

# CFIUS REFORM: FEAR AND FIRRMA, AN INEFFICIENT AND INSUFFICIENT EXPANSION OF FOREIGN DIRECT INVESTMENT OVERSIGHT

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## Introduction

The hostile \$117 billion corporate takeover of Qualcomm, a California semiconductor manufacturer and leader in 5G technology, by Broadcom came to an abnormally abrupt end in March of 2018.<sup>1</sup> While mergers and acquisitions often break down in today's business climate, it is abnormal for the President of the United States to block what would have been the largest tech merger to date.<sup>2</sup> Though Broadcom publicly announced plans to redomicile in the United States, it was not enough to evade government scrutiny because its parent company, Avago, was based in Singapore.<sup>3</sup> In November 2017, Qualcomm directors rejected Broadcom's

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<sup>1</sup> See Shrivanth Vijayakumar et al., *Timeline: Broadcom-Qualcomm Saga Comes to an Abrupt End*, REUTERS: BUSINESS NEWS (Mar. 14, 2018), <https://www.reuters.com/article/us-qualcomm-m-a-broadcom-timeline/timeline-broadcom-qualcomm-saga-comes-to-an-abrupt-end-idUSKCN1GQ22N>.

<sup>2</sup> *Id.*

<sup>3</sup> Hence the Broadcom's NASDAQ ticker symbol of AVGO. See YAHOO FINANCE, <https://finance.yahoo.com> (search "AVGO"). Broadcom is a semiconductor firm that sells its chips to the CFIUS repeat-player Huawei. See also Yuan Gao & Grant Clark, *How Fear of Huawei Killed \$117 Billion Broadcom Deal*, BLOOMBERG (Mar. 3, 2018), <https://www.bloomberg.com/news/articles/2018-03-13/how-china-s-huawei-killed-117-billion-broadcom-deal-quicktake>. Broadcom has since completed its redomicile to the United States and is now headquartered in San Jose, California. See also Yashaswini Swamynathan, *Broadcom Completes Move to U.S. from Singapore*, REUTERS: BUSINESS NEWS (Apr. 4, 2018), <https://www.reuters.com/article/us-broadcom-domicile/broadcom-completes-move-to-u-s-from-singapore-idUSKCN1HB34G>. This was a move that Broadcom says the Committee required as a condition for their approval on an earlier deal with Brocade Communications Systems. See also David McLaughlin, *Trump Blocks Broadcom Takeover of Qualcomm on Security Risks*, BLOOMBERG (Mar. 12, 2018), <https://www.bloomberg.com/news/articles/2018-03-12/trump-issues-order-to-block-broadcom-s-takeover-of-qualcomm-jeoszwnt>. Nevertheless, CFIUS faulted Broadcom for inadequate notice of their now accelerated plan to relocate. See also Letter from Amin

unsolicited \$103 billion acquisition offer.<sup>4</sup>

After months of highly public discussions between the two rival semiconductor firms, the acquisition turned hostile when Broadcom issued a tender offer to Qualcomm shareholders at a premium above the stock price in an attempt to acquire control of Qualcomm board seats.<sup>5</sup> On March 4, 2017, just two days before the scheduled shareholder meeting to determine the outcome of the tender offer, the United States government interjected.<sup>6</sup> The Committee on Foreign Investment in the United States (CFIUS) reviewed the proposed acquisition and halted the takeover attempt by releasing an order stating that it had identified national security risks that required a full investigation.<sup>7</sup> On March 11, the CFIUS Committee concluded its investigation and recommended that the President of the United States reject the deal.<sup>8</sup> President Trump acquiesced to the CFIUS Committee's recommendation and blocked the takeover by Executive Order the following day.<sup>9</sup> This marked the fifth transaction to be formally terminated through the abstruse CFIUS process that informally derails countless deals.<sup>10</sup> Overnight, CFIUS made headlines in not only the local *San Diego Tribune*,<sup>11</sup> but also the *Wall Street Journal*, the

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N. Mir, Deputy Assistant Sec'y, Investment Sec., Dep't of the Treasury, to Mark Plotkin, Covington and Burling LLP, and Theodore Kassinger, O'Melveny & Myers, LLP (Mar. 11, 2018), (accessible at [https://www.sec.gov/Archives/edgar/data/804328/000110465918016576/a18-7296\\_12ex99d1.htm](https://www.sec.gov/Archives/edgar/data/804328/000110465918016576/a18-7296_12ex99d1.htm)).

<sup>4</sup> See Vijayakumar, *supra* note 1.

<sup>5</sup> The takeover offer was temporarily delayed by Qualcomm making a tender offer on another semiconductor company that would have increased the number of shares thus increasing the necessary expense for Broadcom to purchase a controlling quantity. See Vijayakumar, *supra* note 1.

<sup>6</sup> See Qualcomm Inc., Current Rep., (Form 8-K) (Mar. 5, 2018) (attaching March 4, 2018 Interim Order from the Committee on Foreign Investment in the United States as Exhibit 99.1) [https://www.sec.gov/Archives/edgar/data/804328/000110465918014823/a18-7296\\_4ex99d1.htm](https://www.sec.gov/Archives/edgar/data/804328/000110465918014823/a18-7296_4ex99d1.htm).

<sup>7</sup> See Sanders, *infra* note 12.

<sup>8</sup> See Letter from Amin N. Mir to Mark Plotkin and Theodore Kassinger, *supra* note 3.

<sup>9</sup> See McLaughlin, *supra* note 3.

<sup>10</sup> This unprecedented outcome blocking a hostile takeover attempt and disagreed deal "underscores the tough stance the Trump administration is taking on foreign takeovers of U.S. technology firms." See McLaughlin, *supra* note 3.

<sup>11</sup> See Mike Freeman, *President Trump Blocks Broadcom's Bid to Acquire Qualcomm*, SAN DIEGO UNION-TRIB. (Mar. 12, 2018), <https://www.sandiegouniontribune.com/business/technology/sd-fi-broadcom-relocation-20180312-story.html>.

*New York Times*, the *Washington Post*, *Forbes*, *FoxNews*, *CNN*, and law firm newsletters to clients across the globe.<sup>12</sup>

Headlines like those following the Qualcomm-Broadcom breakdown will increase in regularity due to an expansion of the Legislature permitting executive intervention of foreign transactions. CFIUS is the interagency regulatory body that facilitates an executive review of foreign mergers and acquisitions involving a United States entity to stop or reverse deals with national security implications.<sup>13</sup> When international transactions are planned or already completed without prior CFIUS approval, the CFIUS Committee investigates the potential impact on national security and recommends to the President of the United States either approval, implementation of mitigating measures, or full rejection of the deal.<sup>14</sup>

Historically, the large majority of foreign investment in the United States has been unregulated and the process of review itself has been underregulated. Recently, in August of 2018, Congress passed the Foreign Investment Risk Review Modernization Act (FIRRMA) which exponentially expands the scope of CFIUS jurisdiction and the CFIUS review process.<sup>15</sup> The President signed this legislative overhaul into law and FIRRMA now awaits full implementation.<sup>16</sup> CFIUS expansion will negatively impact economic sectors, both domestic and international, if not adequately regulated. Additionally, FIRRMA does not do enough to protect the United States in today's global economy. FIRRMA overextends

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<sup>12</sup> With the Qualcomm-Broadcom takeover in mainstream discussion, CFIUS entered headlines across the globe. See Kate O'Keeffe, *Trump Orders Broadcom to Cease Attempt to Buy Qualcomm*, WALL ST. J. (Mar. 13, 2018), <https://www.wsj.com/articles/in-letter-cfius-suggests-it-may-soon-recommend-against-broadcom-bid-for-qualcomm-1520869867>; Chris Sanders, *U.S. Sees National Security Risk from Broadcom's Qualcomm Deal*, REUTERS: BUSINESS NEWS (Mar. 6, 2018), [https://cn.reuters.com/article/qualcomm-ma-broadcom-idCNL4N1QO4GF; cHALo, Donald Trump Bloquea la Posible Compra de Qualcomm por Parte de Broadcom: "Es Un Riesgo a la Seguridad Nacional," Gonzalo Varas \(Mar. 3, 2018\), https://www.gonzalovaras.cl/2018/03/13/donald-trump-bloquea-la-posible-compra-de-qualcomm-por-parte-de-broadcom-es-un-riesgo-a-la-seguridad-nacional/](https://cn.reuters.com/article/qualcomm-ma-broadcom-idCNL4N1QO4GF; cHALo, Donald Trump Bloquea la Posible Compra de Qualcomm por Parte de Broadcom: 'Es Un Riesgo a la Seguridad Nacional,' Gonzalo Varas (Mar. 3, 2018), https://www.gonzalovaras.cl/2018/03/13/donald-trump-bloquea-la-posible-compra-de-qualcomm-por-parte-de-broadcom-es-un-riesgo-a-la-seguridad-nacional/).

<sup>13</sup> See Vijayakumar, *supra* note 1.

<sup>14</sup> See *Process Overview*, U.S. DEP'T OF THE TREASURY (November 20, 2018, 4:22 PM), <https://www.treasury.gov/resource-center/international/foreign-investment/Pages/cfius-overview.aspx>.

<sup>15</sup> See Foreign Investment Risk Review Modernization Act of 2018, Pub. L. No. 115-232, 132 Stat. 1701-1746 as part of the John S. McCain National Defense Authorization Act for Fiscal Year 2019 (to be codified at 50 U.S.C. § 4565).

<sup>16</sup> See *The Committee on Foreign Investment in the United States (CFIUS)*, U.S. DEP'T OF THE TREASURY, <https://home.treasury.gov/policy-issues/international/the-committee-on-foreign-investment-in-the-united-states-cfius> (last visited Sept. 16, 2019).

CFIUS and will likely hinder necessary investment that funds necessary innovation. Further, FIRRMA falls short by not addressing threats from both start-up technology transfer by hiring American minds and cumulative passive foreign ownership. FIRRMA's failures to adequately address these issues are important because CFIUS serves a critical role in managing international economic tension and preserving national security, a balancing act that is now more critical than ever in the age of cyberwarfare, economic dependence, global citizenship, and artificial intelligence.

This Comment advocates for a more holistic approach to ensure national security interests are preserved while the United States remains open to receiving any potential benefit from inbound foreign direct investment. Part I of this Comment provides background on inbound foreign direct investment, the history of CFIUS, the old review process under the previous legislative framework, and the newly enacted changes to CFIUS review under FIRRMA. Part II analyzes the increased scope of CFIUS jurisdiction and argues that the new regime is insufficient to achieve the needed balance between the interdependent economic and national security consideration. Some changes are inefficient due to overbreadth; other changes fail to successfully capture posed threats to national security that ought to be addressed by CFIUS. Finally, in Part III, this Comment poses a solution to the issues discussed in Part II. To reduce underregulated exposures of national security interests and free the market from an inefficiently designed regulation structure, Part III recommends amendments to FIRRMA, additions to the Securities and Exchange Commission (SEC) regulation, and specific federal regulations FIRRMA allows the Committee to implement.

## I. Background

This background section lays the foundation for later analysis by defining and connecting the key concepts of inbound foreign direct investment and national security, the origin of CFIUS, the regime as it functioned under the Foreign Investment and National Securities Act of 2007 (FINSA) prior to 2018,<sup>17</sup> and the key changes that accompany the

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<sup>17</sup> Foreign Investment and National Security Act of 2007, Pub. L. No. 110-49, 121 Stat. 246 as part of the John S. McCain National Defense Authorization Act for Fiscal Year 2019 (amending Section 721 of the Defense Production Act of 1950, 50 U.S.C. app. § 2170 (2006) (later amended by the Foreign Investment Risk Review Modernization Act

new CFIUS regime under FIRRMA. First, it will discuss foreign direct investment, the definition of FDI, its impact on the economy, and the relation between this source of funding and national security. Second, it will address the history of CFIUS, its origin, and path to codification. Third, it examines the FINSA period as reflected by triggering transaction guidelines, its review process, and the Fifth Amendment challenge in *Ralls Corp. v. Committee on Foreign Investment in the United States*.<sup>18</sup> Fourth, it introduces FIRRMA by discussing the reasons for reform and noting the changes in scope, procedure, and reviewability of decisions.

### A. Foreign Direct Investment (FDI)

Foreign direct investment occurs when an investor, either a company or an individual, domiciled in one country, invests capital into a company, or other projects, in another country.<sup>19</sup> For example, if a company owned by Chinese nationals purchases an American business, the investment would be considered FDI. Traditionally, inbound funds trigger FDI status when the foreign investor acquires ownership or control of over 10% of the domestic company.<sup>20</sup> The United States has long held an Open Investment policy that welcomes FDI due to its economic benefits to the inbound nation.<sup>21</sup> This policy has encouraged continued foreign investment by assuring investors around the world that the administration in power will remain committed to the general principal that all investors should be treated in a fair and equitable manner under the law.<sup>22</sup>

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of 2018, Pub. L. No. 115-232, 132 Stat. 2173–2208 (to be codified as amended at 50 U.S.C. § 4565 ))).

<sup>18</sup> *Ralls Corp. v. Committee on Foreign Investment in the United States*, 758 F.3d 296, 315–16 (D.C. Cir. 2014).

<sup>19</sup> See *Key Foreign Direct Investment (FDI) Terms and Concepts*, INT’L TRADE ADMIN., <https://www.selectusa.gov/fdi-data-glossary> (last visited Jan. 29, 2019).

<sup>20</sup> Regardless of whether the foreign investor is an individual or a business entity. See *id.*

<sup>21</sup> See Statement on the United States Commitment to Open Investment Policy (June 20, 2011) in BUDGET AND PRESIDENTIAL MATERIALS, COMPILATION OF PRESIDENTIAL DOCUMENTS 201100457 (2011).

<sup>22</sup> *Id.*

### i. FDI's Effect on the American Economy

The United States is consistently the top ranked destination for FDI and it arguably plays a vital role in American economic prosperity.<sup>23</sup> In 2016 alone, the United States received FDI of \$365.7 billion as a result of acquisitions of U.S. companies.<sup>24</sup> Additionally, foreign-owned factories in the United States are responsible for nearly one-fifth of all U.S. exports.<sup>25</sup> This influx of capital allows some companies to grow and develop new product lines. For example, inbound foreign direct investment by BMW enabled a \$750 million expansion of the BMW America plant in South Carolina.<sup>26</sup> While the net benefit of FDI in certain contexts is debated by scholars, FDI provides over 12 million jobs in the United States, which is over 8.5% of the labor force.<sup>27</sup>

### ii. FDI and National Security

Increases in FDI, however, also produce national security concerns, particularly in the areas of trade disputes and intellectual property

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<sup>23</sup> See Statement on the 2017 National Security Strategy (Dec. 18, 2017) in BUDGET AND PRESIDENTIAL MATERIALS, COMPILATION OF PRESIDENTIAL DOCUMENTS 201700917 (2017).

<sup>24</sup> See Foreign Investment Risk Review Modernization Act of 2018, as part of the John S. McCain National Defense Authorization Act for Fiscal Year 2019, Pub. L. No. 115-232, 132 Stat. 2176 (to be codified as amended at 50 U.S.C. § 4565); see also *Foreign Direct Investment in the U.S.*, U.S. DEP'T OF COM. (Oct. 3, 2017), <https://www.commerce.gov/news/fact-sheets/2017/10/foreign-direct-investment-united-states> (reporting that majority-owned U.S. affiliates of foreign entities served as a “catalyst for research and development, spending \$56.7 billion in 2015 on R&D and accounting for 15.8 percent of the U.S. total expenditure on R&D by businesses”).

<sup>25</sup> Deborah Orr, *The Largest Foreign Investments in The U.S.*, FORBES (Apr. 10, 2018), [https://www.forbes.com/2008/04/10/foreign-investment-stocks-2000global08-biz-cx\\_do\\_0410investments.html#1c27adfe2b1f](https://www.forbes.com/2008/04/10/foreign-investment-stocks-2000global08-biz-cx_do_0410investments.html#1c27adfe2b1f) (“Foreign-owned factories based in the U.S. do more than cater to the huge American market; these businesses also export nearly \$170 billion worth of goods made in this country. That’s nearly a fifth of all U.S. exports.”).

<sup>26</sup> *Id.*

<sup>27</sup> See Foreign Investment Risk Review Modernization Act of 2018, as part of the John S. McCain National Defense Authorization Act for Fiscal Year 2019, Pub. L. No. 115-232, H.R. 5515, 115th Cong. § 1702 (a)(1) (2018), (to be codified at 50 U.S.C. § 4565); *Foreign Direct Investment: Driving Global Competitiveness and Innovation*, U.S. DEP'T OF COM. (June 9, 2017), <https://www.commerce.gov/news/blog/2017/06/foreign-direct-investment-driving-global-competitiveness-and-innovation>. *But see, e.g.*, Erika George & Elizabeth Thomas, *Bringing Human Rights into Bilateral Investment Treaties: South Africa and a*

transfers. If the economy becomes too dependent on FDI, foreign countries can use the threat of decreased FDI as bargaining leverage in international negotiations.<sup>28</sup> The possibility of foreign influence and control of the economy, especially in sectors pertaining to critical infrastructure, has fueled arguments opposing unregulated FDI on the basis of national security concerns.<sup>29</sup> For example, the Qualcomm-Broadcom transaction threatened to grant a foreign company significant influence over the supply of semiconductors, a key component found in all cellphones, computers, vehicles, missiles, and radar systems.<sup>30</sup> Additionally, foreign ownership of American businesses can enable the theft of American technology through the transfer of intellectual property.<sup>31</sup> Foreign ownership of intellectual property often increases the likelihood of trade secret misappropriation because some foreign government policies force disclosure while other foreign legal regimes do not penalize unauthorized intrusions into computer networks.<sup>32</sup> Once owned by a foreign entity, the jurisdictional capacity of the United States to restrict access is limited; protecting the IP from being stolen or reaching U.S. adversaries becomes a complex matter of international politics.<sup>33</sup> In

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*Different Approach to International Investment Disputes*, 27 *TRANSNAT'L L. & CONTEMP. PROBS.* 404, 430–32 (2018) (noting issues, particularly human rights issues, that can be involved with foreign direct investment).

<sup>28</sup> See Mary Ellen Stanley, *From China with Love: Espionage in the Age of Foreign Investment*, 40 *BROOKLYN J. INT'L L.* 1033, 1035–36 (2015).

<sup>29</sup> See, e.g., U.S. GOV'T ACCOUNTABILITY OFF., GAO-18-494, COMMITTEE ON FOREIGN INVESTMENT IN THE UNITED STATES: ACTION NEEDED TO ADDRESS EVOLVING NATIONAL SECURITY CONCERNS FACING THE DEPARTMENT OF DEFENSE (2018).

<sup>30</sup> Josh Horwitz, *Why the Semiconductor Is Suddenly at the Heart of US-China Tech Tensions*, *QUARTZ* (July 24, 2018), <https://qz.com/1335801/us-china-tech-why-the-semiconductor-is-suddenly-at-the-heart-of-us-china-tensions/> (“[A] small but critical portion of the semiconductor industry has specific applications in the defense sector, for use in things like missiles and radars. Mastery of the semiconductor technology can help ensure that a country’s military technology remains at the cutting edge.”).

<sup>31</sup> See Stanley, *supra* note 28, at 1037 (quoting Matthew Crosston, *Soft Spying: Leveraging Globalization as Proxy Military Rivalry*, 28 *INT'L J. OF INTELLIGENCE & COUNTERINTELLIGENCE* 105, 109 (2014)).

<sup>32</sup> See DEPT. OF JUST., REPORT TO CONGRESS PURSUANT TO THE DEFEND TRADE SECRETS ACT (2018) (“Some foreign countries’ practices and policies, including evidentiary requirements in trade secrets litigation and mandatory technology transfer, put valuable trade secrets at risk of exposure.”).

<sup>33</sup> See, e.g., James Andrew Lewis, *Put China’s Intellectual Property Theft in a Larger Context*, *CTR. FOR STRATEGIC & INT’L STUDIES* (Aug. 15, 2017), <https://www.csis.org/analysis/put-chinas-intellectual-property-theft-larger-context> (clarifying that international trade and

the Qualcomm example, in addition to the economic implications of supply control, the foreign access to intellectual property found in semiconductor manufacturing would expose the United States to heightened threats of cyberwarfare.<sup>34</sup> As a result, the interagency body, the Committee on Foreign Investment in the United States (the “CFIUS”<sup>35</sup>) reviews transactions involving FDI to assess the impact on the U.S. economy and national security.<sup>36</sup>

## B. The Origins of CFIUS

Before elaborating on the inadequacy of the CFIUS regime, it must be noted that CFIUS is not new. FIRRMA did not create a new body for executive review; it expanded the scope of an existing and authorized mechanism. This section gives an overview of the origins of CFIUS, its unique creation, initial intent, and ultimate codification for the purpose of acknowledging the legitimacy of the authority delegated to CFIUS.

Inbound foreign direct investment in the United States increased in the 1970s due to the depreciation of the dollar relative to other currencies.<sup>37</sup> This relative depreciation made it extremely cost efficient for foreign investors to purchase ownership in American companies. At this time, the Organization of the Petroleum Exporting Countries (OPEC) gained enormous surpluses from its oil embargo on the United States and

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intellectual property protection policies are pressing areas of potential reform, and, while alliances and treaties fill the political landscape, there is no comprehensive agreement nor is there is there is an enforcement system to ensure compliance short of diplomatic pressure and political sanctions).

<sup>34</sup> See Jim Lundy, *Cyberwar and 5G: The U.S. and Its Allies Take on Huawei*, ARAGON RES. (Jan. 8, 2019), <https://aragonresearch.com/cyberwar-and-5g-united-states-and-allies-take-on-huawei/>.

<sup>35</sup> See David McLaughlin & Kristy Westgard, *Meet (and Pronounce) CFIUS*, U.S. Watchdog on Deals: *QuickTake*, BLOOMBERG (Mar. 13, 2018, 1:47PM), <https://www.bloomberg.com/news/articles/2018-03-13/meet-and-pronounce-cfius-u-s-watchdog-on-deals-quicktake> (stating that CFIUS is pronounced SIFF-ee-yus).

<sup>36</sup> See JAMES K. JACKSON, CONG. RES. SERV., RL33388, THE COMMITTEE ON FOREIGN INVESTMENT IN THE UNITED STATES (CFIUS) (2018) [hereinafter *Jackson CRS Report 2018*].

<sup>37</sup> Deborah M. Mostaghel, *Dubai Ports World Under Exxon-Florio: A Threat to National Security or a Tempest in a Seaport?*, 70 ALB. L. REV. 583, 588–89 (2007) (“In the 1970s, partly as a result of ‘the depreciation of the dollar against other major foreign currencies,’ foreign investment continued to pour into the United States . . . . [The FIRRMA mandated review concluded] that the United States lacked a coherent mechanism to monitor foreign investment.”).

the coinciding U.S. energy crisis.<sup>38</sup> Concerned over this trend, Congress passed the Foreign Investment Study Act of 1974 which reported the current state of FDI monitoring as inadequate.<sup>39</sup> Fueled by the Study Act report, legislators feared OPEC surpluses would be used to buy critical U.S. assets for political reasons.<sup>40</sup> In a bid to ease legislators' concerns over OPEC investment, President Ford signed Executive Order 11858 establishing CFIUS in 1975.<sup>41</sup>

Congress then addressed the already operational CFIUS in an amendment to the Defense Production Act of 1950 (the "DPA") which expressly granted the Executive branch the authority to review certain

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<sup>38</sup> See, e.g., Robert D. Lifset, *A New Understanding of the American Energy Crisis of the 1970s*, 39 HIST. SOC. RES., HISTORISCHE SOZIALFORSCHUNG 22 (2014).

<sup>39</sup> Foreign Investment Study Act of 1974, Pub. L. No. 93-479, 88 Stat. 1450 (codified at 15 U.S.C. § 78b (2000)); see Joanna Rubin Travalini, *Symposium on the Globalization of Private Equity: Changes in the International Market and the Impact on Private Equity Investment: Comment: Foreign Direct Investment in the United States: Achieving a Balance Between National Economy Benefits and National Security Interests*, 29 NW. J. INT'L L. & BUS. 779, 783 (2009) ("The Study Act, through its mandated review of U.S. foreign investment policy, led the government to conclude that 'the United States did not maintain an adequate mechanism for monitoring foreign investments.'") (quoting Paul I. Djuricic, *The Exxon-Florio Amendment: National Security Legislation Hampered by Political and Economic Forces*, 3 DEPAUL BUS. L.J. 179, 180 (1991)).

<sup>40</sup> See Jackson CRS Report 2018, *supra* note 36, at 1, n.2; Kenneth Y. Hui, National Security Review of Foreign Mergers and Acquisitions of Domestic Companies in China and the United States (2009) (unpublished Cornell Law School Inter-University Graduate Student Conference Papers) (on file with Cornell University Law school) (available at [http://scholarship.law.cornell.edu/lps\\_clacp/34](http://scholarship.law.cornell.edu/lps_clacp/34)); Xingxing Li, *National Security Review in Foreign Investments: A Comparative and Critical Assessment on China and U.S. Laws and Practices*, 13 BERKELEY BUS. L. J. 255, 261 (2016) ("To retrace the history of CFIUS, President Gerald Ford established CFIUS in 1975, following the energy crisis from 1972 through 1975. In the 1970s, it was of concern that . . . [OPEC] would use the surpluses gained in the oil embargo on the United States to buy up critical US assets.").

<sup>41</sup> Exec. Order No. 11,858, 3 C.F.R. 990 (1971–1975), *reprinted as amended in* 3 C.F.R. 13456 (2008). Initially, review of investments that "might have major implications for United States national interests" constituted only one of the five responsibilities given to the Committee. *Id.* The five responsibilities of the committee were to (1) arrange for the preparation of analyses of trends and significant developments in foreign investments in the United States; (2) provide guidance on arrangements with foreign governments for advance consultations on prospective major foreign governmental investments in the United States; (3) review investments in the United States which, in the judgment of the Committee, might have major implications for United States national interests; (4) consider proposals for new legislation or regulations relating to foreign investment as may appear necessary; and (5) as the need arises, the Committee shall submit recommendations and analyses to the National Security Council and to the Economic Policy Board.

mergers and acquisitions for national security purposes.<sup>42</sup> This power has been delegated, by Executive Order, to CFIUS.<sup>43</sup> In 1988, Japanese companies were the leader in FDI in the United States and primarily invested into high-technology industries.<sup>44</sup> Unease over rise in foreign investment and Japanese ownership led Congress to change Section 721 through the “Exon-Florio” Provision.<sup>45</sup> Notably, this legislation eliminated

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<sup>42</sup> Defense Production Act of 1950, 50 U.S.C. app. § 2170 (1950) (currently 50 U.S.C. § 4565 (2019)).

<sup>43</sup> Exec. Order No. 11,858, 3 C.F.R. 990 (1971–1975), *reprinted as amended* in 3 C.F.R. 13456 (2008). The division of responsibility is fundamental in the United States through the separation of powers. The Executive Branch has the authority to address matters of national security, including when such matters derive from economic activity. For a full discussion of authorities given to the President aside from CFIUS (including the International Emergency Economic Powers Act (IEEPA), the Export Administration Act of 1979 (EAA), the Arms Export Control Act (AECA), the Federal Acquisition Regulations System (FARS)), see Jonathan Wakely & Andrew Indorf, *Managing National Security Risk in an Open Economy: Reforming the Committee on Foreign Investment in the United States*, 9 HARV. NAT’L SEC. J., no. 2, 2018, at 6–14. As Commander in Chief, the President has the constitutionally derived authority to classify information and restrict access to that information. See *Dep’t of Navy v. Egan*, 484 U.S. 518, 527 (1988) (“The President, after all, is the ‘Commander in Chief of the Army and Navy of the United States.’ His authority to classify and control access to information bearing on national security . . . flows primarily from this constitutional investment of power in the President, and exists quite apart from any explicit congressional grant.” [citation omitted]). To ensure the protection of classified information, the Defense Security Service has been tasked with the responsibility of oversight as outlined in the National Industry Security Program. Exec. Order No. 12,885, 58 Fed. Reg. 65,863 (Dec. 16, 1993), *amending* Exec. Order No. 12,829, 58 Fed. Reg. 3,479 (Jan. 6, 1993). But when a transaction or investment does not involve classified information, the authority is assigned by the Constitution to Congress through the Commerce Clause. See U.S. CONST. art. I, § 8, cl. 3 (granting Congress the power “[t]o regulate Commerce with foreign Nations, and among the Several States”).

<sup>44</sup> See U.S. GOV’T ACCOUNTABILITY OFF., GAO/NSIAD-96-12, FOREIGN INVESTMENT: IMPLEMENTATION OF EXON-FLORIO & RELATED AMENDMENTS 6, 36 (1995); JAMES K. JACKSON, CONG. RES. SERV., RS22197, THE EXON-FLORIO NATIONAL SECURITY TEST FOR FOREIGN INVESTMENT 2 (2006) [hereinafter *Jackson CRS Report 2006*]; Mostaghel, *supra* note 31, at 590–93.

<sup>45</sup> Omnibus Trade & Competitiveness Act of 1988, 100 Pub. L. No. 418, 102 Stat. 1107, 1425-26 (1988) (amending Title VII of the Defense Production Act of 1950, 50 U.S.C. app. §§ 2158-2169 (1982), by adding Section 721, 50 U.S.C. app. § 2170 (1988)). The proposed wording of the reform would have expanded CFIUS review to investments affecting “national security and essential commerce” but the Reagan Administration rejected the term “essential commerce.” At this time in American history, the outward dedication to open international markets was of significant importance and CFIUS was ripe to become the covert vehicle for policy implementation. In the end, Congress strengthened the President’s hand in conducting foreign investment policy, but decrease

any discrepancy regarding whether the President needed to declare a state of emergency to block a problematic transaction by giving the President explicit authority to take action whenever he considered it “appropriate” to do so, as long as he clarified that (1) other laws inadequately address the transaction risks and (2) a credible threat to national security exists.<sup>46</sup>

A series of transactions involving foreign government entities, as opposed to foreign private entities, once again ignited political pressure to further strengthen CFIUS.<sup>47</sup> An example of this trend includes the French government owned Thompson C.S.F.’s offer to purchase LVT Corporation’s Missile Division which drew significant congressional attention.<sup>48</sup> In 1992, legislators amended Exon-Florio through the “Byrd Amendment.”<sup>49</sup> Attempting to signal the importance of transaction review, Congress used the “Byrd Amendment” to require CFIUS to investigate if the acquiring party was “controlled by or acting on behalf of a foreign government.”<sup>50</sup> Despite these amendments however, critics of the legislation viewed the United States as still “dangerously defenseless against an onslaught of strategic foreign buyouts and acquisitions.”<sup>51</sup>

### C. 2007 Legislation: CFIUS under FINSA

In 2006, the Alcatel-Lucent acquisition and Dubai Port’s World deal led to a renewed interest in CFIUS.<sup>52</sup> The backlash from these two highly

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its own influence to reassure the markets that investment transactions would be generally untouched by political interference. See *Jackson CRS Report 2018*, *supra* note 36, at 5–7.

<sup>46</sup> *Jackson CRS Report 2006*, *supra* note 44, at 2–3.

<sup>47</sup> See generally Kristy E. Young, Note, *The Committee on Foreign Investment in the United States and the Foreign Investment and National Securities Act of 2007: A Delicate Balancing Act That Needs Revision*, 15 U.C. DAVIS J. INT’L L. & POL’Y 43, 47 (2008).

<sup>48</sup> See Mostaghel, *supra* note 37, at 597–600.

<sup>49</sup> National Defense Authorization Act for Fiscal Year 1993, Pub. L. No. 102-484, 106 Stat. 2315, 2464–65 (1992).

<sup>50</sup> *Id.*; 138 CONG. REC. S14039 (daily ed. Sept. 18, 1992) (statement of Sen. Byrd) (hoping that amendment provides “signal to the administration of the importance that the Congress places on this issue”).

<sup>51</sup> See, e.g., Christopher F. Corr, *A Survey of United States Controls on Foreign Investment Operations: How Much is Enough?*, 9 AM. U. J. INT’L L. & POL’Y 417, 431 (1994).

<sup>52</sup> See *The DP World Controversy and the Ongoing Vulnerability of U.S. Seaports: Hearing on The National Security Implications of the Dubai Ports World Deal to Take Over Management of U.S. Ports Before the H. Comm. on Armed Services*, 109th Cong. 10–14, 133–139 (2006) (statement of Stephen E. Flynn, PhD., Commander, U.S. Coast Guard (Ret.), Jeane J. Kirkpatrick Senior Fellow in National Security Studies) (available at <https://www.govinfo.gov/content/pkg/CHRG-109hhr32987/pdf/CHRG-109hhr32987.pdf>). CFIUS and President Bush approved the French acquisition of Lucent Technologies but required the

broadcast deals urged Congress to pass FINSA.<sup>53</sup> FINSA reformed the CFIUS process and established the decade long regime that serves as a baseline for later analysis of the changes implemented in FIRRMA.<sup>54</sup> This section will examine the FINSA guidelines for CFIUS review relating to overall structure and purpose. Next, the procedural process of review under FINSA is outlined by defining the initial triggering criteria, the Committee review period, and the role of the President. Finally, FINSA's bar on judicial review of CFIUS decisions is demonstrated through *Ralls Corp.*

### i. Guidelines for CFIUS Review

FINSA defined the type of transaction the Committee should review, the distribution of Committee power, and the goal of the review process as understood by Congress at the time they enacted the legislation. Covered transactions were defined as “any merger, acquisition, or takeover . . . by or with any foreign person which could result in foreign control of any person engaged in interstate commerce in the United States.”<sup>55</sup> Although FINSA did not explicitly define ‘control,’ the Treasury Department states that control is not determined by a numeric benchmark, but rather by a subjective determination of power, direct or indirect, exercised or exercisable, to direct or decide matters affecting the entity.<sup>56</sup>

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foreign acquirer to agree to a Special Security Arrangement that restricted its access to some work done by the target's research arm, Bell Labs. *Jackson CRS Report 2018, supra* note 36, at 8. Outrage surrounded the state-owned Dubai World Exports' announcement that it intended to purchase controlling management interest in six U.S. ports, the criticism becoming so fierce that DP decided to “transfer” its interest to an undisclosed American Company. See David E. Sanger, *Under Pressure, Dubai Company Drops Port Deal*, N.Y. TIMES (Mar. 10, 2006), <https://www.nytimes.com/2006/03/10/politics/under-pressure-dubai-company-drops-port-deal.html>.

<sup>53</sup> See Judy Wang, *Ralls Corp. v. CFIUS: A New Look at Foreign Direct Investments to the US*, 54 COLUM. TRANSNAT'L L. BULL. 30, 36 (2016).

<sup>54</sup> The greatest impact felt by the few companies whose transactions did go under review was a dip in stock price due to investors' negative perception of government investigations and the possibility of intervention. See *Jackson CRS Report 2018, supra* note 36, at 12 (citing anecdotal evidence that CFIUS review “can negatively affect the firm's stock price”).

<sup>55</sup> 50 U.S.C. § 4565(a)(4) (2018).

<sup>56</sup> *Jackson CRS Report 2018, supra* note 36, at 17. In comparison, the term ‘control’ as used in the Corporate Law context often means the capacity to choose directors and possible influence or dominate the board. See Adolf A. Berle, Jr., “Control” in *Corporate Law*, 58 COLUM. L. REV. 1212, 1212 (1958).

Transactions were not considered covered under CFIUS jurisdiction if they were undertaken “solely for the purpose of investment” with no intent to direct business operations, meaning they resulted in the ownership of less than 10% of the voting securities or were undertaken by a financial investment institution through “ordinary course of business for its own account.”<sup>57</sup> For example, consider a passive investment by a foreign national as a limited partner of an investment fund. If that fund has a general partner who is not a foreign national, then when that fund purchases a shareholder interest in a domestic corporation, the “control” required for CFIUS jurisdiction would not likely be satisfied.<sup>58</sup>

### *No Single Agency Holds Authority*

CFIUS is a regulatory committee of the Executive Branch with representatives from multiple government agencies.<sup>59</sup> The interagency Committee is headed by the Secretary of the Treasury; the Committee includes permanent members identified as the heads of nine departments; however, other departments and advisors participate on a case-by-case basis when necessary.<sup>60</sup> The Treasury Department has been unsuccessful

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<sup>57</sup> 31 C.F.R. § 800.302 (2008); *Jackson CRS Report 2018*, *supra* note 36, at 15.

<sup>58</sup> Typically, general partners are involved with day-to-day operations and decisions of the business; in contrast, limited partners cannot act in the management role reserved for general partners without exposing them to the liability risks of the general partner. *See* ALAN PALMITER & FRANK PARTNOY, *CORPORATIONS: A CONTEMPORARY APPROACH* 409–10 (2d ed. 2014).

<sup>59</sup> *See* Composition of CFIUS, THE U.S. DEPT. OF THE TREASURY (Dec. 1, 2010, 8:08 AM), <https://www.treasury.gov/resource-center/international/foreign-investment/Pages/cfius-members.aspx> (last visited Jan. 29, 2019).

<sup>60</sup> The CFIUS members include the heads of the following: (1) Department of the Treasury (chair); (2) Department of Justice; (3) Department of Homeland Security; (4) Department of Commerce; (5) Department of Defense; (6) Department of State; (7) Department of Energy; (8) Office of the U.S. Trade Representative; (9) Office of Science & Technology Policy. The following offices also observe and, as appropriate, participate in CFIUS’ activities: (1) Office of Management & Budget; (2) Council of Economic Advisors; (3) National Security Council; (4) National Economic Council; (5) Homeland Security Council. The Director of National Intelligence and the Secretary of Labor are non-voting, *ex-officio* members of CFIUS with roles as defined by statute and regulation. *Composition of CFIUS*, U.S. DEP’T OF THE TREASURY (Dec. 1, 2010), <https://www.treasury.gov/resource-center/international/foreign-investment/Pages/cfius-members.aspx> (reformatted); *see also* *Ralls Corp. v. Comm. on Foreign Inv. in U.S.*, 758 F.3d 296, 302 n.2 (D.C. Cir. 2014) (“The President also appointed the United States Trade Representative and the Director of the Office of Science and Technology Policy to CFIUS and directed several White House officials, among others, to participate as observers.”).

in implementing an organizational structure to effectively coordinate the synchronization of these agencies' efforts thus far.<sup>61</sup>

### *The Purpose: National Security*

The predominant goal of the CFIUS body has always been to investigate business transactions involving foreign investment that could impair national security.<sup>62</sup> FINSA broadened the scope of economic activity subject to CFIUS review by stating that “the term ‘national security’ shall be construed so as to include those issues relating to ‘homeland security’, including its application to critical infrastructure.”<sup>63</sup> According to the Committee, “[n]ational security risk is a function of the interaction between threat and vulnerability, and the potential

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<sup>61</sup> See U.S. GOV'T ACCOUNTABILITY OFF., GAO-18-494, COMMITTEE ON FOREIGN INVESTMENT IN THE UNITED STATES: ACTION NEEDED TO ADDRESS EVOLVING NATIONAL SECURITY CONCERNS FACING THE DEPARTMENT OF DEFENSE 13 (2018) (“CFIUS has experienced an increase in workload in recent years, but Treasury, as CFIUS lead, has not coordinated member agency efforts to better understand staffing levels needed to complete core committee functions.”).

<sup>62</sup> See *The Committee on Foreign Investment in the United States (CFIUS)*, U.S. DEP'T OF THE TREASURY, <https://home.treasury.gov/policy-issues/international/the-committee-on-foreign-investment-in-the-united-states-cfius> (last visited Sept. 8, 2019).

<sup>63</sup> Foreign Investment and National Security Act of 2007, Pub. L. No. 110-49, 121 Stat. 246 (amending Section 721 of the Defense Production Act of 1950, 50 U.S.C. app. § 2170 (2006)); *Jackson CRS Report 2018*, *supra* note 36, at 15. The wording and timing of this change align with the legislation passed in response to the September 11, 2001 terrorist attacks. See Patriot Act of 2001, Pub. L. No. 107-56, Title X, § 1014, (2001); 42 U.S.C. § 5195(c)(e) (1994); Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2135 (2002) (6 U.S.C. § 101). Thus, determining the current list of included sectors remained the responsibility of the Department of Homeland Security (DHS). The DHS determined sectors as of 2007 are: (1) Agriculture and Food; (2) Defense Industrial Base; (3) Energy; (4) Public Health and Healthcare; (5) National Monuments and Icons; (6) Banking and Finance; (7) Drinking Water and Water Treatment Systems; (8) Chemical; (9) Commercial Facilities; (10) Dams; (11) Emergency Services; (12) Commercial Nuclear Reactors, Materials, and Waste; (13) Information Technology; (14) Telecommunications; (15) Postal and Shipping; (16) Transportation Systems; and (17) Government Facilities. See *Jackson CRS Report 2018*, *supra* note 36, at 16 n.42. The 2013 Presidential Policy Directive reconfirmed the responsibility of DHS and other agencies resulting in an updated list of sixteen sectors deemed critical to U.S. infrastructure. See Directive on Critical Infrastructure Security and Resilience, 2013, DAILY COMP. PRES. DOC. 201300092 (Feb. 12, 2013). The 2013 list added critical manufacturing, consolidated multiple prior categories into ‘communications,’ and eliminated the national monuments and icons sector. See *Jackson CRS Report 2018*, *supra* note 36, at 16.

consequences of that interaction for U.S. national security.”<sup>64</sup> A blatant example of a deal featuring this type of national security risk is the 2016 Chinese Fujian Grand Chip Investment Fund’s attempted acquisition of Aixtron, a German-based technology with assets in the United States.<sup>65</sup> President Obama blocked this deal because it involved semiconductors, partially produced in California, that were used in foreign missile defense systems.<sup>66</sup>

## ii. CFIUS Review Process

### *Retro-active Review, Pro-active Application, SEC Filings*

CFIUS may initiate a review of a covered transaction *sua ponte*.<sup>67</sup> SEC filings and press releases can draw the Committee’s unsolicited attention and lead to a review proceeding. Alternatively, either party to a covered transaction could initiate a CFIUS review by providing written notice to the Committee.<sup>68</sup> Under FINSA, parties never needed to file for CFIUS; they only strategically exercised the option to file for CFIUS review voluntarily.<sup>69</sup> If parties chose to file, they hoped to avoid the otherwise lingering risk that CFIUS would be able to retroactively investigate and undo the deal.<sup>70</sup> There has never been a statute of limitations imposed on CFIUS review; the Committee can investigate before the covered transaction is completed, while the covered transaction is pending, or

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<sup>64</sup> See U.S. Department of the Treasury, Letter to Parties Re: CFIUS Case 18-036: Broadcom Limited (Singapore)/Qualcomm Incorporated (Mar. 5, 2018), [https://www.sec.gov/Archives/edgar/data/804328/000110465918015036/a18-7296\\_7ex99d1.htm](https://www.sec.gov/Archives/edgar/data/804328/000110465918015036/a18-7296_7ex99d1.htm).

<sup>65</sup> See e.g., Maria Sheahan, *China’s Fujian Drops Aixtron Bid After Obama Blocks Deal*, REUTERS, (Dec. 8, 2016, 3:27AM), <https://www.reuters.com/article/us-aixtron-m-a-fujian/chinas-fujian-drops-aixtron-bid-after-obama-blocks-deal-idUSKBN13X16H>.

<sup>66</sup> *Id.* Nevertheless, the denied approval was censured as the “politicization” of commerce. *Id.*

<sup>67</sup> See Foreign Investment and National Security Act of 2007, Pub. L. No. 110-49, 121 Stat. 248; *Ralls Corp. v. Committee on Foreign Investment in the United States*, 758 F.3d 296, 302 (D.C. Cir. 2014).

<sup>68</sup> Foreign Investment and National Security Act of 2007, Pub. L. No. 110-49, 121 Stat. 247; 31 C.F.R. § 800.401(a) (2008).

<sup>69</sup> See 31 C.F.R. § 800.401(a) (2008) (“A party or parties to a proposed or completed transaction may file a voluntary notice of the transaction with the Committee.”).

<sup>70</sup> See e.g., Christopher Kimball & Kevin King, *Me&A Guide to CFIUS: How the Review Process Can Impact Your Transaction*, COOLEY (Oct. 10, 2017), <https://www.cooley.com/news/insight/2017/2017-10-06-ma-guide-to-cfius-article-1-of-4>.

retro-actively after the covered transaction closed.<sup>71</sup> Historically, parties could only obtain a legal “safe harbor” and estop CFIUS from potentially reversing the agreement if they chose to voluntarily apply for CFIUS review and ultimately received a determination that no national security risk remained unresolved.<sup>72</sup> At any stage of the transaction, the decision to apply for review by filing voluntary notice involves risk. For example, in one of five transactions blocked by the President, the Ralls Corp windfarm purchase, the parties strategically filed a delayed notice.<sup>73</sup> Here, CFIUS did not review the purchase until five months after the transaction concluded but still retroactively required the divestment of the acquired assets.<sup>74</sup>

### *Review Committee*

Under the FINSA regime, the review process lasted thirty days during which the Committee considered eleven factors to determine if and how the proposed or completed transaction affected national security.<sup>75</sup> If risks

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<sup>71</sup> See Foreign Investment and National Security Act of 2007, Pub. L. No. 110-49, 121 Stat. 248; Ralls Corp., 758 F.3d at 302.

<sup>72</sup> See Wakely & Indorf, *supra* note 43, at 8 (citing 50 U.S.C. § 4565(b)(1)(D)).

<sup>73</sup> See Younglai, *infra* note 84.

<sup>74</sup> See COMMITTEE ON FOREIGN INVESTMENT IN THE UNITED STATES, ANNUAL REPORT FOR THE CALENDAR YEAR 2012, 2 (2013); Sinead Carew & Jessica Wohl, *Huawei Backs Away from 3Leaf Acquisition*, REUTERS (Feb. 19, 2011, 11:04 AM), <https://www.reuters.com/article/us-huawei-3leaf/huawei-backs-away-from-3leaf-acquisition-idUSTRE71I38920110219>.

<sup>75</sup> The eleven factors are outlined as follows:

For purposes of this section, the President or the President’s designee may, taking into account the requirements of national security, consider—

- (1) domestic production needed for projected national defense requirements,
- (2) the capability and capacity of domestic industries to meet national defense requirements, including the availability of human resources, products, technology, materials, and other supplies and services, the control of domestic industries and commercial activity by foreign citizens as it affects the capability and capacity of the United States to meet the requirements of national security,
- (3) the potential effects of the proposed or pending transaction on sales of military goods, equipment, or technology to any country . . .
- (4) the potential effects of the proposed or pending

were not resolved after the thirty-day review period, then a forty-five day National Security Investigation followed.<sup>76</sup> At the commencement of the forty-five day formal investigation, the Committee sent a recommendation

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- transaction on United States international technological leadership in areas affecting United States national security;
- (5) the potential national security-related effects on United States critical infrastructure, including major energy assets;
  - (6) the potential national security-related effects on United States critical technologies;
  - (7) whether the covered transaction is a foreign government-controlled transaction, as determined under subsection (b)(1)(B);
  - (8) as appropriate, and particularly with respect to transactions requiring an investigation under subsection (b)(1)(B), a review of the current assessment of--
  - (9) the adherence of the subject country to nonproliferation control regimes, including treaties and multilateral supply guidelines, which shall draw on, but not be limited to, the annual report on “Adherence to and Compliance with Arms Control, Nonproliferation and Disarmament Agreements and Commitments” required by section 403 of the Arms Control and Disarmament Act [22 USCS § 2593a];
    - (A) the relationship of such country with the United States, specifically on its record on cooperating in counter-terrorism efforts, which shall draw on, but not be limited to, the report of the President to Congress under section 7120 of the Intelligence Reform and Terrorism Prevention Act of 2004 [unclassified]; and
    - (B) the potential for transshipment or diversion of technologies with military applications, including an analysis of national export control laws and regulations;
    - (C) the long-term projection of United States requirements for sources of energy and other critical resources and material; and
  - (10) such other factors as the President or the Committee may determine to be appropriate, generally or in connection with a specific review or investigation.

Foreign Investment and National Security Act of 2007, Pub. L. No. 110-49, 121 Stat. 253 (codified as amended at 50 U.S.C. § 4565(f) (2019)).

<sup>76</sup> See *Jackson CRS Report 2018*, *supra* note 36, at 11.

letter to the President relaying the Committee's approval, rejection, or suggested contingent mitigation measures.<sup>77</sup>

### *President Decision*

This structure gave the President fifteen days to make a final determination in the form of a Presidential Order.<sup>78</sup> FINSA added criteria for the President to take into consideration and ensured that the President “is under no obligation to follow the recommendation of the Committee to suspend or prohibit an investment.”<sup>79</sup> Nevertheless, before blocking a transaction, the President still needed to determine that (1) other laws did not sufficiently protect the country, and (2) that there existed “credible evidence” that if the transaction were to be executed, it would impair national security.<sup>80</sup> For example, if the deal would otherwise be blocked by the Department of Justice (DOJ) Antitrust Division and Federal Trade Commission (FTC) due to antitrust concerns, then there is no reason CFIUS must intervene and the first requirement would not be met. The second requirement of credible evidence that national security would suffer is more subjective. An example of a deal that may not meet this criteria is the foreign sale of a company like Coca-Cola or Levi's; though loved American brands, their foreign ownership would not likely create realistically foreseeable threats to matters of national security.

### iii. Judicial Challenge

Since its establishment, CFIUS' intentional opacity has created controversy.<sup>81</sup> FINSA furnished Congress with confidential briefings on covered transactions and unclassified reports were released by the Committee, but this did not increase transparency to the parties involved

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<sup>77</sup> *Id.*

<sup>78</sup> *Id.*

<sup>79</sup> *Id.* at 13.

<sup>80</sup> *Id.* at 5.

<sup>81</sup> See *Jackson CRS Report 2018*, *supra* note 36, at 1 (“Originally established by an Executive Order of President Ford in 1975, the committee has operated until recently in relative obscurity.”).

or the general public.<sup>82</sup> The resulting discretion granted to the President is “not be subject to judicial review.”<sup>83</sup>

This limited transparency led to the only CFIUS court case to date: Ralls Corporation brought suit constitutionally challenging President Obama’s 2012 mandate that it divest an Oregon Windfarm Project for alleged national security threats.<sup>84</sup> Though incorporated in Delaware, Ralls Corporation’s owners were Chinese nationals, and thus their purchase of four American LLCs with windfarm location in and around restricted Navy airspace fell “within the ambit of the DPA.”<sup>85</sup> Ralls disputed the constitutionality of the CFIUS orders on Fifth Amendment grounds claiming a right to review and rebut evidence considered.<sup>86</sup> The court determined that FIRRMA afforded no lack of reviewability to the CFIUS Committee decision<sup>87</sup> and that the Presidential Order deprived Ralls of its property interest while violating the due process clause.<sup>88</sup>

Though the court clarified that “due process does not require disclosure of *classified* information supporting official action,” the court

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<sup>82</sup> *Id.* at 10, 20.

<sup>83</sup> *See* Foreign Investment and National Security Act of 2007, Pub. L. No. 110-49, 121 Stat. 256; *Jackson CRS Report 2018*, *supra* note 36, at 14.

<sup>84</sup> *See* Rachel Younglai, *Obama Blocks Chinese Wind Farms in Oregon Over Security*, REUTERS (Sept. 28, 2012), <https://www.reuters.com/article/us-usa-china-turbines/obama-blocks-chinese-wind-farms-in-oregon-over-security-idUSBRE88R19220120929>. Ralls submitted a twenty-five-page notice of the transaction to CFIUS prompting a formal thirty-day review that resulted in an Order Establishing Interim Mitigation Measures. The CFIUS Order (with its amendments implemented three days into the Investigation Period) mandates Ralls remove all items from the disputed site, cease all construction, operation, and access on the site, and refrain from selling the site without prior CFIUS notice and approval. The President timely released an Order on the matter prohibiting the transaction and restricting Ralls future transactions involving the site. *See* *Ralls Corp. v. Committee on Foreign Investment in the United States*, 758 F.3d 296, 305-06 (D.C. Cir. 2014).

<sup>85</sup> *See Ralls Corp.*, 758 F.3d at 301. Even after Ralls moved the Lower Ridge cite to reduce conflict with low-level aircraft exercises at the Navy’s request, one of the target LLC’s project sites remained in and around a U.S. Navy restricted airspace and bombing zone. *Id.* at 304–05.

<sup>86</sup> *Id.* at 302.

<sup>87</sup> *Id.* at 311. The court determined that Ralls had acquired a property interest under state law that did not contain a contingency element as to Presidential Veto. *Id.* at 316–17.

<sup>88</sup> Citing the Supreme Court’s recognition of the “right to know the factual basis for the action and the opportunity to rebut the evidence supporting that action,” the court ruled in favor of Ralls Corp., although this favorable verdict ultimately had no effect on the outcome of the transaction. *Id.* at 318–19.

found that the President, or CFIUS acting on his behalf, had the duty to make the unclassified materials used in his determination available to Ralls and to provide Ralls the opportunity to dispute these materials as a matter of due process right.<sup>89</sup> The holding did not require the administration to disclose its reasoning for the determination. Nevertheless, this ruling is highly criticized because the administration's opinion on delicate foreign policy issues can be revealed by the choice of documents left unclassified and therefore able to be disclosed to parties.<sup>90</sup> Scholars point out that in practice, this ruling is unlikely to expand transparency because there are no legal requirements to limit which documents the government files as classified.<sup>91</sup> *Ralls Corp* is unlikely to help future parties like Ralls because beyond the disclosure of un-classified documents, which may become increasingly limited in number, there is no judicial review of CFIUS decisions on merits.<sup>92</sup>

#### D. 2018 FIRRMA Legislation

In 2018, CFIUS endured its latest legislative overhaul. FIRRMA tightened the oversight of FDI, a subtle but significant shift from the long-proclaimed Open Investment policy. This section outlines the climate surrounding the push for CFIUS reform, the reasons FIRRMA passed, and the key changes the bill makes to the CFIUS regime. In Part II, these changes are critiqued in light of the specific issues they seek to resolve. FIRRMA is the embodiment of frustrations felt by the inbound and

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<sup>89</sup> Importantly, this opinion clarified that the President is under no obligation to disclose his rationale on sensitive questions about the transaction related to national security. *Id.* at 319–20.

<sup>90</sup> See Christopher M. Fitzpatrick, Note, *Where Ralls Went Wrong: CFIUS, The Courts, and the Balance of Liberty and Security*, 101 CORNELL L. REV. 1087, 1104 (2016). Ultimately, the CFIUS unprecedentedly released 3,487 pages of unclassified documents and withheld only two documents on the basis of executive privilege, and the decision by the Obama administration to not fight the ruling's legitimacy by appeal is often criticized. See Karlee Weinmann, *In Rare Move, CFIUS Hands Over Cache of Ralls Docs*, LAW360 (Nov. 26, 2014), <https://www-law360-com.sandiego.idm.oclc.org/articles/599760/in-rare-move-cfius-hands-over-cache-of-ralls-docs>.

<sup>91</sup> See Chang Liu, Note, *Ralls v. CFIUS: The Long Time Coming Judicial Protection of Foreign Investors' Constitutional Rights Against Government's National Security Review*, 15 J. INT'L BUS. & L. 361, 375 (2016).

<sup>92</sup> *Id.* (“[I]f Ralls is given another chance to answer or persuade the President or the Committee (which is unlikely), the White House and its officers still have the say at the end of the day, and Ralls may very well have to bear the loss of its business decisions.”).

outbound trade and investment relationship with China,<sup>93</sup> the military's dependence on private sector developed critical technology, and the increase in global citizenship ideology among Americans.<sup>94</sup> The trade deficit in China has crept to -\$350 billion annually and Chinese venture capital funds run rampant in Silicon Valley investing in critical technology.<sup>95</sup> For example, Danhua Venture Capital (DHVC) is a Chinese venture-capital firm based near Stanford University that the Chinese government established and now funds.<sup>96</sup> These contributions are not minute or rare. The Defense Innovation Unit Experimental (DIUx) estimates that Chinese investors injected up to \$4 billion into early-stage venture deals in 2015.<sup>97</sup> In 2016, legislators started advocating for various plans that would have strengthened the secretive CFIUS by allowing it to scrutinize the surging inflow of investment from China.<sup>98</sup> By 2018,

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<sup>93</sup> Early stages of FIRRMA favored including a "blacklist" of countries that would receive heightened scrutiny like China and Russia. See Jeff Farrah, *Foreign Investment Bill and its Impact on the VC and Startup Ecosystem*, NATIONAL VENTURE CAPITAL ASSOCIATION BLOG (July 25, 2018), <https://nvca.org/blog/foreign-investment-bill-impact-vc-startup-ecosystem/>. Ultimately, with the prevalence of secondary transactions and continued shifting of the political scene this strategy was abandoned in the final version of FIRRMA.

<sup>94</sup> *The Lawfare Podcast: The Future of CFIUS*, LAWFARE (June 2, 2018), <https://www.lawfareblog.com/lawfare-podcast-future-cfius> (episode 317, min. 4, comment by Ivan Schlager, a partner with Skadden Arps' national security practice); Yuliya Strizhakova et al., *Branded Products as a Passport to Global Citizenship: Perspectives from Developed and Developing Countries*, 16 J. OF INT'L MKTG. 57, 57 (2008).

<sup>95</sup> See United States Census Bureau, *Foreign Trade: Trade in Goods with China*, U.S. DEPT. OF COMMERCE, <https://www.census.gov/foreign-trade/balance/c5700.html#2016>; Heather Somerville, *China's Penetration of Silicon Valley Creates Risks for Startups*, REUTERS (June 28, 2018, 7:25 PM), <https://www.reuters.com/article/us-usa-china-techinvesting-insight/chinas-penetration-of-silicon-valley-creates-risks-for-startups-idUSKBN1JP08V>.

<sup>96</sup> Somerville, *supra* note 95.

<sup>97</sup> Michael Brown & Pavneet Singh, *Defense Innovation Unit Experimental: China's Technology Transfer Strategy: How Chinese Investments in Emerging Technology Enable a Strategic Competitor to Access the Crown Jewels of U.S. Innovation*, REORG (2017), <https://new.reorg-research.com/data/documents/20170928/59ccf7de70c2f.pdf> ("Sinovation (formerly known as China's Innovation Works) provides a great example of an active Chinese venture firm investing in the U.S.: it was founded in 2009, manages three funds of \$1.2 billion in total capital and has invested in almost 300 startups--including 25 in artificial intelligence.").

<sup>98</sup> See Kate O'Keefe, *Lawmakers Push for Tighter Scrutiny of Chinese Investment in U.S.*, WALL ST. J. (Feb. 21, 2017), <https://www.wsj.com/articles/lawmakers-push-for-tighter-scrutiny-of-chinese-investment-in-u-s-1487678403>. The Foreign Investment and Economic Security Act (FIESA) was introduced by Representative DeLauro on July 7, 2016. The bill proposed the expansion of CFIUS jurisdiction and the additional consideration of the economic "net benefit" by CFIUS, but the bill never bolstered

pressure from the Trump administration over Chinese and other foreign investments exposed the limits of CFIUS scope under FINSA and propelled legislators to move CFIUS reform forward by placing FIRRMA in the “must pass” National Defense Authorization Act.<sup>99</sup> The next era of CFIUS legislation received the President’s signature on August 13, 2018.<sup>100</sup>

### i. The Roots of FIRRMA

Unlike FINSA, FIRRMA did not arise out of a particular crisis. Rather, it surfaced gradually from a growing sense of foreign policy frustration and highly public transactions that highlighted CFIUS’ concerns. The initial worries over suspect OPEC investment have been replaced by skepticism over Chinese and Russian “economic espionage” as politically motivated

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sufficient support. *See* H.R. 5665, 114th Cong. (2nd Sess. 2016). By October 18, 2017, a bill was introduced to the Senate by Senators Grassley and Brown in the United States Foreign Investment Review Act (UFIR) that proposed a solution to long-term economic impact concern by adding an independent process to supplement the existing CFIUS regulation. *See* S. 1983, 115th Cong. § 1002 (2017). Shortly after, on November 8, 2017, Senators Cornyn and Pittenger introduced the Foreign Investment Risk Review Modernization Act of 2018 (FIRRMA) touting its “laser-focus[] on national security.” *See* Letter from William Perry, Former U.S. Department of Defense Secretary, to Senators Cornyn and Feinstein Dec. 17, 2017) <https://www.cornyn.senate.gov/sites/default/files/Sec.%20Bill%20Perry%20letter%20FIRRMA.pdf>.

<sup>99</sup> The bill that housed the CFIUS reform legislation, the John S. McCain National Defense Authorization Act for Fiscal Year 2019, passed with bipartisan support in both the House and Senate. This does not mean, however, that an overwhelming number of legislators view FIRRMA itself, and each change implemented, as beneficial. Advocates of the bill strategically attached the Defense Authorization Act because this act is a “must-pass” by both parties due to its military funding implications; therefore, it cannot be inferred that Congress views this legislation as optimal in its entirety. *See* Patricia Zengerle & Mike Stone, *Senate Passes Defense Bill, Battle Looms With Trump Over China’s ZTE*, REUTERS (June 18, 2018, 3:38 PM), <https://www.reuters.com/article/us-usa-defense-spending/senate-passes-defense-bill-battle-looms-with-trump-over-chinas-zte-idUSKB N1JE2XA>. *See generally* Michael S. Schmidt & Eric Schmitt, *A Russian GPS Using U.S. Soil Stirs Spy Fears: Proposal for Antennas Ignites Resistance*, N.Y. TIMES, Nov. 17, 2013, at A14; Jackson CRS Report 2018, *supra* note 36, at 63 (discussing various foreign investment transactions that raised concerns over the CFIUS’s review process).

<sup>100</sup> *See* Remarks on Signing the John S. McCain National Defense Authorization Act for Fiscal Year 2019 at Fort Drum, New York, 2018 DAILY COMP PRES. DOC. 201800532. (Aug. 13, 2018).

investment and trade secret theft in the United States continues to grow.<sup>101</sup> Vulnerability to such exploitations is no secret; the counter-intelligence efforts often thought to have died with the Cold War have simply reemerged on the new battleground of the global marketplace.<sup>102</sup> Previous generations of Americans felt threatened by Russian spies and feared foreign invasions, but today, fear derives from foreign data breaches and economic dependence. In particular, Congressional Reports address both the rise of foreign investment by Chinese state-owned enterprises (SOEs) and the fear that SOEs invest to meet strategic political objectives rather than passive economic gains.<sup>103</sup>

The number of transactions terminated through CFIUS significantly increased under the Obama and Trump administrations. From 2011 to

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<sup>101</sup> See 18 U.S.C. § 1831(2012) (defining “economic espionage”); Fitzpatrick, *supra* note 90, at 1091. The contention that CFIUS is being used as an economic protector more than a national security watchdog loses traction in light of the CFIUS Committee’s approval of the “Chinese-led consortium” Chongqing Casin Enterprise Group’s acquisition of the Chicago Stock Exchange (CHX) in December 2016 despite members of Congress expressing their worry over possible Chinese influence on the U.S. equity market. See Jackson CRS Report 2018, *supra* note 36, at 48; Alexander Osipovich, *Chicago Stock Exchange Ends Proposed Sale to Chinese Investors*, WALL ST. J. (Mar. 5, 2018), <https://www.wsj.com/articles/chicago-stock-exchange-ends-proposed-sale-to-chinese-investors-1520281716>. Likewise, CFIUS has not yet blacklisted any particular industry; even semiconductor firm acquisitions which historically have faced heavy national security concerns have received approval at times. See Notice, 73 Fed. Reg. 74570 (Dec. 8, 2008) (“[C]FIUS does not focus on any one U.S. business sector or group of sectors.”); Hayley Ringle, *Why ON Semiconductor’s \$2.4B Fairchild Acquisition Took Nearly a Year to Close*, PHOENIX BUS. J. (Sep 20, 2016, 11:42 AM), <https://www.bizjournals.com/phoenix/news/2016/09/19/why-on-semiconductors-2-6-fairchild-acquisition.html>.

<sup>102</sup> See Souvik Saha, *CFIUS Now Made in China: Dueling National Security Review Frameworks as a Countermeasure to Economic Espionage in the Age of Globalization*, 33 N.W. J. INT’L L. & BUS. 199, 200 (2012) (“[T]he United States’ vulnerability to espionage—military or economic—is hardly a secret . . . . Those operating on the frontlines of American counter-intelligence efforts echo the sentiment: ‘The Cold War is not over, it has merely moved into a new arena: the global marketplace.’” (quoting Investigation Programs Counterintelligence Division, *Focus on Economic Espionage*, FED. BUREAU OF INVESTIGATION, <https://www2.fbi.gov/hq/ci/economic.htm> (last visited Feb. 19, 2019))).

<sup>103</sup> Jackson CRS Report 2017, *supra* note 36, at 28 (“According to the Organization for Economic Co-operation and Development (OECD) ‘an estimated 22% of the world’s largest 100 firms are now effectively under state control, the highest percentage in decades.’” (citing ORG. FOR ECON. COOPERATION AND DEV., STATE-OWNED ENTERPRISES AS GLOBAL COMPETITORS: A CHALLENGE OR AN OPPORTUNITY? 13 (2016))).

2016, the number of transactions reviewed by CFIUS increased by 55%.<sup>104</sup> Historically, presidents used CFIUS to block five transactions: (1) China National Aero-Technology Import and Export Corporation acquisition of MAMCO Manufacturing (1990); (2) Ralls Corporation completed acquisition of an Oregon wind farm project (2012); (3) Chinese firm Fujian Grand Chip Investment Fund attempted acquisition of Aixtron, a German-based semiconductor company that held U.S. assets (2016); (4) Chinese investment firm, Canyon Bridge Capital Partners' attempted \$1.3 billion acquisition of Lattice Semiconductor Corporation; (5) Broadcom's attempted \$117 billion takeover of Qualcomm (2018).<sup>105</sup> The magnitude of CFIUS influence must not be diminished by the deceptively small number of blocked deals. Though unascertainable, a significant number of deals are not formally blocked but are, nevertheless, informally derailed by CFIUS.<sup>106</sup> For those deals that last through the initial investigation stage, nearly half are terminated by the parties in a conscious choice to avoid a negative CFIUS determination.<sup>107</sup> Note that four of the five blocked deals occurred under President Obama and President Trump.<sup>108</sup> The reason for

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<sup>104</sup> John S. McCain National Defense Authorization Act for Fiscal Year 2019 § 1702(a)(4) (2019).

<sup>105</sup> See JAMES K. JACKSON, CONG. RES. SERV., RL33388, THE COMMITTEE ON FOREIGN INVESTMENT IN THE UNITED STATES (*CFIUS*) (2019) [hereinafter Jackson CRS Report 2019].

<sup>106</sup> See 50 U.S.C. app. § 2170(d)(2) (2007). Since 2007, CFIUS activity increased exponentially under FINSA; between 2008-2015 CFIUS investigated 333 of the 925 transactions that provided notices to the Committee. See CFIUS ANN. REP. TO CONGRESS (2015). Sixty-two of these planned transactions were withdrawn; among them was the divestment of an already complete \$2 million asset purchase from a U.S. server technology company by Chinese Huawei while the companies awaited a decision from the President. *Id.*; Carew & Wohl, *supra* 67. The first blocked transaction came in 1990 when President Bush ordered the divestment of China's Aero-Technology Import and Export Corporation acquisition of MAMCO Manufacturing. JAMES K. JACKSON, CONG. RESEARCH SERV., RL33312, THE EXON-FLORIO NATIONAL SECURITY TEST FOR FOREIGN INVESTMENT 21 (2013). Nearly half of the transactions CFIUS investigated since 1990 CFIUS have been terminated by the parties. *Jackson CRS Report 2017, supra* note 36, at 41 (referencing the Israeli firm Check Point Software Technologies' decision to terminate negotiations to purchase American firm Sourcefire for \$225 million).

<sup>107</sup> *Jackson CRS Report 2017, supra* note 36, at 41.

<sup>108</sup> *Jackson CRS Report 2019 supra* note 105, at 18. Meanwhile, the tendency for firms to self-terminate their transactions as a result of a CFIUS Committee recommendation has continued. See, e.g., Ana Swanson & Paul Mozur, *MoneyGram and Ant Financial Call Off Merger, Citing Regulatory Concerns*, N.Y. TIMES (Jan. 2, 2018), <https://www.nytimes.com/2018/01/02/business/moneygram-ant-financial-china-cfius.html>. On September 13,

this increasing trend for CFIUS intervention is necessary in the new global marketplace given the grave threat posed by the transfer of American owned intellectual property and growing concerns over cyber security.<sup>109</sup> In the last decade, Chinese investment in U.S. technology firms shifted from primarily joint ventures or acquisitions to “greenfield” investments in venture-backed startups aimed to acquire cutting-edge technology at the early stages of development.<sup>110</sup>

Current political action by the Trump Administration, like the push for allies to prevent China’s Huawei from building Europe’s 5G network, demonstrate the urgency and importance of winning the arms race for technology.<sup>111</sup> The collapse of the Qualcomm-Broadcom hostile takeover signaled a shift in the Committee’s concerns that previous legislation never addressed CFIUS’ active involvement in this arms race. This is the only transaction CFIUS blocked before any deal had been agreed to by the parties.<sup>112</sup> Additionally, national security concerns presented as a possible rationale for the Presidential Order blocking the deal included references to the hypothetical decrease in research and development funding. The

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2017, the President issued an Executive Order prohibiting the acquisition of Lattice Semiconductor by Canyon Bridge Capital Partners. *See* Order of Sept. 13, 2017, 82 Fed. Reg. 43665 (Sept. 13, 2017). This outcome can be attributed to both the nature of the intellectual property involved in the deal and the corporate structure of Canyon Bridge which is “a private equity fund backed by China Venture Capital Fund Corp. Ltd.; a Chinese corporation owned by Chinese state-owned entities.” William McConnell, *Trump Blocks Lattice Semiconductor Deal*, THE STREET (Sept. 13, 2017, 4:52 PM), <https://www.thestreet.com/story/14304802/1/trump-blocks-lattice-semiconductor-deal.html>.

<sup>109</sup> *See* Donald J. Trump (@realDonaldTrump), TWITTER (Mar. 7, 2018, 7:38 AM), <https://twitter.com/realdonaldtrump/status/971409845453762560?lang=en> (reacting to the theft of intellectual property); Donald J. Trump (@realDonaldTrump), TWITTER (July 24, 2018, 4:09 AM), <https://twitter.com/realdonaldtrump/status/1021713905020817413> (referencing unfavorable trade positions); Donald J. Trump (@realDonaldTrump), TWITTER (May 11, 2017, 12:34 PM), <https://twitter.com/realdonaldtrump/status/862752672683839488> (noting strengthening of cyber security).

<sup>110</sup> *See* BROWN & SINGH, *supra* note 97, at 9.

<sup>111</sup> *See* David Sanger et al., *In 5G Race With China, U.S. Pushes Allies to Fight Huawei*, N.Y. TIMES (Jan. 26, 2019), <https://www.nytimes.com/2019/01/26/us/politics/huawei-china-us-5g-technology.html> (“The administration contends that the world is engaged in a new arms race — one that involves technology, rather than conventional weaponry, but poses just as much danger to America’s national security.”).

<sup>112</sup> *See* Micheal Leiter et al., *Broadcom’s Blocked Acquisition of Qualcomm*, HARV. L. SCH. F. ON CORP. GOVERNANCE & FIN. REG. (Apr. 3, 2018), <https://corpgov.law.harvard.edu/2018/4/03/broadcoms-blocked-acquisition-of-qualcomm/>.

diminishment of funds dedicated to leading 5G technology would have allowed China to take a leadership role in that sector of the tech industry.<sup>113</sup>

## ii. Changes to CFIUS

As discussed in greater detail in Part II, FIRRMA made changes to CFIUS in three distinct areas: procedural structure, jurisdictional scope, and judicial forum for parties seeking a remedy. The new law expands CFIUS influence by increasing the scope of sectors subject to review, changes the CFIUS review structure and its timing, and provides a designated forum for judicial actions brought by parties.<sup>114</sup> The newly enacted review process could impact nearly all contemplated mergers, acquisitions, and joint ventures involving any foreign entity.<sup>115</sup> Under the old regime, a transaction's coverage turned on whether or not a foreign entity gained "control." Under the new statute, this bar has been lowered to whether or not a foreign entity will acquire influence over decisions.<sup>116</sup>

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<sup>113</sup> See Letter from Dep't of the Treasury to Mark Plotkin & Theodore Kassinger (Mar. 5, 2018) (on file with the SEC at [https://www.sec.gov/Archives/edgar/data/804328/000110465918015036/a18-7296\\_7ex99d1.htm](https://www.sec.gov/Archives/edgar/data/804328/000110465918015036/a18-7296_7ex99d1.htm)); Sanger et al., *supra* note 111 ("In an age when the most powerful weapons, short of nuclear arms, are cyber-controlled, whichever country dominates 5G will gain an economic, intelligence and military edge for much of this century.").

<sup>114</sup> The differences in the two versions of FIRRMA ultimately were reconciled in both the House of Representatives and the Senate under the National Defense Authorization Act for 2019, sent to the President, and signed into law. Differences between the House and Senate versions of FIRRMA are outlined in multiple sources (mostly practitioner releases for clients). See Fischer & Rabinowitz, *Differing CFIUS Reform Bills Move Through U.S. House and Senate*, PILLSBURY: GLOBAL TRADE & SANCTIONS L. BLOG (June 26, 2018), <https://www.globaltradeandsanctionslaw.com/defense-bill-senate-cfius-reform-legislation/>; *The Committee on Foreign Investment in the United States (CFIUS): Summary of FIRRMA's Key Provisions*, U.S. DEP'T TREASURY, <https://www.treasury.gov/resource-center/international/Documents/Summary-of-FIRRMA.pdf> (last visited March 12, 2019). See generally John S. McCain National Defense Authorization Act for Fiscal Year 2019.

<sup>115</sup> See David Levine et al., *New CFIUS Rules May Impact All Foreign Investment in the United States*, MCDERMOTT, WILL & EMERY (Oct. 16, 2018), <https://www.mwe.com/insights/cfius-rules-impact-foreign-investment-us/>; Saleha Mohsin, *U.S. Treasury Rules Strengthen Oversight of Foreign Investors*, INS. J. NEWS (Oct. 11, 2018), <https://www.insurancejournal.com/news/national/2018/10/11/504077.htm>.

<sup>116</sup> John S. McCain National Defense Authorization Act for Fiscal Year 2019 § 1703(a)(3) (2019); see also *infra* Part II(A)(i).

Additionally, “transaction” under FIRRMA now includes joint ventures.<sup>117</sup> FIRRMA jurisdiction now includes real estate transactions but fails to cover non-property related “greenfield” investments.<sup>118</sup> New businesses often exist without real estate assets and thus, this type of new investment remains outside the scope of review.<sup>119</sup> CFIUS now has authority over transactions between foreign parties and U.S. companies with access to sensitive personal data of U.S. citizens. FIRRMA expands CFIUS covered transactions to include all “critical technologies,” a category which is currently vague but will likely be determined in practice by the Department of Defense (DOD).<sup>120</sup> Moreover, FIRRMA implements procedural changes by: adding an additional, sometimes *mandatory*, step to the review process; implementing filing fees; extending the number of days for several stages of review;<sup>121</sup> and permitting the Committee to suspend a transaction on its own.<sup>122</sup> Lastly, while the rationale of the Committee and President will remain undisclosed, FIRRMA outlines that civil actions may be brought in the United States Court of Appeals for the District of

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<sup>117</sup> John S. McCain National Defense Authorization Act for Fiscal Year 2019 § 1703(a)(4)(B)(i) (2019).

<sup>118</sup> John S. McCain National Defense Authorization Act for Fiscal Year 2019 § 1703(a)(4)(B)(ii) (2019). A traditional “greenfield” investment was the purchase of open land, which is now a covered transaction through the real estate expansion; however, the meaning “greenfield” now encompasses the establishment of any new domestic entity; see MICHAEL RAMSEY ET AL., PRINCIPLES OF INTERNATIONAL BUSINESS TRANSACTIONS 747 (4th ed. 2017).

<sup>119</sup> See generally, Yung-Ming Cheng, *Determinants of FDI Mode Choice: Acquisition, Brownfield, and Greenfield*, 23 CAN. J. OF ADMIN. SCIS. 202 (2006) (expanding with a full discussion on FDI mode choice between acquisition, brownfield, and greenfield).

<sup>120</sup> See *The Lawfare Podcast: The Future of CFIUS*, LAWFARE (June 2, 2018), <https://www.lawfareblog.com/lawfare-podcast-future-cfius>.

<sup>121</sup> See Michael Gershberg & Justin Schenck, *The CFIUS Reform Bill*, HARV. L. SCH. F. ON CORP. GOVERNANCE & FIN. REG. (Aug. 26, 2018), <https://corpgov.law.harvard.edu/2018/08/26/the-cfius-reform-bill/> (“FIRRMA grants CFIUS itself the authority to suspend a proposed or pending covered transaction . . . as long as the covered transaction is under review . . . [and] refer a transaction to the President . . . at any time during the review . . .”).

<sup>122</sup> Foreign Investment Risk Review Modernization Act of 2018, as part of the John S. McCain National Defense Authorization Act for Fiscal Year 2019, Pub. L. No. 115-232, 132 Stat. 2193 (to be codified as amended at 50 U.S.C. § 4565).

Columbia Circuit where some evidence will only be available to judges, not the parties.<sup>123</sup>

### E. Key Takeaways

To summarize, the interagency body called CFIUS reviews transactions involving FDI to assess the impact on the U.S. economy and national security.<sup>124</sup> After an investigation, the Committee gives a recommendation to the President who then decides whether to approve, block, or impose restricting conditions on the transaction.<sup>125</sup> Functionally, the impacted parties do not have the ability to appeal the ultimate determination because they do not have a right to have the reasoning by the President disclosed. The new FIRRMA legislation greatly expanded the number of reviewed transactions by increasing the scope of CFIUS jurisdiction to include transactions resulting in foreign access to sensitive personal data of U.S. citizens, “critical technologies,” and real estate. FIRRMA does not eliminate the threat of foreign entities, including SOEs, funding startup companies in the United States. Lastly, FIRRMA increases the burden on parties by allowing CFIUS to require mandatory declarations, impose filing fees, and provide delayed responses from the Committee.

Moving forward, this foundation will be critical in analyzing the interdependent aspects of the new CFIUS regime. Part II will build on this base to discuss how the CFIUS jurisdiction expansion will have an economic impact on the amount of inbound FDI. Additionally, Part II uses this foundation to address why security issues surrounding start-ups funded by foreign investors are not resolved by FIRRMA. Lastly, the background will aid discussion about FIRRMA’s effect on judicial review, transparency, and potential constitutional issues under the new mandatory filings.

## II. Analysis

Although FIRRMA’s bolstering of CFIUS power is a necessary shift, these changes fall short of achieving their goal. FIRRMA does not

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<sup>123</sup> See generally Jill Priluck, *The Mysterious Agency That Can Block a Global Merger*, REUTERS (July 8, 2013), <https://www.reuters.com/article/idUS37319485520130708> (illustrating the ambiguity of CFIUS violations).

<sup>124</sup> See generally *Jackson CRS Report 2019*, *supra* note 105 (explaining the role of CFIUS).

<sup>125</sup> *Id.*

effectively mitigate the national security threat of foreign control over the same sources of cutting edge intellectual property on which the U.S. military depends. FIRRMA's overly broad restrictions on investment come at the cost of lost capital injected into the U.S. economy, which contributes to necessary economic growth and employment.<sup>126</sup> This increased breadth, combined with FIRRMA's inefficient structure, may actually intensify national security concerns under FIRRMA; CFIUS' ability to accommodate the influx of reviews rests on the Treasury Department's ability to coordinate amplified operations among all Committee member agencies. Furthermore, a deceleration of American innovation caused by any underfunding of private sector research and development may harm national defense operations.

Ultimately, from an economic standpoint, FIRRMA is likely to cause unnecessary inefficiencies that will probably over-deter advantageous FDI and thus prove detrimental to economic prosperity. Regarding national security, FIRRMA fails to close loopholes in the regulatory procedures that are necessary to resolve the threat of unregulated foreign investment.<sup>127</sup> To prove these arguments, this section will analyze the most influential changes FIRRMA made to CFIUS. Each of these changes will be critiqued on two bases:

Whether it is likely to achieve the intended goal of further preserving national security, and (2) Whether it does so efficiently so as to preserve the interests of commerce. First, this section addresses how FIRRMA adjusts the scope of CFIUS jurisdiction and critiques the ability of CFIUS to accommodate these changes without compromising its ability to serve as an adequate gatekeeper. Second, the discussion analyzes the effect of adjustments to the application and review procedure. Third, this section examines resurfacing Fifth Amendment issues argued in *Ralls Corp* in light of the now mandatory application requirement.

### A. Increased Scope of CFIUS Jurisdiction

FIRRMA expands the scope of CFIUS in five key ways. First, the criteria triggering FDI is shifted from enabling foreign "control" of the business to allowing foreign "influence" over business activities, and accordingly, joint ventures are now a covered transaction form. Second, the legislation adds foreign access to sensitive personal data of U.S. citizens

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<sup>126</sup> See Wakely & Indorf, *supra* note 43, at 28.

<sup>127</sup> See *infra* Part II(A)(iv)(2), III(A)(i).

as a triggering element for CFIUS review. Third, the undefined sector of “critical technologies” is added to the existing sector of critical infrastructure as an area of the economy in which foreign involvement would pose risks to national security. Fourth, real estate transactions of both developed and undeveloped land involving foreign entities now fall under CFIUS jurisdiction. Lastly, FIRRMA provides a potential carve-out for some financial institutions with foreign limited partners benefiting from passive investments in the United States.

#### i. Change from Control to Influence

In the past, CFIUS interpreted “control” very broadly.<sup>128</sup> FIRRMA recalibrates this benchmark to the lower standard of “influence.”<sup>129</sup> FIRRMA states that CFIUS covers any direct or indirect investment in a U.S. business that gives a foreign person access to “any material nonpublic technical information,” access to the board of directors, or access to decision-making beyond basic shareholder voting rights that could *influence* company involvement in sensitive personal data; critical technologies; or critical infrastructure.<sup>130</sup> This provision “is designed to capture small investments that might not otherwise fall within CFIUS jurisdiction because they lack the previously-required threshold of ‘control.’”<sup>131</sup> It is reasonable to predict that this term too will be construed to include the smallest interests feasible.<sup>132</sup>

Additionally, transactions involving foreign entities are covered if a foreign government possesses a substantial interest in a U.S. company either directly or indirectly.<sup>133</sup> The code’s instructions to the Committee

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<sup>128</sup> See Kirkland & Ellis LLP, *President Obama Heeds CFIUS and Blocks Chinese Takeover of German Semiconductor Company*, KIRKLAND ALERT (Dec. 6, 2016), [https://www.kirkland.com/siteFiles/Publications/President\\_Obama\\_Heeds\\_CFIUS\\_and\\_Blocks\\_Chinese\\_Takeover\\_of\\_German\\_Semiconductor\\_Company.pdf](https://www.kirkland.com/siteFiles/Publications/President_Obama_Heeds_CFIUS_and_Blocks_Chinese_Takeover_of_German_Semiconductor_Company.pdf) (“[I]n practice, CFIUS in-terprets ‘control’ very broadly.”).

<sup>129</sup> See John S. McCain National Defense Authorization Act for Fiscal Year 2019.

<sup>130</sup> See John S. McCain National Defense Authorization Act for Fiscal Year 2019, Nonpublic information includes trade secrets relevant to critical technologies and infrastructure. See John S. McCain National Defense Authorization Act for Fiscal Year 2019.

<sup>131</sup> See William M. Hannay, *Congress Enacts New Law to Control Foreign Investments in the U.S.*, NAT’L L. REV. (Aug. 13, 2018), <https://www.natlawreview.com/article/congress-enacts-new-law-to-control-foreign-investments-us>.

<sup>132</sup> See Wakely & Indorf, *supra* note 43, at 8.

<sup>133</sup> See John S. McCain National Defense Authorization Act for Fiscal Year 2019.

indicate that the definition of “substantial interest” includes a situation where the government retains “influence on the actions of a foreign person.”<sup>134</sup> This is significant because any corporation doing business in an authoritarian country, like China, could potentially meet this expanded criteria. The Chinese government is notorious for controlling its private sector enterprises and establishing government owned businesses, including financial firms like venture capital funds.<sup>135</sup> Specifically, China’s 2017 National Intelligence Law requires the support and cooperation of Chinese organizations and citizens in the government’s intelligence operations.<sup>136</sup>

In alliance with concerns over foreign “influence,” FIRRMA expands CFIUS to cover an additional type of transaction.<sup>137</sup> CFIUS now covers joint ventures despite heavy protest by large American technology firms.<sup>138</sup>

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<sup>134</sup> John S. McCain National Defense Authorization Act for Fiscal Year 2019.

<sup>135</sup> See e.g., Schumpeter, *China’s Private Sector Faces an Advance By the State*, *ECONOMIST* (Dec. 8, 2018), <https://www.economist.com/business/2018/12/08/chinas-private-sector-faces-an-advance-by-the-state>.

<sup>136</sup> See Guojia Qingbao Fa (国家情报法) [Law on National Intelligence] (promulgated by the Standing Comm. Nat’l People’s Cong., June 27, 2017, effective June 28, 2017) 2017 STANDING COMM. NAT’L PEOPLE’S CONG. GAZ. 28 (China) [http://www.npc.gov.cn/npc/xinwen/2017-06/27/content\\_2024529.htm](http://www.npc.gov.cn/npc/xinwen/2017-06/27/content_2024529.htm); Murray Scot Tanner, *Beijing’s New National Intelligence Law: From Defense to Offense*, *LAWFARE*, (July 20, 2017, 11:30 AM), <https://www.lawfareblog.com/beijings-new-national-intelligence-law-defense-offense> (“Article Seven stipulates that ‘any organization or citizen shall support, assist, and cooperate with state intelligence work according to law.’ . . . ‘state intelligence work organs, when legally carrying forth intelligence work, may demand that concerned organs, organizations, or citizens provide needed support, assistance, and cooperation.’”).

<sup>137</sup> Bloomberg refers to this change as “a key component of the bill and marks the most significant change to the current CFIUS framework.” See Saleha Mohsin & Ben Brody, *Tech Firms May Beat Trump in Debate Over Chinese Joint Ventures*, *BLOOMBERG* (Apr. 17, 2018, 12:38 PM), <https://www.bloomberg.com/news/articles/2018-04-17/tech-firms-may-beat-trump-in-debate-over-chinese-joint-ventures>.

<sup>138</sup> Many large American tech companies have partnerships with Chinese firms with military ties. See *U.S. Tech Companies and Their Chinese Partners With Military Ties*, *N.Y. TIMES* (Oct. 30, 2015), <https://www.nytimes.com/interactive/2015/10/30/technology/US-Tech-Firms-and-Their-Chinese-Partnerships.html>; Judith Lee et al., *CFIUS Reform: Our Analysis*, *GIBSON DUNN* (Aug. 14, 2018), <https://www.gibsondunn.com/cfius-reform-our-analysis/>; Mohsin & Brody, *supra* note 137 Critics also opposed CFIUS having control over licensing agreements. Congress relocated issues of outbound investment like licensing agreements to the Export Controls Act of 2018, also signed into law in NDAA, but joint ventures were left to CFIUS. See John S. McCain National Defense Authorization Act for Fiscal Year 2019. Nevertheless, the DOD warns that the sharing

Previously, FINSA did not categorize joint ventures as a covered transaction type and thus FINSA permitted foreign entities to collaborate with corporations without exposure to CFIUS review because the technical agreement structure was not a merger, acquisition, or takeover. This difference in strategic corporate structuring no longer permits the unchecked transfer of information and resources.<sup>139</sup>

Though lowering the standard from “control” to “influence” adequately encompasses concerns associated with the uncertain impact of authoritarian government on private entities, this shift also creates the possibility that the Committee could choose to embark down an inefficient slippery-slope that could result in excess filings for transactions that do not pose significant national security threats.<sup>140</sup> For example, if the Committee were to interpret its authority and the “influence” standard to the broadest extent, it could mean that American companies—including big household names like Walmart, Apple, Boeing, and Starbucks—with operations in China could be burdened to file for CFIUS review for every merger, acquisition, and joint venture they undertake so long as they remain active in Chinese markets where the Chinese government has authoritarian control.<sup>141</sup> Excessive filing would hinder CFIUS’ goal of protecting the United States economically and would increase the risk that the regulatory mechanism will be overburdened, causing the potential for deterioration in review quality where it is needed to protect national security.

## ii. Sensitive Personal Data

FIRRMA further expands CFIUS jurisdiction by classifying any transaction that would result in foreign access to sensitive personal data of U.S. citizens as a covered transaction. In the wake of private data

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of intellectual property inherent in these deal structures despite the Export Control system. See Wakely & Indorf, *supra* note 43.

<sup>139</sup> See Mohsin & Brody, *supra* note 137 (quoting a spokesman from Conrny’s office, Drew Brandewie, who stated that, “China has a long track record of pressuring U.S. companies into joint ventures to coerce them into sharing technology critical to our national security . . . in spite of our export control system . . .”).

<sup>140</sup> This is not a guarantee. Luckily, there is still opportunity to narrow the impact of this expansion through Committee drafted Federal Regulations. See *infra* Part III(C).

<sup>141</sup> See Philip van Doorn, *Apple, Nike and 18 Other U.S. Companies Have \$158 Billion at Stake in China Trade War*, MARKETWATCH (Apr. 4, 2018, 7:09 AM), <https://www.marketwatch.com/story/trade-war-watch-these-are-the-us-companies-with-the-most-at-stake-in-china-2018-03-29>.

scandals with Equifax, Yahoo!, and Facebook, the European Union's recent implementation of data legislation brought the issue of personal data privacy to the forefront of political discussion.<sup>142</sup> Unlike the United States, the European Union consolidated and synchronized the law on data privacy by passing the General Data Protection Regulation (GDPR) that became effective in May 2018.<sup>143</sup> The CFIUS Committee expressed its concerns over data in the MoneyGram-Ant Financial deal, though both parties terminated the agreement before reaching the President for final review.<sup>144</sup> Congress reacted to MoneyGram-Ant Financial, recent data scandals, and international pressure by giving CFIUS jurisdiction over data.<sup>145</sup> CFIUS is the wrong mechanism to implement this type of legislation. Implementation of international data transfer regulation

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<sup>142</sup> See Elizabeth Reise, *USA Today's List of the Biggest Data Breaches and Hacks of All Time*, USA TODAY (Oct. 3, 2017, 5:17 PM), <https://www.usatoday.com/story/tech/2017/10/03/biggest-data-breaches-and-hacks-all-time/729294001/>; Nicholas Confessore, *Cambridge Analytica and Facebook: The Scandal and the Fallout So Far*, N.Y. TIMES (April 4, 2018), <https://www.nytimes.com/2018/04/04/us/politics/cambridge-analytica-scandal-fallout.html>.

The GDPR requires institutions to provide in plain language, notice and purpose of data collection, obtain consent, provide security and disclosure, and permit access to users' own data and lastly, maintain accountability. See generally Regulation (EU) 2016/679, of the European Parliament and of the Council of 27 April 2016 on the Protection of Natural Persons with Regard to the Processing of Personal Data and on the Free Movement of Such Data, and Repealing Directive 95/46/EC (General Data Protection Regulation), 2016 O.J. (L 119) 1. The impact of these new requirements is far-reaching; by covering anyone whose data involves the European Union, the EU set the foundation for a global data protection platform. The international impact can be seen already through the Privacy Shield, a cross between legislation and a treaty that implements the data transfer framework for EU Citizens' data held within the United States. Due to the GDPR and public concern over an individual's own personal data being collected, harvested, and sold, it is not surprising that legislators sought to include elements of data protection into CFIUS review.

<sup>143</sup> See Tal Z. Zarsky, *Incompatible: The GDPR in the Age of Big Data*, 47 SETON HALL L. REV. 995, 995–96 (2017).

<sup>144</sup> See *Jackson CRS Report 2018*, *supra* note 36, at 72. Ant Financial, a subsidiary of Alibaba which is China's leading e-commerce company, sought to acquire the American money transfer firm, MoneyGram, for \$1.2 billion. *Id.* Though the President had not yet blocked the transaction, the parties chose to mutually terminate their intended agreement. See *Press Release: MoneyGram And Ant Financial Announce Termination Of Amended Merger Agreement*, MONEYGRAM (Jan. 2, 2018, 4:15 PM), <http://ir.moneygram.com/news-releases/news-release-details/moneygram-and-ant-financial-announce-termination-amended-merger> (leaving investors on notice that CFIUS would not approve the deal but nevertheless indicating intentions to establish a strategic cooperation with Ant Financial).

<sup>145</sup> See 50 U.S.C. § 4565(a)(4)(B)(iii)(III) (2019).

through CFIUS will burden the efficiency of a critical national security committee and unnecessarily hinder economic prosperity across the United States because (1) “sensitive personal data” is left undefined; and (2) broad interpretation could expose nearly all companies within the United States as well as many overseas to CFIUS review of their transactions whenever a foreign entity is a party.

FIRMA does not define “sensitive personal data,” but the GDPR legislation uses the same term. The European law broadly defines it as any data relating to an identified or identifiable person.<sup>146</sup> Outside the GDPR, whether data is considered “sensitive” is subjective as is evidenced by various levels of publication by individuals. For example, sexual orientation and political preferences are included in the GDPR list of protected data, but anyone on Facebook can attest that it is common for individuals to “share” this type of information openly online.<sup>147</sup> Because FIRMA failed to define “sensitive personal data,” the Committee is left to eventually draw the line somewhere. Even if defined, imposing regulations on the otherwise legal transfers of data is inadequate because there will inevitably remain rampant unnegotiated breaches and no parallel requirements are imposed on companies to give users some control in what happens to their data. Adding to CFIUS’ duties will not solve the massive data privacy problem that the Legislative Branch faces.<sup>148</sup>

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<sup>146</sup> The GDPR states that “personal data’ means any information relating to an identified or identifiable natural person (‘data subject’); an identifiable natural person is one who can be identified, directly or indirectly, in particular by reference to an identifier such as a name, an identification number, location data, an online identifier or to one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of that natural person.” Regulation (EU) 2016/679, 2016 O.J. (L 119) 33. Examples include: “personal data revealing racial or ethnic origin, political opinions, religious or philosophical beliefs; trade-union membership; genetic data, biometric data processed solely to identify a human being; health-related data; data concerning a person’s sex life or sexual orientation.” *What personal data is considered sensitive?*, EUROPEAN COMMISSION, [https://ec.europa.eu/info/law/law-topic/data-protection/reform/rules-business-and-organisations/legal-grounds-processing-data/sensitive-data/what-personal-data-considered-sensitive\\_en](https://ec.europa.eu/info/law/law-topic/data-protection/reform/rules-business-and-organisations/legal-grounds-processing-data/sensitive-data/what-personal-data-considered-sensitive_en) (last visited Feb. 20, 2019).

<sup>147</sup> While privacy settings exist on many social media platforms, many users ignore these setting options. *See e.g.*, Alyssa Newcomb, *How to update your privacy settings on Facebook, Twitter, Google and Instagram*, NBC NEWS (May 24, 2018 12:24 PM), <https://www.nbcnews.com/tech/tech-news/how-update-your-privacy-settings-facebook-twitter-google-instagram-n877216>. Furthermore, those with access to the “private” account can photograph any content posted.

<sup>148</sup> The GDPR does, however, force U.S. companies, if they hold any private data of E.U. citizens, to adhere to GDPR mandates. *See e.g.*, Yaki Faitelson, *Yes, the GDPR Will Affect Your U.S.-Based Business*, FORBES (Dec. 4, 2017, 8:30 AM), <https://www.forbes.com/>

FIRMA's expansion of CFIUS obligations, including international transfers involving this form of asset, may result in inefficient reviews, again depleting resources that are necessary to investigate other national security matters. While "sensitive personal data" is yet to be defined, under the broadest possible interpretation of the term, it is difficult to identify any industry without access to some form of data that could be considered "sensitive" and "personal." For example, if an individual's financial data is considered sensitive and personal, then most end-user service providers and merchants could be subject to CFIUS jurisdiction under FIRMA because they collect individuals' credit card numbers. For service providers that do not charge for their platforms, they profit by running ads—ads that are tailored by individual preferences identified through data collection.<sup>149</sup> Moving offline, consider the healthcare industry: both researchers and providers retain medical information identifiable to their patients. Only strictly business-to-business firms appear safe from any potential expansion of the "sensitive personal data" category.

Ultimately, the incomplete structure of data protection law in the United States likely negates the potential benefits of this expansion. The issue of data protection must be acknowledged, and although it poses risks that relate to matters of national security, CFIUS is not the proper channel to handle this issue if it is to remain a genuine gatekeeper of U.S. economic security threatened by inbound foreign direct investment. FIRMA designs CFIUS to review foreign transactions exclusively and does not address any disclosures or protection measures for harboring data without intent to transfer on the international market. CFIUS is not designed to handle complex data analytics and does not currently specialize in the technical expertise needed to ensure data regulation compliance. Further, the increase in transactions CFIUS would need to review as a result of this provision will likely burden the Committee's ability to efficiently identify national security issues involved in other transactions.

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sites/forbestechcouncil/2017/12/04/yes-the-gdpr-will-affect-your-u-s-based-business/#2acaba5a6ff2.

<sup>149</sup> See *Facebook: Transparency and the Use of Consumer Data: Hearing Before the H. Comm. On Energy and Com.*, 115th Cong. 47 (2018) (statement by Mark Zuckerberg, Co-founder, Chairman and CEO, Facebook, Inc.).

### iii. Critical Technologies

Taking aim at Silicon Valley, FIRRMA adds the new category of “critical technologies” to the list of covered transactions. This change is significant because it is the first “depart[ure] from CFIUS’ exclusive focus on reviewing inbound foreign investment, and expand[s] its remit to include *outbound* contributions of certain intellectual property by U.S. businesses.”<sup>150</sup> FIRRMA shows that Congress is no longer only worried about foreign ownership of critical infrastructure within the United States but is equally concerned about critical technologies leaving the control of the United States due to the rise of the global marketplace. The consequence of this shift led FIRRMA to add a special covered transaction category to trigger CFIUS review whenever “critical technologies” are involved in any foreign transaction regardless of the structural transaction type or size of the investment.

Interestingly, FIRRMA reacts to the fear of losing technological superiority<sup>151</sup> by eliminating incentives to stay in the lead by making it more difficult for these innovative industry leaders to operate in the efficiency-driven economy.<sup>152</sup> Absent regulatory oversight of intellectual property

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<sup>150</sup> See Wakely & Indorf, *supra* note 43, at 36.

<sup>151</sup> Trade secret theft is a valid concern. See THE NATIONAL BUREAU OF ASIAN RESEARCH, UPDATE TO THE IP COMMISSION REPORT: THE THEFT OF AMERICAN INTELLECTUAL PROPERTY: REASSESSMENTS OF THE CHALLENGE AND UNITED STATES POLICY 2 (2017) (“[E]stimates suggest that trade secret theft is between 1% and 3% of GDP, meaning that the cost to the \$18 trillion U.S. economy is between \$180 billion and \$540 billion”). While this data is slightly outdated, it nevertheless shows the magnitude of the issue. Economically speaking, the estimated cost to the U.S. of intellectual property theft in 2017 was between \$180-\$540 billion. See Sanger et al., *supra* note 111 (stating that “Chinese cyberintrusions of American companies and government entities have occurred repeatedly, including by hackers suspected of working on behalf of China’s Ministry of State Security.”). This figure includes cyberintrusions and data breaches of American companies, some of which are attributed to foreign governments. *Id.* Although other legislative efforts like Section 1637 of the 2015 National Defense Authorization Act addressed theft, proper cross-border acquisitions that transferred valuable intellectual property, and possibly exposed it to increased risk of theft, remained solely under the discretion of CFIUS. See THE NATIONAL BUREAU OF ASIAN RESEARCH, UPDATE TO THE IP COMMISSION REPORT: THE THEFT OF AMERICAN INTELLECTUAL PROPERTY: REASSESSMENTS OF THE CHALLENGE AND UNITED STATES POLICY 3, 17–18 (2017) (listing the possibility of increasing CFIUS power as a short-term solution that was yet to be implemented at the time).

<sup>152</sup> According to the Department of the Treasury’s Office of Investment Security, the decision to expand covered transactions to include “critical industries” involved weighing the economic and national security factors stating:

transfer, national security depends on the United States being the first to access new technology and innovate so rapidly that by the time that technology reaches foreign hands, it is irrelevant because the United States has already moved ahead.<sup>153</sup> Agencies dedicated to national security including the DOD and the Department of Homeland Security have grown increasingly dependent on the private sector and have forged innovative partnerships in Silicon Valley.<sup>154</sup> In the field of emerging technologies, products designed and used for commercial purposes are increasingly serving the needs of the military.<sup>155</sup> As a result, both an economic collapse of the California tech hubs and the theft or acquisition

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Although the vast majority of foreign direct investment in the United States provides economic benefits to our nation—including the promotion of economic growth, productivity, competitiveness, and job creation—some foreign direct investment threatens to undermine the technological superiority that is critical to U.S. national security. Specifically, the threat to critical technology industries is more significant than ever as some foreign parties seek, through various means, to acquire sensitive technologies with relevance for U.S. national security.

83 Interim Rule, 73 Fed. Reg. 51324 (Oct. 11, 2018).

<sup>153</sup> Though the United States is not ranked first in the World Intellectual Property Organization's (WIPO) Global Innovation Index, the position is one of leadership regardless. See WIPO et. al, *Global Innovation Index 2018: China Cracks Top 20. Top Rankings: Switzerland, Netherlands, Sweden, UK, Singapore, U.S.*, WORLD INTELL. PROP. ORG. (July 10, 2018), [http://www.wipo.int/pressroom/en/articles/2018/article\\_0005.html](http://www.wipo.int/pressroom/en/articles/2018/article_0005.html); KPMG, *THE CHANGING LANDSCAPE OF DISRUPTIVE TECHNOLOGIES: TECH HUBS FORGING NEW PATHS TO OUTPACE THE COMPETITION* 3, 35 (2018) (listing the United States as “[t]he tech industry global outpacer”). The background provided by CFIUS with the pilot program regulations explicitly notes fear over “the threat of erosion of technological superiority.” 83 Interim Rule, 73 Fed. Reg. 51324 (Oct. 11, 2018).

<sup>154</sup> See Heather Somerville, *Defense Department's Tech Investing Signals Silicon Valley's Importance in Cyberwarfare*, MERCURY NEWS (May 13, 2015, 5:56 PM), <https://www.mercurynews.com/2015/05/13/defense-departments-tech-investing-signals-silicon-valleys-importance-in-cyberwarfare/>; Terri Moon Cronk, *Carter: DoD, Private-Sector Tech Innovation Keep U.S. Ahead*, U.S. DEPARTMENT OF DEFENSE (Mar. 3, 2016) (“Bridging ties between DoD and Silicon Valley has resulted in several initiatives, such as the Defense Digital Service, the Defense Innovation Unit Experimental, and the secretary’s announcement yesterday of the Defense Innovation Advisory Board.”), <https://dod.defense.gov/News/Article/Article/685675/carter-dod-private-sector-tech-innovation-keep-us-ahead/>; *Silicon Valley Innovation Program*, U.S. DEPARTMENT OF HOMELAND SECURITY, <https://www.dhs.gov/science-and-technology/svip> (expanding on the roles of DHS Science and Technology Directorate (S&T) Silicon Valley Innovation Program (SVIP) in tackling the hardest problems faced by DHS and the Homeland Security Enterprise by finding new technologies that strengthen national security).

<sup>155</sup> See BROWN & SINGH, *supra* note 97, at 8.

of intellectual property used by the DOD would pose risks to national security.

Yielding to pressures driven largely by rapid innovation, Congress left the specific definition of this new triggering category largely undetermined. FIRRMA does not limit the “critical technologies” to only those that are currently utilized by the military; Congress tactfully avoided defining what technologies are considered critical because, with today’s rapid pace of innovation, the relevancy of a strict bright-line list of currently critical technologies would quickly expire.<sup>156</sup> The legislation avoids creating a list by outlining a compilation of lists determined by other government entities that are updated regularly.<sup>157</sup> CFIUS identified this rapid change in technology as a primary compelling circumstance for implementing a pilot program.<sup>158</sup>

#### *CFIUS Additions Via Recommendations*

FIRRMA further leaves room for those lists to expand by allowing the Committee chairperson to recommend additional technologies to add to one of the lists the legislation includes.<sup>159</sup> While the Committee expects to reach consensus on such matters, to have eleven government agencies all in agreement is unlikely. Each department has its own interests and perspectives, and thus are likely to value concerns differently. On a

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<sup>156</sup> See Marina Gorbis, *Innovation Is Happening Faster Than We Can Adapt*, N.Y. TIMES (July 22, 2015, 3:31 AM), <https://www.nytimes.com/roomfordebate/2015/07/22/is-silicon-valley-saving-the-world-or-just-making-money/innovation-is-happening-faster-than-we-can-adapt> (“[T]echnologies are emerging faster than our institutional capacity to adapt to them . . . we will need dynamic thinkers and policymakers to balance established needs with this growth.”).

<sup>157</sup> See 50 U.S.C. § 4565(a)(6)(A) (2019). This list includes: defense articles or defense services included on the United States Munitions List; the Commerce Control List by the Export Administration; nuclear equipment, parts and components, materials, software, technology, facilities, material; and emerging and foundational technologies featured in the Export Control Reform Act of 2018. See 83 Interim Rule, 73 Fed. Reg. 51328 (Oct. 11, 2018). Particular technologies this act identifies as emerging and foundational are expected to be released imminently. See e.g., Farhad Jalinous et al., *CFIUS: FIRRMA Pilot Program Mandates Notification for Certain Critical Technology*, WHITE & CASE LLP (Oct. 13, 2018), <https://www.whitecase.com/publications/alert/cfius-firrma-pilot-program-mandates-notification-certain-critical-technology>.

<sup>158</sup> 83 Interim Rule, 73 Fed. Reg. 51325 (Oct. 11, 2018).

<sup>159</sup> See Foreign Investment Risk Review Modernization Act of 2018, as part of the John S. McCain National Defense Authorization Act for Fiscal Year 2019, Pub. L. No. 115-232, 132 Stat. 2182 (to be codified as amended at 50 U.S.C. § 4565(a)(6)(B)(i)).

practical level, the DOD will heavily influence the ultimate defining of “critical technologies.”<sup>160</sup> This is disturbing because the DOD is able to single out any industry and operates in the “black.”<sup>161</sup> The DOD can make a claim to the Committee and support this claim by stating that it cannot disclose its reasoning or evidence while imposing significant transaction costs on entire industries, not just particular deals. This is bad public policy due to the potential for unchecked abuse of power.

Note further, that the President of the United States again maintains control of the final contents of the list the CFIUS Committee can amend.<sup>162</sup> Potentially for political purposes, the President could subject entire industries to the negative effects of CFIUS review borne by the parties who must seek approval; this presents an additional opportunity for the abuse of power. For example, it would be legal, but potentially unwarranted, for the President to remove the Committee’s hypothetical addition of pharmaceutical development as a critical technology sector. The Committee may have justifiable reason for making a suggested addition, however, the President is not obligated to present a rationale for accepting or ignoring the Committee’s proposal. Consequently, the underlying motivation behind the President’s action to shelter or subject a particular industry could be improper, such as to please campaign donors or a supportive voter demographic.

### *Anticipated Breadth and Uncertainty*

The current pilot program, effective as of November 10, 2018, includes twenty-seven industries identified by NAICS code.<sup>163</sup> Among

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<sup>160</sup> See Nova Daly et al., *The Lawfare Podcast: The Future of CFIUS*, LAWFARE (Jun. 2, 2018, 1:30 PM), <https://www.lawfareblog.com/lawfare-podcast-future-cfius> (citing as evidence of the strengthening of the DOD, the speakers note the 700% increase in funding delegated to the DOD up almost \$20 million).

<sup>161</sup> The term “black” is commonly used in reference to the “black budget” and “black projects” of the DOD that are intentionally left to function free from disclosures or reporting. See e.g., ALICE C. MARONI, CONG. RESEARCH SERV., IB87201, SPECIAL ACCESS PROGRAMS AND THE DEFENSE BUDGET: UNDERSTANDING THE “BLACK BUDGET” 5 (1989) (“In using the term ‘black budget,’ most observers are making a generic reference to the programs . . . for which DOD has not provided unclassified funding data . . .”).

<sup>162</sup> See Export Control Reform Act of 2018, as part of the John S. McCain National Defense Authorization Act for Fiscal Year 2019, Pub. L. No. 115-232, 132 Stat. 2211 (codified as amended at 50 U.S.C. § 4812(a)).

<sup>163</sup> U.S. Dep’t of Treasury: Office of Public Affairs, Q&A: Interim Regulations for FIRRMA Pilot Program (Oct. 10, 2018), <https://home.treasury.gov/system/files/206/QA-FIRRMA-Pilot-Program.pdf> (providing answers to questions on retroactive

these twenty-seven are research and development in biotechnology and nanotechnology, and manufacturing of semiconductors, optical instruments and lenses, batteries, turbines, petrochemicals, aircrafts, and radio and television broadcasting and wireless communications equipment.<sup>164</sup> This initial list focuses more on hardware than software which is unlikely to continue as the DOD, with the initiative of protecting the United States from both bombs and cyberattacks alike, increases its involvement.<sup>165</sup> No barriers prevent the government agencies delegated with the responsibility of updating the included lists, or CFIUS, who can recommend that additions be made, from adding hundreds of NAICS codes or abandoning the code distinctions in favor of general, sector-wide industry terms. In his praise for the strengthened CFIUS authority, President Trump emphasized passing FIRRMA as a base point saying, “[w]e’ll see if that’s good enough, and if it’s not, then we will keep adding on to it.”<sup>166</sup> Given national security’s dependence on the private sector, this expansion may be counterproductive because the potential overbreadth could cripple the quick pace of business that enables Silicon Valley to thrive. Critical industries are being protected to aid the preservation of their globally advantageous position, which accordingly aids national defense.

Nevertheless, broad or quickly changing definitions are necessary because the government is not well-equipped to identify which specific new technologies today will become driving foundational technologies in the future and present threats to national security.<sup>167</sup> To exemplify this

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application and industry selection in questions twelve and seventeen); *see also* 83 Interim Rule, 73 Fed. Reg. 51328, 51333–34 (Oct. 11, 2018); States Census Bureau, *North American Industry Classification System*, U.S. DEPT. OF COMMERCE, <https://www.census.gov/eos/www/naics/> (last visited Feb. 20, 2019) (“The North American Industry Classification System (NAICS) is the standard used by Federal statistical agencies in classifying business establishments for the purpose of collecting, analyzing, and publishing statistical data related to the U.S. business economy.”).

<sup>164</sup> For full list of all twenty-seven pilot program industries, see Annex A of the Interim Regulations. *See* 83 Interim Rule, 73 Fed. Reg. 51333–34 (Oct. 11, 2018).

<sup>165</sup> *See* CATHERINE A. THEOHARY & ANNE I HARRINGTON, CONG. RESEARCH SERV., R43848, CYBER OPERATIONS IN DOD POLICY AND PLANS: ISSUES FOR CONGRESS 1 (2015).

<sup>166</sup> Remarks During a Roundtable Discussion on the Foreign Investment Risk Review Modernization Act of 2018, DAILY COMP. PRES. DOC. 01800544 (Aug. 23, 2018).

<sup>167</sup> *See* Greenberg Center for Geoeconomic Studies, *Chinese Investment in Critical U.S. Technology: Risks to U.S. Security Interests: Insights From a CFR Workshop*, COUNCIL ON FOREIGN REL. (last visited on Oct. 16, 2017), <https://www.cfr.org/report/chinese->

point, consider the Soviet Union's acquisition of ball bearing technology.<sup>168</sup> The U.S. government never anticipated that this knowledge would eventually become a critical element in the Russian ownership of precision-guided missiles.<sup>169</sup> This is unacceptable; national security must be preserved by limiting access to intellectual property related to emerging technologies.

This change to CFIUS is critical to national security and has the potential to serve as an effective solution to current demands, but it is equally likely that the vagueness of FIRRMMA will cause a chilling effect and deter beneficial investments. The ease of expanding the definition of "critical technologies" creates uncertainty in the market. Furthermore, this uncertainty will deter foreign investment and decrease the market of acquirers and investors. This could harm American companies both at the beginning of their growth cycle, should venture capital become more competitive without foreign funds in the market, and at the end of their development cycle by limiting the number of potential buyers. In conclusion, by leaving so much undetermined, FIRRMMA increases uncertainty which may weaken incentives needed to drive innovation and protect the nation in the new age of defense.

#### iv. Real Estate and the Greenfield Problem

Prior to FIRRMMA, transactions with foreign entities involving real estate within the United States did not automatically trigger CFIUS review. While past blocked deals sometimes involved real estate, like the Ralls Corp. windfarms, the involvement of land did not itself subject the transaction to review, but rather, the CFIUS jurisdiction derived from the shift in control of an existing American businesses to foreign investors.<sup>170</sup> The amendment clarifies that it is use of land and not ownership of land

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investment-critical-us-technology-risks-us-security-interests [hereinafter "Greenberg Center"].

<sup>168</sup> See THANE GUSTAFSON, DEFENSE ADVANCED RESEARCH PROJECTS AGENCY (DARPA), R-2649-ARPA, SELLING THE RUSSIANS THE ROPE?, SOVIET TECHNOLOGY POLICY AND U.S. EXPORT CONTROLS 10–14 (1981).

<sup>169</sup> See Greenberg Center, *supra* note 167.

<sup>170</sup> See *Ralls Corp. v. Committee on Foreign Investment*, 758 F.3d 296, 301, 321 (D.C. Cir. 2014).

that drives concern.<sup>171</sup> Not only do purchases qualify but also any leases or concessions to a foreign entity.<sup>172</sup> The reasoning behind this shift focuses on national security breaches that could develop from the use of land that does, or could, serve as an airbase or port, land that is near military bases, or land close to other sensitive government facilities.<sup>173</sup> President Trump highlighted this feature, stating that through FIRRMA, “we’re doing a lot of things against foreign acquisition of property, and especially where they’re near sensitive military installations. So this was a very big deal.”<sup>174</sup> This amendment brings two significant benefits. First, it establishes predictability by avoiding questionable filings which eliminates parties’ search for inscrutable information. Second, it stops the establishment of new companies by foreign entities when there is a land purchase involved. Unfortunately, it does not go far enough because FIRRMA does not cover the issue of funding new, not currently formed companies on paper without current physical assets.<sup>175</sup>

### *FIRRMA Successfully Avoids Questionable Filings*

Parties involved in the foreign purchase of land have been uncertain whether they need to submit notice to CFIUS, or if filing only wastes resources. By nature, undisclosed military projects will not advertise their location, and as a result, no amount of due diligence by parties guarantees that a location is absolutely clear of national security concerns. FIRRMA aids process efficiency by eliminating the uncertainty surrounding foreign transactions with real estate assets. CFIUS review now applies to three types of land- related foreign direct investments: (1) acquisitions of existing U.S. companies with land assets; (2) the lease and use of property known as “brownfield” investments; and (3) the acquiring of vacant land

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<sup>171</sup> See Foreign Investment Risk Review Modernization Act of 2018, as part of the John S. McCain National Defense Authorization Act for Fiscal Year 2019, Pub. L. No. 115-232, 132 Stat. 2177 (2018) (codified as amended at 50 U.S.C. § 4565(a)(4)(B)(ii)).

<sup>172</sup> *Id.*

<sup>173</sup> See Foreign Investment Risk Review Modernization Act of 2018, as part of the John S. McCain National Defense Authorization Act for Fiscal Year 2019, Pub. L. No. 115-232, 132 Stat. 2177 (2018) (codified as amended at 50 U.S.C. § 4565(a)(4)(B)).

<sup>174</sup> Remarks During a Roundtable Discussion on the Foreign Investment Risk Review Modernization Act of 2018, 2018, DAILY COMP. PRES. DOC. 01800544 (Aug. 23, 2018).

<sup>175</sup> See MICHAEL RAMSEY ET AL., *supra* note 118, at 747.

for later development.<sup>176</sup> Parties engaging in this type of FDI no longer need to debate the best course of action—CFIUS has jurisdiction. To clarify, FIRRMA efficiently restricts the real estate category. Not every real estate transaction in the United States will be reviewed by CIFIUS.<sup>177</sup> That would be a gross misuse of resources by the Committee, and FIRRMA appropriately acknowledges this by providing a carve-out for minor transactions like those regarding single family dwellings.<sup>178</sup> Like all CFIUS jurisdiction, the focus rightly remains on FDI, and thus only real estate transactions involving FDI are covered.

### *FIRRMA Fails to Cover Establishment of Greenfield Investments*

Though the real estate expansion effectively and efficiently accounts for land purchases, it is probable that FIRRMA will ultimately fail to address “greenfield” investments.<sup>179</sup> Today, the term “greenfield” investment refers to the establishment of subsidiaries and the funding of new business ventures. Historically, Congress tailored CFIUS provisions to address national security concerns in mergers and acquisitions (M&A) rather than new investments.<sup>180</sup> The logic behind focusing only on

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<sup>176</sup> The traditional true “greenfield” definition is “any construction of a new facility in the United States by a foreign person.” Wakely & Indorf, *supra* note 43, at 1, 41. In 2013, the Russian space agency, Roscosmos, intended to construct GPS stations within the United States but regardless of the CFIUS Committee’s opposition which was rooted in concerns voiced by the CIA, DOD, and members of Congress, CFIUS was unable to review greenfield investments at this time. See Jackson CRS Report 2018, *supra* note 36, at 63; see also Schmidt & Schmitt, *supra* note 99.

<sup>177</sup> See Foreign Investment Risk Review Modernization Act of 2018, as part of the John S. McCain National Defense Authorization Act for Fiscal Year 2019, Pub. L. No. 115-232, 132 Stat. 2177 (2018) (codified as amended at 50 U.S.C. § 4565(a)(4)(C)(i)).

<sup>178</sup> *Id.*

<sup>179</sup> Surprisingly this point escaped the scrutiny from mainstream media and few firms have included the distinction between true “greenfield” land purchases, which are covered, and common or modern “greenfield” investments in their updates to clients. But see Michael E. Leiter et al., *US Finalizes CFIUS Reform: What It Means for Dealmakers and Foreign Investment*, SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP (Aug. 6, 2018), <https://www.skadden.com/insights/publications/2018/08/us-finalizes-cfius-reform> (“FIRRMA codifies CFIUS’ jurisdiction to review the purchase of U.S. business-owned real estate while also expanding CFIUS’ jurisdiction to include leases and other real estate transactions as well as purchases of vacant land (i.e., true ‘greenfield’ investments.”).

<sup>180</sup> See Gary Husisian, *CFIUS and the New Trump Administration: Your Top Ten Questions Answered*, FOLEY & LARDNER LLP (Jan. 25, 2017), <https://www.foley.com/cfius-and-the-new-trump-administration-your-top-ten-questions-answered-01-25-2017/>

originally intended transaction types loses validity now that FIRRMA added the real estate category, which by default includes new investments in land. Hypothetically, foreign entities could establish a subsidiary in the United States that does not incorporate the elements of real estate, purchase of an existing asset, or entail a merger or joint venture with an American business. This legislation requires one of these triggering elements to occur concurrently with the establishment of a business entity to be fully effective in stopping the invasion of state-owned enterprises (SOEs).<sup>181</sup> The resulting paper entity from this hypothetical structuring would not be free to operate as an American company and avoid CFIUS in the future when engaging in later transactions, but in the interim, the new entity would be able to hire skilled American innovators and engage in research and development. FIRRMA likely does not effectively ensure that the next great breakthrough in American innovation is controlled by American financial backing. Congress knew well of the issues associated with SOE market entrants, from China specifically.<sup>182</sup> A Senate Hearing testimony back in 2017 acknowledged that “when you go to Silicon Valley, it is sort of an open secret that Chinese firms are all over the place trying to acquire brains, technology, [therefore] trying to get around export controls and CFIUS.”<sup>183</sup> Furthermore, the DOD stressed its concern over unregulated startup investments into cutting edge technology in areas like

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(expanding in question six on the historical gap of monitoring of “greenfields or new start-up ventures” due to the focus on M&A).

<sup>181</sup> See Jim Talent, *Chinese ‘Greenfield’ Investments Are a Threat More Than a Benefit*, NAT’L REV. (Jun. 28, 2018, 3:43 PM), <https://www.nationalreview.com/corner/china-greenfield-investments-national-security-threat/>.

<sup>182</sup> See generally *Examining the Role of the Committee on Foreign Investment in the United States: Hearing Before the S. Comm. on Banking, Housing, and Urb. Aff.*, 115th Cong. 1–2 (2017); Jen Patja Howell, *The Lawfare Podcast: The Future of CFIUS*, LAWFARE (Jun. 2, 2018, 1:30 PM), <https://www.lawfareblog.com/lawfare-podcast-future-cfius>. Greenfield investment by Chinese entities is neither a recent phenomenon nor is it limited to Silicon Valley. See Ping Deng, *Investing for Strategic Resources and its Rationale: The Case of Outward FDI From Chinese Companies*, 50 BUS. HORIZONS 71, 75 (2007) (quoting a Chinese investor in Camden, South Carolina back in 1999 who said, “By setting up the production plant in the U.S., we aim to draw on America’s expertise in design, research, innovation, and technology, as well as to increase our global brand.” (Haier Group, personal communication, Aug. 2004)).

<sup>183</sup> *Examining the Role of the Committee on Foreign Investment in the United States: Hearing Before the S. Comm. on Banking, Housing, and Urb. Aff.*, 115th Cong. (2017) (statement of James A. Lewis, Senior Vice President, Center for Strategic and International Studies).

artificial intelligence, robotics, and blockchain.<sup>184</sup> One change suggested by the DOD in its 2017 Defense Innovation Unit Experimental (DIUx) draft report was to discourage the funding of U.S. start-ups involved in developing cutting-edge technologies.<sup>185</sup> Early advancements in emerging areas of technology like these commonly become the foundational building blocks for innovation in the future.<sup>186</sup> FIRRMA's failure to add the transactional form of initial establishment, the modern "greenfield" investment strategy, to the scope of CFIUS likely means that start-up investments that do not involve an existing U.S. entity are not covered under CFIUS.

This constitutes a lapse in CFIUS' ability to protect the national security interests of the United States by exposing the nation to strategic ownership of potentially critical technology by foreign entities, including SOEs.<sup>187</sup> FIRRMA supporters argue for the need to protect the innovation of American minds for both economic independence and military advancement purposes through the "critical technologies" addition to CFIUS' scope. However, those benefits could escape through this establishment, and later employment, loophole. Chinese SOEs are able to bet early on American technological innovation and if they bet correctly—invest by employing the creators of the next big Silicon Valley start-up—then the United States will lose the crucial advantage the Legislature

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<sup>184</sup> See BROWN & SINGH, *supra* note 97. An example of this type of joint venture that coerces the transfer of cutting-edge technology is the 2015 IBM partnership with Teamsun, a Chinese cyber-security company. See Mohsin & Brody, *supra* note 137 ("The Defense Department has raised concerns about Chinese investors financing American startups that are developing leading-edge technology in sectors with military applications like artificial intelligence, augmented reality and robotics.").

<sup>185</sup> See JACKSON, CONG. RESEARCH SERV., *supra* note 36, at 36; Fred Kaplan, *The Pentagon's Innovation Experiment*, MIT TECH. REV., (Dec. 19, 2016), <https://www.technologyreview.com/s/603084/the-pentagons-innovation-experiment/> (expanding on the Pentagon's DIUx and the outlook on its continuation under the Trump Administration).

<sup>186</sup> See BROWN & SINGH, *supra* note 97, at 7.

<sup>187</sup> See Greenberg Center, *supra* note 167 ("U.S. policymakers should view them as being made at the behest of the Chinese government, whether due to the availability of financing from state-owned banks or due to the Communist Party of China's influence over significant private-sector companies."). Additionally, the workshop insights conclude that increased Chinese investment in new technology could have two national security implications: (1) a direct threat to the U.S. military's technological superiority; and (2) an undermining of U.S. economic competitiveness. *Id.*

appears intent to maintain.<sup>188</sup> The correct balance of national security and economic activity is difficult to ascertain but the correct balance is unachievable if there are potentially harmful investments going not just uninvestigated, but undocumented as foreign until it is too late.

#### v. Investment Fund Carveout

FIRRMA evades the complex issues for CFIUS reform attributable to the integration of foreign funds in American financial institutions. In its shift to cover noncontrolling investments in U.S. businesses involved with critical technology and personal information, drafters of FIRRMA needed to decide how to categorize massive investment funds that have both significant influence and foreign beneficiaries.<sup>189</sup> Complicating matters is the prerogative that it is nearly impossible to verify which entities are the true beneficiaries of these investments.<sup>190</sup> Even if possible, implicating all foreign investment would overburden both CFIUS and negatively impact the stock market due to uncertainty and speculation. As a result, FIRRMA wisely left indirect investments outside CFIUS' expanded jurisdiction.<sup>191</sup> Foreign investment into investment funds does not trigger CFIUS review so long as (1) the fund is managed by a general or managing partner; that partner is not a foreign person; and (3) the investment fund satisfies that any foreign investor is only a limited partner.<sup>192</sup> As a limited partner, the foreign person does not control the fund's investment decisions, determine

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<sup>188</sup> *Examining the Role of the Committee on Foreign Investment in the United States: Hearing Before the S. Comm. on Banking, Housing, and Urb. Aff.*, 115th Cong. (2017) (statement of James A. Lewis, Senior Vice President, Center for Strategic and International Studies).

<sup>189</sup> Luis A. Aguilar, Commissioner at the U.S. Securities and Exchange Commission, remarked that "the role and influence of institutional investors has grown over time." See Luis A. Aguilar, *Institutional Investors: Power and Responsibility*, HARV. L. SCH. F. ON CORP. GOVERNANCE & FIN. REG. (Apr. 23, 2013), <https://corpgov.law.harvard.edu/2013/04/23/institutional-investors-power-and-responsibility/> (noting specifically that even "[i]n 2009, institutional investors owned in the aggregate 73% of the outstanding equity in the 1,000 largest U.S. corporations.").

<sup>190</sup> See PALMITER & PARTNOY, *supra* note 58, at 409–10.

<sup>191</sup> See e.g., John M. Caccia et al., *Governance Implications of CFIUS Reform for US Investment Funds With Foreign Investors*, SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP (Oct. 30, 2018), <https://www.skadden.com/insights/publications/2018/10/governance-implications-of-cfius-reform>.

<sup>192</sup> See Foreign Investment Risk Review Modernization Act of 2018, as part of the John S. McCain National Defense Authorization Act for Fiscal Year 2019, Pub. L. No. 115-232, 132 Stat. 2180–81 (2018) (codified as amended at 50 U.S.C. § 4565(a)(4)(D)(vi)(I)).

the compensation of the general partner, or have access to trade secrets or board of directors of the U.S. companies with which the fund invests.<sup>193</sup>

This is likely the best *temporary* position to avoid overburdening both funding mechanisms throughout the country and the Committee's current enforcement limitations. FIRRMA likely falls short of implementing an optimal long-term solution needed to ensure passive investment does not become active in the aggregate and threaten national security. If a large portion, or even the majority, of an investment fund is attributed to foreign investors there may be reason for CFIUS to want Congress delegated jurisdiction to review the large transactions involving the fund. By having undisclosed economic strongholds, it is possible that foreign investors could systematically divest and cause ripple effects throughout financial markets. Any threat to economic stability could delay innovation into critical technology directly impacting national defense. In the long term, the threat of unified foreign control through millions of small investments must be mitigated and FIRRMA does not adequately provide a plan that addresses this concern. CFIUS is unlikely the best resource to watch the market as a whole due to capacity issues with oversight. Rather CFIUS should work in unison with better equipped regulatory agencies like the Securities and Exchange Commission (SEC) that have the expertise to handle massive data analytics.<sup>194</sup>

## B. Procedural Changes

From a procedural perspective, FIRRMA is significant because it (1) imposes a mandatory filing of declarations for certain triggering transactions; (2) expands the duration of days permitted at each stage of CFIUS review; and (3) gives the Committee authority to implement sanctions before giving its recommendation to the President to make a final determination. Because these adjustments are accompanied by an expanded definition of covered transactions, they are likely to create a delay in the transaction process for an unprecedented number of industries.<sup>195</sup> By increasing transaction costs, FIRRMA's procedure decreases the potential economic benefit derived from FDI.

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<sup>193</sup> *Id.*

<sup>194</sup> *See infra* Part III(B)(i).

<sup>195</sup> *See supra* Part II(a).

### i. Mandatory Declarations

FIRRMA mandates that parties privy to certain covered transactions file a mandatory declaration.<sup>196</sup> Not only does this change add an entirely new initial step to the FDI oversight process, but it also is the first time that CFIUS filings are mandatory rather than voluntary.<sup>197</sup> Unlike the already existing full notice filing, the declaration filing is not to exceed five pages, but all other requirements are left to the discretion of the Committee to be specified later by federal regulation.<sup>198</sup> FIRRMA mandates declarations for covered transactions that would result in the acquisition of a “substantial interest” in a U.S. business by a foreign entity in which a foreign government directly or indirectly has a “substantial interest.”<sup>199</sup> To illustrate, if *Foreign Company A* has a foreign government as a major creditor, perhaps a 20% stock purchase of *U.S. Company B* by *Foreign Company A* would require a CFIUS declaration filing.<sup>200</sup>

FIRRMA leaves the task of defining the term “substantial interest” to the Committee and permits the Committee to require mandatory declarations for *any* covered transactions.<sup>201</sup> Exercising this authority would multiply the number of filings that CFIUS reviews and thus could

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<sup>196</sup> Foreign Investment Risk Review Modernization Act of 2018, as part of the John S. McCain National Defense Authorization Act for Fiscal Year 2019, Pub. L. No. 115-232, 132 Stat. 2184–2186 (2018) (codified as amended at 50 U.S.C. § 4565(b)(1)(C)(v)(IV)).

<sup>197</sup> See e.g., Leiterlvan, *supra* note 179.

<sup>198</sup> Foreign Investment Risk Review Modernization Act of 2018, as part of the John S. McCain National Defense Authorization Act for Fiscal Year 2019, Pub. L. No. 115-232, 132 Stat. 2184 (2018) (codified as amended at 50 U.S.C. § 4565(b)(1)(C)(v)(II)); see also Interim Rule, 73 Fed. Reg. 51325 (Oct. 11, 2018) (describing what information must be included in declarations).

<sup>199</sup> Foreign Investment Risk Review Modernization Act of 2018, as part of the John S. McCain National Defense Authorization Act for Fiscal Year 2019, Pub. L. No. 115-232, 132 Stat. 2185 (2018) (codified as amended at 50 U.S.C. § 4565(b)(1)(C)(v)(IV)(AA)).

<sup>200</sup> Nothing in the statute suggests this hypothetical 20% ownership interest qualifies as substantial, however corporate law requirements indicate that 20% is a generally accepted level indicating significance. For example, for the issue of “substantial” dilution, when the number of new shares issued exceeds 20% of currently issued shares, the issuance requires shareholder approval. MODEL BUS. CORP. ACT § 6.21(f)(1)(ii) (1969) (Am. Bar Ass’n, revised 2016).

<sup>201</sup> Foreign Investment Risk Review Modernization Act of 2018, as part of the John S. McCain National Defense Authorization Act for Fiscal Year 2019, Pub. L. No. 115-232, 132 Stat. 2184–86 (2018) (codified as amended at 50 U.S.C. § 4565(b)(1)(C)(v)(IV)).

increase the number of delayed transactions.<sup>202</sup> On October 10, 2018, the Treasury Department released its pilot program requiring that at least forty-five days prior to the closing date of a transaction covered by the pilot program, the parties must either (a) file the new declaration form to allow the Committee to determine if a full notice must be subsequently filed, or (b) file full notice with the Committee.<sup>203</sup> If a party's transaction triggers a mandatory declaration but the party fails to file, it may owe a civil monetary penalty up to the value of the transaction.<sup>204</sup>

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<sup>202</sup> See e.g., Farhad Jalinous et al., *CFIUS Reform Becomes Law: What FIRRMA Means for Industry*, WHITE & CASE LLP (Aug. 13, 2018), <https://www.whitecase.com/publications/alert/cfius-reform-becomes-law-what-firrma-means-industry> (discussing the importance of CFIUS' regulations yet to be determined).

<sup>203</sup> See Interim Rule, 73 Fed. Reg. 51325 (Oct. 11, 2018); Latham & Watkins, *CFIUS Pilot Program Makes Notifications Mandatory for Specific Areas of Critical Technology*, LATHAM & WATKINS CLIENT ALERT (Oct. 17, 2018), <https://www.lw.com/thoughtLeadership/lw-cfius-pilot-program-makes-notifications-mandatory-for-specific-areas-of-critical-technology>.

<sup>204</sup> See Foreign Investment Risk Review Modernization Act of 2018, as part of the John S. McCain National Defense Authorization Act for Fiscal Year 2019, Pub. L. No. 115-232, 132 Stat. 2185 (2018) (codified as amended at 50 U.S.C. § 4565(b)(1)(C)(v)(IV)(g)); Interim Rule, 73 Fed. Reg. 51322 (Oct. 11, 2018). CFIUS can now elect to implement filing fees to supplement government funding for its expanding operations. FIRRMA granted CFIUS a \$20 million annual budget until 2023. See Foreign Investment Risk Review Modernization Act of 2018, as part of the John S. McCain National Defense Authorization Act for Fiscal Year 2019, Pub. L. No. 115-232, 132 Stat. 2204 (2018) (codified as amended at 50 U.S.C. § 4565(p)(2)). FIRRMA sets forth two criteria for the amount of any filing fee: (1) the fee may not exceed 1% of the transaction value; and (2) may not exceed \$300,000. See Foreign Investment Risk Review Modernization Act of 2018, as part of the John S. McCain National Defense Authorization Act for Fiscal Year 2019, Pub. L. No. 115-232, 132 Stat. 2204 (2018) (codified as amended at 50 U.S.C. § 4565(p)(3)(B)(i)). Though \$300,000 would be crippling to a small business, it is unlikely that a small business would engage in a transaction valued over \$30,000,000 and avoid triggering the first criterion. Additionally, FIRRMA requires CFIUS to conduct a study to determine the feasibility and merits of a Prioritization Fee in exchange for faster comments from the committee. See Foreign Investment Risk Review Modernization Act of 2018, as part of the John S. McCain National Defense Authorization Act for Fiscal Year 2019, Pub. L. No. 115-232, 132 Stat. 2205 (2018) (codified as amended at 50 U.S.C. § 4565(p)(3)(D)). The concept of premium pricing for priority government services is not new; examples include one-day passport application processing, priority shipping through the United States Postal Service, and TSA precheck at airport security. From a policy perspective, this is a conduct specific tax serving a valid purpose. However, like the increased duration of review periods, imposing fees will add to the total transaction costs. Importantly, filing fees pose a danger by deterring otherwise compliant parties from filing voluntary notices for review. Not all transactions are subject to mandatory declarations, only those specified by the CFIUS committee through federal regulations to come. Parties to CFIUS covered transactions that are not subject to the mandatory filing will retain the option of filing notice with CFIUS. These parties will weigh the now

This change is effective but inefficient. Prior to mandatory filings, parties to a transaction threatening national security could possibly evade pre-closing regulatory review by strategically choosing not to file for CFIUS review. Although retroactive review always remained available, the damage associated with transfer of proprietary intellectual property is irreversible: there is no remedy for already-gleaned knowledge. By requiring particularly problematic transactions to file an initial declaration document, CFIUS can more effectively prevent irreparable harm caused by disclosing the nation's most promising intellectual advancements. Nevertheless, the CFIUS regime has only retroactively blocked deals on the most problematic transactions. These are the same transactions where the parties are most likely to know CFIUS would take interest in the deal and have historically chosen to voluntarily file CFIUS notice as a condition to closing and thus avoid spontaneous government interference after the deal's termination date. In conclusion, to catch deals that would have otherwise chosen not to file notice, the Committee will likely broaden the number of covered transactions that must file mandatory declarations. The benefits derived from eliminating CFIUS' dependency on voluntary action or tipping from media coverage and SEC filings is outweighed by the likelihood of litigation<sup>205</sup> and possible delay in CFIUS decisions on triggering transactions due to the strain to review filings from this mandatory preliminary stage.

## ii. Timing

FIRRMA expands the duration of the CFIUS review process. First, CFIUS is granted ten business days to respond to the declaration.<sup>206</sup> The

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increased transaction costs of filing—FIRRMA added fees, FIRRMA added timing delays, and the previously existing potential for government restrictions that may have otherwise been avoided—against the previously established benefit of a “safe harbor” from retroactive investigation if approval is granted. FIRRMA increases the costs of filing and therefore shifts an otherwise equal balancing of benefits toward the decision to not file for CFIUS review voluntarily. The relative impact of this negative externality will depend on the committee's ultimate criteria for transactions subject to mandatory filing. There is a risk that this pending criterion will not capture a transaction posing a threat to national security. As a result, any additional deterrence of voluntarily filing should be avoided.

<sup>205</sup> Additionally, the mandatory nature of this stage will reopen Fifth Amendment arguments raised in *Ralls Corp.* See *infra* Part II(C).

<sup>206</sup> See Foreign Investment Risk Review Modernization Act of 2018, as part of the John S. McCain National Defense Authorization Act for Fiscal Year 2019, Pub. L. No. 115-232, 132 Stat. 2178–88 (2018) (codified as amended at 50 U.S.C. § 4565(b)(1)(C)(i)(II)(aa)).

full review now lasts forty- five days followed by a forty-five day investigation period, if necessary.<sup>207</sup> In the case of “extraordinary circumstance,” the Committee may extend this review period by an additional fifteen days.<sup>208</sup> Lastly, FIRRMA grants the President fifteen days to make a final determination.<sup>209</sup> In the aggregate, this amounts to the possibility that the CFIUS process will last 115 days from the initial declaration filing to the final determination.

On its surface, this change is a significant increase from the seventy-five day allotment under FINSA. However, the Committee under FINSA regularly forced parties to withdraw and refile if they failed to complete their review within the statutory allotment. For example, under FINSA, a party could be forced to wait 150 days in total because a refiling would restart the clock for Committee review.<sup>210</sup> FIRRMA intends to stop the practice of forced refiling by mandating that the Committee file a

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<sup>207</sup> *Id.*

<sup>208</sup> *See* Foreign Investment Risk Review Modernization Act of 2018, as part of the John S. McCain National Defense Authorization Act for Fiscal Year 2019, Pub. L. No. 115-232, § 1709, 132 Stat. 1635, 2187–88 (2018) (codified as amended at 50 U.S.C. § 4565(b). Note that within this forty-five to sixty day window is the thirty day period allotted to the Director of National Intelligence to conduct his own investigation. *See* Foreign Investment Risk Review Modernization Act of 2018, as part of the John S. McCain National Defense Authorization Act for Fiscal Year 2019, Pub. L. No. 115-232, § 1712, 132 Stat. 1635, 2189 (2018) (codified as amended at 50 U.S.C. § 4565(b)(4)(1)(A).

<sup>209</sup> *See* Foreign Investment Risk Review Modernization Act of 2018, as part of the John S. McCain National Defense Authorization Act for Fiscal Year 2019, Pub. L. No. 115-232, § 1714, 132 Stat. 1635, 2191 (codified as amended at 50 U.S.C. § 4565(d)(2) (2018)).

<sup>210</sup> Covington & Burling LLP summarizes the FIRRMA change to the review period as follows:

As a result, a single complete CFIUS review process potentially could take as long as 105 days, [this does not include the 10 business days the Committee has to respond to the initial declaration filing] as opposed to 75 days under current law. That said, the 15-day extension also could shorten somewhat the overall timeframe for those transactions that currently must be withdrawn and refiled if CFIUS has not completed its review within the initial 75 days. Those transactions today generally are subject to a second full 75-day process, for a total of 150 days, whereas the 15-day extension could permit at least some such transactions to be completed without the need for a refiling.

Covington & Burling LLP, *CFIUS Update: FIRRMA Finalized, Nears Passage*, COVINGTON NEWS AND INSIGHTS (Jul. 25, 2018), <https://www.cov.com/en/news-and-insights/insights/2018/07/cfius-update-firrma-finalized-nears-passage>.

Congressional report of incidents involving excess duration that explains the reason for delay.<sup>211</sup>

Nevertheless, in the aggregate this increase in the normal duration of the CFIUS review process will likely increase transaction costs. The detailed nature of both the information CFIUS requires to be disclosed in the notice filings and the information the Committee can request throughout the investigation period makes it unlikely that parties could evade delays by filing before completing due diligence and negotiations.<sup>212</sup> Time is a valuable resource parties try to conserve throughout the transaction to avoid excessive transaction costs. Additionally, other regulatory hurdles, like antitrust clearance from the DOJ and FTC, often take CFIUS clearance into consideration. Thus, the delay from CFIUS can cause even further delay in the government approval process.<sup>213</sup> By increasing the time needed to close transactions, it is highly likely that FIRRMA raises the threshold of synergistic value needed to make a rational deal.

### iii. Committee Action

FIRRMA enables the Committee to suspend a proposed or pending action.<sup>214</sup> Prior to this shift, CFIUS only stopped transactions once the President made a determination, though parties were free to amend their agreements to push their respective closing dates. This amendment to the CFIUS procedure is beneficial because it allows CFIUS to prevent irreparable harm that would otherwise occur if the transaction closed. This may be necessary, for example, in cases with significant technical know-how involved because the damage from the transfer of intellectual property is unable to be reversed.<sup>215</sup> The Committee's authority to

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<sup>211</sup> See Foreign Investment Risk Review Modernization Act of 2018, as part of the John S. McCain National Defense Authorization Act for Fiscal Year 2019, Pub. L. No. 115-232, § 1719, 132 Stat. 1635, 2197 (2018) (codified as amended at 50 U.S.C. § 4565(m)).

<sup>212</sup> See Peter Thomas et al., *A Primer on CFIUS: Navigating the Evolving U.S. National Security Foreign Investment Review Process*, ANTITRUST SOURCE (Jun. 2018), [https://www.americanbar.org/content/dam/aba/multimedia/antitrust\\_law/jun18\\_thomas\\_6\\_21f.pdf](https://www.americanbar.org/content/dam/aba/multimedia/antitrust_law/jun18_thomas_6_21f.pdf).

<sup>213</sup> See *id.*

<sup>214</sup> See Foreign Investment Risk Review Modernization Act of 2018, as part of the John S. McCain National Defense Authorization Act for Fiscal Year 2019, Pub. L. No. 115-232, § 1718, 132 Stat. 1635, 2193 (2018) (codified as amended at 50 U.S.C. § 4565(l)).

<sup>215</sup> This characteristic of intellectual property is demonstrated by the frequency at which courts grant preliminary injunctions in IP misappropriation cases. See *e.g.*, *Gilliam v. Am. Broad. Co.*, 538 F.2d 14, 26 (2d Cir. 1976).

temporarily stop a transaction for the duration of the CFIUS investigation is the most explicit evidence of the Committee acting on the President's behalf. Unfortunately, though this change is beneficial in achieving its intended outcome, the entanglement of executive action could potentially give rise to constitutional problems with judicial review and transparency that may make these benefits too costly for the CFIUS regime to implement.<sup>216</sup>

### C. Judicial Review and Transparency are Likely Unrealistic

On a final note, it is critical to acknowledge the continued issue of judicial reviewability. FIRRMA explicitly allows for civil actions to be brought in the United States Court of Appeals for the District of Columbia.<sup>217</sup> This change to the legislation creates the illusion that parties can bring suits to challenge CFIUS, but this ability is severely limited. While it is true that the possibility of Committee action being subject to judicial review could incentivize nonarbitrary decisions and better awareness of Due Process standards, actual litigation will remain a rare occurrence.<sup>218</sup>

Unfortunately for parties, the President's reasoning is still not subject to judicial review; parties can only challenge final decisions by the President on constitutional grounds.<sup>219</sup> Recall that the restrictions applied in *Ralls Corp.*; FIRRMA does not give grounds to reevaluate this precedent.<sup>220</sup> For the parties seeking recourse, this likely means that the ultimate outcome of their case will remain unaltered despite filing a civil action as the statute permits because the CFIUS structure leaves the final

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<sup>216</sup> See *infra* Part II(C).

<sup>217</sup> See Foreign Investment Risk Review Modernization Act of 2018, as part of the John S. McCain National Defense Authorization Act for Fiscal Year 2019, Pub. L. No. 115-232, § 1715, 132 Stat. 1635, 2191 (2018) (codified as amended at 50 U.S.C. § 4565(e)(2)); Joseph G. Falcone et al., *President Trump Expands CFIUS Jurisdiction and Powers*, LEXOLOGY (Aug. 14, 2018), <https://www.lexology.com/library/detail.aspx?g=c1f33256-f90b-4f65-a9a4-f3b83c2a6254>.

<sup>218</sup> See Wakely & Indorf, *supra* note 43, at 38. Though this article was written prior to the passing of the new FIRRMA law and therefore was based on the Senate's version of the proposed bill, the concern over judicial reviewability applies to the newly enacted legislation as well.

<sup>219</sup> See Leiter et al., *supra* note 179 ("FIRRMA does not eliminate the existing prohibition against judicial review of presidential actions and findings resulting from CFIUS cases . . . .").

<sup>220</sup> *Ralls Corp. v. Comm. on Foreign Inv.*, 758 F.3d 296, 311 (D.C. Cir. 2014).

determination to the discretion of the President. Realistically, a suit will probably incur further unwanted fees associated with the failed transaction and still leave the practical result of the deal unchanged.

Additionally, access to information remains limited. The issue with the government labeling more documents as classified—which may otherwise have been categorized as unclassified—remains intact under Executive Order 13,526.<sup>221</sup> The need to preserve indications of the President’s opinion on matters of foreign affairs and national security as the President sees fit likely trumps the value of general transparency.<sup>222</sup>

FIRRMA makes clear that even in successful cases, only the judge will have access to privileged information.<sup>223</sup> Section 1715 allows the D.C. Circuit Court of Appeals to consider classified or otherwise confidential evidence on the condition that review occurs on an *ex parte* basis and *in camera*.<sup>224</sup> Delegating CFIUS cases to this particular court makes sense because some judges on this circuit have experience sitting on the Foreign Intelligence Surveillance Court of Review which already hears cases involving information that is sensitive to national security.<sup>225</sup> Nevertheless,

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<sup>221</sup> See *id.* at 319; Exec. Order No. 13,526, 3 C.F.R. § 13526 (2010) (allowing significant delegation of classification authority and broad classification categories, which include “foreign relations or foreign activities of the United States.”). See generally *Dep’t of the Navy v. Egan*, 484 U.S. 518, 527 (1988) (discussing presidential “authority to classify and control access to information bearing on national security”).

<sup>222</sup> There is a utility curve of the amount of information kept proprietary. Some scholars express opposing views that government transparency has become excessive. See e.g., Christina E. Wells, *Administrative Law Discussion Forum: “National Security” Information and the Freedom of Information Act*, 56 ADMIN L. REV. 1195, 1196 (2004) (“Although officials often have credible and legitimate reasons to keep national security information secret, government secrecy initiatives have invariably expanded to encompass information beyond their initial rationale.”).

<sup>223</sup> See Foreign Investment Risk Review Modernization Act of 2018, as part of the John S. McCain National Defense Authorization Act for Fiscal Year 2019, Pub. L. No. 115-232, § 1715, 132 Stat. 1635, 2191 (2018) (codified as amended at 50 U.S.C. § 4565(e)(3)).

<sup>224</sup> *Id.*

<sup>225</sup> To handle disputes related to The Foreign Intelligence Surveillance Act (FISA), Congress established the Foreign Intelligence Surveillance Court of Review. See 50 U.S.C. § 1803 (2015). The three D.C. Circuit judges, delegated by the Chief Justice of the United States, who currently sit on the Foreign Intelligence Surveillance Court of Review are Honorable Judges Cabranes, Sentelle, and Tallman. See U.S. FOREIGN INTELLIGENCE SURVEILLANCE ACT, [https://www.fisc.uscourts.gov/fiscr\\_membership](https://www.fisc.uscourts.gov/fiscr_membership) (last visited Sept. 1, 2019); see also Nelson Dong et al., *Greater Scrutiny on Foreign Inbound Investments: Update on the Foreign Investment Risk Review Modernization Act of 2018*, DORSEY & WITNEY LLP (Aug. 15, 2018), <https://www.dorsey.com/newsresources/publications/client-alerts/2018/08/foreign-investment-risk-review-modernization-act> (“Section 1715(4) expressly

an adequate forum does not negate the need for parties to be afforded the chance to be granted actual relief or at minimum, receive some form of transparency. In reality, neither of these needs are met by FIRRMA's superficial attempt to increase judicial reviewability and transparency for parties.

Aside from the specified forum, FIRRMA may have judicial implications from the addition of mandatory declarations. Two excerpts from the *Ralls Corp* opinion give an indication as to how the Judiciary will likely interpret the change in mandatory filing and potential use of executive privilege to maintain the secrecy of the review process. When the court decided *Ralls Corp*, it differentiated the case based on the voluntary choice to file notice with CFIUS by companies involved in the transaction.<sup>226</sup> The court stated that failure to seek pre-approval did not work as waiver “when the regulatory scheme expressly contemplates that a party to a covered transaction may request approval—if the party decides to submit a voluntary notice at all—either before or *after* the transaction is completed.”<sup>227</sup> The court drew a distinction from the optional nature of filing under FINSA. This permits the assumption that the shift to mandatory filings under FIRRMA could reopen the courts to evaluate Fifth Amendment Due Process implications.

Furthermore, *Ralls Corp* did not fully deliberate the issue of executive privilege.<sup>228</sup>

It remains undetermined whether executive privilege, by either the executive communications prong or the deliberative process prong, will successfully shield disclosure of even unclassified documents considered.<sup>229</sup> Some scholars called for reform after the *Ralls Corp* decision, arguing that only the Committee's action, as an agency, should be subject to procedural review like in the cases of *Ralpho* and *Ungar* on which the *Ralls Corp* court relied.<sup>230</sup> This suggestion ignores the design of CFIUS

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provides that the ‘use of information’ provisions in FISA will not apply to any civil action brought to challenge a CFIUS ruling under Section 1715.”).

<sup>226</sup> *Ralls Corp. v. Comm. on Foreign Inv.*, 758 F.3d 296, 317 (D.C. Cir. 2014) (differentiating this case from *Alvin v. Suzuki*, 227 F.3d 107, 123 (3d Cir. 2000) and *Parker v. Bd. of Regents of Tulsa Junior Coll.*, 981 F.2d 1159, 1163 (10th Cir. 1992)).

<sup>227</sup> *Id.*

<sup>228</sup> *Id.* at 320–21.

<sup>229</sup> *Id.*; see generally *Ralls Corp.*, 758 F.3d 296.

<sup>230</sup> See, e.g., Christopher M. Fitzpatrick, Note, *Where Ralls Went Wrong: CFIUS, The Courts, and the Balance of Liberty and Security*, 101 CORNELL L. REV. 1087, 1100–01 (2016) (citing *Ralpho v. Bell*, 569 F.2d 607, 613–15 (D.C. Cir. 1977) (finding that an agency's

which intentionally blurs the line between executive agency and executive office; however, under the new FIRRMA regulation, the agency side of CFIUS gains significant power that could render this critique more applicable.<sup>231</sup>

#### D. Conclusion

Though the power of CFIUS may be better utilized under FIRRMA, the issue of efficient use of this power remains unrealized. Historically, the parties involved withdraw almost half of the transactions CFIUS investigated rather than waiting for a potentially negative determination.<sup>232</sup> The significant increase in the number of covered transactions will magnify this effect and lead to unintentional overdeterrence. The loss of economically beneficial transactions that would not have posed a threat to national security will ripple through the U.S. economy, impacting research and development, employment, and general economic stability. Additionally, FIRRMA leaves open the problematic “greenfield” investment loophole, which could potentially allow foreign investors to exploit the intellectual expertise on which the United States depends.

### III. Proposed Solution

To successfully navigate the modern battleground of the global marketplace, U.S. oversight regulations must strategically address the nation’s intertwined economic and national security objectives. While FIRRMA addresses several leading concerns of today, it expands CFIUS to a point of excess and will not be able to efficiently achieve its goals. CFIUS should be respected as a pivotal element imbedded in a larger, wholistic strategy rather than as the sole gatekeeper watching for a range of problematic commerce. CFIUS should be expanded by increasing resources needed to handle an already large volume of cases. But even

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determination using secretive evidence was unfair to the claimant entitled to an opportunity to meet the evidence considered); *Ungar v. Smith*, 667 F.2d 188, 197–98 (D.C. Cir. 1981) (reviewing only constitutional claims against the agency’s procedural mechanisms for determining the Hungarian corporation’s property rights after World War II).

<sup>231</sup> See *supra* Part II(a)(iii).

<sup>232</sup> See JAMES K. JACKSON, CONG. RESEARCH SERV., RL33388, The Committee on Foreign Investment on Foreign Investment in the United States (CFIUS) 57 (2016) (referencing the Israeli firm Check Point Software Technologies’ decision to terminate negotiations to purchase American firm Sourcefire for \$225 million).

with an increased budget to expand, a new and improved CFIUS is only part of a larger regulatory structure needed to address the complex balance between economically beneficial but tactically concerning foreign investment in U.S. technology, real estate, and infrastructure.<sup>233</sup>

First, an amendment to FIRRMA is necessary. Personal data concerns should be addressed as a separate issue independent from CFIUS. Second, CFIUS should be supported by other legislative changes. Financial regulation must authorize the SEC to require investment funds to disclose their lists of all investors including limited partners. Third, the Committee must pass regulations that ease the process for parties to avoid stifling the economy and the innovation it drives.

### **A. Amendments to CFIUS: Data**

The issue of personal data protection deserves to be addressed on its own merit. CFIUS cannot be tasked with the responsibility of addressing all current concerns. When overextended, CFIUS will not be able to review FDI transactions efficiently and adequately. Congress ought to amend FIRRMA by striking the provision that triggers CFIUS review over foreign investments resulting in foreign access to the sensitive personal data of U.S. citizens.

Instead, like the European Union, the United States should pass its own version of the GDPR. This separate bill could then address breaches of personal data that have no connection to FDI. Specifically, the bill should adopt measures to ensure American companies, and any companies that may be domiciled abroad but still collect the data of American citizens, implement adequate safeguards to prevent the theft of such information.

If passed, this amendment would reduce the number of covered transactions.

Additionally, this solution will eliminate the need for the Committee to further define what data qualifies as “sensitive” and “personal.” An overburdened CFIUS regulatory regime is equally as concerning as gaps in review coverage. FIRRMA should enable CFIUS to operate in an efficient manner, one that promotes both comprehensive reviews of FDI when national security is threatened and economic fluidity when transactions do not.

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<sup>233</sup> See Greenberg Center, *supra* note 167.

## **B. Support From Outside: SEC Investor Disclosures and Startup Funding Disclosures**

### **i. Passive Investment Still Poses a Threat**

The culmination of passive investment by foreign nationals stands to expose the U.S. economy to vulnerabilities. The Security and Exchange Commission (SEC) can ease the difficulty of identifying individuals who participate in investment funds like those discussed in Part II which are currently awarded the investment fund carveout. In an effort to increase transparency, the SEC should pass a new regulation mandating all forms of investment funds to maintain accurate records of their current beneficiaries. Adequate record keeping should identify the name, investment size, proportion of the fund attributed to the investment, and the citizenship status of each investor. The SEC should then require companies whose sum of foreign investors reaches a determined threshold of magnitude or percentage of the fund to file the fund's records with the SEC. This regulation would give CFIUS the necessary ability to determine who the investment funds truly represent, take this knowledge into consideration during its review and investigation process, and if it deems necessary, expand the "other [covered] transactions" section to include investments made by investment funds that meet certain criteria the Committee deems problematic.

### **ii. Startup Structure Reporting**

Legislators must stop the flow of FDI going into technology startups without being subject to CFIUS review. The most efficient way to accomplish this would be if each individual state uniformly enacts an additional part to their business registration requirements to stop unchecked "greenfield" investments. These laws should require companies to disclose all investors, the amount of their investments, and their citizenship status in order to legally conduct business in the state. This solution uses a registration process that is already in place to share knowledge which businesses already have access to, at little to no additional costs to the state or federal government. At the very least, this step would create a record for CFIUS and Congress to analyze. If Congress found that the intellectual property associated with these startups overlap with the category of critical technology, further steps could be taken. Federalism bars such a sweeping requirement on state

governments; Congress likely cannot force this simple solution upon the states without “commandeering” state legislatures in violation of the Tenth Amendment.<sup>234</sup> Universal concern over the issues present could nevertheless drive states to pass their own versions of such a reporting standard, but full enactment by all fifty states is likely too optimistic. Unfortunately, to gather this information it is likely necessary for Congress to make a separate federal establishment of business entity registration form.<sup>235</sup> In taking additional measures to shelter American technology and know-how from foreign nationals, legislators should consider the risk of banning foreign investment into new ventures against the possible cost to innovation should that funding supply suddenly evaporate.

### C. Regulations Inside CFIUS: Definitions

One of FIRRMA’s strengths is its design to allow the experts, the Committee, to further establish specific federal regulations to implement the law’s intended changes. The Treasury department stated that FIRRMA will reach full implementation no later than February 2020 after the completion of the pilot program.<sup>236</sup> To best capitalize on this opportunity and avoid overbreadth issues that could cause a chilling effect on investment, CFIUS should consider adding regulations to clarify what transactions trigger the “critical technologies” review.

It is well-documented that in some industries, companies tend to patent innovations in order to protect their commercial value.<sup>237</sup> Examples of this are frequently found in pharmaceutical and biotech companies. As a result, the Committee could identify particular companies who hold patents that indicate research and development into areas the DOD believes has the potential to prove useful from a military standpoint. By targeting companies rather than entire industry sectors, the number of covered transactions could be greatly reduced. Nevertheless, for industries where

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<sup>234</sup> See U.S. CONST. amend. X.

<sup>235</sup> Congress could argue that this action is supported by the Commerce Clause. See U.S. CONST. art. I, § 8, cl. 3.

<sup>236</sup> Press Release, U.S. Dep’t of the Treasury, Treasury Releases Interim Regulations for FIRRMA Pilot Program, (Oct. 10, 2018), <https://home.treasury.gov/news/press-releases/sm506>.

<sup>237</sup> See, e.g., Stuart J.H. Graham et al., *High Technology Entrepreneurs and the Patent System: Results of the 2008 Berkeley Patent Survey*, 24 BERKELEY TECH. L.J. 1255, 1278 (2009) (“[T]he incidence and usefulness of patents to technology entrepreneurs is very much determined by the industry and technology in which the company is operating.”).

trade secret protection is used as an alternative to filing patents, the Committee will need to stick to industry wide identification. The NAICS codes used in the pilot program appear to be a useful tool; however, it should be noted that businesses self-identify for these classifications.

The Committee should urgently implement Federal Regulation that defines “influence” specifically. By defining the currently vague term through exact situations and numeric criteria, parties can be clear when CFIUS review should be initiated and when their filing of notice would only hinder valid inquiries into other transactions. The Committee can apply the long-recognized value behind bright line rules in unrelated legal precedent to avoid overbreadth that would otherwise hinder positive economic activity and distract resources from transactions in need of oversight.

An additional means of transferring intellectual property across borders that is not addressed by CFIUS is the labor market. Non-compete agreements and trade secret law are unlikely to preserve proprietary information being used in jurisdictions outside the United States. This fight over the right to work freely between individuals and the companies who invest in their employees is seen in the current debate over the social value and public policy arguments for and against the use of non-compete agreements. As long as public policy favors the freedom of individuals to earn a living in their prospective fields of expertise, then all the essential information FIRMA seeks to protect could be transferred through the medium of minds without the scrutiny of CFIUS review. The mobility of individuals in their occupations has undeniable value by giving individuals autonomy. Nevertheless, the poaching of America’s best minds does pose a real threat to national security that should be considered.

It has been assumed that the benefits an individual derives from living in the United States outweigh any monetary incentives companies abroad may offer, but perhaps this assumption nears the end of its utility as the rise of greed plagues modern society. Ideally, a sense of national loyalty within the individuals who have such critical proprietary knowledge would limit any potentially problematic intellectual property transfer across borders; however, this may no longer be the case as the increasingly global economy continues to give rise to a sense of global citizenship. Regardless of the rationale behind the decisions of business leaders, the need for oversight of FDI is clear and CFIUS will need to pass further regulations to ensure they adequately and efficiently review transactions.

#### **IV. Conclusion**

In conclusion, the proposed changes regarding the removal of data as a triggering transaction component, the Committee's defining of "critical technologies" and "influence," and the SEC regulation to track passive investment will condense the far reaching implications of the new CFIUS regime under FIRRMA and maximize efficiency to encourage investment into the American economy without hindering genuine concerns over national security. Today, with the rise of the global market and military dependence on private sector innovation, it is the duty of the elected officials of the United States to achieve the precise balance between protecting the nation from problematic FDI and ensuring economic investment continues to incentivize the innovation that protects the country. FIRRMA fails to achieve this critical balance because it is neither sufficient in protecting national security interests nor efficient in preserving economic incentives.

