 21, 2007); Lucent Techs. Inc., Current Report (Form 8-K) (Nov. 17, 2006) [hereinafter Lucent 8-K]; Alcatel-Lucent Press Release, Alcatel-Lucent Announces Independent Subsidiary to Serve the U.S. Federal Government Market (Dec. 1, 2006) (on file with author); *see also infra* Section IV.B.

65. White House Release, *supra* note 64.

66. Lucent 8-K, *supra* note 64 (emphasis added).

infrastructure of commercial carriers. The filing goes on to state: “The provisions contained in both the National Security Agreement and the Special Security Agreement are not expected to impact the projected synergies to be realized from the merger transaction or materially impact the integration of the businesses of Alcatel and Lucent.”⁶⁷

3. Analysis of the Alcatel/Lucent National Security Agreement

Even from the small public indication of the conditions in this National Security Agreement, there appear to be at least four telecommunications industry policies which may conflict with, or point in a different direction than, these conditions.

a. Freedom to Interconnect Equipment that Does Not Cause Technical Harm to Telecom Networks

Before 1968, the Bell System provided all equipment that could be used in or interconnected to its networks and did not allow “foreign attachments.” The FCC determined that the Bell System applied this approach in an excessively restrictive manner, barring equipment that would do no technical harm to the Bell System’s networks and thereby restricting innovation and increasing costs.⁶⁸

Since 1968, the FCC has administered standards and certification procedures designed to allow interconnection of any equipment chosen by the customer or service provider as long as it does not cause technical harm to public telecom networks.⁶⁹ The technical standards for terminal equipment cover factors such as electrical emissions and power levels. To facilitate the rapid, low-cost availability of equipment for selection by customers, the FCC adopted procedures allowing testing and certification by manufacturers and accredited third parties (including foreign entities).

67. *Id.*

68. Use of the Carterfone Device in Message Toll Telephone Service, *Declaratory Ruling*, 13 F.C.C.2d 420 (1968); see also *United States v. Am. Tel. & Tel. Co.*, 524 F. Supp. 1336, 1348 (D.C. Cir. 1981).

69. 47 C.F.R. § 68 (2000); see also 2000 Biennial Regulatory Review of Part 68 of the Commission’s Rules and Regulations, *Report & Order*, 15 FCC Rcd. 24,944 (2000) [hereinafter *Biennial Review*]; 2000 Biennial Regulatory Review of Part 68 of the Commission’s Rules and Regulations, *Order on Reconsideration*, 17 FCC Rcd. 8440 (2002); FCC, PART 68 FAQs 1 (2007), <http://www.fcc.gov/wcb/iatd/part68faqs.pdf> (

Under Part 68, wireline telecommunications carriers must allow all TE [terminal equipment] to be connected directly to their networks, provided the TE meet certain technical criteria for preventing four prescribed harms. These harms are electrical hazards to operating company personnel, damage to network equipment, malfunction of billing equipment, and degradation of service to customers other than the user of the TE and that person’s calling and called parties.

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These standards and procedures apply equally to domestic and foreign-manufactured equipment.

In furtherance of this well-established policy, the FCC adopted in 2005 the following principle pertaining to equipment used in Internet services: “To encourage broadband deployment and preserve and promote the open and interconnected nature of the public Internet, consumers are entitled to connect their choice of legal devices that do not harm the network.”⁷⁰

In addition to promoting competition and innovation in the telecom equipment available to customers in the U.S., this emphasis on open markets allows manufacturers to make decisions on how and where to develop, manufacture, and support their products. U.S.-owned as well as foreign-owned manufacturers can choose to locate any operation outside the U.S. or to obtain any component or service from a third party outside the U.S., as long as the resulting equipment satisfies the FCC’s standards and processes for not causing technical harm to telecom networks.⁷¹

For U.S. manufacturers, the U.S. government has also worked to open foreign markets for terminal and other telecommunications equipment based on transparent international technical standards.⁷²

70. Internet Policy, *supra* note 38, at 14,988.

71. See FCC, EQUIPMENT AUTHORIZATION OF TELEPHONE TERMINAL EQUIPMENT 2 (2006), <http://www.fcc.gov/oet/ea/TCB-part-68-list.pdf> (FCC recognition of Telecommunications Certification Bodies to perform equipment authorizations in Germany, Netherlands, Singapore and United Kingdom); Biennial Review, *supra* note 69, at 24,947 (

The Part 68 rules are premised on a compromise whereby providers are required to allow terminal equipment manufactured by anyone to be connected to their networks, provided that the terminal equipment has been shown to meet the technical criteria for preventing network harm that are established in the Part 68 rules. . . . Our rules have facilitated a vibrant, competitive market for terminal equipment, reducing prices and resulting in a proliferation of new equipment and capabilities available to consumers.

); Lucent 2005 Form 10-K, *supra* note 60, at 17 (“We are also dependent on international suppliers for some of our components and subassemblies and for assembly of some of our products.”); James Hookway, *Vietnam Vies to Get in on Outsourcing*, WALL ST. J., May 29, 2007, at A-6 (Vietnamese companies develop software for Nortel Networks Corp. and Alcatel-Lucent). On the other hand, some in the U.S. federal government are concerned about higher security risks related to use of foreign manufacturing operations for U.S. critical infrastructure. See OFFICE OF THE UNDER SEC’Y OF DEF. FOR ACQUISITION, TECH., AND LOGISTICS, REPORT OF THE DEFENSE SCIENCE BOARD TASK FORCE ON CRITICAL HOMELAND INFRASTRUCTURE PROTECTION 14 (2007), *available at* http://www.acq.osd.mil/dsb/reports/2007-01-Critical_Homeland_Infrastructure_Protection.pdf (“Some critical [defense industrial base] assets are located overseas. This severely limits the ability of the DoD to use regulatory mechanisms to ensure compliance with security guidelines, although threats to overseas [defense industrial base] assets may be inherently greater and at higher risk than domestic [defense industrial base] assets.”); see also National Defense Critical Infrastructure Protection Act of 2006, H.R. 4881, 109th Cong. (proposed legislation to ensure that infrastructure critical to national security is controlled by U.S. citizens).

72. See *infra* Section I.B.3(b); *infra* Section III.C (U.S.-Korea Free Trade Agreement);

From the small public description of the Alcatel/Lucent National Security Agreement, it is not possible to determine whether the “robust and far-reaching” conditions relating to the communications infrastructure of the U.S. impose a significant burden on this company’s supply of equipment and services for U.S. customers. Perhaps there will be no adverse effects on the prices, timing, and features of equipment available to U.S. customers. However, the national security conditions may go beyond the technical-harm standards and processes under the FCC’s rules that are generally applicable to U.S. and foreign suppliers of telecom equipment to U.S. customers. Furthermore, such national security conditions would not have been applicable to Lucent, or even to Alcatel’s sales in the U.S., but for Alcatel’s merger with Lucent and the consequential CFIUS review of this transaction.

b. Open Markets for Telecom Equipment Suppliers

The U.S. Trade Representative has objected to restrictions in some countries on imports of U.S.-manufactured telecom equipment.⁷³

Larry Irving et al., *Steps Toward a Global Information Infrastructure*, 47 FED. COMM. L.J. 271, 277 (1994) (Larry Irving, former Assistant Sec’y, U.S. Dept. of Commerce) (

Today, the international arena is beset with a multiplicity of different technical standards, formats, and requirements that make interconnection and interoperability, and therefore communications, very difficult. One of the administration’s goals is to continue our active participation in international standard-setting activities and encourage other countries to ensure that interoperability of networks—among countries, networks, and individual users and information providers—is afforded the highest priority. The United States has played a leadership role in the international standardization process developed through the ITU, the International Electrotechnical Commission, and the International Organization for Standardization. It also has illustrated its commitment to global telecommunications standardization through the establishment of Committee T1, which develops national telecommunications network standards for the United States and drafts and proposes U.S. technical contributions to the ITU.

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73. See Press Release, Office of the U.S. Trade Rep., USTR Issues 2005 “1377” Review of Telecommunications Trade Agreements (Mar. 31, 2005), available at http://www.ustr.gov/Document_Library/Press_Releases/2005/March/USTR_Issues_2005_1377_Review_of_Telecommunications_Trade_Agreements.html (concerns about burdensome testing and certification requirements in Mexico and Korea, and limitations on suppliers’ choice of technology in China and Korea); Press Release, Office of the U.S. Trade Rep., U.S. and Korea Resolve Major Trade Dispute in Telecom Sector (Apr. 23, 2004), available at http://www.ustr.gov/Document_Library/Press_Releases/2004/April/US_Korea_Resolve_Major_Trade_Dispute_in_Telecom_Sector.html (under pressure from the U.S., Korea agrees not to adopt a technical standard for wireless systems that would have shut out systems from U.S. manufacturers); Press Release, Office of the U.S. Trade Rep., U.S. and EU Implement Agreement to Reduce Barriers on Transatlantic Trade of Telecommunications and Electronics Products (Jan. 17, 2001), available at http://www.ustr.gov/Document_Library/Press_Releases/2001/January/US_EU_Implement_Agreement_to_Reduce_Barriers_on_Transatlantic_Trade_of_Telecommunications_Electronics_Products.html (reducing barriers to approximately \$30 billion in annual transatlantic trade of

Similarly, the U.S. government encourages competition among telecom equipment manufacturers (without limiting foreign corporations or foreign-sourced products) and generally allows manufacturers to make market decisions on technologies, manufacturing operations, investments, and locations. Instead of regulations, the U.S. government generally relies on market forces to promote the availability of telecom equipment with advanced features, low prices, and capabilities which meet customers' needs.

There are a few areas of industry-wide FCC regulations requiring equipment to comply with certain performance standards and capabilities in furtherance of national security in terms of law enforcement activities and emergency services.⁷⁴ Furthermore, telecom equipment manufacturers have participated in promoting the security of telecom and Internet networks through government-sponsored efforts, such as the National Security Telecommunications Advisory Committee and the Network Reliability and Interoperability Council,⁷⁵ as well as industry committees and efforts at individual companies. These regulations and national security efforts have not differentiated between U.S. and foreign ownership or operations of manufacturers.

The undertakings to protect the communications infrastructure of the U.S. in the National Security Agreement have not been disclosed. If they involve restrictions on the operations and business decisions of this foreign-incorporated telecom equipment manufacturer, then these conditions would go in a different direction than the open-borders, deregulated, free-market approach of the U.S. Trade Representative and the FCC.

c. Deregulation of Carriers' Decisions on the Selection and Deployment of Equipment

The FCC and state regulators used to play a significant role in approving carriers' capital expenditures for facilities and, in some cases, the selection and deployment of equipment used in carriers' networks.

telecommunications and electronics products by eliminating duplicative product testing requirements); *infra* Section III.C.

74. See *infra* Section I.B.3(c).

75. See NAT'L SEC. TELECOMMS. ADVISORY COMM., ISSUE REVIEW: A REVIEW OF ISSUES ADDRESSED THROUGH NSTAC XXIX (2006), <http://www.ncs.gov/nstac/reports/2006/NSTAC%20XXIX%20Issue%20Review.pdf>; NAT'L SEC. TELECOMMS. ADVISORY COMM., GLOBALIZATION TASK FORCE REPORT (2000), <http://www.ncs.gov/nstac/reports/2000/GTF-Final.pdf>; National Communications System, National Security Telecommunications Advisory Committee (NSTAC), <http://www.ncs.gov/nstac/nstac.html> (last visited Oct. 13, 2007); Network Reliability and Interoperability Council, <http://www.nric.org> (last visited Oct. 13, 2007).

As noted above, the FCC required prior approval for the addition or termination of interstate lines by carriers.⁷⁶ Such regulations were replaced by blanket authorizations, allowing carriers to make independent, market-driven decisions on the equipment to deploy, the locations to deploy the equipment, the features and capacities of the equipment, and the equipment suppliers.⁷⁷

Furthermore, the FCC and state regulators used to engage in rate regulation based on the carriers' costs, including whether to allow a carrier to recover capital expenditures for certain network equipment. Such regulations were replaced by price caps or other alternative approaches for carriers with market power (by which rates are not based on carriers' actual costs and regulators do not determine whether to disallow certain capital expenditures), and deregulation of rates charged by nondominant (competitive) carriers.⁷⁸ As an additional check on equipment purchases in an earlier era, regulators required prior approval for new service offerings; this constrained carriers' investments in some equipment with capabilities to support new features. Again, regulators have decreased reviews of new services and have encouraged carriers to deploy equipment with advanced features of their choice.⁷⁹

There are a few areas in the communications laws and regulations which impose requirements on carriers' equipment. For example, a statute and FCC rules require carriers to implement equipment with specified capabilities to assist law enforcement activities (such as wiretapping), and telecom equipment manufacturers shall make available to carriers such equipment at reasonable charges.⁸⁰ Also, the FCC has

76. See *supra* notes 44-45.

77. Unbundled Access, *supra* note 49 (along these lines, the FCC removed unbundling regulations applicable to new network facilities so as to encourage carriers to make market-based decisions on equipment deployments and technologies).

78. See Motion of AT&T Corp. to be Declared Non-Dominant for International Service, *Order*, 11 FCC Rcd. 17,963 (1996); Motion of AT&T Corp. to be Reclassified as a Non-Dominant Carrier, *Order*, 11 FCC Rcd. 3271 (1995); Policy & Rules Concerning Rates for Dominant Carriers, *Report & Order & Second Further Notice of Proposed Rulemaking*, 4 FCC Rcd. 2873 (1989).

79. See 47 U.S.C. § 157(a) ("It shall be the policy of the United States to encourage the provision of new technologies and services to the public."); Warren G. Lavey, *Innovative Telecommunications Services and the Benefit of the Doubt*, 27 CAL. W. L. REV. 51 (1990); *supra* notes 36, 38.

80. Communications Assistance for Law Enforcement Act of 1994, Pub. L. No. 103-414, 108 Stat. 4279 (codified as amended in scattered sections of 18 and 47 U.S.C.); 47 U.S.C. § 1002 (obligations of telecommunications carriers with regard to law enforcement assistance capabilities of its equipment, facilities and services); § 1005(b) (

a manufacturer of telecommunications transmission or switching equipment and a provider of telecommunications support services shall, on a reasonably timely basis and at a reasonable charge, make available to the telecommunications carriers using its equipment, facilities, or services such features or modifications as are necessary to permit such carriers to comply with the capability requirements of section 1002.

adopted rules for carriers to deploy equipment providing connection to, and automatic location of users by, emergency services.⁸¹ These requirements are applicable industry-wide, to domestic as well as foreign-sourced equipment, regardless of whether the manufacturer is U.S.-owned or foreign-owned.

It is not possible to determine from public information how and to what extent the National Security Agreement affects the availability of options for U.S. carriers' decisions on the selection and deployment of equipment. In at least some ways, the U.S. government has increased its influence over a leading provider's costs, features, supply, or support for equipment. This affects the equipment that carriers can select and deploy. Moreover, unlike the requirements for law enforcement and emergency services capabilities, the conditions in the National Security Agreement only apply to equipment from one foreign-owned supplier.

*d. Nondiscrimination among Telecom Equipment
Manufacturers*

In addition to the regulatory/antitrust attack on the Bell System's equipment interconnection restrictions, the U.S. developed a strong regulatory and antitrust policy against the Bell System's practices of excluding unaffiliated manufacturers from the carriers' procurements of network equipment. The FCC's order in 1977 prohibited this discriminatory exclusion of competing telecom equipment manufacturers.⁸² Later, the antitrust consent decree that broke up the Bell System reflected on-going concerns about discrimination in telecom equipment procurements by barring the Bell Operating Companies from engaging in manufacturing and from discriminating among manufacturers.⁸³ When Congress lifted the restriction on the Bell Operating Companies' entry into manufacturing in 1996, the statute continued the policy of nondiscrimination in carriers' equipment

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81. IP-Enabled Services, *First Report & Order & Notice of Proposed Rulemaking*, 20 FCC Rcd. 10,245 (2005); Revision of the Commission's Rules to Ensure Compatibility with Enhanced 911 Emergency Calling Systems, *Report & Order & Second Further Notice of Proposed Rulemaking*, 18 FCC Rcd. 25,340 (2003).

82. FCC Docket 19129, *supra* note 59; Consolidated Application of American Telephone and Telegraph Company and Specified Bell System Companies for Authorization Under Sections 214 and 310(d) of the Communications Act of 1934, *Memorandum Opinion, Order & Authorization*, 96 F.C.C.2d 18, 58-59 (1983) ("We have always believed that increased competition should facilitate operating company purchase of the most cost effective equipment available and accelerate the introduction of new service features.").

83. Divestiture, *supra* note 34, at 190-91; see Warren G. Lavey & Dennis W. Carlton, *Economic Goals and Remedies of the AT&T Modified Final Judgment*, 71 GEO. L.J. 1497 (1983).

procurements through several safeguards.⁸⁴ The protections apply industry-wide, without regard to the manufacturer's country of incorporation or the equipment's place of origin.

The National Security Agreement takes a different approach. Through CFIUS's review of a single foreign acquisition, national security conditions are made to apply solely to one manufacturer. Other foreign-incorporated manufacturers (unless covered by similar agreements following CFIUS reviews of their acquisitions of U.S. businesses), the foreign-sourced equipment of domestic or other foreign manufacturers, and the U.S.-sourced equipment of domestic or other foreign manufacturers are not covered by such conditions. While these conditions do not prohibit carriers from procuring equipment from a leading foreign provider, they are at odds with the policy of nondiscrimination among telecom equipment manufacturers in the actions of Congress, the FCC, and the Antitrust Division of the Justice Department.

II. FCC CONDITIONS ON A MERGER OF DOMESTIC TELECOM CARRIERS

The FCC's order approving the largest domestic telecom merger accepted a commitment against using offshore labor and failed to impose the national security burdens that it adopted for foreign acquisitions.

A. Background on the AT&T/BellSouth Transaction

On March 5, 2006, AT&T and BellSouth announced their agreement to merge. The domestic companies were leading wireline carriers and joint owners of the large wireless carrier Cingular. The companies claimed several merger benefits including the following: an expected net present value of \$18 billion in synergies; creating a more innovative and efficient carrier operating a single fully integrated wireless and wireline Internet Protocol network offering a full range of advanced solutions; and giving "business and government customers, including military and national security agencies, a reliable U.S.-based provider of integrated, secure, high-quality and competitively priced services to meet their needs anywhere in the world."⁸⁵ The expected synergies included cutting about 10,000 jobs.⁸⁶ Because the transaction did not involve a foreign acquirer, there was no CFIUS review. The Antitrust Department of the Justice Department closed its investigation

84. 47 U.S.C. §§ 272, 273.

85. AT&T/BS Press Release, *supra* note 4.

86. See AT&T INC., AT&T, BELL SOUTH MERGER: SUBSTANTIAL SYNERGY OPPORTUNITIES, STRENGTHENED GROWTH PLATFORMS IN WIRELESS, BUSINESS AND INTEGRATED SERVICES 36 (2006), <http://www.sec.gov/Archives/edgar/data/732713/000095012306002593/y18291se425.htm>.

of the transaction on October 11, 2006 without requiring divestitures or imposing any condition.⁸⁷

In contrast, the FCC struggled to reach an order accepted by a majority of the commissioners. With one commissioner recused,⁸⁸ the two Democratic commissioners diverged from the Republican chairman and other Republican commissioner. The Democratic commissioners sought a range of conditions, many similar to what AT&T had accepted in 2005 in connection with the merger of AT&T and SBC (also reflected in conditions to approval of the merger of Verizon and MCI on the same day).⁸⁹ The 2005 conditions included commitments on rate freezes for special access services, offerings of unbundled network elements, broadband deployment, Internet backbone interconnections, and compliance with the FCC's Internet neutrality policy principles. Notably, the 2005 conditions did not include job repatriation or other national security/anti-globalization commitments.

FCC Chairman Kevin Martin made several attempts to bring an order to a vote for the AT&T/BellSouth transaction.⁹⁰ After being unable to obtain a majority to support approval of the transaction without conditions, the FCC received an offer of conditions by the merging parties on October 13, 2006; this offer was then subject to public comments as well as numerous meetings for interested parties with the commissioners and staff.⁹¹ After describing the offered conditions

87. Press Release, Dept. of Justice, Statement by Assistant Attorney General Thomas O. Barnett Regarding the Closing of the Investigation of AT&T's Acquisition of BellSouth (Oct. 11, 2006), available at http://www.justice.gov/atr/public/press_releases/2006/218904.htm (Justice Department concluded that the transaction was not likely to reduce competition substantially, and would likely result in cost savings and other efficiencies that should benefit consumers).

88. Statement of Comm'r Robert M. McDowell in the *Memorandum Opinion & Order* in the Application for Transfer of Control Filed by AT&T Inc. and BellSouth Corp., WC Dkt. No. 06-74 (Dec. 18, 2006), available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-269058A1.pdf.

89. SBC Communications Inc. and AT&T Corp. Applications for Approval of Transfer of Control, *Memorandum Opinion & Order*, 20 FCC Rcd. 18,290, app. F (2005) [hereinafter SBC/AT&T Order]; Verizon/MCI Order, *supra* note 46, at app. G.

90. Public Notice, FCC, Deletion of Agenda Items from October 12, 2006, Open Meeting and FCC to Hold an Additional Open Meeting, Friday, October 13, 2006, at 11:00 a.m. (Oct. 11, 2006), available at http://fjallfoss.fcc.gov/edocs_public/attachmatch/DOC-267857A1.pdf; Public Notice, FCC, Open Commission Meeting Scheduled for October 13, 2006, Cancelled (Oct. 13, 2006), available at http://fjallfoss.fcc.gov/edocs_public/attachmatch/DOC-267891A1.pdf; Letter from Michael J. Copps & Jonathan S. Adelstein, Comm'rs, FCC, to Kevin J. Martin, Chairman, FCC (Oct. 13, 2006), available at http://fjallfoss.fcc.gov/edocs_public/attachmatch/DOC-267893A1.pdf; Letter from Kevin J. Martin, Chairman, FCC, to Michael J. Copps & Jonathan S. Adelstein, Comm'rs, FCC (Oct. 13, 2006), available at http://fjallfoss.fcc.gov/edocs_public/attachmatch/DOC-267892A1.pdf; Public Notice, FCC, Deletion of Agenda Item from November 3, 2006, Open Meeting (Nov. 2, 2006), available at http://fjallfoss.fcc.gov/edocs_public/attachmatch/DOC-268326A1.pdf.

91. Application for Consent to Transfer of Control Filed by AT&T Inc. and BellSouth

(regarding broadband services, public safety and disaster recovery, unbundled network elements, special access, wireless, transit service and Internet neutrality), the companies noted in the offer: “we also discussed the possibility of further conditions relating to the repatriation to the BellSouth territory of jobs that had been expatriated to overseas locations.”⁹² Finally, the companies filed a revised offer of conditions on December 28, 2006.⁹³ The FCC voted on December 29, 2006 to approve the transaction subject to the offered conditions,⁹⁴ and the companies closed the merger that day.⁹⁵

Two other pieces of background information on this transaction are helpful. First, the U.S. government was aware that the U.S. telecommunications industry had lost hundreds of thousands of jobs since its peak around March 2001.⁹⁶ The most prominent factors appear to be unrelated to offshore outsourcing by U.S. telecommunications service providers — decreased network construction, industry consolidation by service providers, exit of some competitors, and implementation of more-automated and lower-maintenance technologies.⁹⁷ Yet, there had been some articles in 2004 on BellSouth’s

Corporation, *Public Notice*, 21 FCC Rcd. 11,490 (2006).

92. *Id.* at 11,498.

93. Letter from Robert W. Quinn, Jr., Sr. Vice President, AT&T Inc., to Marlene H. Dortch, Sec’y, FCC (Dec. 28, 2006), *available at* http://gulfoss2.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6518716381 [hereinafter Offer of Conditions].

94. FCC Approves Merger of AT&T Inc. and BellSouth Corp. in *Memorandum Opinion & Order* in Application For Consent to Transfer of Control, WC Dkt. No. 06-74, 2006 WL 3847995 (Dec. 29, 2006).

95. AT&T Inc., Current Report (Form 8-K) (Dec. 29, 2006), *available at* <http://www.sec.gov/Archives/edgar/data/732717/000095012306015733/y28428e8vk.txt>.

96. See U.S. Dept. of Labor Bureau of Labor Statistics, Telecommunications, <http://www.bls.gov/oco/cg/cgs020.htm> (“Employment in the telecommunications industry is expected to decline 7 percent over the 2004-14 period, compared with 14 percent growth for all industries combined.”) (last visited Oct. 13, 2007) [hereinafter BLS Telecommunications]; *The Employment Situation: 2004: Hearing Before the Joint Economic Committee*, 109th Cong. 7 (2004) (statement of Kathleen P. Utgoff, Comm’r, Bureau of Labor Statistics) (“Since March 2001, the telecommunications industry has shed 302,000 jobs.”); Michael K. Powell, Chairman, FCC, Remarks at the Goldman Sachs Communicopia XI Conference 1 (Oct. 2, 2002), *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-226929A1.pdf (nearly 500,000 jobs lost in the telecommunications industry). *But see* sources cited *supra* note 1; *Assessing the Communications Marketplace: Hearing Before the S. Comm. on Commerce, Science and Transportation*, 110th Cong. (2007) (statement of Kevin J. Martin, Chairman, FCC) (“In 2006, . . . job creation in the industry is high. . .”).

97. See BLS Telecommunications, *supra* note 96; Financial Turmoil in the Telecommunications Marketplace; Maintaining the Operations of Essential Communications: Hearing Before the S. Comm. on Commerce, Science, and Transportation, 107th Cong. 6-10 (written statement of Michael K. Powell, Chairman, FCC), *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-224797A1.pdf. Concerns about declining U.S. employment in the telecommunications industry had been voiced for several years at the FCC and in Congress. With Democrats capturing a majority of the Senate

decisions to move 600-900 positions in information technology applications to India (with \$275 million in savings over five years) and use foreign workers in help desk support for broadband customers.⁹⁸

The Communications Workers of America (“CWA”) participated in the FCC’s review of the AT&T/BellSouth merger. This labor union represented more than 175,000 employees at the merging companies.⁹⁹ CWA’s comments pointed to AT&T’s decision following the AT&T/SBC merger to close some U.S.-based call centers and contract with vendors based overseas to handle customer calls. The union noted its efforts to reach an agreement with the merging companies to protect employment security. In the absence of an agreement with the companies, CWA supported conditions to the FCC’s approval such that the “merged entity does not sacrifice quality customer service by reducing employment and closing facilities to meet synergy targets.”¹⁰⁰

Second, the AT&T/BellSouth merger was approved by public utility commissions in nineteen states.¹⁰¹ Conditions for approval of this transaction were adopted by some state regulators, including some conditions to address labor concerns. For example, the Kentucky Public Service Commission’s approval on July 25, 2006 included commitments by the merging parties to cap rates for basic local service for five years, maintain local charitable and economic development activities, adhere to labor agreements in place at the time of the merger, and notify the Kentucky commission prior to closing any facilities in the state.¹⁰² It does not appear that any state commission required the merged company to increase employment in that state or addressed the repatriation of offshore outsourced jobs. While Louisiana would benefit from a particular provision in the companies’ labor commitment to the FCC, the

and House of Representatives in the November 2006 election, labor unions were poised to increase their influence on federal government decisions, including with regard to this issue.

98. See E-BUSINESS STRATEGIES, INC., BELLSOUTH CORPORATION – THE TELECOMMUNICATIONS INDUSTRY LOOKS TO OFFSHORE IT (2004), available at http://www.ebstrategy.com/downloads/case_studies/Bellsouth.pdf [hereinafter EBS]; Nick Wreden, *Overseas Outsourcing Bites into Telecom; Political Pressure Keeps Jobs Here, But For How Long?*, AMERICA’S NETWORK, Feb. 15, 2004, available at http://findarticles.com/p/articles/mi_m0DUJ/is_2004_Feb_15/ai_n6082741.

99. Comments of Communications Workers of America in Application for Consent to Transfer of Control Filed by AT&T Inc. and BellSouth Corp., WC Dkt. No. 06-74, at 1 (June 5, 2006), available at http://svartifoss2.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6518358746 [hereinafter CWA Comments].

100. *Id.* at 4.

101. Offer of Conditions, *supra* note 93, at 1.

102. Press Release, Ky. Pub. Serv. Comm’n, PSC Approves BellSouth Merger with AT&T; Merger Will Have No Immediate Effect on Rates (July 25, 2006), available at http://psc.ky.gov/agencies/psc/press/072006/0725_r01.pdf.

order adopted by the Louisiana Public Service Commission did not contain any condition related to jobs.¹⁰³

B. Repatriation Condition in FCC's Order Approving the AT&T/BellSouth Transaction

The AT&T/BellSouth commitment, which became a condition to the FCC's approval of the merger, reads as follows:

AT&T/BellSouth is committed to providing high quality employment opportunities in the U.S. In order to further this commitment, AT&T/BellSouth will repatriate 3,000 jobs that are currently outsourced by BellSouth outside of the U.S. This repatriation will be completed by December 31, 2008. At least 200 of the repatriated jobs will be physically located within the New Orleans, Louisiana MSA.¹⁰⁴

Only Democratic Commissioner Copps — not his Democratic colleague or the Republican commissioners — pointed to this condition in his statement on the merger order.¹⁰⁵ The FCC order approving the transaction does not mention the repatriation condition in analyzing the potential public interest benefits or harms from the transaction. CWA praised the merger with the conditions, pointing to jobs created by the companies' commitment to expand broadband services as well as the "commitment to bringing thousands of support jobs back to the United States."¹⁰⁶

The repatriation condition was adopted in the context of two findings in the FCC's order. First, the FCC found that the merger would promote national security.¹⁰⁷ Second, the FCC found that the merger

103. Request for Approval and/or Letter of Non-Opposition to the Indirect Change in Control of Certain Certificated Entities Resulting From the Planner Merger, *Order*, La. PSC Dkt. No. U-29427 (July 12, 2006), available at <https://p8.lpsc.org/Workplace/getContent?objectStoreName=Orders&vsId=%7B1C0CB098-6248-4144-A7CA-E78E3A07765B%7D&objectType=document&id=%7B9624BD8E-9DA0-411A-BE89-A95BF697DFE1%7D>; see also Joint Application for Approval of Indirect Transfer of Control of Telecomms. Facilities Resulting from Agreement and Plan of Merger between AT&T Inc. and BellSouth Corp., *Notice of Proposed Agency Action & Order Approving Indirect Transfer of Control*, Fla. PSC Dkt. No. 060308-TP (June 23, 2006), available at <http://www.psc.state.fl.us/library/filings/06/05491-06/06-0531.ord.doc> (finding the transfer of control to be in the public interest based on the companies' management, technical and financial capabilities; the companies' operations will remain intact while they project synergies of \$2 billion annually; does not address employment effects).

104. AT&T/BellSouth Order, *supra* note 3, at 5807.

105. Copps Statement, *supra* note 6, at 5833; see *supra* note 6.

106. See Press Release, Commc'ns Workers of Am., CWA: AT&T-BellSouth Merger Will Promote Critical Build-Out of High-Speed Networks (Dec. 29, 2006), available at <http://www.cwa-union.org/news/page.jsp?itemID=28161726>.

107. AT&T/BellSouth Order, *supra* note 3, at 5765-66.

would produce efficiencies related to vertical integration as well as economies of scope and scale (with much of the cost savings from head count reductions) that would benefit the public interest.¹⁰⁸

C. Analysis of AT&T/BellSouth Conditions

The FCC's order approving the AT&T/BellSouth merger is notable on globalization issues from two perspectives. First, the commitment it adopts reversing some offshore outsourcing runs contrary to the policy of globalization. Second, while the FCC was well-aware of the conditions imposed in other FCC orders as a result of CFIUS reviews of some foreign acquisitions, the FCC did not adopt any of these national security conditions for this domestic merger.

1. Weak Linkage to National Security and Employment Security

The preceding sections noted the Congressional, FCC, and U.S. Trade Representative policies of deregulating carriers' decisions on services and networks, limiting regulatory burdens imposed on carriers' operations, and promoting the globalization of the telecommunications industry. The FCC previously allowed carriers to make unregulated, market-based decisions on where to conduct their operations, including through offshore outsourcing. Moreover, the U.S. government fought against restrictions by foreign governments on U.S.-produced equipment and services in foreign telecom sectors.

Although perhaps a reasonable political action to help organized labor, an important constituent in Democratic politics, the repatriation condition is contrary to these policies. In an attempt to cast a favorable light on this condition in the context of the FCC's established policies, Commissioner Copps linked the jobs repatriation condition to developing the next-generation of communications services in the U.S.¹⁰⁹ Yet, there

We take considerations of national security and disaster recovery extremely seriously, and we find that the merger has the potential to generate significant benefits by enhancing national security, improving services to U.S. government customers, and enhancing the Applicants' disaster recovery capabilities. Specifically, we find that the merger will enable a unified, end-to-end, IP-based network that can provide the government with additional security and routing efficiency for vital and sensitive government communications. In addition, we find that the merger will enhance the Applicants' abilities to prepare for, and respond to, disasters.

Id.

108. *Id.* at 5771.

109. See Copps Statement, *supra* note 6, at 6; see also IEEE-USA, Position Statement on Offshore Outsourcing, <http://www.ieeeusa.org/policy/positions/offshoring.html> ("IEEE-USA is particularly concerned that offshoring of engineering, computer science and other high tech

is little to support this linkage.

Copps' assertion starts from the view that foreign workers contribute less to the development of U.S. telecommunications networks and services than do U.S. workers. In recent years, BellSouth sold most of its investments in foreign carriers to focus on its U.S. service providers and operations, including through the expansion of broadband services.¹¹⁰ Facing increasing competition from cable television systems, wireless operators, Voice over Internet Protocol services and other providers, BellSouth had strong incentives to innovate, improve quality, and reduce prices (and costs) for its U.S. networks and services. When BellSouth decided to move offshore some support jobs that were tied to the U.S. networks and services, this market-based business decision was made through analysis of costs, availability of skilled workers, speed and quality of technology development, and quality of customer service — all for the benefit of BellSouth's U.S. networks and services.

In addition to taking advantage of an opportunity to help a U.S. labor union and U.S. workers, Copps may have believed that BellSouth diminished its efforts to develop next-generation services in the U.S. through its offshore outsourcing. If Copps believed that the market was failing in this area, the repatriation condition may do little to address concerns about service quality and network upgrades.

The condition does not specify the types of jobs that must be repatriated. As noted above, it appears from press articles that some of BellSouth's offshore support came in help-desk services while others worked in applications development.¹¹¹ The technology skills involved in help-desk jobs for broadband services (or billing inquiry positions, data entry, and various lower-skilled information technology jobs) are significantly different than the technology skills in software development positions (or network design, equipment development, and other higher-skilled information technology jobs). Perhaps the merged company would repatriate jobs linked to developing next-generation services; on

jobs could eventually weaken America's leadership in technology and innovation, a threat that has serious implications for our national security as well as our economic competitiveness.") (last visited Oct. 13, 2007).

110. See BellSouth Corp., Amendment to Annual Report (Form 10-K/A), at 3, 4, 6 (Mar. 1, 2006) (BellSouth described increasing competition and price pressures; realigned asset portfolio toward domestic wireless and broadband, with sale of Latin American operations; business strategy includes "providing superior service and [] offering flexible packages of voice, data and multimedia applications through improved distribution channels and systems, . . . deploying new broadband/[Internet Protocol] platforms that support both voice and data services as well as other new service applications, . . . and reduc[ing] our cost structure by managing the utilization of existing assets and redirecting spending to focus new investment on high-growth products and services").

111. See EBS, *supra* note 98, at 4-5 (BellSouth had taken measures to ensure the security of its Indian delivery center, such as regular employee background checks, physical security and a full disaster recovery plan).

the other hand, the company did not agree to such linkage in the condition, and the 3,000 jobs that would be repatriated may have little to do with developing next-generation networks and services.

While complying with this condition, economics may drive the merged company to keep or move offshore many other positions that are key to developing the next-generation of U.S. communications services.¹¹² If the company cannot use offshore employees that it manages for technology development, it may attempt to achieve technology development at comparable costs by contracting with offshore equipment manufacturers. The merged company and U.S. carriers generally were acquiring technologies from a wide range of offshore suppliers.¹¹³

Although the FCC has found that improved network technologies and service quality can promote national security,¹¹⁴ it is not clear that the repatriation condition will achieve this goal. By reversing free-market decisions to use offshore outsourcing, the condition will raise the merged company's costs. Also, the migration of jobs may disrupt some projects. While the public record does not include analysis by the FCC, the merged company, or the CWA of the actions to comply with this condition and their impacts, these impacts may slow technology development and deployment, decrease the quality of support services for offerings, and lessen price competition.

According to CWA, the FCC must consider the employment impacts of mergers in determining whether transactions would serve the public interest.¹¹⁵ The repatriation commitment does little to address employment security for the unionized workers of the merging companies. There is no overall commitment to employment in the U.S.; the merged company can proceed with its plan to cut 10,000 workers. Additionally, there is no restriction on new offshore or domestic outsourcing.

From the CWA's perspective, the repatriation condition may symbolize the ability of political pressures regarding U.S. employment to cause a giant U.S. telecom company to bend. On the other hand, it may also symbolize the limited power of U.S. labor unions and labor-oriented

112. See Paul McDougall, *AT&T to Cut Hundreds of U.S. Tech Jobs, Sources Say*, DR. DOBB'S PORTAL, Sep. 28, 2006, <http://www.ddj.com/dept/ai/193100354> ("Programmers in India typically earn at least 60% less than their U.S. counterparts. . . . AT&T's apparent decision to repatriate some jobs while outsourcing others reflects a growing dilemma faced by many U.S. companies. . . . AT&T has apparently decided to maintain customer-facing jobs in the United States while shipping out behind-the-scenes operations.").

113. See *supra* Section I.B.3(b).

114. AT&T/BellSouth Order, *supra* note 3, at 5766; SBC/AT&T Order, *supra* note 89, at 18,385-89; Verizon/MCI Order, *supra* note 46, at 18,531-35.

115. CWA Comments, *supra* note 99, at 3.

regulators in the increasingly global economy.

2. Failure to Consider National Security Measures Adopted in Foreign-Ownership Transactions

The FCC adopted its order approving the AT&T/BellSouth merger two weeks after the Departments of Homeland Security and Justice filed with the FCC the Security Agreement as a proposed condition on the FCC's approval of the Verizon/América Móvil transaction. Over the past few years, the FCC had in several proceedings (each involving a foreign acquisition of a U.S. telecom carrier) adopted many of these conditions in security agreements developed pursuant to CFIUS reviews.¹¹⁶ National security is a component of the FCC's public interest determination for domestic as well as cross-border transactions.¹¹⁷ Yet, in the AT&T/BellSouth transaction creating the largest U.S. telecom carrier, the FCC did not adopt any of the CFIUS national security measures.

A foreign acquisition of a provider of U.S. infrastructure services may increase concerns about U.S. national security.¹¹⁸ However, some of the CFIUS measures for foreign-acquired carriers can be viewed as industry best practices and helpful for U.S. law enforcement, whether implemented by a domestic or foreign-owned carrier.¹¹⁹ These measures potentially include personnel screening, storing traffic and customer records in the U.S., transmitting and controlling domestic traffic in the U.S., appointing a qualified security officer with reporting obligations to the U.S. government, and annual third-party audits of security practices and vulnerabilities. For example, the FCC and national security agencies should be concerned about the ability of an untrustworthy employee to harm the U.S. communications infrastructure or disclose sensitive information, regardless of whether that employee gains access through a position at a domestic or foreign-owned carrier. An industry-wide approach to safeguards is especially warranted for the telecom industry in light of the interconnected, networked operations and services of multiple carriers.

In addition to possible national security benefits, a wider application

116. See DT, *supra* note 50; Applications of Guam Cellular and Paging, Inc. and DoCoMo Guam Holdings, Inc., *Memorandum Opinion & Order & Declaratory Ruling*, 21 FCC Rcd. 13,580 (2006); Lewis, *supra* note 17, at 467-72.

117. See AT&T/BellSouth Order, *supra* note 3, at 5765-66; SBC/AT&T Order, *supra* note 89, at 18,385-86; Verizon/MCI Order, *supra* note 46, at 18,531-33 ("We take considerations of national security extremely seriously, and we find that the merger has the potential to generate benefits arising from more efficient routing and greater redundancy.").

118. See *supra* note 32 and accompanying text.

119. See *supra* note 98 (The repatriation condition highlights the role of foreign workers and operations for U.S.-owned carriers.); *infra* Section IV.C.

of these conditions would have promoted the FCC's policies of fair competition and globalization. Imposing these measures on domestic carriers would have leveled the competitive playing field with the foreign-acquired carriers that agreed to these measures in connection with recent acquisitions. The costs for U.S. national security measures would have fallen more equally across competitors. Also, a wider application of these measures would have sent the signal to foreign governments that the U.S. does not unreasonably discriminate against foreign-owned carriers and foreign investors.

Nevertheless, there is no indication that the FCC considered imposing any of the CFIUS measures as conditions for the AT&T/BellSouth merger. None of the Departments of Homeland Security and Justice, other interested parties, legislators, foreign-owned carriers, or the FCC itself pressed for these measures. Accordingly, the merging companies did not "offer" them.

Perhaps the FCC and the national security agencies were reluctant to pursue these measures for a domestic transaction in light of the Congressional and FCC policies of minimizing regulatory burdens.¹²⁰ It is also possible that these agencies decided that any expansion of these measures to domestic carriers should be done industry-wide through a statute or rulemaking, instead of as merger conditions. In any case, the absence of these conditions in the FCC's approval of the largest domestic telecom merger calls into question the balance struck in foreign acquisitions between national security concerns and policies favoring globalization and deregulation.

III. FOREIGN RESPONSES AND CONTEXT

Sections I and II of this Article described three transaction-specific conditions imposed by the U.S. government, which sacrifice some aspects of telecom globalization and deregulation to promote national security and employment security. The next step in the analysis considers three points in the international context for these U.S. actions: (A) foreign responses to CFIUS-imposed conditions on telecom transactions; (B) foreign restrictions on acquisitions of infrastructure businesses by U.S. and other non-domestic companies; and (C) recent U.S. efforts to address foreign restrictions on telecom globalization. These points show that there is significant international attention to CFIUS-imposed conditions on telecom transactions, with implications for foreign governmental actions with regard to telecom globalization, and that the U.S. continues to pursue commitments by foreign

120. See generally Warren G. Lavey, *Responses by the Federal Communications Commission to WorldCom's Accounting Fraud*, 58 FED. COMM. L.J. 613, 674-77 (2006).

governments to open their telecom sector.

A. Foreign Responses to CFIUS-Imposed Conditions on Telecom Transactions

In 2005-06, U.S. concerns about foreign responses to CFIUS issues focused on the Congressional reactions to the proposed CNOOC/Unocal and Dubai Ports transactions as well as some of the bills introduced in Congress that would have sharply restricted foreign acquisitions of U.S. infrastructure businesses.¹²¹ With the enactment of the CFIUS reform legislation in July 2007, the Bush Administration emphasized the limited scope of the national security reviews, falling far short of economic protectionism.¹²² While not as significant as the concerns about those actions, foreign governments have noticed and objected to the CFIUS-imposed conditions on telecom transactions in the forms of security agreements.

In particular, the European Commission issued a report in February 2007 (after the CFIUS review of the Alcatel/Lucent transaction), which pointed specifically to these “far-reaching” agreements “impos[ing] strict corporate governance requirements on companies seeking [FCC] approval of the foreign takeover of a U.S. communications firm.”¹²³ The report on U.S. barriers to trade and investment stated: “The EU recognizes that there are security issues to be resolved relating to trade and investment, particularly in the aftermath of 9/11, but has long

121. *See, e.g.*, Letter from John J. Castellani, President, Bus. Roundtable, to Members of the U.S. Congress 2 (Mar. 27, 2006), available at <http://www.businessroundtable.org/pdf/32706LettertoCongressCFIUSFINAL.pdf> (

If the Congress were to adopt excessive changes, such as banning foreign investment in or across certain sectors, there is a significant risk that these types of changes would have the unintended consequence of discouraging legitimate foreign investment in the United States and encouraging other countries to discriminate against U.S. companies.

); *see also supra* notes 18-21.

122. FINSA, *supra* note 11. Press Release, U.S. Dept. of the Treasury, Secretary Paulson Statement on Foreign Investment and National Security Act (July 26, 2007), available at <http://www.treasury.gov/press/releases/hp509.htm> (CFIUS reviewed only about 10 percent of foreign direct investments in 2006); Henry Paulson, Sec’y, U.S. Dept. of the Treasury, Remarks at Press Roundtable in Beijing, China (Aug. 1, 2007), available at <http://www.treasury.gov/press/releases/hp525.htm> (

[T]he President recently signed CFIUS legislation which I believe is a step forward, a better CFIUS bill. It’s focused on national security and the relatively few investments that involve national security every year. . . . We welcome foreign investment in the United States from sovereign wealth funds or any direct foreign investment.

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123. EUROPEAN COMM’N, UNITED STATES BARRIERS TO TRADE AND INVESTMENT: REPORT FOR 2006 14 (2007), available at www.trade.ec.europa.eu/doclib/docs/2007/february/tradoc_133290.pdf.

expressed concern about excessive use which could be interpreted to be a disguised form of protectionism.”¹²⁴

Similarly, a 2005 report by the Commission of the European Communities (after the CFIUS reviews of the Deutsche Telekom/VoiceStream and Global Crossing/Singapore Technologies Telemedia/Hutchison Telecommunications transactions) pointed to the harms to investment flows from the types of conditions in the security agreements. In discussing “anomalous ownership restrictions on the US side which go beyond the minimum necessary for security reasons,” but without singling out telecom transactions, the report stated: “EU Companies are also concerned that screening and notification procedures involving [CFIUS] include disproportionate oversight and corporate governance requirements, as well as screening of sensitive personnel.”¹²⁵

In addition to these statements by foreign governments objecting to excessive CFIUS-imposed conditions, these conditions have likely contributed to the increasing reviews of U.S. and other non-domestic investments by foreign governments, as discussed in the next section.

B. Foreign Restrictions on Acquisitions of Infrastructure Businesses

While the CFIUS-imposed conditions on telecom transactions conflict with globalization and deregulation policies, they are less restrictive than a prohibition on foreign acquisitions of U.S. businesses in this sector. Other countries have been protectionist in this sector, making the U.S. conditions appear less of an outlier or threat to globalization developments. For example, French Decree No. 2005-1739 of December 2005 requires prior approval by the Minister of Economy for a non-EU entity to make an acquisition in one of the country’s eleven “sensitive sectors” (or strategic domestic industries), which include telecommunications companies.¹²⁶ This policy has led some observers to the view that France would not have allowed Lucent to acquire Alcatel, even subject to national security safeguards in agreements.¹²⁷

124. *Id.*

125. EUROPEAN COMM’N DIRECTORATE-GENERAL FOR TRADE, COMMUNICATION FROM THE COMMISSION TO THE COUNCIL, THE EUROPEAN PARLIAMENT AND THE ECONOMIC AND SOCIAL COMMITTEE: A STRONGER EU-US PARTNERSHIP AND A MORE OPEN MARKET FOR THE 21ST CENTURY 7 (2005), available at http://www.trade.ec.europa.eu/doclib/docs/2005/may/tradoc_123438.pdf.

126. Peter Lichtenbaum & Andrew D. Irwin, *National Security Review of Foreign Investment: Recent Developments Around the World*, INT’L L. NEWS, Winter 2007, at 13, 14 [hereinafter Lichtenbaum & Irwin].

127. See William Hawkins, *Business Should Favor a Stronger CFIUS*, DEFENSENEWS.COM May 8, 2006, at <http://defensenews.com/story.php?F=1760114&C=commentary>.

An article in early 2007 identified several major governments that scrutinize proposed significant foreign investments for potential national security impacts. These countries include Canada, France, Germany, the United Kingdom, Russia, China, and India.¹²⁸ The authors observed: “The trend toward tighter review procedures suggests that the U.S. security concerns may be influencing other lawmakers and that there is a broader global trend to give security concerns greater weight in investment policy.”¹²⁹ In one well-publicized matter in 2005, India’s Foreign Investment Promotion Board and Department of Telecom stalled applications by the Chinese telecom equipment manufacturer Huawei Technologies Co. to set up a manufacturing unit as well as a research and development center in India and to bid on state telecom projects.¹³⁰ The reports refer to security concerns from India’s intelligence agencies on Huawei’s links to the Chinese intelligence and military establishments.

In addition to laws providing for reviews of foreign acquisitions in multiple sectors, some countries have laws or rules setting caps on foreign ownership of telecommunications companies.¹³¹ In Canada, the

128. See Lichtenbaum & Irwin, *supra* note 126, at 13.

129. *Id.*; see also Deborah Solomon, *Foreign Investors Face New Hurdles Across the Globe*, WALL ST. J., July 6, 2007, at A1. In a speech on October 9, 2007, Canada’s Minister of Industry Jim Prentice stated an intent to screen foreign acquisitions on grounds of national security following the U.S. example:

[E]ven the U.S. – that bastion of free enterprise – has the means to ‘review and block transactions in the name of national security. . . .’ In fact the American Foreign Investment and National Security Act protects the United States’ national security, critical infrastructure and key technology. Canada asserts no less right. . . . Canada does not have a national security test for foreign investment. . . . [T]hat’s an oversight that should be addressed by this government.

Jim Prentice, Can. Minister of Indus., Address Before the Vancouver Board of Trade (Oct. 9, 2007), *available at* <http://www.ic.gc.ca/cmb/welcomeic.nsf/cdd9dc973c4bf6bc852564ca006418a0/85256a5d006b97208525736f00568e03!OpenDocument>; see also Anna Fifield & Song Jung-a, *Seoul Rethinks Foreign Investment Law*, FIN. TIMES, Oct. 22, 2007, *available at* <http://www.ft.com/cms/s/0/c27347a0-80c4-11dc-9f14-0000779fd2ac.html> (“Like the US and other countries, Korea already restricts investment in defence-related companies. But there are now at least four amendments to the Foreign Investment Promotion Act before the national assembly aimed at offering greater protections to Korean companies.”).

130. See, e.g., Indrajit Basu, *Raising the Red Scare in India’s Telecom Sector*, ASIA TIMES ONLINE, Nov. 15, 2005, *at* http://www.atimes.com/atimes/South_Asia/GK16Df02.html; John Ribeiro, *Plan From China’s Huawei May Be Blocked in India*, COMPUTERWORLD, Aug. 17, 2005, *available at* <http://www.computerworld.com/managementtopics/outsourcing/story/0,10801,103990,00.html>.

131. The U.S. allows foreign ownership of common carriers in excess of 25 percent if the FCC finds that such ownership will serve the public interest, with a presumption in favor of the foreign ownership in cases of investment from countries which are signatories to the WTO’s Basic Telecommunications Agreement. See *supra* note 7; FCC INT’L BUREAU, REPORT ON INTERNATIONAL TELECOMMUNICATIONS MARKETS 2000 UPDATE 3-4 (2001), *available at* http://fjallfoss.fcc.gov/edocs_public/attachmatch/DA-01-117A1.pdf.

Telecommunications Act requires that Canadians control and own at least 80 percent of the voting shares of a telecommunications common carrier.¹³² A report by Canada's Standing Committee on Industry, Science and Technology in 2003 recommended that this restriction be eliminated, noting that the Investment in Canada Act subjected foreign acquisitions of Canadian businesses in all sectors to a "net benefit" review by the Minister of Industry.¹³³ Nevertheless, Canada has not changed its foreign ownership restrictions in the telecom sector.

Similarly, in discussing the CFIUS-reform legislation as well as the openness to foreign direct investment and trade, a senior U.S. Treasury official recently pointed to concerns that Japan continues to shelter its communications industries from competition, new entry, and new product introduction.¹³⁴

C. *Recent U.S. Efforts to Address Foreign Restrictions on Telecom Globalization*

One more piece of the foreign context for the actions by CFIUS and the FCC is the U.S. government's continuing effort to obtain commitments by foreign governments to open their telecom sector. This effort is illustrated by the U.S. free trade agreement with the Republic of Korea announced on April 1, 2007. In announcing the commencement of these negotiations with South Korea, the U.S. Trade Representative called them "the most commercially significant free trade negotiation we have embarked on in 15 years."¹³⁵ The announcement went on to state as background: "The United States is aggressively working to open markets globally, regionally and bilaterally and to expand American opportunities in overseas markets."¹³⁶

The Business Roundtable urged the U.S. negotiators to identify and remove non-traditional barriers to the Korean market.¹³⁷ This report

132. ICT Regulation Toolkit, Practice Note: Foreign Ownership in Canada [3.4.2], <http://www.ictregulationtoolkit.org/en/PracticeNote.1882.html> (last visited Oct. 13, 2007).

133. *Id.* (report found that restrictions on foreign investment in the sector impeded capital investment by new entrants, growth and productivity).

134. Robert M. Kimmitt, Deputy Sec'y, U.S. Dept. of the Treasury, Remarks on Japan and the United States: Indispensable Partners, in *Asia and Beyond* (April 17, 2007), available at <http://www.treasury.gov/press/releases/hp356.htm> (noting that foreign direct investment inflows over the past decade averaged 1.6 percent of gross domestic product (GDP) for the U.S., but only 0.1 percent of GDP for Japan; "the United States is open to investment from abroad, and we hope Japan will become more open to investment as well").

135. Press Release, Office of the U.S. Trade Rep., United States, South Korea Announce Intention to Negotiate Free Trade Agreement (Feb. 2, 2006), available at http://www.ustr.gov/Document_Library/Press_Releases/2006/February/United_States_South_Korea_Announce_Intention_to_Negotiate_Free_Trade_Agreement.html?ht=.

136. *Id.*

137. See BUS. ROUNDTABLE, REAL LIBERALIZATION IN THE U.S.-KOREA FTA: MOVING BEYOND THE TRADITIONAL FTA (2006), available at

cited the existence of technical barriers in many sectors of Korea through laws or regulations that appear neutral on their face but have the effect of excluding U.S. products or making them less competitive. Specifically in the telecommunications sector, this U.S. group claimed that Korea began setting standards for next-generation equipment and technology in a manner favoring Korean technology.¹³⁸

As announced on April 1, 2007, the free trade agreement includes three commitments by Korea in the telecom sector: (a) “permit U.S. companies within two years to own up to 100 percent of a telecommunications operator in Korea;” (b) “[e]nsure[] U.S. operators cost-based access to the services and facilities of dominant Korean telephone companies, including submarine cable stations, to facilitate the U.S. companies’ construction and operation of competing networks to serve customers in Korea;” and (c) “[i]nclude groundbreaking safeguards on restrictions that regulators can impose on operators’ technology choice, particularly in wireless technologies.”¹³⁹

As part of the support for this agreement, AT&T commended the U.S. Trade Representative’s “ongoing commitment to promote competition and encourage investment in global telecommunications markets,” and called for rapid approval of the agreement by the lawmakers in the U.S. and Korea to “ensure that consumers everywhere reap the benefits of a fully competitive global telecommunications environment.”¹⁴⁰ Similarly, the Telecommunications Industry Association, representing telecom equipment manufacturers in the U.S., observed that the agreement will “let the people of both nations continue to use the latest in [information and communication technology] ICT products.”¹⁴¹

In summary, the U.S. Trade Representative continues to pursue open global telecommunications markets. The CFIUS and FCC actions described in Sections I and II of this Article do not appear to have impeded the progress in this area reflected in the U.S.-Korea free trade agreement. On the other hand, other governments have objected to the

http://64.203.97.43/pdf/20060607000korea_paper.pdf.

138. *Id.* at 7.

139. *Free Trade with Korea: Summary of the KORUS FTA*, TRADE FACTS (Office of the U.S. Trade Rep., D.C.), June 2007, available at http://www.ustr.gov/assets/Document_Library/Fact_Sheets/2007/asset_upload_file939_11034.pdf; Office of the U.S. Trade Rep., Final – United States – Korea FTA Texts, http://www.ustr.gov/Trade_Agreements/Bilateral/Republic_of_Korea_FTA/Draft_Text/Section_Index.html (last visited Oct. 13, 2007).

140. *Strong Support for the U.S.-Korea (KORUS) Free Trade Agreement*, TRADE FACTS (Office of the U.S. Trade Rep., D.C.), May 24, 2007, available at http://www.ustr.gov/assets/Document_Library/Fact_Sheets/2007/asset_upload_file608_11053.pdf.

141. *Id.* at 4.

CFIUS-imposed restrictions in the telecom sector and have increased their reviews of acquisitions by U.S. and other non-domestic companies in the telecom and other sectors.

IV. ADDRESSING NATIONAL SECURITY VULNERABILITIES THROUGH INDUSTRY-WIDE MEASURES

The restrictions described in Sections I and II were adopted on a transaction-specific basis, applying to only a few companies in a multi-carrier, multi-supplier, networked industry. The resulting spotty efforts to address national security vulnerabilities or offshore outsourcing not only imposed heavier burdens on the merging companies, but also left large gaps in pursuit of those policy objectives. The analysis referred to the possible alternative of the U.S. government taking an industry-wide approach to these policy objectives. In fact, there have been industry-wide national security efforts, which were intensified post-9/11 through laws, regulations, and government-led plans in the many infrastructure industries, including the telecommunications sector.¹⁴² While the types of measures agreed to in the TELPRI Security Agreement have been applied to some industries, those types of protections have not been applied across telecommunications services or equipment companies. This section describes national security protections in four other industries, the increased security measures imposed on foreign-owned contractors for U.S. classified projects, and the limited scope of the industry-wide security practices for the telecommunications industry.

A. National Security Protections in Some Industries

Congress and regulatory agencies have adopted legislation and rules applying to several industries security measures such as personnel screening, company-developed and government-reviewed security plans, physical and information-systems access controls, and company security officers. These requirements do not single out foreign-owned firms. This section briefly reviews some of the industry-wide measures in several infrastructure sectors — marine ports, airports, nuclear power plants, and financial institutions.

142. See NATIONAL INFRASTRUCTURE PROTECTION PLAN, *supra* note 32; Press Release, Dep't of Homeland Sec., Remarks by Secretary Michael Chertoff at a U.S. Chamber Event on the Completion of the 17 Sector Specific Plans, as Part of the National Infrastructure Protection Plan (May 21, 2007), *available at* http://www.dhs.gov/xnews/speeches/sp_1179843074582.shtm; Homeland Security Presidential Directive/HSPD-7, 2003 WL 22962448 (Dec. 17, 2003), *available at* <http://www.whitehouse.gov/news/releases/2003/12/20031217-5.html>.

1. Marine Ports

U.S. marine ports have a mix of foreign and domestic ownership, reflecting the globalization of shipping lines, supply lines, and distribution networks.¹⁴³ Congress has taken an industry-wide approach to tightening security at marine ports facilities with the same requirements applicable regardless of the nationality of ownership.

Congress adopted laws requiring additional security measures for marine ports in the Maritime Transportation Security Act of 2002¹⁴⁴ and the Security and Accountability for Every Port Act of 2006.¹⁴⁵ One major initiative is a personnel security program administered by the Transportation Security Administration (“TSA”). Under a rule adopted by the Department of Homeland Security, TSA and the U.S. Coast Guard in January 2007, an estimated 750,000 individuals will require Transportation Worker Identification Credentials.¹⁴⁶ The program covers merchant mariners and workers with unescorted access to secure areas of vessels and port facilities. It also requires individuals to undergo a security threat assessment and receive a biometric credential. Enrollment and issuance of credentials is planned to occur over an 18 month period.

The 2002 law also requires marine ports to develop security plans that are subject to initial review, approval, and periodic inspection/review by the Department of Homeland Security; it is implemented through the U.S. Coast Guard.¹⁴⁷ The plans include the

143. See JOHN FRITTELLI & JENNIFER E. LAKE, CONG. RESEARCH SERV., TERMINAL OPERATORS AND THEIR ROLE IN U.S. PORT AND MARITIME SECURITY 3-4 (2006), available at <http://digital.library.unt.edu/govdocs/crs/permalink/meta-crs-9273:1> [hereinafter CRS Report] (according to a survey by the U.S. Maritime Administration, at the 17 largest U.S. container ports, 66% of the terminals are operated by a foreign-owned company, 26% are run by purely domestic companies, and 7% are run by a domestic/foreign joint venture) (

Foreign involvement in U.S. port terminal operations is an extension of an industry driven by globalization. The largest container shipping lines have extended their services around the globe because their biggest customers, such as big box retailers and auto, electronics, and clothing manufacturers, have extended their supply lines and distribution networks around the globe.

); Leonard C. Gilroy & Adam B. Summers, *Detailing Foreign Management of U.S. Infrastructure*, REASON.ORG, Mar. 15, 2006, http://www.reason.org/privatization/foreign_management_us_infrastructure.shtml [hereinafter Gilroy & Summers].

144. Maritime Transportation Security Act of 2002 § 102(a), 46 U.S.C. §§ 70101-17 (2006).

145. Security and Accountability for Every Port Act of 2006, Pub. L. No. 109-347, 120 Stat. 1884 (codified in scattered sections of 6, 19, 31, 42, 46, and 47 U.S.C.).

146. See 46 U.S.C. § 70105 (2006); Transportation Worker Identification Credential (TWIC) Implementation in the Maritime Sector, 72 Fed. Reg. 3492 (Jan. 25, 2007), available at http://www.tsa.gov/assets/pdf/1652-AA41_twic_fr.pdf; Transp. Sec. Admin., Transportation Worker Identification Credential (TWIC) Program, http://www.tsa.gov/what_we_do/layers/twic/index.shtm (last visited Oct. 13, 2007).

147. 46 U.S.C. § 70103(c); 33 C.F.R. § 105 (2006).

following: a security officer; vulnerability assessment; physical, cargo and personnel security measures, including security training for all personnel as well as drill and exercise requirements; access controls to secure areas; record keeping and monitoring requirements; and procedural security policies.

Some analysts have questioned whether there is a connection between U.S. national security and foreign ownership of marine ports. In one insightful passage, the authors of a Congressional Research Service report question the factual basis for singling out foreign-owned businesses for more extensive security measures:

It is important to pinpoint exactly what advantage a terrorist group would have if it had some kind of connection with a terminal operator. Foreign terminal operators would gain intimate knowledge of the day-to-day security procedures at the U.S. terminals they operate and theoretically could pass this knowledge on to a terrorist group. However, U.S.-based terminal operators would have the same knowledge and a terrorist group could infiltrate them also. Because foreign terminal operators hire mostly Americans to work in their terminals, they may pose no more security risk than a U.S.-based company. One could view foreign companies like DP [Dubai Ports] World as mostly the financiers behind the terminal operation with little or no involvement in the day-to-day running of the terminals.

. . . [T]he issue of foreign terminal operators involves guaranteeing security while remaining attractive to sources of capital.¹⁴⁸

2. Airports

Like marine ports, security measures at U.S. airports combine personnel screening by the TSA and security plans developed by facility operators, which are subject to government review and audit. Again, the requirements apply across airports operated by domestic and foreign companies. Several U.S. airports are operated or managed by foreign-owned companies.¹⁴⁹

Pursuant to the Aviation and Transportation Security Act of 2001,¹⁵⁰ TSA works with airlines and airports in screening all airline and airport employees and contractors who require unescorted access to secure areas. Security Identification Display Area badges (695,564 active as of

148. CRS Report, *supra* note 143, at 13.

149. Gilroy & Summers, *supra* note 143.

150. Aviation and Transportation Security Act, Pub. L. No. 107-71, 115 Stat. 597 (2001) (codified as amended in scattered sections of 49 U.S.C.).

January 31, 2006) are required to access areas beyond alarmed doors that are used for airport operations, allowing access to the flight line, ramp, or aircraft; in addition, sterile area badges (85,013 active as of January 31, 2006) are required to access areas beyond the passenger screening checkpoint but inside the terminal area.¹⁵¹ Prior to employment, airlines and airports send fingerprints and other biographical information to the American Association of Airport Executives Transportation Security Clearinghouse, which transmits the information to TSA. TSA conducts a name-based security threat assessment against approximately ten databases, and updates these searches continuously for all cleared personnel. Also, TSA transmits to the FBI the necessary biographical information and fingerprint data to conduct criminal history records checks. As of April 2006, TSA was vetting approximately 1,100 applicants each week.

Airport operators are required to develop, submit for TSA approval, and implement airport security programs.¹⁵² The airport security programs must include: an airport security coordinator; personnel screening and identification; inspections/audits by TSA; descriptions of the secured areas; access control measures; training programs; and record keeping systems.

3. Nuclear Power Plants

Section 103d of the Atomic Energy Act of 1954, as amended, provides that no license for a nuclear power plant may be issued to an alien, or to a corporation owned, controlled, or dominated by an alien, foreign corporation, or foreign government.¹⁵³ The Nuclear Regulatory Commission (“NRC”) issued guidelines in 1999 providing for a range of foreign investments in utilities as long as the companies remain under the control and domination of U.S. citizens,¹⁵⁴ and has approved some foreign minority interests.¹⁵⁵ With the limited foreign ownership interest in this sector, the point of the following description is not the application

151. See *Travel vs. Terrorism: Federal Workforce in Managing Airport Security: Hearing Before the Subcomm. on the Federal Workforce and Agency Organization of the H. Comm. on Government Reform*, 109th Cong. (2006) (statement of Robert Jamison, Deputy Sec’y for Sec. Operations, Transp. Sec. Admin.), available at http://www.tsa.gov/press/speeches/asset_summary_multi_image_with_table_0393.shtm.

152. 49 C.F.R. § 1542 (2006).

153. 42 U.S.C. § 2133(d) (2006).

154. Final Standard Review Plan on Foreign Ownership, Control, or Domination, 64 Fed. Reg. 52,355 (Sept. 28, 1999); 10 C.F.R. § 50.38 (2006).

155. See, e.g., U.S. NUCLEAR REGULATORY COMM’N, INDUS. CONSOLIDATION REVIEW WORKING GROUP, INDUSTRY CONSOLIDATION IMPACT REPORT 58-60 (2002); Three Mile Island, Unit No. 1, *Order*, Dkt. No. 50-289 (Apr. 12, 1999); *Order Approving Application Regarding Merger of New England Electric System and The National Grid Group PLC*, 64 Fed. Reg. 72367-69 (Dec. 27, 1999).

of safeguards to foreign-owned as well as U.S.-owned operators, but rather the extensive government efforts to safeguard this infrastructure sector of U.S.-controlled operators.

In response to the September 11, 2001 attacks, the NRC ordered all operating nuclear power plants to submit revised physical security plans, safeguards contingency plans, and guard training and qualification plans.¹⁵⁶ The NRC developed and imposed a revised Design Basis Threat, and required licensees to address in their plans how they would protect against that threat.¹⁵⁷ In general, the changes resulted in more restrictive site access controls for personnel including: expanded, expedited, and more thorough employee background checks; increased security patrols and posts; augmented security forces and capabilities; additional physical barriers; enhanced coordination with law enforcement and military authorities; and augmented security and emergency response training, equipment and communication.¹⁵⁸

Congress also enacted industry-wide measures designed to improve the security of nuclear power plants and materials. Sections of the Energy Policy Act of 2005 expanded the scope of personnel subject to fingerprinting and criminal background checks by the FBI and the NRC; allowed the NRC to authorize licensees to use enhanced weapons; and established a system of manifests related to transfer or receipt of nuclear materials, with security background checks.¹⁵⁹

4. Financial Institutions

Banks and other financial institutions operating in the U.S. include a wide range of foreign-owned companies as well as diverse U.S. owners.¹⁶⁰ Concerned about the security of customer information

156. All Operating Power Reactor Licensees, 68 Fed. Reg. 24,517 (May 7, 2003).

157. See *Homeland Security: Monitoring Nuclear Power Plant Security: Hearing Before the Subcomm. on National Security, Emerging Threats and International Relations of the H. Comm. on Government Reform*, 108th Cong. (2004) (statement of Luis A. Reyes, Exec. Dir. for Operations, Nuclear Regulatory Comm'n), available at <http://www.nrc.gov/reading-rm/doc-collections/congress-docs/congress-testimony/2004/9-14-04-final.pdf>.

158. *Id.*; see also U.S. GOV'T ACCOUNTABILITY OFFICE, NUCLEAR POWER PLANTS: EFFORTS MADE TO UPGRADE SECURITY, BUT THE NUCLEAR REGULATORY COMMISSION'S DESIGN BASIS THREAT PROCESS SHOULD BE IMPROVED (2006), available at <http://www.gao.gov/new.items/d06388.pdf>.

159. Energy Policy Act of 2005 §§ 652-56, Pub. L. No. 109-58, 119 Stat. 594, 810-14 (codified as amended in scattered sections of 42 U.S.C.); see U.S. NUCLEAR REGULATORY COMM'N, OFFICE OF NUCLEAR REACTOR REGULATION, ENVIRONMENTAL ASSESSMENT SUPPORTING PROPOSED RULE, POWER REACTOR SECURITY REQUIREMENTS (2006), available at <http://www.nrc.gov/reading-rm/doc-collections/commission/secys/2006/secy2006-0126/enclosure4.pdf>.

160. See generally Jose A. Lopez, *Patterns in the Foreign Ownership of U.S. Banking Assets*, Federal Reserve Bank of San Francisco, ECON. LETTER (Fed. Reserve Bank of S.F., Cal.), Nov. 24, 2000, available at <http://www.frbsf.org/econsrch/wklyltr/2000/el2000->

obtained by all companies in this industry regardless of the nationality of ownership, Congress passed in the Gramm-Leach-Bliley Act of 1999 a provision requiring the Federal Trade Commission (“FTC”) to establish standards relating to administrative, technical, and physical information safeguards for financial institutions.¹⁶¹ This provision has been implemented through a “softer” industry-wide requirement of security measures compared to the mandates described above for marine ports, airports and nuclear power plants — fewer specific government-ordered security requirements and a smaller role for government agencies in reviewing security plans and performing security checks.

Clearly, there is a huge difference in national security importance between safeguarding an individual consumer’s checking account information versus protecting the major operations of a marine port, airport, nuclear power plant, or financial institution.¹⁶² The point here is to contrast both the approach and measures of the CFIUS transaction-specific conditions pertaining to telecommunications call records against the industry-wide statute and rule for protecting financial institutions’ customer information.

The Safeguards Rule adopted by the FTC requires financial institutions to develop written information security plans that describe their programs to protect customer information, but allows flexibility in light of the entities’ varying size, complexity, nature and scope of their activities, sensitivity of their customer information, and other conditions.¹⁶³ The five components of each plan required by the FTC’s rule are: (a) designate one or more employees to coordinate the safeguards; (b) identify and assess the risks to customer information, and evaluate the effectiveness of current measures; (c) design, implement, monitor and test a safeguards program; (d) hire appropriate service providers and contract with them to implement safeguards; and (e) periodically evaluate and adjust the program. Among other recommendations, the FTC suggests that companies consider (but does

35.html.

161. 15 U.S.C. §§ 6801-09 (2006).

162. National security safeguards for financial institutions extend beyond protecting the privacy and security of customers’ information to protecting the financial institutions’ operations. See FIN. SERVS. SECTOR COORDINATING COUNCIL FOR CRITICAL INFRASTRUCTURE PROT. AND HOMELAND SEC., 2006 ANNUAL REPORT (2007), available at http://www.fsscc.org/reports/2006/annual_report_2006.pdf.

163. Standards for Safeguarding Customer Information, 67 Fed. Reg. 36,484 (May 23, 2002); 16 C.F.R. § 314 (2006); *Protecting Our Nation’s Cyberspace: Educational Awareness for the Cyber Citizen: Hearing Before the Subcomm. on Technology, Information Policy, Intergovernmental Relations and the Census of the H. Comm. on Government Reform*, 108th Cong. (2004) (statement of Orson Swindle, Comm’r, Fed. Trade Comm’n), available at <http://www.ftc.gov/os/2004/04/042104cybersecuritytestimony.pdf>; Fed. Trade Comm’n, Financial Institutions and Customer Information: Complying with the Safeguards Rule, <http://www.ftc.gov/bcp/online/pubs/buspubs/safeguards.shtm> (last visited Oct. 13, 2007).

not require them to implement) checking backgrounds before hiring employees who will have access to customer information, training employees, and limiting access to sensitive customer information through physical locks and passwords.

Among the contrasts between the Safeguards Rule and the call-records provisions of the TELPRI Security Agreement are that the Safeguards Rule applies to all financial institutions subject to the FTC's jurisdiction, regardless of nationality of ownership. The rule does not restrict the storage of customer records to domestic locations. It recommends, but does not require, screening personnel with access to such records, and does not provide a role for a government agency in such screening. Last, the Safeguard Rule does not require retention of records for five years.

B. Restrictions on Foreign-Owned Contractors for U.S. Classified Projects

One area of U.S. regulations that imposes additional security restrictions on foreign-owned firms involves contractors and subcontractors performing classified work for the U.S. government.¹⁶⁴ Because of the representation on CFIUS of the Department of Defense and other agencies experienced in protecting classified work, this National Industrial Security Program ("NISP") model has influenced both the transaction-specific approach and conditions adopted by CFIUS for certain foreign acquisitions, even when no classified work is performed by the target U.S. businesses. Yet, there are important distinctions between the treatment of foreign-owned firms under the NISP versus CFIUS-imposed provisions like those in the TELPRI Security Agreement.

The NISP requires all firms having access to classified information to implement a range of security measures. Regardless of the nationality of the owners, these measures include appointing a U.S. citizen employee who has a security clearance to supervise and direct security measures related to the classified information; adopting written security procedures if requested by the government agency; working with the government agency to screen personnel; providing security training to employees; cooperating with government representatives on inspections and security reviews; establishing physical protections and information system controls to safeguard classified information, including publishing an information systems security policy and appointing an information

164. See DEF. TECHNICAL INFO. CTR. (DTIC), DOD 5220.22-M: NATIONAL INDUSTRIAL SECURITY PROGRAM OPERATING MANUAL (2006), <http://www.dtic.mil/whs/directives/corres/html/522022m.htm> (follow pdf hyperlinks).

systems security manager; implementing systems to minimize classified visits, including determining whether a visit is necessary, identifying visitors and limiting the disclosure of classified information based on need-to-know; and protecting against unauthorized exports of classified information or articles, or unauthorized disclosures to foreign interests.¹⁶⁵

The additional measures applied to foreign-owned contractors for classified projects do not substantially increase the burdens of these day-to-day operational safeguards. Rather, the NISP largely addresses foreign ownership, control, or influence in terms of the composition of the contractor's board of directors, the voting rights of the foreign shareholder, and security responsibilities of certain directors.¹⁶⁶ A Special Security Agreement ("SSA") preserves the foreign owner's right to be represented on the board with a direct voice in business management while denying unauthorized access to classified information; it requires certain board members to be cleared U.S. citizens who are involved in security matters. A SSA also provides for the establishment of a Government Security Committee to oversee classified and export control matters. If the agency determines that national security requires greater insulation of the foreign owner from the business, then a Proxy Agreement requires the foreign owner to convey its voting rights to the proxy holders, who are cleared U.S. citizens having substantial freedom to manage the business independently of the foreign owner. As for supplemental operational safeguards, these agreements require the contractor to adopt a technology control plan approved by the agency for compliance with export restrictions, and to appoint a technology control officer. Most of the operational protections of classified information and restraints on the contractor's day-to-day functioning apply regardless of the nationality of ownership.

In contrast, the TELPRI Security Agreement imposes on the foreign-owned telecommunications carrier a wide range of operational safeguards as well as restrictions on the board of directors that do not apply to U.S.-owned carriers. The Security Agreement follows the NISP model by requiring the foreign shareholder to appoint certain directors who are U.S. citizens with security clearances and who have certain security responsibilities. On the other hand, the Security Agreement imposes burdensome conditions on the carrier's day-to-day functioning which are not applied to U.S.-owned firms. U.S.-owned carriers are not required to use transmission, switching, and hosting equipment located only in the U.S., or to store all records in the U.S.; they are not required to screen personnel; and they are not required to retain a neutral third party to perform annual security audits.

165. *Id.* at 1-2-1, 2-2-1, 5-1-1, 5-2-1, 6-1-1, 8-1-1, 10-2-1.

166. *Id.* at 2-3-1 to 2-3-5.

C. Communications Sector Security Plan

On May 21, 2007, the U.S. Department of Homeland Security announced the completion of seventeen sector-specific plans for protecting the nation's critical infrastructure, including a plan for the communications sector.¹⁶⁷ The communications sector plan ("CS Plan") was developed through broad collaboration by government agencies and industry representatives.¹⁶⁸ The security strategy is aimed at ensuring that "the Nation's communications networks and systems are secure, resilient, and rapidly restored after an incident."¹⁶⁹ In the vision statement, "protective programs [government and industry collaboration] focus on response and recovery strategies," while the industry (owners and operators) is "responsible for employing prevention and protection strategies," and "[c]ustomers are responsible for protecting their own assets and access points [as well as] providing for diverse and assured communications to support their specific essential functions."¹⁷⁰

The CS Plan includes analyses of the sector's assets, risks, infrastructure prioritization, coordination programs, and other important national security issues. For purposes of this Article, review of the CS Plan will focus on the extent to which this plan applies industry-wide types of measures that are applied through the CFIUS process only to a few foreign-owned companies. If so, then this government/industry effort would recognize that these CFIUS-imposed measures address important security vulnerabilities that should be implemented by all companies in this sector, and may decrease claims by foreign governments that requirements like the TELPRI Security Agreement erect a barrier to trade and investment by imposing heavier burdens on foreign companies.

Regarding industry protective measures and initiatives, the CS Plan refers to the efforts of an FCC advisory group to develop best practices

167. Press Release, Dep't of Homeland Sec., DHS Completes Key Framework for Critical Infrastructure Protection (May 21, 2007), available at http://www.dhs.gov/xnews/releases/pr_1179773665704.shtm; Dep't of Homeland Sec., Fact Sheet: National Infrastructure Protection Program Sector-Specific Plans, http://www.dhs.gov/xnews/gc_1179776352521.shtm (last visited Oct. 13, 2007).

168. COMMUNICATIONS SECTOR PLAN, *supra* note 32, at ii-iv (signatories include Departments of Homeland Security, Justice, Defense and Commerce; FCC; General Services Administration; National Telecommunications and Information Administration; New Jersey Board of Public Utilities; and the Communications Sector Coordinating Council (carriers, manufacturers and other service providers)).

169. *Id.* at 2.

170. *Id.* at 19, 25-26; see Letter from Eileen R. Larence, Dir., U.S. Gov. Accountability Office, to Reps. Bennie G. Thompson & Sheila Jackson-Lee, U.S. Cong., at 4 (July 10, 2007), available at <http://www.gao.gov/new.items/d07706r.pdf> (criticizing communications sector plan for failing to "discuss how human assets fit into existing security projects or are relevant to fill the gaps to meet the sector's security goals").

— recommendations for voluntary actions by infrastructure owners and operators “that provide companies with guidance aimed at improving the overall reliability, interoperability and security of networks.”¹⁷¹ The protective measures fall into three categories: physical security, cyber/logical security, and human security. The CS Plan notes that companies vary in the protections they implemented depending on various factors.

The best practices referenced by the CS Plan cover a wide range of topics for various categories of companies. For a wireline network operator like TELPRI, the website shows 639 best practices as of May 31, 2007.¹⁷² Generally, the best practices — even as voluntary recommendations for consideration by companies — do not go as far as the Security Agreement.

For example, a best practice developed by the FCC advisory group regarding personnel screening states: “Network Operators, Service Providers, Equipment Suppliers and Property Managers should consider establishing and implementing background investigation policies that include criminal background checks of employees. The policy should detail elements of the background investigation as well as disqualification criteria.”¹⁷³ In contrast, the Security Agreement requires more extensive screening (including background and financial investigations as well as criminal records checks by a third party, with regular monitoring of employees for possible disqualifications) with a greater involvement of government agencies (including that the company provides them the results of the third-party screening, and further background checks by government agencies).¹⁷⁴ These provisions of

171. COMMUNICATIONS SECTOR PLAN, *supra* note 32, at 48, 109 (FCC’s Network Reliability and Interoperability Council).

172. *See* Network Reliability and Interoperability Council Best Practices, <http://www.bell-labs.com/cgi-user/krauscher/bestp.pl?howDisp=&allrecords=allrecords> (last visited Oct. 13, 2007) [hereinafter NRIC].

173. *Id.* at 7-7-5033 (follow ‘7-7-5033’ hyperlink) (last visited Oct. 13, 2007); *see id.* at 7-7-8099 (follow ‘7-7-8099’ hyperlink) (last visited Oct. 13, 2007) (“Network Operators, Service Providers and Equipment Suppliers should perform background checks that are consistent with the sensitivity of the position’s responsibilities and that align with [human resources] policy. These checks could include those that verify employment history, education, experience, certification, and criminal history.”).

174. TELPRI Security Agreement, *supra* note 24, at 14-16 (screening through a reputable third party of existing personnel and new candidates in a list of positions developed through consultation with certain government agencies, including employees who have access to the communications infrastructure, call records, subscriber records or information on law enforcement activities; screening must include a background and financial investigation as well as a criminal records check; at the request of the government agencies, results of the screening will be provided to those agencies, and the employees and candidates must consent to such disclosure; cooperate with any federal government agency desiring to perform further background checks; candidates who are rejected by the government pursuant to such further background checks will not be hired or will be promptly removed from such position; monitor

the Security Agreement appear to be closer to the Transportation Worker Identification Credential program or the screening for airport employees described above than they are to the applicable voluntary best practices recommendation for the communications industry.¹⁷⁵

Certain best practices provide recommendations on network routing.¹⁷⁶ However, none of these recommendations even suggests that all companies consider the security benefits of the location restrictions under the Security Agreement, or that all equipment used to transmit, switch, control, manage, or supervise domestic communications be located in the U.S.¹⁷⁷ On the contrary, one of the best practices addresses foreign sites and merely recommends a physical security program for such assets and personnel.¹⁷⁸

A third example of these disparities is in the retention of records. The Security Agreement requires that this foreign-owned company store exclusively in the U.S. all domestic communications, call records, billing records, and other subscriber information, and retain such information for at least five years.¹⁷⁹ Again, the best practices make several

the screened personnel (update the screening), and promptly remove personnel who no longer meet the requirements; and maintain records on the status of screened personnel and provide them to government agencies on request).

175. See *supra* Section IV.A.1-2.

176. NRIC, *supra* note 172, at 7-7-0520 (follow ‘7-7-0520’ hyperlink) (last visited Oct. 13, 2007) (“Network Operators and Service Providers should have a route policy that is available, as appropriate. A consistent route policy facilitates network stability and inter-network troubleshooting.”); *id.* at 7-7-0566 (follow ‘7-7-0566’ hyperlink) (last visited Oct. 13, 2007) (“Network Operators and Service Providers should consider placing and maintaining 911 circuits over diverse interoffice transport facilities (e.g., geographically diverse facility routes, automatically invoked standby routing, diverse digital cross-connect system services, self-healing fiber ring topologies, or any combination thereof.”); *id.* at 7-7-0617 (follow ‘7-7-0617’ hyperlink) (last visited Oct. 13, 2007) (“Network Operators and Service Providers should ensure that routing controls are implemented and managed to prevent adverse routing conditions.”); *id.* at 7-7-0731 (follow ‘7-7-0731’ hyperlink) (last visited Oct. 13, 2007) (“Network Operators should provide physical diversity on critical inter-office routes when justified by a risk or value analysis.”); *id.* at 7-7-1065 (follow ‘7-7-1065’ hyperlink) (last visited Oct. 13, 2007) (“Network Operators and Service Providers should identify and manage critical network elements and architecture that are essential for network connectivity and subscriber services considering security, functional redundancy and geographical diversity.”); *id.* at 7-7-5105 (follow ‘7-7-5105’ hyperlink) (last visited Oct. 13, 2007) (“Network Operators and Equipment Suppliers should consider the security implications of equipment movement both domestically and internationally, including movement across borders and through ports of entry.”); *id.* at 7-7-5107 (follow ‘7-7-5107’ hyperlink) (last visited Oct. 13, 2007) (“Network Operators, Service Providers and Equipment Suppliers should evaluate and manage risks (e.g., alternate routing, rapid response to emergencies) associated with a concentration of infrastructure components.”).

177. TELPRI Security Agreement, *supra* note 24, at 7.

178. NRIC, *supra* note 172, at 7-7-5220 (follow ‘7-7-5220’ hyperlink) (last visited Oct. 13, 2007) (“Network Operators, Service Providers and Equipment Suppliers who utilize foreign sites should establish and implement a comprehensive physical security program for protecting corporate assets, including personnel, at those sites.”).

179. TELPRI Security Agreement, *supra* note 24, at 8-9.

recommendations for all companies with regard to records, but do not suggest consideration of the security benefits of domestic-only storage and retention for at least five years.¹⁸⁰

Finally, unlike the Security Agreement's restriction on outsourcing and Commissioner Capps' discussion of the harms of offshore outsourcing,¹⁸¹ the best practices only address outsourcing in recommending consideration of a quality assessment, functional testing, and security testing by an independent entity.¹⁸²

In summary, the CS Plan and the compilation of voluntary best practices referenced therein reflect a major effort to promote national security by addressing all companies in the U.S. communications sector, U.S.-owned as well as foreign-owned. However, there are sharp disparities between the measures recommended therein for voluntary adoption by the entire industry versus the requirements imposed through the CFIUS process on a foreign-acquired company. The laws and regulations applicable to security measures for the marine ports, airports, and nuclear power plants industries are more stringent than the safeguards for the U.S.-owned telecommunications operators. These other sectors illustrate that Congress and federal agencies know how to make safeguards like those in the Security Agreement applicable industry-wide, but have failed to do so in the telecommunications sector.

CONCLUSION

There is a complex, evolving fit for the telecommunications industry between (a) national security or employment security concerns and (b) policies favoring globalization and deregulation. Much is at stake in achieving this fit.

In Congressional testimony on February 7, 2007, the Treasury Department expressed concerns about deterring foreign investment and thereby weakening national security:

The administration views investment, including investment from overseas, as vital to continued economic growth, job creation, and

180. NRIC, *supra* note 172, at 7-6-1022 (follow '7-7-1022' hyperlink) (last visited Oct. 13, 2007) ("Network Operators, Service Providers and Equipment Suppliers should consider the development of a vital records program to protect vital records that may be critical to restoration efforts."); NRIC, *supra* note 172, at 7-7-3217 (follow '7-7-3217' hyperlink) (last visited Oct. 13, 2007) ("Network Operators and Service Providers should provide and maintain current 24/7/365 contact information accessible to Public Safety Answering Points (PSAPs) so that PSAPs may obtain additional subscriber information as appropriate.").

181. TELPRI Security Agreement, *supra* note 24, at 19.

182. NRIC, *supra* note 172, at 7-7-5084 (follow '7-7-5084' hyperlink) (last visited Oct. 13, 2007) ("Network Operators, Service Providers and Equipment Suppliers should consider ensuring that outsourcing of hardware and software includes a quality assessment, functional testing and security testing by an independent entity.").

building an ever-stronger America. . . . As [Treasury] Secretary [Henry] Paulson has stated: “The U.S. experience illustrates the benefits of openness and competition. Our economy is by far the world’s strongest because it is built on openness — openness to people of all nationalities, openness to new ideas, openness to investment, and openness to competition.”

. . . .

. . . . [W]e have experienced recent controversies relating to particular foreign investments in the United States. These controversies, coupled with some troubling signs that other countries are pursuing barriers to foreign investment, and increasingly negative media coverage of the U.S. investment climate, underscore the need to improve and reform the CFIUS process. . . .

The administration regards our nation’s security as its top priority. . . .

. . . .

. . . . [L]et me emphasize that the Bush administration is firmly committed to keeping the U.S. economy open to international investment while at the same time protecting our national security. Openness at home encourages other nations to lower their barriers which can help advance prosperity and economic freedom in the rest of the world. In short, a domestic climate conducive to foreign investment strengthens national security.¹⁸³

In the flurry of legislative activity to reform the CFIUS process, leading to the enactment of FINSA in July 2007, legislators, the Bush Administration, business groups, and representatives of labor worked together on assessing the risks and benefits of foreign investments and open markets. However, there has been no legislative or regulatory

183. *Committee on Foreign Investment in the United States (CFIUS), One Year After Dubai Ports World: Hearing Before the H. Comm. on Financial Services*, 110th Cong. 2, 5 (2007) (statement of Clay Lowery, Assistant Sec’y, U.S. Dept. of the Treasury), available at http://www.house.gov/apps/list/hearing/financialsvcs_dem/htlowery020707.pdf; see also Paulson, *supra* note 16 (“[T]he fear of foreign investment may be resurfacing. . . . [W]e must assess the cost versus the benefits of our regulatory structure and certain aspects of our legal system that may discourage foreign investment.”).

effort to level the national security protections from CFIUS reviews across all foreign-owned and U.S.-owned telecommunications companies.¹⁸⁴ Such leveling of national security burdens regardless of nationality of ownership (at least for friendly foreign countries) would signal that the U.S. economy is open to international investment while strengthening national security.

Regarding the CFIUS recommendation on the Alcatel/Lucent transaction, President Bush proclaimed that CFIUS had properly balanced these interests: “The President’s decision demonstrates the commitment of the United States to protect its national security interests and maintain its openness to investment, including investment from overseas, which is vital to continued economic growth, job creation, and an ever-stronger nation.”¹⁸⁵ The signal sent by the National Security Agreement and Special Security Agreement for this transaction is clearly more positive for foreign investment than if the President had blocked this transaction.

Perhaps the national security and employment security measures in the Verizon/América Móvil, Alcatel/Lucent, and AT&T/BellSouth transactions achieve the optimal balance of these policies. On the other hand, there may be adverse effects in the actions of other governments against U.S. companies as well as decreased domestic competition and network upgrades. Recently-developed conditions on a few telecom companies are contrary to, or at least point in a different direction than, policies favoring globalization and deregulation that were developed and fought for over several decades by Congress, the FCC and other federal agencies. There should be further public scrutiny by Congress, the FCC, and other agencies of the costs, benefits, and implications of these

184. Many of the Security Agreement-type CFIUS conditions date back to 2000 in the agreement covering NTT’s acquisition of Verio. Lewis, *supra* note 17, at 470-71. Yet, in over six years, Congress and the FCC have not applied such national security measures to all domestic and foreign-owned companies. While CFIUS has imposed these and additional conditions on several foreign acquirers of telecom and Internet service providers since the NTT/Verio agreement, these conditions do not apply to many foreign-owned service providers and do not apply to domestic-owned service providers. See *Committee on Foreign Investment in the United States (CFIUS), One Year After Dubai Ports World: Hearing Before the H. Comm. on Financial Services*, 110th Cong. 2, 5 (2007) (statement of David Heyman, Dir. of Homeland Sec. Program, Ctr. for Strategic and Int’l Studies), available at http://www.house.gov/apps/list/hearing/financialsvcs_dem/htheyman020607.pdf (lessons from the CFIUS review of the Dubai Ports transaction in 2006:

Foreign ownership does not and should not be assumed to automatically confer additional vulnerability on a business. . . . The threshold test for [CFIUS] national security reviews should be based on two assurances: one, that security of business transactions meet U.S. standards; and two, that U.S. government has the ability and authority to audit and verify that security.

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185. White House Release, *supra* note 64.

measures. If these measures are found to promote national security in this multi-carrier, multi-supplier, networked industry, the public debate should address whether they should be applied to domestic companies as well.

Technology platforms for some telecom services have converged.¹⁸⁶ Similarly, some regulatory treatments for technically distinct but competing services have converged.¹⁸⁷ Yet, there is a growing divergence in national security conditions for U.S.-owned versus foreign-owned providers. At some point, this disparity may become harmful to the U.S. government's efforts to develop a globalized, deregulated telecom industry free from national barriers and distinctions. This disparity may also reflect national security vulnerabilities in U.S.-owned providers that should be addressed through industry-wide legislation, regulations or other standards. Finally, some regulators' pursuit of merger-specific conditions reflecting labor opposition to offshore outsourcing imposes anticompetitive restrictions on the target companies and burdens on their customers. Again, legislation and agency rulemaking should address these issues in an industry-wide manner.

186. See *Accessing the Communications Marketplace: Hearing Before the S. Comm. on Commerce, Science and Transportation*, 110th Cong. (2007) (written statement of Kevin J. Martin, Chairman, FCC), available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-270192A1.pdf.

187. See, e.g., *Universal Service Contribution Methodology, Report & Order & Notice of Proposed Rule Making*, 21 FCC Rcd. 7518 (2006), review granted in part, vacated in part *sub nom.* *Vonage Holdings Corp. v. F.C.C.*, 489 F.3d 1232 (D.C. Cir. 2007) (extending universal service contributions to interconnected voice over Internet Protocol providers is supported by the FCC's principle of competitive neutrality).