

2020

## Investments and Security: Balancing International Commerce and National Security with Expanded Authority for the Committee on Foreign Investment in the United States

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### Recommended Citation

Christopher Jusuf, *Investments and Security: Balancing International Commerce and National Security with Expanded Authority for the Committee on Foreign Investment in the United States*, 29 Cath. U. J. L. & Tech 145 (2020).

Available at: <https://scholarship.law.edu/jlt/vol29/iss1/5>

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# INVESTMENTS AND SECURITY: BALANCING INTERNATIONAL COMMERCE AND NATIONAL SECURITY WITH EXPANDED AUTHORITY FOR THE COMMITTEE ON FOREIGN INVESTMENT IN THE UNITED STATES

*Christopher W. Jusuf\**

“I believe strongly in free trade but it also has to be fair trade. It’s been a long time since we had fair trade. . . . I am not going to let America and its great companies and workers be taken advantage of any longer. They have taken advantage of our country. No longer.”<sup>1</sup> In his first address to Congress in 2017, newly inaugurated President Donald Trump vowed to reverse what he saw as a decades-long policy of international commerce that was hurting the American worker. This view on trade policy was a central element of his populist platform that propelled then-candidate Trump to victory in the 2016 presidential election<sup>2</sup> and represented a significant departure from traditional Republican commitments to free enterprise and low barriers to international commerce.<sup>3</sup>

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<sup>1</sup> Donald Trump, President, Remarks by President Trump in Joint Address to Congress (Feb. 28, 2017) (transcript available in the DAILY COMP. PRES. DOC.).

<sup>2</sup> *Read Donald Trump’s Speech on Trade*, TIME (June 28, 2016), <https://time.com/4386335/donald-trump-trade-speech-transcript/>.

<sup>3</sup> Julia Azari, *Why The 2016 Election Won’t Go Away*, FIFETHIRTYEIGHT (Nov. 7,

Although public opinion still varies widely on the issues of trade deficits, free trade agreements, and foreign competition with American businesses,<sup>4</sup> lawmakers and administration officials have long acknowledged the effects of international commerce on national security. This issue has largely remained unaddressed in mainstream American political discourse.<sup>5</sup>

In March of 2018, the federal government blocked semiconductor giant Broadcom from acquiring the San Diego-based chip manufacturer Qualcomm for \$103 billion.<sup>6</sup> Earlier that year, the government also stopped a similar firm, Hubei Xinyan, from purchasing semiconductor testing company Xcerra Corp for \$580 million.<sup>7</sup> More notably, in a case involving Huawei Technologies, the Chinese smartphone giant was halted from a deal with AT&T to sell its products in the US.<sup>8</sup> Each transaction was killed by a little-known—but increasingly powerful—administrative panel within the executive branch: the Committee on Foreign Investment in the United States (CFIUS) (also “the committee”).<sup>9</sup> Each case also represents a new front in the growing technological, economic, and strategic competition between China and the US.<sup>10</sup> Unlike more commonly known executive powers, such as imposing tariffs or sanctions, CFIUS authority enables the president to completely prohibit specific transactions—or even suspend existing deals—when justified for national security purposes.<sup>11</sup>

From 2013 to 2015, the last years that CFIUS released unclassified data, 74 of the 387 (19.1%) reviewed transactions were focused on cases involving

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2017), <https://fivethirtyeight.com/features/why-the-2016-election-wont-go-away/> (noting that “on multiple occasion during the 2016 campaign, Trump broke from Republican orthodoxy, including on issues such as free trade and health care”).

<sup>4</sup> Lydia Saad, *Americans’ Views on Trade in the Trump Era*, GALLUP (Oct. 25, 2019), <https://news.gallup.com/opinion/gallup/267770/americans-views-trade-trump-era.aspx>.

<sup>5</sup> See Simon Lester & Huan Zhu, *Closing Pandora’s Box: The Growing Abuse of the National Security Rationale for Restricting Trade*, CATO INST. (June 25, 2019), <https://www.cato.org/publications/policy-analysis/closing-pandoras-box-growing-abuse-national-security-rationale>.

<sup>6</sup> Emily Stewart, *The Broadcom-Qualcomm Deal and Trump’s Decision to Block It, Explained*, VOX (Mar. 13, 2018), <https://www.vox.com/policy-and-politics/2018/3/13/17116288/qualcomm-broadcom-trump-cfius-treasury-deal>.

<sup>7</sup> Greg Roumeliotis, *U.S. Blocks Chip Equipment Maker Xcerra’s Sale to Chinese State Fund*, REUTERS (Feb. 22, 2018), <https://www.reuters.com/article/xcerra-ma-hubeixinyan/u-s-blocks-chip-equipment-maker-xcerras-sale-to-chinese-state-fund-idUSL2N1QD01X>.

<sup>8</sup> Sijia Jiang, *Huawei’s AT&T U.S. Smartphone Deal Collapses*, REUTERS (Jan. 8, 2018), <https://www.reuters.com/article/us-at-t-huawei-tech/huaweis-att-u-s-smartphone-deal-collapses-idUSKBN1EX29E>.

<sup>9</sup> Kevin Granville, *Cfius, Powerful and Unseen, is a Gatekeeper on Major Deals*, N.Y. TIMES (Mar. 5, 2018), <https://www.nytimes.com/2018/03/05/business/what-is-cfius.html>.

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

China-based acquirers.<sup>12</sup> Given the recent focus to counter increasing Chinese influence, this number will likely grow in the coming years.<sup>13</sup> This effect will be multiplied by the increased scope of authority granted to CFIUS with the 2018 enactment of the Foreign Investment Risk Review Modernization Act (FIRRMA).<sup>14</sup> While recognized by many officials as a necessary asset to protect American national security interests, especially in an era of emergent Chinese aggression, many critics are concerned that CFIUS is an overly blunt tool that puts an unnecessary burden on business transactions and will have negative impacts on economic growth that will outlive the current US-China rivalry.<sup>15</sup>

Originally created and operated by an Executive Order under President Gerald Ford in 1975,<sup>16</sup> CFIUS traces its statutory origins to the 1988 “Exon-Florio” amendment to the Defense Production Act of 1950, which authorized the president to “review certain corporate mergers, acquisitions, and takeovers, and to investigate the potential impact on national security of such actions.”<sup>17</sup> Later, the 2007 Foreign Investment and National Security Act officially established CFIUS in a statute during concerns over foreign purchases of US port activity.<sup>18</sup> The 2018 FIRRMA legislation represents the most significant expansion of CFIUS authority in the committee’s history. It has already been used to dramatically increase the number of transactions reviewed; thus, making the committee’s review “a core aspect of capital fundraising and [mergers and acquisitions] for more businesses than it has been in the past.”<sup>19</sup> Originally established as a voluntary advisory committee, CFIUS has evolved into what has been called “the No. 1 weapon in the Trump administration’s protectionist arsenal” and the “ultimate regulatory bazooka.”<sup>20</sup>

This article proposes that the FIRRMA expansion of CFIUS authority provides necessary tools to protect important American national security interests in a highly dynamic power competition with China, but statutory or

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<sup>12</sup> 2015 COMM. ON FOREIGN INV. IN THE U. S. ANN. REP. 16.

<sup>13</sup> Mercy A. Kuo, *CFIUS and China: The FIRRMA Factor*, THE DIPLOMAT (Oct. 17, 2018), <https://thediplomat.com/2018/10/cfius-and-china-the-firma-factor/>.

<sup>14</sup> *Id.*

<sup>15</sup> Robert Teitelman, *The Biggest Threat to Mergers Could Be a Secretive Government Agency*, BARRON’S (Apr. 30, 2019), <https://www.barrons.com/articles/committee-foreign-investment-cfius-mergers-51556635683>; Hernan Cristerna, *Deal-Making is Alive and Well, but the Market is Changing*, N.Y. TIMES (Aug. 25, 2017), <https://www.nytimes.com/2017/08/25/business/dealbook/deal-making-is-alive-and-well-but-the-market-is-changing.html?module=inline>.

<sup>16</sup> Exec. Order No. 11858, 40 Fed. Reg. 20,263 (May 7, 1975).

<sup>17</sup> JARED T. BROWN & MOSHE SCHWARTZ, CONG. RESEARCH SERV., R43767, THE DEFENSE PRODUCTION ACT OF 1950: HISTORY, AUTHORITIES, AND CONSIDERATIONS FOR CONGRESS 18 (2018).

<sup>18</sup> *Id.*

<sup>19</sup> Kuo, *supra* note 13.

<sup>20</sup> Cristerna, *supra* note 15; Granville, *supra* note 9.

administrative limitations should be instituted to prevent abuse and to avoid undue economic burdens that do not affect national security. “Section I: Prior Law” will review the administrative and statutory history of CFIUS to establish the original policy goals for the committee, and to determine how its structural makeup enables—and limits—its reach. “Section II: The Foreign Investment Risk Review Modernization Act” will explore in-depth the legislative history, text, and regulatory effects of FIRRMA. “Section III: Analysis” will assess the merits of various arguments surrounding CFIUS and FIRRMA, as well as review cases in which CFIUS has exercised its newly expanded jurisdictional authority. “Section IV: Conclusion” will close the article with a summary of its findings and outlook on the future.

## I. PRIOR LAW

### A. Executive Order 11858

On May 7, 1975, President Ford issued Executive Order 11858, creating CFIUS.<sup>21</sup> Section 1(a) established that the committee comprises six representatives—none below the assistant-secretary level—designated by the Secretary of State, the Secretary of the Treasury, the Secretary of Defense, the Secretary of Commerce, the Assistant to the President for Economic Affairs (Chief Economic Advisor), and the Executive Director of the Council on International Economic Policy.<sup>22</sup> The order designated the representative from the Department of the Treasury as the chairman of the committee and granted the chairman authority to invite representatives from other departments and agencies to participate in committee business.<sup>23</sup> Section 1(b) outlines CFIUS’s primary responsibility of “monitoring the impact of foreign investment in the United States, both direct and portfolio, and for coordinating the implementation of United States policy on such investment.”<sup>24</sup> In execution of this duty, the committee is directed to provide various forms of analyses and advice to the president on foreign investments, including a “review [of] investments in the United States which, in the judgment of the [c]ommittee, might have major implications for United States national interest.”<sup>25</sup> Section 1(c) directs the committee to “submit recommendations and analyses to the National Security

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<sup>21</sup> Exec. Order No. 11858, 40 Fed. Reg. at 20,263.

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

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

Council and to the Economic Policy Board” should the need arise.<sup>26</sup>

In its early years, CFIUS existed merely as an advisory committee without any explicit responsibility over matters of national security.<sup>27</sup> The inclusion of the Department of Defense (DoD) as a permanent member of the committee suggests that national defense is to be included in its overall review of foreign investments.<sup>28</sup> However, the primary motivation for its creation was spurred by increasing concerns about members of the Organization of Petroleum Exporting Countries (OPEC) investing in American financial assets for political influence over economic benefit.<sup>29</sup> President Ford created the committee to ease these concerns and “dissuade Congress from enacting new restrictions” on foreign investment.<sup>30</sup>

Initially, CFIUS was not a particularly active organization; meeting only ten times between 1975 and 1980.<sup>31</sup> Beginning in 1980, the committee evolved into the national security-focused organization that it is today.<sup>32</sup> At the request of the DoD, CFIUS investigated several proposed acquisitions by foreign firms of various American companies that produced materials or products used by the military.<sup>33</sup> DoD-requested investigations comprised a majority of CFIUS activity between 1980 and 1987.<sup>34</sup>

#### B. The Exon-Florio Amendment

In response to concerns about increasingly frequent acquisitions from Japanese technology companies, Congress passed the “Exon-Florio” Amendment as part of the Omnibus Trade and Competitiveness Act of 1988.<sup>35</sup> This provision updated the Defense Production Act of 1950 to give explicit authority to the president to “block proposed or pending foreign ‘mergers, acquisitions, or takeovers’ of ‘persons engaged in interstate commerce in the United States’ that threaten to impair the national security.”<sup>36</sup> Exon-Florio also

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

<sup>27</sup> *See id.* (omitting from the CFIUS’s mandate any explicit national security responsibilities).

<sup>28</sup> JAMES K. JACKSON, CONG. RESEARCH SERV., RL33388, COMMITTEE ON FOREIGN INVESTMENT IN THE UNITED STATES (CFIUS) 31 (2019); *see also* Exec. Order No. 11858, *supra* note 16.

<sup>29</sup> JAMES K. JACKSON, CONG. RESEARCH SERV., RL33388, COMMITTEE ON FOREIGN INVESTMENT IN THE UNITED STATES (CFIUS) 4 (2019).

<sup>30</sup> *Id.*

<sup>31</sup> *Id.* at 6.

<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

<sup>34</sup> JAMES K. JACKSON, CONG. RESEARCH SERV., RL33388, COMMITTEE ON FOREIGN INVESTMENT IN THE UNITED STATES (CFIUS) 6 (2019).

<sup>35</sup> *Id.* at 7.

<sup>36</sup> *Id.*

established the parameters in which the president could invoke this authority by limiting it to situations in which “1) other U.S. laws were inadequate or inappropriate to protect the national security; and 2) ‘credible evidence’ existed that the foreign interest exercising control might take action that threatened to impair U.S. national security.”<sup>37</sup> It should be noted that the first version of the bill encompassed transactions implicating “national security and essential commerce.”<sup>38</sup> President Ronald Reagan vetoed this version of the bill because he believed that “essential commerce” would be too broad of a category that could extend the president’s authority to review transactions that did not meet the “traditional concepts of military/defense.”<sup>39</sup> Congress conceded to the administration’s request to limit review authority only to matters directly impacting national security by removing the “essential commerce” language.<sup>40</sup>

President Reagan signed the Exon-Florio Amendment into law and implemented it via Executive Order 12661, which delegated the new authorities to CFIUS.<sup>41</sup> The executive order prescribed deadlines for the review process, as well as certain required elements in the committee’s report to the president.<sup>42</sup> Notably, the new provisions changed the prescribed membership requirements to replace the “representatives” from each of the respective departments with the secretaries of each department—signaling the newly heightened importance of the committee.<sup>43</sup> Further, the order added the Attorney General and the Director of the Office of Management and Budget (OMB) as permanent members of the committee.<sup>44</sup> Even though CFIUS was not explicitly designated as the executing agency in the Exon-Florio Amendment, President Reagan’s implementation effectively reformed the committee into an expansive and far-reaching entity with broad authority to review foreign investments and recommend to the president that certain transactions be halted for national defense purposes.<sup>45</sup>

Perhaps the most significant effect of the Exon-Florio Amendment is that it signaled to the White House that Congress wanted the presidency to play a more active role in assuaging public concerns about possible detrimental effects of malicious foreign investment, while simultaneously removing the legislative

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<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

<sup>39</sup> *Id.* at 7–8.

<sup>40</sup> JAMES K. JACKSON, CONG. RESEARCH SERV., RL33388, COMMITTEE ON FOREIGN INVESTMENT IN THE UNITED STATES (CFIUS) 7 (2019).

<sup>41</sup> Exec. Order No. 12661, 54 Fed. Reg. 779 (Dec. 7, 1988).

<sup>42</sup> *Id.* at 780–81.

<sup>43</sup> *Id.* at 779.

<sup>44</sup> *Id.*

<sup>45</sup> JAMES K. JACKSON, CONG. RESEARCH SERV., RL33388, COMMITTEE ON FOREIGN INVESTMENT IN THE UNITED STATES (CFIUS) 7-8 (2019).

branch from the process.<sup>46</sup> Although Congress did not want to change the US's long-standing policy of openness to foreign investment and trade, some industries were concerned that they would be wrongfully considered for review under the auspice of national security.<sup>47</sup> Because CFIUS serves as a direct advisor to the president, and is comprised entirely of presidential appointees, its approach and aggressiveness in pursuing limitations is largely determined by the president's philosophical outlook toward foreign investments.<sup>48</sup>

### C. The Byrd Amendment

In 1992, Senator Robert Byrd inserted an amendment to the National Defense Authorization Act (NDAA) for Fiscal Year 1993, to yet again increase CFIUS's reach.<sup>49</sup> Unlike the existing discretionary authority enjoyed by the committee at the time, the "Byrd Amendment" introduced language that explicitly required the president—through CFIUS—to investigate any "instance in which an entity controlled by or acting on behalf of a foreign government seeks to engage in any merger, acquisition, or takeover which could result in the control of a person engaged in interstate commerce in the United States that could affect the national security of the United States."<sup>50</sup> The Byrd Amendment further expanded the scope of CFIUS and reinforced its now primary purpose of addressing national security concerns. However, ambiguity in some of its language would later inspire Congress to further amend the provision for greater clarification.<sup>51</sup>

### D. The Foreign Investment and National Security Act

Despite its existence since 1975, CFIUS itself was not expressly authorized by statute until President George W. Bush signed the Foreign Investment and National Security Act (FINSAs) on July 26, 2007.<sup>52</sup> In codifying CFIUS into law, FINSAs's main provisions clarified the review and investigation process, increased oversight measures for Congress, and added tracking and enforcement

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<sup>46</sup> *See id.* at 8 (noting that "Congress attempted to strengthen the President's hand in conducting foreign investment policy, while limiting its own role as a means of emphasizing that, as much as possible, the commercial nature of investment transactions should be free from political considerations").

<sup>47</sup> *Id.*

<sup>48</sup> *Id.*

<sup>49</sup> *Id.* at 9.

<sup>50</sup> National Defense Authorization Act for Fiscal Year 1993, Pub. L. No. 102-484, § 837, 106 Stat. 2315, 2464 (1992) (codified as amended at 50 U.S.C. app. § 2170).

<sup>51</sup> H.R. REP. NO. 110-24, at 10 (2007).

<sup>52</sup> JAMES K. JACKSON, CONG. RESEARCH SERV., RL33388, COMMITTEE ON FOREIGN INVESTMENT IN THE UNITED STATES (CFIUS) 4, 10 (2019).

measures to be implemented after committee decision.<sup>53</sup> The bill further expanded the scope of CFIUS review by adding security implications to “critical infrastructure” as review criteria.<sup>54</sup> In addition, FINSA prescribed three factors to consider during a national security review of a transaction: (1) the threat posed by the foreign investment in terms of intent and capabilities, (2) the potential aspects of the business activity that could pose vulnerabilities to national security, and (3) the national security consequences if the vulnerabilities are exploited.<sup>55</sup> FINSA also added the Secretary of Commerce and the Secretary of Homeland Security as permanent members of the committee.<sup>56</sup>

Part of Congress’ motivation for FINSA was to address a “potential misreading of Congressional intent in the so-called ‘Byrd amendment’ to Exon-Florio” by ensuring “that transactions involving companies controlled by foreign governments will receive heightened scrutiny by CFIUS.”<sup>57</sup> This concern arose after CFIUS approved Dubai Ports World’s purchase of management operations of several major port facilities around the US.<sup>58</sup> Although corrective administrative measures were later taken to address these concerns, Congress felt it was time to implement a more robust statutory framework upon CFIUS.<sup>59</sup>

#### E. The Regulatory Framework and Process

This section will outline the standard practices and guidelines CFIUS operated under prior to FIRRMA’s enactment. As mentioned above, the president was authorized to:

suspend or prohibit any “covered transaction” when, in the President’s judgment, there is credible evidence to believe that the foreign person exercising *control* over a U.S. business might take action that threatens to impair the national security, and when provisions of [other law] do not, in the judgment of the President, provide adequate and appropriate authority for the President to protect the national security.<sup>60</sup>

“Control” is defined as:

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<sup>53</sup> Foreign Investment and National Security Act of 2007, Pub. L. No. 110-49, §§ 2, 5, 7, 121 Stat. 246 (2007) (to be codified at 50 U.S.C. app. § 2061 note).

<sup>54</sup> § 2(b)(2)(E).

<sup>55</sup> JAMES K. JACKSON, CONG. RESEARCH SERV., RL33388, COMMITTEE ON FOREIGN INVESTMENT IN THE UNITED STATES (CFIUS) 10 (2019).

<sup>56</sup> Foreign Investment and National Security Act § 3.

<sup>57</sup> H.R. REP. NO. 110-24, at 10 (2007).

<sup>58</sup> *Id.* at 12.

<sup>59</sup> *Id.* at 13.

<sup>60</sup> 31 C.F.R. § 800.101 (2011) (emphasis added).

the power, direct or indirect, whether or not exercised, through the ownership of a majority or a dominant minority of the total outstanding voting interest in an entity, board representation, proxy voting, a special share, contractual arrangements, formal or informal arrangements to act

in concert, or other means, to determine, direct, or decide important matters affecting an entity.<sup>61</sup>

Prior to FIRRMA, there were four categories of “covered transactions” that CFIUS had review authority over: (a) a transaction which results or could result in control of a US business by a foreign person; (b) a transaction in which a foreign person conveys its control of a US business to another foreign person; (c) a transaction that results or could result in control of any part of an entity or assets, if such a part of an entity or assets constitutes a US business; and (d) a joint venture in which the parties enter into a contractual or other similar arrangement, in which a foreign person could control a US business by means of the joint venture.<sup>62</sup>

Non-covered transactions include: (a) a stock split or pro rata stock dividend that does not involve a change in control; (b) a transaction that results in a foreign person holding ten percent or less of the outstanding voting interests in a US business, but only if the transaction is solely for the purpose of passive investment; (c) an acquisition of any part of an entity of assets that do not constitute a US business; (d) an acquisition of securities by a person acting as a securities underwriter in the ordinary course of business and in the process of underwriting; and (e) an acquisition pursuant to a condition in a contract of insurance related to fidelity, surety, or casualty obligations if the contract was made by an insurer in the ordinary course of business.<sup>63</sup>

In order to initiate a review of a covered transaction, a party to the transaction, normally the US business, will provide voluntary notice to the committee that will include several important pieces of information required by the regulation.<sup>64</sup> Parties—understanding that CFIUS has the authority to review a transaction indefinitely, even after execution—generally comply with this voluntary notice procedure in order to avoid possible divestment risks or other punitive actions by the president.<sup>65</sup>

After the notice is accepted, CFIUS has thirty days to review the transaction.<sup>66</sup> By the end of this review period, the committee can begin an investigation phase

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<sup>61</sup> § 800.204(a).

<sup>62</sup> § 800.301(a)–(d).

<sup>63</sup> § 800.302(a)–(e).

<sup>64</sup> § 800.401(a).

<sup>65</sup> JAMES K. JACKSON, CONG. RESEARCH SERV., RL33388, COMMITTEE ON FOREIGN INVESTMENT IN THE UNITED STATES (CFIUS) 8 (2019).

<sup>66</sup> 31 C.F.R. § 800.502(b).

if any member of the committee believes the transaction poses a threat to national security.<sup>67</sup> If the committee chooses not to undertake the additional investigation, CFIUS action on that transaction is concluded, and the parties may proceed with their plan.<sup>68</sup> If the committee chooses to commence an investigation, the investigation must begin before the end of the thirty-day review period, and the investigation may not last longer than forty-five days.<sup>69</sup>

No later than one day after the investigation concludes, CFIUS shall send a report to the president if (1) the committee recommends that the president suspend or prohibit the transaction, (2) the committee is unable to reach a decision on suspension or prohibitions, or (3) the committee requests that the president his or herself makes a determination on the transaction.<sup>70</sup> The committee is not required to report to the president if it concludes its investigation and finds that no further action is needed.<sup>71</sup>

Although on paper it seems that this process takes a maximum of seventy-five days, in practice it often takes much longer for a transaction to be fully reviewed.<sup>72</sup> Because the list of information required in their notices is extensive, companies have adopted a practice of “pre-filing” with CFIUS to ensure that the committee has all the information it needs in order to complete a formal review.<sup>73</sup> Additionally, companies will often withdraw from the formal review in order to address specific concerns that the committee may have with its plan that would otherwise preclude approval.<sup>74</sup>

#### F. CFIUS in Action Prior to FIRRMA

One of the challenges in assessing past-CFIUS practice is the fact that the committee rarely releases public data on its reviews. In order to protect both proprietary business information for US companies, as well as classified information regarding national security priorities, CFIUS is mandated to keep information on parties and transactions confidential during and after review.<sup>75</sup>

However, an unclassified version of a 2015 report to Congress provides some insight into the general activity of the committee during that time, albeit on a

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<sup>67</sup> § 800.503(a)(1).

<sup>68</sup> § 800.504.

<sup>69</sup> §§ 800.505–506.

<sup>70</sup> § 800.506(a), (b)(1)–(3).

<sup>71</sup> § 800.506 (d).

<sup>72</sup> H.R. REP. NO. 110-24, at 11 (2007).

<sup>73</sup> *Id.* at 10.

<sup>74</sup> *Id.* at 10–11.

<sup>75</sup> 31 C.F.R. § 800.702(a)–(d).

macro level without providing details of individual cases.<sup>76</sup> In 2015, CFIUS reviewed 143 covered transactions and investigated sixty-six of them.<sup>77</sup> Eleven notices were approved after CFIUS directed mitigating measures to address national security concerns.<sup>78</sup> Three notices were withdrawn and abandoned after CFIUS and the parties were unable to identify mutually acceptable mitigating measures; one notice was rejected outright.<sup>79</sup>

The number of notices, and consequently the number of investigations, steadily increased each year between 2009 and 2015, with the frequency of reviews more than doubling during that period.<sup>80</sup> China is involved in about twenty percent of all CFIUS reviews, which is more than any other country.<sup>81</sup> In the same period, from 2013–2015, investments from the United Kingdom and Canada—both staunch US allies and trading partners—comprised the second and third countries in the same metric.<sup>82</sup>

In order to protect classified information, CFIUS does not release conclusions reached on whether there is a coordinated effort to acquire critical US technology companies, but data suggests that Chinese firms acquire more critical US technology companies than any other non-ally nation.<sup>83</sup> Even more concerning was the committee's conclusion that foreign adversaries are committed to using a range of tactics to obtain critical US technology.<sup>84</sup> The committee determined that “[s]ensitive U.S. economic information and technology are targeted by the intelligence services, private sector companies, academic and research institutions, and citizens of dozens of countries.”<sup>85</sup>

## II. THE FOREIGN INVESTMENT RISK REVIEW MODERNIZATION ACT

In explaining its motivation behind passing FIRRMA, Congress stated:  
it should continue to be the policy of the United States to enthusiastically welcome and support foreign investment, consistent with the protection of national security; at the same time, the national security landscape has shifted in recent years, and so has the nature of the investments that pose the greatest potential risk to national

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<sup>76</sup> 2015 COMM. ON FOREIGN INV. IN THE U. S. ANN. REP. 12.

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

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

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

<sup>80</sup> *Id.* at 3.

<sup>81</sup> *Id.* at 16.

<sup>82</sup> *Id.*

<sup>83</sup> *Id.* at 28.

<sup>84</sup> *Id.* at 31.

<sup>85</sup> *Id.*

security, which warrants an appropriate modernization of the processes and authorities of the Committee on Foreign Investment in the United States.<sup>86</sup>

Congress also stated that a national security nexus is a prerequisite for the committee to review a case for the purposes of defending a national interest.<sup>87</sup>

FIRRMA's most significant reform to CFIUS is the expansion of scope with four new "covered transaction" categories in addition to the existing classifications.<sup>88</sup> These include (1) the purchase or lease by a foreign person of real estate located on or near US government property that may provide surveillance abilities; (2) non-passive foreign investments in any company that works with "critical technology," "critical infrastructure," or "sensitive personal information of U.S. citizens;" (3) changes in existing ownership rights that could change control of a US company; and (4) any other transaction structured to circumvent CFIUS review.<sup>89</sup>

Additionally, FIRRMA adds six new factors that committee members must consider while reviewing a notice: (1) involvement of a country of "special concern" that seeks to acquire critical technology or infrastructure; (2) potential national security effects of cumulative control of a critical technology or other assets; (3) a foreign person's history of complying with US law; (4) how control of US industries and commercial activity affects the US's ability to produce materials and products needed by the Department of Defense; (5) the extent to which a covered transaction could expose private information of US citizens to foreign persons as it affects national security; and (6) the likelihood a covered transaction creates or worsens a cybersecurity vulnerability.<sup>90</sup>

Other than expanding CFIUS's review scope and criteria, FIRRMA also makes several administrative changes to the committee, including the establishment of a specialized fund in which CFIUS may charge fees to fund reviews and hire additional staff to perform the increased workload expected with the expanded jurisdiction.<sup>91</sup> FIRRMA also centralizes much of CFIUS's staff within the Treasury Department and directs all other participant departments to designate an assistant secretary position to oversee the

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<sup>86</sup> Foreign Investment Risk Review Modernization Act of 2018, Pub. L. No. 115-232, § 1702(b)(3)–(4), 132 Stat. 2175–76 (2018).

<sup>87</sup> § 1702(b)(9).

<sup>88</sup> Stephanie Zable, *The Foreign Investment Risk Review Modernization Act of 2018*, LAWFARE (Aug. 2, 2018), <https://www.lawfareblog.com/foreign-investment-risk-review-modernization-act-2018>.

<sup>89</sup> *Id.*

<sup>90</sup> § 1702(c)(1)–(6).

<sup>91</sup> Zable, *supra* note 88.

department's CFIUS activities.<sup>92</sup> The time limit for the review phase was extended from thirty to forty-five days, and the committee may now invoke a fifteen-day extension on the investigation phase under "extraordinary circumstances."<sup>93</sup> Lastly, FIRRMA grants CFIUS greater authority to initiate reviews unilaterally,<sup>94</sup> an ability that has some critics worried about overreach.<sup>95</sup>

On January 17, 2020, the Treasury Department's Investment Security Office published the final rules to implement FIRRMA into the US regulatory regime. The publication came in two parts: the first implementing the majority of FIRRMA provisions<sup>96</sup> and the second implementing the provisions regarding the new rules on real estate transactions.<sup>97</sup> These rules took effect on February 13, 2020.<sup>98</sup> A subsequent publication on February 18, 2020, made technical corrections to these rules to provide clarity but did not make significant policy changes to the regulations.<sup>99</sup>

In clarifying what CFIUS considers when reviewing a covered transaction, the rule states that any committee analysis should consider the following elements: the *threat*, the *vulnerabilities*, and the *consequences to national security* related to a potential transaction.<sup>100</sup> The threat is defined as "the intent and capability of a foreign person to take action to impair the national security of the United States."<sup>101</sup> The vulnerabilities are the "extent to which the nature of the US business presents susceptibility to impairment of national security."<sup>102</sup> The consequences to national security are the "potential effects on national security that could reasonably result from the exploitation of the vulnerabilities by the threat actor."<sup>103</sup>

The Treasury Department noted that during the notice-and-comment period for the regulation, several stakeholders requested that the definition of "critical

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<sup>92</sup> *Id.*

<sup>93</sup> *Id.*

<sup>94</sup> *Id.*

<sup>95</sup> See Teitelman, *supra* note 15.

<sup>96</sup> Provisions Pertaining to Certain Investments in the United States by Foreign Persons, 85 Fed. Reg. 3112, 3113 (Jan. 17, 2020) (to be codified at 31 C.F.R. pt. 800, 801).

<sup>97</sup> Provisions Pertaining to Certain Transactions by Foreign Persons Involving Real Estate in the United States, 85 Fed. Reg. 3158, 3158 (Jan. 17, 2020) (to be codified at 31 C.F.R. pt. 802).

<sup>98</sup> Provisions Pertaining to Certain Investments in the United States by Foreign Persons, 85 Fed. Reg. at 3112; Provisions Pertaining to Certain Transactions by Foreign Persons Involving Real Estate in the United States, 85 Fed. Reg. at 3158.

<sup>99</sup> Provisions Pertaining to Certain Investments in the United States by Foreign Persons and Provisions Pertaining to Certain Transactions by Foreign Persons Involving Real Estate in the United States; Correction, 85 Fed. Reg. 8747, 8747 (proposed Feb. 18, 2020) (to be codified at 31 C.F.R. pt. 800, 802).

<sup>100</sup> 31 C.F.R. § 800.102 (2020).

<sup>101</sup> *Id.*

<sup>102</sup> *Id.*

<sup>103</sup> *Id.*

technology” be amended from those used in the proposed rules.<sup>104</sup> The Department, however, noted that FIRRMA sets the definition of the term, and did not give the executive branch discretion to change the statutory definition.<sup>105</sup> Under FIRRMA, critical technologies include products in any of six specified categories: (1) defense products included in the US Munitions List as “set forth in the International Traffic in Arms Regulation (ITAR),” (2) items on the Commerce Control List of the Export Administration Regulations, (3) specially designed equipment and components related to nuclear energy, (4) nuclear facilities and material, (5) specified agents and toxins, and (6) “emerging and foundational technologies.”<sup>106</sup> Prior to the publication of the final rule, stakeholders were concerned that there was not a clear definition of “emerging and foundational technologies.”<sup>107</sup> The Department responded by incorporating the definition of the same term from the previously enacted Export Control Reform Act of 2018.<sup>108</sup> However, that act does not have a specific definition of the term itself, and instead gives wide discretion to the administration to identify such technologies that “are essential to the national security of the United States.”<sup>109</sup> These terms are particularly important because the new regulations permanently codify a pilot program that required mandatory notice filings by parties to transactions involving critical technology.<sup>110</sup> Such transactions involving critical technology, along with transactions that would result in controlling interests by a foreign government, require the parties to file a mandatory notice, rather than the standard voluntary notice.<sup>111</sup> Firms that fail to comply with the mandatory filing requirement may face fines of \$250,000 or the value of the transaction, whichever is greater.<sup>112</sup>

Furthermore, the regulation defines “critical infrastructure” as any “systems and assets, whether physical or virtual, so vital to the United States that the incapacity or destruction of such systems or assets would have a debilitating impact on national security.”<sup>113</sup>

Lastly, the regulation clarifies what constitutes “sensitive personal

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<sup>104</sup> Provisions Pertaining to Certain Investments in the United States by Foreign Persons, 85 Fed. Reg. at 3115.

<sup>105</sup> *Id.*

<sup>106</sup> 31 C.F.R. § 800.215.

<sup>107</sup> Provisions Pertaining to Certain Investments in the United States by Foreign Persons, 85 Fed. Reg. at 3115.

<sup>108</sup> *Id.*

<sup>109</sup> See 50 U.S.C. § 4817(a)(1)(A) (2018).

<sup>110</sup> See 31 C.F.R. § 800.401(c) (2020).

<sup>111</sup> Provisions Pertaining to Certain Investments in the United States by Foreign Persons, 85 Fed. Reg. at 3121.

<sup>112</sup> 31 C.F.R. § 800.901(b).

<sup>113</sup> § 800.214.

information of U.S. citizens” in several protected data categories, such as genetic, identifiable, or anonymized data.<sup>114</sup> The information included in these data categories is as follows: financial information, consumer commerce data, insurance information, health information, non-public electronic communications (email, messaging, chats), geolocation data, biometric data (facial recognition, voice, retina, fingerprints), data related to federal or state government identification cards, data related to US government security-clearance status, or data related to an application for a security clearance or federal employment.<sup>115</sup>

Combining the technology, infrastructure, and data categorizations of companies, the regulation created the term “TID”<sup>116</sup> to refer to parties that are subject to increased scrutiny under the new FIRRMA policy.<sup>117</sup> Under FIRRMA, transactions with TID companies do not necessarily need to grant a foreign person control of the company in order to be subjected to CFIUS jurisdiction, which was the previous status quo.<sup>118</sup> Now, TID-company transactions could be subject to review if the investment would give a foreign person “1) access to material nonpublic technical information; 2) membership or observer rights on, or the right to nominate an individual to a position on the board of directors; or 3) involvement, other than through voting of shares, in substantive decision-making of the US business regarding critical technology, critical infrastructure, or sensitive personal information.”<sup>119</sup> TID companies are also subject to the mandatory reporting requirement when a potential investment would give twenty-five percent or more voting interest to a foreign person in which a foreign state has a forty-nine percent or more voting interest.<sup>120</sup>

### III. ANALYSIS

#### A. The Country of Special Interest

One of the more controversial additions to CFIUS is the “country of special concern” provision that effectively allows the committee to discriminate against

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<sup>114</sup> Provisions Pertaining to Certain Investments in the United States by Foreign Persons, 85 Fed. Reg. at 3118–19.

<sup>115</sup> 31 C.F.R. § 800.241(a)(ii) (2020).

<sup>116</sup> “Technology, Infrastructure, Data.”

<sup>117</sup> 31 C.F.R. § 800.248(a)–(c).

<sup>118</sup> Christian Davis et al., *What’s Changed and What’s the Same in Final CFIUS Rules*, LAW360 (Jan. 15, 2020), <https://www.akingump.com/images/content/1/1/v2/113302/Law360-What-s-Changed-And-What-s-The-Same-In-Final-CFIUS-Rules.pdf>.

<sup>119</sup> *Id.*

<sup>120</sup> *Id.*

certain countries.<sup>121</sup> Even though China is not explicitly named in the text of the bill, the veil of pretense over the true target of the revamped CFIUS is noticeably thin.<sup>122</sup> During deliberations over FIRRMA, Senator John Cornyn said, “What we need to do is elevate everybody’s understanding of what China’s strategic long-term goals are, and they are to dominate the United States economically and militarily. They’ve got a very clear strategy for doing that, and we need to wake up to that and make sure we’re responding in kind.”<sup>123</sup>

Some have argued that this prejudicial treatment of China over other international actors is unjust and politically motivated.<sup>124</sup> These critics cite the fact that CFIUS is comprised of politically-appointed members, and it often chooses to review specific types of transactions that originate from China when it declines review of similar transactions from other countries.<sup>125</sup> Calling CFIUS review a “protectionist” policy, critics state that the committee sets up the US and China in an unnecessarily adversarial relationship.<sup>126</sup> Others have stated that the administration has “taken almost like a whack-a-mole approach to dealing with these issues, because it seems that as soon as a Chinese company is in the news, all of a sudden that becomes the new target. . . . It seems very unlikely that there is thinking going on about the longer term strategy, and much more likely that the focus instead is on this politically motivated attack on an application because it’s a Chinese-owned app, even if there are real security questions.”<sup>127</sup> However, heightened concern over China is hardly a phenomenon specific to CFIUS, and is consistent with the Trump administration’s overarching National Defense Strategy.<sup>128</sup>

The National Defense Strategy (NDS) is published every four years, one year

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<sup>121</sup> Zable, *supra* note 88.

<sup>122</sup> Kuo, *supra* note 13.

<sup>123</sup> Diane Bartz, *Senate, House Panels Ok Bills to Tighten Foreign Investment Oversight*, REUTERS (May 22, 2018), <https://www.reuters.com/article/us-usa-cfius-congress/senate-house-panels-ok-bills-to-tighten-foreign-investment-oversight-idUSKCN1IN2TC>.

<sup>124</sup> See Patrick Griffin, *CFIUS in the Age of Chinese Investment*, 85 FORDHAM L. REV. 1757, 1788 (2017); Andrew Thompson, *The Committee on Foreign Investment in the United States: An Analysis of the Foreign Investment Risk Review Modernization Act of 2018*, 19 J. HIGH TECH. L., 361, 399–400 (2019).

<sup>125</sup> Thompson, *supra* note 124, at 401.

<sup>126</sup> *Id.* at 400.

<sup>127</sup> Brian Fung, *TikTok is a National Security Threat, US Politicians Say. Here’s What Experts Think*, CNN (July 9, 2020), <https://www.cnn.com/2020/07/09/tech/tiktok-security-threat/index.html>.

<sup>128</sup> See generally DEP’T OF DEF., SUMMARY OF THE 2018 NAT’L DEF. STRATEGY (2018) (“Long-term strategic competitions with China and Russia are the principal priorities for the [DoD], and require both increased and sustained investment, because of the magnitude of the threats they pose to U.S. security and prosperity today, and the potential for those threats to increase in the future.”).

after the start of each presidential term.<sup>129</sup> The NDS highlights the administration's broad strategic objectives as they relate to national security, and it is used by the DoD and other agencies as a guiding principle to adhere to while crafting and executing policy.<sup>130</sup> The Trump administration's NDS explicitly labeled "revisionist powers" like China and Russia as a "central challenge to U.S. prosperity and security."<sup>131</sup> Specifically, the NDS accuses China of "leveraging military modernization, influence operations, and predatory economics to coerce neighboring countries to reorder the Indo-Pacific region to their advantage."<sup>132</sup> The NDS notes that China exploits the long-standing international order of cooperation and mutual benefit in order to establish its own hegemony in the region.<sup>133</sup>

For years prior to FIRRMA's enactment, senior lawmakers and DoD officials have raised suspicion over the rapidly increasing amount of Chinese money coming into the US to invest in high-tech products, such as robotics, drones, and artificial intelligence (AI).<sup>134</sup> In a Pentagon-commissioned report to Congress and the president, top military officials warned that China is actively seeking to acquire American technology companies to help grow its military and economic capabilities.<sup>135</sup> In a separate report, experts warned that Chinese state-owned firms were being actively guided by national plans to acquire and invest in AI and advanced robotics technologies.<sup>136</sup> Pentagon officials at the time concluded that existing government protections designed to protect critical defense technology were insufficient, which paved the way for FIRRMA.<sup>137</sup>

As part of a wider, multi-pronged approach to "get tougher" on China, the Trump administration used the expanded CFIUS authorities to stop several different Chinese acquisitions in the telecom,<sup>138</sup> microchip,<sup>139</sup> and even social media industries.<sup>140</sup> The coerced divestiture of the Grindr dating app is

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<sup>129</sup> 10 U.S.C. § 113(g)(1)(A), (E) (2018).

<sup>130</sup> § 113(g)(B)(i)–(iv).

<sup>131</sup> DEP'T OF DEF., SUMMARY OF THE 2018 NAT'L DEF. STRATEGY, at 1.

<sup>132</sup> *Id.*

<sup>133</sup> *Id.*

<sup>134</sup> Paul Mozur & Jane Perlez, *China Tech Investment Flying Under the Radar, Pentagon Warns*, N.Y. TIMES (Apr. 7, 2017), <https://www.nytimes.com/2017/04/07/business/china-defense-start-ups-pentagon-technology.html?action=click&contentCollection=Business%20Day&module=inline&region=EndOfArticle&pgtype=article>.

<sup>135</sup> *Id.*

<sup>136</sup> JONATHAN RAY ET AL., CHINA'S INDUS. AND MIL. ROBOTICS DEV. 12 (2016).

<sup>137</sup> Mozur & Perlez, *supra* note 134.

<sup>138</sup> Jiang, *supra* note 8.

<sup>139</sup> Roumeliotis, *supra* note 7.

<sup>140</sup> Echo Wang, *China's Kunlun Tech Agrees to U.S. Demand to Sell Grindr Gay Dating App*, REUTERS (May 13, 2019), <https://www.reuters.com/article/us-grindr-m-a-beijingkunlun/chinas-kunlun-tech-agrees-to-u-s-demand-to-sell-grindr-gay-dating-app-idUSKCN1SJ28N>.

particularly noteworthy because it represents one of the rare instances in which CFIUS unilaterally initiated a review of a transaction that had already been completed in an industry with seemingly minimal national security interest.<sup>141</sup> Although CFIUS does not publicize its specific concerns with particular cases, Grindr does collect users' images, names, locations, messages, and HIV statuses; each of these data points are all potentially compromising information should they fall into the wrong hands.<sup>142</sup> This justification, if it is in fact what the committee used to warrant the action, could have serious implications for a rapidly growing digital economy.<sup>143</sup> In an era with app developers, marketers, and other entities regularly collecting data from each of their users, some fear that nearly every business that operates online is within the reach of CFIUS.<sup>144</sup>

These fears could be verified with the controversy surrounding TikTok. The mobile-based app, owned by the Chinese firm ByteDance, allows users to create and share short-form video content with music, narration, and various visual effects.<sup>145</sup> In just a few years, the app became incredibly popular in the US, especially in younger demographics.<sup>146</sup> At the end of 2019, TikTok had over thirty-seven million users in the US.<sup>147</sup> While seemingly innocent on its face, TikTok, like many other social media apps, collects users' geolocation information, IP addresses, and content of in-app messages.<sup>148</sup> This data falls within the expanded criteria of covered transactions under FIRRMA, which now includes sensitive personal data such as geolocation.<sup>149</sup> American leaders have raised alarms that ByteDance may give this information to the Chinese government, an allegation the company has repeatedly denied.<sup>150</sup> Former Secretary of State Mike Pompeo said "with respect to Chinese apps on people's

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<sup>141</sup> *Id.*

<sup>142</sup> *Id.*

<sup>143</sup> See generally Makada Henry-Nickie et al., *Trends in the Information Technology Sector*, BROOKINGS (Mar. 29, 2019), <https://www.brookings.edu/research/trends-in-the-information-technology-sector/> (noting the digital economy has grown 2.5 times faster than the global GDP over the past fifteen years).

<sup>144</sup> See *id.* (noting some of the potential risks to data privacy that result from the growing practice of collecting users' personal information).

<sup>145</sup> Sarah Perez, *It's Time to Pay Serious Attention to TikTok*, TECHCRUNCH (Jan. 29, 2019), <https://techcrunch.com/2019/01/29/its-time-to-pay-serious-attention-to-tiktok/>.

<sup>146</sup> See J. Clement, *TikTok: Number of Users in the United States 2019-2024*, STATISTA (Feb. 28, 2020), <https://statista.com/statistics/1100836/number-of-us-tiktok-users/>.

<sup>147</sup> *Id.*

<sup>148</sup> Fung, *supra* note 127.

<sup>149</sup> See Linda M. Weinberg et al., *Expanded CFIUS Jurisdiction Affects Foreign Investments in The U.S.; Certain Countries Exempted*, NAT'L L. REV. (Sept. 1, 2020), <https://www.natlawreview.com/article/expanded-cfius-jurisdiction-affects-foreign-investments-us-certain-countries> (noting transaction criteria now covered by CFIUS includes sensitive personal data such as geolocation).

<sup>150</sup> Fung, *supra* note 127.

phones,” users should be cautious about their private information getting “in the hands of the Chinese Communist Party.”<sup>151</sup> These concerns have led to CFIUS opening an investigation into ByteDance’s 2016 acquisition of Musical.ly, the American precursor to TikTok.<sup>152</sup> In response to this investigation, a group of American investors immediately began considerations in buying out the app to bring control over the app’s data and decision making into American hands.<sup>153</sup> Regardless of whether TikTok and ByteDance would actually give private US user data to the Chinese government, it appears that the mere threat of CFIUS intervention may have achieved its policy end goals.<sup>154</sup> However, before CFIUS concluded its investigation of TikTok, President Trump issued an executive order to effectively ban the app’s usage within the US.<sup>155</sup> Instead of acting through CFIUS, Trump issued this order through authorities granted by the International Emergency Economic Powers Act (IEEPA), an analogous statute that grants even broader powers to the president to intervene in the markets in response to declared emergencies.<sup>156</sup> Although acting through a different statute, the reasoning behind the order is nearly identical to the justifications put in place by FIRRMA:

TikTok automatically captures vast swaths of information from its users, including Internet and other network activity information such as location data and browsing and search histories. This data collection threatens to allow the Chinese Communist Party access to Americans’ personal and proprietary information – potentially allowing China to track the locations of Federal employees and contractors, build dossiers of personal information for blackmail, and conduct corporate espionage.<sup>157</sup>

On September 19, 2020, TikTok reached a deal with Oracle, a California-based data technology company, to have Oracle take a 12.5% stake in TikTok and to store the app’s data on Oracle’s secure cloud servers.<sup>158</sup> In the press

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<sup>151</sup> Charles Creitz, *Pompeo Warns of Potential Restriction of Chinese TikTok App; US Users May be Ceding Info to ‘Chinese Communists,’* FOX NEWS (July 6, 2020), <https://www.foxnews.com/media/mike-pompeo-tik-tok-china-communist-social-media-spying-fox-ingraham>.

<sup>152</sup> Sherisse Pham, *TikTok Could be Sold to American Investors to Avert US Ban, Reports Say,* CNN (July 23, 2020), <https://www.cnn.com/2020/07/23/tech/tiktok-us-investors-hnk-intl/index.html>.

<sup>153</sup> *Id.*

<sup>154</sup> *See id.* (noting that Wells Fargo instructed employees to remove TikTok from company phones and the scrutiny that ByteDance faced from other countries after the threat of CFIUS intervention).

<sup>155</sup> Exec. Order No. 13942, 85 Fed. Reg. 48637 (Aug. 6, 2020).

<sup>156</sup> Geoffrey Gertz, *Why is the Trump Administration Banning TikTok and WeChat?*, BROOKINGS (Aug. 7, 2020), <https://www.brookings.edu/blog/up-front/2020/08/07/why-is-the-trump-administration-banning-tiktok-and-wechat/>.

<sup>157</sup> Exec. Order No. 13942, *supra* note 155.

<sup>158</sup> Press Release, Oracle Corporation, Oracle Chosen as TikTok’s Secure Cloud

release announcing the agreement, Oracle CEO Safra Catz said: “We are a hundred percent confident in our ability to deliver a highly secure environment to TikTok and ensure data privacy to TikTok’s American users, and users throughout the world. This greatly improved security and guaranteed privacy will enable the continued rapid growth of the TikTok user community to benefit all stakeholders.”<sup>159</sup> This agreement seemed to satisfy the US government’s concerns over the security of American data on the app, but questions still remain.<sup>160</sup>

The Grindr and TikTok cases prove that the Trump administration was not hesitant to wield CFIUS and other expansive authorities to counter increasing Chinese encroachment on American interests, even in transactions that would not traditionally be considered national security concerns.

#### B. Is CFIUS Now Too Powerful?

In an era of hyper-partisanship and gridlock on Capitol Hill, CFIUS has achieved the near-impossible and received wide bipartisan support in both chambers of Congress.<sup>161</sup> Although lawmakers tried to reach a delicate balance between protecting national interest and fostering free enterprise, many critics still share concerns about a relatively obscure government working group that effectively acts as a gatekeeper for international investment in US companies.<sup>162</sup>

Given that CFIUS largely reflects the president’s views on trade, such worries may be warranted—especially under the Trump Administration, which had a proven penchant towards protectionist policies.<sup>163</sup> Some critics of CFIUS authority have pointed to the blocked acquisition of Qualcomm by its Singapore-based competitor, Broadcom.<sup>164</sup> Qualcomm is a leading innovator in the US in the development of 5G wireless technology.<sup>165</sup> However, even though Singapore is a close American ally and Broadcom has stated its intention to reincorporate

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Provider (Sept. 19, 2020), <https://www.oracle.com/news/announcement/oracle-chosen-as-tiktok-secure-cloud-provider-091920.html>.

<sup>159</sup> *Id.*

<sup>160</sup> Charles Riley and Julia Horowitz, *Trump Approves TikTok Deal. But Big Questions Remain*, CNN BUS. (Sept. 21, 2020), <https://www.cnn.com/2020/09/21/tech/tiktok-oracle-walmart-explained/index.html>.

<sup>161</sup> Martin Chorzempa, *Is the US Treasury Going Too Far in Protecting US Technology?*, PETERSON INST. FOR INT’L ECON. (Oct. 23, 2018), <https://www.piie.com/blogs/trade-investment-policy-watch/us-treasury-going-too-far-protecting-us-technology>.

<sup>162</sup> Teitelman, *supra* note 15.

<sup>163</sup> JAMES K. JACKSON, CONG. RESEARCH SERV., RL33388, COMMITTEE ON FOREIGN INVESTMENT IN THE UNITED STATES (CFIUS) 38 (2019).

<sup>164</sup> Stewart, *supra* note 6.

<sup>165</sup> *Id.*

back into the US, President Trump announced that he would stop the acquisition before the final terms had even been reached by the parties.<sup>166</sup> In a rare public statement on the decision, the White House cited concerns with Broadcom's "relationships with foreign entities" and fears that the deal would "weaken Qualcomm's technological leadership," giving an edge to Chinese companies like Huawei."<sup>167</sup> The committee further explained that Chinese dominance in 5G would have severe repercussions for US national security.<sup>168</sup> However, if CFIUS can justify *any* interference with a non-adversary country for the purpose of preserving American competitive edge over Chinese industries, at what point does the net cease to extend over every part of the technology industry?

Critics of CFIUS and the protectionist policy remain justifiably skeptical. In the Qualcomm case, President Trump intervened before notice of the potential transaction was accepted by CFIUS.<sup>169</sup> Some have viewed this intervention as sign of "the administration's willingness to be more active in trade and implementing protectionist policies."<sup>170</sup> The increased authority and intentionally vague review criteria set out in FIRRMA expands the president's ability to exercise this more proactive approach.<sup>171</sup> This has caused many to raise concerns that the damage CFIUS would cause to the economy may outweigh the potential benefits it provides in mitigating perceived national security risks.<sup>172</sup> This concern may be realized with the implementation of the expanded authorities for CFIUS under FIRRMA.<sup>173</sup>

### C. The Real Value of Trade

For the last half century, officials and academics largely recognized that international trade supports national security by creating a robust system of interdependence and shared consequences between nations, which prevents large conflicts from erupting.<sup>174</sup> The modern US economy relies heavily on

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<sup>166</sup> *Id.*

<sup>167</sup> Alan Rappeport & Cecilia Kang, *U.S. Calls Broadcom's Bid for Qualcomm a National Security Risk*, N.Y. TIMES (Mar. 6, 2018), <https://www.nytimes.com/2018/03/06/business/qualcomm-broadcom-cfius.html>.

<sup>168</sup> *Id.*

<sup>169</sup> *See* Stewart, *supra* note 6.

<sup>170</sup> *Id.*

<sup>171</sup> *See generally* Teitelman, *supra* note 15.

<sup>172</sup> Rachel Boyd, *FIRRMA: "Buy American" Products, or Bye American Progress?*, 19 WAKE FOREST J. BUS. & INTELL. PROP. L. 103, 116, 119 (2019).

<sup>173</sup> *See* Tricia Reville, *Rice Paddies on the White House Law: CFIUS & the Foreign Control Requirement*, 10 COLUM. J. RACE & L. 114, 122 (2020) (criticizing potential expansion of CFIUS authority under FIRRMA).

<sup>174</sup> *See* KIYOUN SOHN AND TAKE DONG YEO, DOES THE INTERNATIONAL TRADE HELP TO ENHANCE NATIONAL SECURITY? 6-7 (2005), [https://faculty.washington.edu/karyiu/confer/sea05/papers/sohn\\_yeo.pdf](https://faculty.washington.edu/karyiu/confer/sea05/papers/sohn_yeo.pdf).

international trade, and lawmakers have traditionally sought to lower barriers to trade rather than raise them.<sup>175</sup> However, CFIUS and FIRRMA stand as exceptions to this general rule, to the chagrin of many who would prefer the federal government take a more laissez-faire approach to the matter.

Because of FIRRMA's robust ambiguities, critics are concerned that it will cause a chilling effect on foreign investments into the US that do not pose a national security risk but are still vital to American economic prosperity.<sup>176</sup> As discussed above, FIRRMA's expanded scope was largely directed to curb aggressive Chinese maneuvers, but its lack of language explicitly specifying China as a threat could easily be interpreted to be applied to *any* country of "special concern" that could threaten the competitive advantage of American companies.<sup>177</sup> If this fear were to materialize, and if CFIUS began exercising proactive review of transactions from non-adversary or even allied countries, it would be easy to see that the international business community may view the US as a more hostile market that is too risky to attempt penetration.<sup>178</sup> This would prove disastrous for US businesses and workers, who are becoming increasingly reliant on foreign capital to sustain themselves or expand.

Congress and the Treasury Department seemed to understand the concern that business leaders had about the blanket-jurisdiction of a post-FIRRMA CFIUS, which would cover *all* foreign investments.<sup>179</sup> This led them to include a provision in FIRRMA to create a new category of "excepted foreign states" from which "excepted investors" would enjoy limits on how much CFIUS would be able to review their transactions.<sup>180</sup> The regulations clarify that the committee is responsible for identifying such excepted foreign states.<sup>181</sup> Excepted investors are generally persons or governments who are nationals of excepted foreign states and are not nationals of any non-excepted foreign state.<sup>182</sup> The committee chooses excepted states by determining whether a candidate nation "has established and is effectively utilizing a robust process to analyze foreign investments for national security risks and to facilitate coordination with the

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<sup>175</sup> Boyd, *supra* note 172, at 104.

<sup>176</sup> *Id.* at 116.

<sup>177</sup> *Id.*

<sup>178</sup> *Id.* at 117.

<sup>179</sup> See generally U.S. DEP'T OF THE TREASURY, FREQUENTLY ASKED QUESTIONS ON FINAL CFIUS REGULATIONS IMPLEMENTING FIRRMA 1 (Jan. 13, 2020), <https://home.treasury.gov/system/files/206/Final-FIRRMA-Regulations-FAQs.pdf> (outlining regulations governing CFIUS and FIRRMA issue and addressing concerns raised about CFIUS and FIRRMA).

<sup>180</sup> *Id.* at 4.

<sup>181</sup> 31 C.F.R. § 800.218 (2020).

<sup>182</sup> § 800.219(a)(1)–(2).

United States on matters relating to investment security.”<sup>183</sup>

As this classification of excepted foreign states is new to the committee, it has only designated three nations in this group: Canada, Australia, and the United Kingdom (U.K.).<sup>184</sup> These states are historically close allies of the US.<sup>185</sup> and were chosen for their “robust intelligence-sharing and defense industrial base integration mechanisms with the United States.”<sup>186</sup> However, this special status with the U.K. came under threat because of concerns over the country’s decision to integrate Huawei technology into its 5G network infrastructure.<sup>187</sup> Some US lawmakers went as far as to call for the end of intelligence-sharing status with the British over this decision.<sup>188</sup> Luckily, the U.K. chose to reverse this decision in response to pressure from Washington and its own intelligence review.<sup>189</sup> The top Democratic and Republican members of the House Armed Services Committee called the reversal “a reassuring development that will benefit not only British security and privacy, but the ability of our countries to work even more closely together on vital security matters.”<sup>190</sup> Senator Ben Sasse put it more bluntly: “The UK made the right call today to kick the Chinese Communist spy ring out of their network. The special relationship is stronger now, as are our joint efforts to expose the threats the CCP and their surveillance puppet pose to the free world.”<sup>191</sup> Despite being eventually alleviated, the U.K.-Huawei

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<sup>183</sup> § 800.1001(a).

<sup>184</sup> *CFIUS Excepted Foreign States*, U.S. Dep’t of the Treasury, <https://home.treasury.gov/policy-issues/international/the-committee-on-foreign-investment-in-the-united-states-cfius/cfius-excepted-foreign-states> (last visited Mar. 8, 2021).

<sup>185</sup> Josh Katz & Kevin Quealy, *Which Country is America’s Strongest Ally? For Republicans, It’s Australia*, N.Y. TIMES (Feb. 3, 2017), <https://www.nytimes.com/interactive/2017/02/03/upshot/which-country-do-americans-like-most-for-republicans-its-australia.html>.

<sup>186</sup> U.S. DEP’T OF THE TREASURY, FREQUENTLY ASKED QUESTIONS ON FINAL CFIUS REGULATIONS IMPLEMENTING FIRRMA 1 (Jan. 13, 2020), <https://home.treasury.gov/system/files/206/Final-FIRRMA-Regulations-FAQs.pdf> (outlining regulations governing CFIUS and FIRRMA issue and addressing concerns raised about CFIUS and FIRRMA).

<sup>187</sup> Adam Satariano, *Britain Defies Trump Plea to Ban Huawei from 5G Network*, N.Y. TIMES (Jan. 29, 2020), <https://www.nytimes.com/2020/01/28/technology/britain-huawei-5G.html?smid=nytcore-ios-share>.

<sup>188</sup> Joe Gould, *Key Republicans Seek Ban on Intel Sharing with Countries that Use Huawei*, DEF. NEWS (Jan. 27, 2020), <https://www.defensenews.com/congress/2020/01/27/key-republicans-seek-ban-on-intel-sharing-with-countries-that-use-huawei/>.

<sup>189</sup> Arjun Kharpal, *UK to Phase Out Huawei Gear from 5G Networks in a Major Policy U-turn after U.S. Sanctions*, CNBC (July 6, 2020), <https://www.cnbc.com/2020/07/06/huawei-uk-5g-gear-to-be-phased-out-of-networks-in-major-policy-u-turn.html>.

<sup>190</sup> Press Release, H. Comm. On Armed Serv., Smith and Thornberry Joint Statement on The U.K.’S Decision to Protect Their Telecom Networks From Huawei, (July 14, 2020), <https://republicans-armedservicesforms.house.gov/news/email/show.aspx?ID=TIE2XVE36QOKF5VS7YZUEJVEMU>.

<sup>191</sup> Press Release, Ben Sasse, Sasse Statement on UK Huawei Ban (July 14, 2020), <https://www.sasse.senate.gov/public/index.cfm/press-releases?ID=75C22322-2004-4694->

controversy underscores the seriousness with which the American government considers the threat of aggressive Chinese investment practices.<sup>192</sup> This case highlights the extent to which the US would go to counter this threat, even at the potential cost to relationships with long-standing economic and strategic partners.

In addition to the chilling effect on international investments into the US, critics are even more concerned about the potential consequences to American businesses if other countries begin implementing their own CFIUS-like bodies in response to perceived protectionism from the US.<sup>193</sup> US stock markets experienced high volatility as a result of the growing trade war between China and the US.<sup>194</sup> If tensions between China and the US do not dampen soon, some fear that an “economic iron curtain” would polarize the world into two separate economic spheres, led by the US in the West and China in the East.<sup>195</sup> This “economic iron curtain,” much like the iron curtain of the Cold War, would sever access to markets of billions of people and could be catastrophic to the global international order.<sup>196</sup>

However, the debate over trade policy with China is not unique to the policies surrounding CFIUS or this generation of leaders. Ever since the Nixon administration reopened a relationship between Washington and Beijing, most experts believed that increased economic and diplomatic cooperation between nations would liberalize authoritarian regimes and integrate them into the community of nations that prioritize individual liberty, free enterprise, and human rights.<sup>197</sup> As recently as 2002, President Bush outlined in his National Security Strategy: “Chinese leaders are discovering that economic freedom is the only source of national wealth. In time, they will find that social and political

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<sup>192</sup> Smith and Thornberry Joint Statement, *supra* note 190 (stating that it is critical for U.S. allies to understand the risk Huawei poses in a 5G network and further discussing the benefits of banning Huawei).

<sup>193</sup> Boyd, *supra* note 172, at 118.

<sup>194</sup> See Christine Romans, *It's 'Groundhog Day' for the Trade-war-obsessed Markets*, CNN BUS. (Nov. 22, 2019), <https://www.cnn.com/2019/11/22/investing/dow-stock-market-trade-war/index.html>.

<sup>195</sup> Christian Edwards, *Former US Treasury Secretary Hank Paulson Warns of an 'Economic Iron Curtain' if the US and China Can't Find a Way to Get Along*, BUS. INSIDER (Nov. 7, 2018), <https://www.businessinsider.com/former-treasury-secretary-hank-paulson-warns-us-china-trade-war-2018-11>.

<sup>196</sup> *Id.*

<sup>197</sup> See generally Daniel Griswold, *Trade and the Transformation of China*, CATO INST. (Nov. 2, 2002), <https://www.cato.org/publications/speeches/trade-transformation-china> (“Trade with China is about more than jobs and incomes. Around the world, trade and the development it has spurred have created a more hospitable climate for civil and political freedoms.”).

freedom is the only source of national greatness.”<sup>198</sup> Almost twenty years later, with China actively operating mass-detention facilities for religious minorities,<sup>199</sup> suppressing democratic movements in Hong Kong,<sup>200</sup> and conducting thinly-veiled military threats against neighboring sovereign nations,<sup>201</sup> most would say that this goal is yet to be achieved. As stated in the Trump administration’s National Security Strategy, China wants to “shape a world antithetical to U.S. values and interests.”<sup>202</sup>

The increased focus on countering Chinese investments into the US has had a dramatic effect. In 2018, Chinese foreign direct investments into the US totaled \$4.8 billion, a decrease of 84% from 2017 and down 90% from 2016.<sup>203</sup> This decrease was due to new tariffs, increased trade disputes between the two countries, a general economic slowdown, and CFIUS, which had discouraged many investors from seeking new deals or had caused others to abandon ongoing investment deliberations out of fear of government intervention.<sup>204</sup> Although American businesses undoubtedly benefit financially from the investments of Chinese enterprises and persons, the legislative history of CFIUS delegates an explicit statutory duty to the executive branch to weigh that benefit against the costs that US strategic interests may incur.<sup>205</sup> The Trump administration made it clear that the president’s stance was to engage in a proactive—some would say overly aggressive—approach to counter this increasing threat.<sup>206</sup> The overwhelming bipartisan support for the FIRRMA amendments in Congress suggests that both major political parties share—or at least acquiesce to—this position.

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<sup>198</sup> *Id.*

<sup>199</sup> Austin Ramzy & Chris Buckley, ‘*Absolutely No Mercy*’: *Leaked Files Expose How China Organized Mass Detentions of Muslims*, N.Y. TIMES (Nov. 16, 2019), <https://www.nytimes.com/interactive/2019/11/16/world/asia/china-xinjiang-documents.html>.

<sup>200</sup> Amy Qin, *China Hits Back at U.S. Over Hong Kong Bill in a Mostly Symbolic Move*, N.Y. TIMES (Dec. 2, 2019), <https://www.nytimes.com/2019/12/02/world/asia/china-us-hong-kong-bill-protests.html>.

<sup>201</sup> Joel Gehrke, *Taiwan Fears Growing Threat of Attack by China*, WASH. EXAMINER (July 22, 2020), <https://www.washingtonexaminer.com/policy/defense-national-security/taiwan-fears-growing-threat-of-attack-by-china>.

<sup>202</sup> THE WHITE HOUSE, NAT’L SECURITY STRATEGY OF THE U.S. 25 (2017).

<sup>203</sup> Teitelman, *supra* note 15.

<sup>204</sup> *Id.*

<sup>205</sup> Exec. Order No. 11859, *supra* note 16 (“The Committee shall have primary continuing responsibility within the Executive Branch for monitoring the impact of foreign investment in the United States, both direct and portfolio, and for coordinating the implementation of United States policy on such investment.”).

<sup>206</sup> See Mario Mancuso, *CFIUS Report Shows Trump Admin’s Push to Curb Risky M&A*, KIRKLAND & ELLIS (Nov. 25, 2019), <https://www.kirkland.com/news/in-the-news/2019/11/cfius-report-shows-trump-admins-push-to-curb-risky>.

## D. Considering Judicial Review

Understanding that CFIUS provides an important tool to protect national security and strategic interests, some scholars have proposed incorporating more safeguards in the review process in order to not overburden international commerce while still maintaining the committee's general mission directive.<sup>207</sup> One proposed option is to implement protections modeled after the International Emergency Economic Powers Act (IEEPA), an analogous statute that oversees executive review of the Office of Foreign Assets Control (OFAC) for national security concerns.<sup>208</sup>

OFAC may freeze assets and restrict access to US financial institutions by sanctioned countries or factions, like drug traffickers or terrorism groups, who have been designated by the US government. It may also impose penalties on those who fail to comply with its directives.<sup>209</sup> IEEPA's safeguards come into effect at three points: prior to taking national security action, during such action, and after-action appellate review.<sup>210</sup> Specifically, IEEPA requires that in order for OFAC to intervene in a case, there (1) must be a national emergency, (2) Congress must have oversight of the process, and (3) there must be an opportunity for judicial review of OFAC's decision.<sup>211</sup>

Given the preventative nature of CFIUS's mission directive, and the way it has been historically exercised, OFAC's requirement for a national emergency for jurisdiction would likely not be appropriate to translate to CFIUS.<sup>212</sup> Additionally, and as mentioned above, Congress has already imposed several oversight measures to ensure its legislative intent is carried out by CFIUS. Critics of CFIUS, however, are not concerned with the committee's implications for the balance of power between the executive and legislative branches, but instead on the potential overreach of the federal government in otherwise lawful business transactions.<sup>213</sup> This raises the question of whether decisions made by CFIUS and the president under this authority should be subject to judicial review. More specifically, can a determination by the executive branch based on national security implications be contested in a court of law?

This question was raised by appellees in *Ralls Corp. v. Comm. on Foreign*

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<sup>207</sup> See Maddy Berg, *A Tale of Two Statutes: Using IEEPA's Accountability Safeguards to Inspire CFIUS Reform*, 118 COLUM. L. REV. 1763, 1765 (2018).

<sup>208</sup> *Id.*

<sup>209</sup> *Id.* at 1780.

<sup>210</sup> *Id.* at 1763.

<sup>211</sup> 50 U.S.C. §§ 1701(a), 1702(c), 1703(b) (2012); see also Berg, *supra* note 207, at 1766.

<sup>212</sup> See § 1701 (a)–(b); see also Berg, *supra* note 207, at 1767–70.

<sup>213</sup> Cristerna, *supra* note 15.

*Inv.*<sup>214</sup> The *Ralls* decision arose from a case in which Ralls Corporation purchased four American firms that operated windfarms in Oregon.<sup>215</sup> Although Ralls was incorporated in the US, both of its owners were Chinese nationals with close ties to a major Chinese manufacturing firm.<sup>216</sup> One of the sites of the acquired wind farms was within the US Navy's restricted airspace, and the other three were in proximity of restricted airspace.<sup>217</sup> Although there were other foreign-owned wind turbines within proximity of the same area, CFIUS determined the Ralls transaction to be a national security risk.<sup>218</sup> Then-President Obama issued an order to prohibit the transaction and required Ralls Corporation to completely divest from the companies in question.<sup>219</sup> Ralls Corporation proceeded to sue CFIUS and the president.<sup>220</sup>

Ralls Corporation sought to invalidate CFIUS's finding and the presidential order. It alleged violations of statutory authority, the Administrative Procedure Act (APA), the Fifth Amendment Due Process Clause, and the Fifth Amendment Equal Protection Clause.<sup>221</sup> Although the decision in this case rested primarily on procedural due process considerations, with facts specific to this instance, the appeals court also discussed the justiciability of contesting a determination by the executive branch based on national security.<sup>222</sup> For the purpose of this article's thesis, analysis will focus on the latter discussion.

The government asserted that Ralls Corporation's due process challenge raised a nonjusticiable political question.<sup>223</sup> The "political question" doctrine, as stated in *Baker v. Carr*, bars a court from considering a claim when:

Prominent on the surface of [the] case . . . is found a [1] textually demonstrable constitutional commitment of the issue to a coordinate political department; or [2] a lack of judicially discoverable and manageable standards for resolving it; or [3] the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or [4] the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or [5] an unusual need for unquestioning adherence to a political decision already made; or [6] the potentiality of embarrassment from multifarious

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<sup>214</sup> *Ralls Corp. v. Comm. On Foreign Inv.*, 758 F.3d 296, 312 (D.C. Cir. 2014).

<sup>215</sup> *Id.* at 301.

<sup>216</sup> *Id.*

<sup>217</sup> *Id.* at 304.

<sup>218</sup> *Id.* at 305.

<sup>219</sup> *Id.* at 306.

<sup>220</sup> *Id.*

<sup>221</sup> *Id.*

<sup>222</sup> *Id.* at 312–13.

<sup>223</sup> *Id.* at 312.

pronouncements by various departments on one question.<sup>224</sup>

Applying this doctrine, the court acknowledged precedent that stated the executive branch's finding of a threat to national security not to be justiciable.<sup>225</sup> The court recognized that such a determination represents a political question based on "foreign policy decisions of the Executive Branch . . . for which the Judiciary has neither aptitude, facilities nor responsibility to make."<sup>226</sup> Although the ruling in *Ralls* did not hinge on the political question doctrine, the court's discussion of the doctrine's application to national security determinations is still valid law, and remains the ruling precedent.<sup>227</sup> With that understood, the court in *Ralls* also ruled that parties subject to CFIUS review are owed a due process right to review unclassified evidence the committee may have related to its case and contest matters of fact, but it also ruled that determinations of national security implications remain nonjusticiable.<sup>228</sup>

In the years since *Ralls*, the bar on judicial review of national security determinations has not been challenged.<sup>229</sup> With the judiciary restrained from interceding in CFIUS review and Congress explicitly delegating *more* authority to the committee, critics argue that foreign investors are left with too much uncertainty as to how, or if, to conduct business with US firms.<sup>230</sup>

Some have argued that the *Ralls* decision should be rolled back, and that courts should begin exercising review of executive national security determinations.<sup>231</sup> These critics claim that allowing judges to weigh in on such decisions will preserve constitutional protections for individuals and assuage concerns many businesses have with CFIUS authority.<sup>232</sup> However, these critics ignore the long-standing political question doctrine, and they fail to acknowledge that the courts have stated that the judicial branch is not nearly as capable of making national security determinations as the executive branch is.<sup>233</sup> Adding a layer of judicial review on national security decisions may alleviate some concerns for certain classes of businesses, but it would effectively trample

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<sup>224</sup> *Id.* at 313.

<sup>225</sup> *Id.* at 314; *see also* *People's Mojahedin Org. of Iran v. U.S. Dep't of State*, 182 F.3d 17, 23 (D.C. Cir. 1999) (stating that the court is not competent to pass upon national security finding by the secretary).

<sup>226</sup> *Ralls Corp.*, 758 F.3d at 314.

<sup>227</sup> *Id.* at 313 (quoting *Baker v. Carr*, 369 U.S. 186 (1961)).

<sup>228</sup> *Id.* at 319–20.

<sup>229</sup> Isaac Lederman, *The Right Rights for the Right People? The Need for Judicial Protection of Foreign Investors*, 61 B.C. L. REV. 703, 735 (2020).

<sup>230</sup> *Id.* at 735–36.

<sup>231</sup> *Id.* at 736.

<sup>232</sup> *Id.* at 738.

<sup>233</sup> *People's Mojahedin Org. of Iran*, 182 F.3d at 23–24.

on the separation of powers established by the founders. Rolling back *Ralls* would catastrophically hinder the president's ability to execute his constitutional duty to protect the nation, and its debilitating effects would far outweigh any marginal benefits that may be seen with foreign investor stability. Although courts reserve the ability to review matters related to procedure and findings of fact in CFIUS cases, the *Ralls* precedent must be preserved, and courts should be barred from ruling on administrative determinations of national security.

#### IV. CONCLUSION

After FIRRMA's enactment, the Trump administration wielded CFIUS authority unapologetically and at a rate faster than any period in the committee's history. As discussed above, the courts may not offer much relief for worried investors who fear their mergers and acquisitions will be halted by the committee. However, certain FIRRMA provisions implemented by regulation are beginning to ease concerns among investors from allied nations. The committee already designated Australia, Canada, and the U.K. as excepted ally states, and more states are likely to be added as the policy matures.<sup>234</sup> This will provide substantially more stability to investors from trusted sources, as well as allow CFIUS to focus its attention on targeted nations that are more directly in line with the National Defense Strategy, namely: China, Russia, Iran, and their proxies.<sup>235</sup> In practice, the Trump Administration framed nearly all of its publicly announced CFIUS decisions within the framework of the strategic competition with these nations. Although Congress likely used the "country of special concern" language to allow the administration greater flexibility in execution, it would be wise to ease concerns among allied nations by amending the law to specifically designate these competitor countries in statute.

However, it is clear that CFIUS is here to stay and should be a key element of strategic planning by any business who seeks to operate with international investors or clients. This will be especially true under a divide between China and the US that is only deepening. In July of 2020, the US expelled the Chinese consulate in Houston and cited it as a hub to help direct "massive illegal spying and influence operations."<sup>236</sup> In response, China expelled a US consulate in Chengdu.<sup>237</sup>

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<sup>234</sup> *CFIUS Excepted Foreign States*, U.S. Dep't of the Treasury, <https://home.treasury.gov/policy-issues/international/the-committee-on-foreign-investment-in-the-united-states-cfius/cfius-excepted-foreign-states> (last visited Mar. 8, 2021).

<sup>235</sup> See U.S. DEP'T OF DEF., SUMMARY OF THE 2018 NAT'L DEF. STRATEGY (2018).

<sup>236</sup> Edward Wong et al., *U.S. Orders China to Close Houston Consulate, Citing Efforts to Steal Trade Secrets*, N.Y. TIMES (July 22, 2020), <https://www.nytimes.com/2020/07/22/world/asia/us-china-houston-consulate.html>.

<sup>237</sup> Lily Kuo, *China Orders U.S. Consulate in Chengdu to Close as Tensions Rise*,

At the time of this writing, the world is in the throngs of an unprecedented economic downturn as a result of the COVID-19 virus. This has leaders concerned that China will take advantage of vulnerable companies to acquire technologies or data to close the strategic gap with the US.<sup>238</sup> In an effort to offer a better alternative to tempting Chinese investments, the DoD established the Trusted Capital Marketplace program to recruit “patriotic investors” to help finance promising firms.<sup>239</sup> However, this program is still in its infancy and will take much more time to reach the same level of coordination and sophistication as China’s proxy firms, if it ever does.<sup>240</sup>

Questions still remain about how the US and the rest of the world will emerge from the COVID-19 crisis. However, the resurgent US-China rivalry will likely remain, especially amid reports that China deceived the international community by hiding the truth about COVID-19, thus hindering other nations’ abilities to respond.<sup>241</sup> With domestic opinions about the communist country at historic lows,<sup>242</sup> an American-Chinese détente is becoming increasingly obscure, and the era of great-power competition will likely extend far into the foreseeable future. This tension will also likely continue with the new administration under President Joe Biden, as recognition of the dangers posed by China is quickly becoming a bipartisan consensus in Washington.<sup>243</sup> Like the US-Soviet rivalry during the Cold War, both sides are ready and willing to pull every lever of power in order to counter the advances of the other.<sup>244</sup> With the two largest economies on the planet<sup>245</sup> poised to deploy their respective whole-of-

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GUARDIAN (July 24, 2020), <https://www.theguardian.com/world/2020/jul/24/china-orders-us-consulate-in-chengdu-to-close-as-tensions-rise#:~:text=Beijing%20has%20ordered%20the%20closure,province%2C%20to%20cease%20all%20operations>.

<sup>238</sup> Aaron Mehta & Valerie Insinna, *Amid Pandemic, Pentagon Urges ‘Hyper-Vigilance’ Against Foreign Investment*, DEF. NEWS (Mar. 25, 2020), <https://www.defensenews.com/coronavirus/2020/03/25/amid-pandemic-pentagon-urges-hyper-vigilance-against-foreign-investment/>.

<sup>239</sup> Aaron Mehta, *To Counter China, Pentagon Wants to Create Patriotic Investors*, DEF. NEWS (May 10, 2019), <https://www.defensenews.com/pentagon/2019/05/10/to-counter-china-pentagon-wants-to-create-patriotic-investors/>.

<sup>240</sup> *Id.*

<sup>241</sup> Kathy Gilsinan, *How China Deceived the WHO*, ATLANTIC (Apr. 12, 2020), <https://www.theatlantic.com/politics/archive/2020/04/world-health-organization-blame-pandemic-coronavirus/609820/>.

<sup>242</sup> Sarah Zheng, *U.S. Public’s Opinion of China Hits 20-Year Low, Gallup Poll Says*, S. CHINA MORNING POST (Mar. 3, 2020), <https://www.scmp.com/news/china/diplomacy/article/3064730/us-publics-opinion-china-hits-20-year-low-gallup-poll-says>.

<sup>243</sup> Ishaan Tharoor, *What the U.S. Election Means for China*, WASH. POST (Oct. 7, 2020), <https://www.washingtonpost.com/world/2020/10/07/what-us-election-means-china/>.

<sup>244</sup> Eric A. Posner & John Yoo, *International Law and the Rise of China Cold*, 7 CHI. J. INT’L L. 1 (2006).

<sup>245</sup> Caleb Silver, *The Top 20 Economies in the World*, INVESTOPEDIA (Mar. 18, 2020),

government and whole-of-economy arsenals, companies of every size operating in every sector would be wise to prepare for the crossfire.

