Modernizing CFIUS

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Abstract

Although foreign investment has been a critical component of U.S. economic growth since our nation's founding, such investment has not always been benign. For over four decades, the Committee on Foreign Investment in the United States ("CFIUS") has been the U.S. government's primary tool for monitoring and addressing national security concerns arising from acquisitions of domestic businesses by foreign investors. Since its inception, CFIUS has sought to strike a balance between promoting an open investment environment and protecting our nation's security. Although it has experienced several challenges since its inception, none have been as momentous as those CFIUS has faced in recent years. Factors such as the increase in the complexity of merger and acquisition transactions, advancements in technology, and the economic rise of China exposed jurisdictional gaps in CFIUS, prompting legislative and executive action. Seeking to modernize CFIUS, Congress developed the Foreign Investment Risk Review Modernization Act ("FIRRMA"), legislation aimed at expanding CFIUS's jurisdiction and better equipping CFIUS to protect U.S. national security interests. The legislation was met with bipartisan support and signed into law by the President in 2018.

While FIRRMA helps solve some of the recent national security concerns raised by foreign investment, it also brings new challenges to CFIUS. This Article tells the story of FIRRMA—what led to it and what the law does—and offers a glimpse of the unique challenges the adoption of FIRRMA will pose to CFIUS in the coming years. In particular, the Article highlights the added complexity of working in parallel with other U.S. government regimes, the rise of "Big Data," and the need to increase cooperation with U.S. allies.

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INTRODUCTION

Foreign investment has been central to the growth of the U.S. economy since America's beginnings. But sometimes capital from foreign shores seeks more than just an economic return. The U.S. government has relied on CFIUS to deal with national security issues implicated by transactions involving foreign investors for over 40 years.[1] CFIUS is a committee composed of members from 11 different

[1] Exec. Order No. 11,858, 3 C.F.R. 990 (1971–1975) (establishing CFIUS and vesting it

government agencies[2] that reviews foreign investments in a wide array of businesses and properties with the help of the U.S. intelligence community.

Encouraging an open market for foreign investment while upholding national security have been the main goals of CFIUS. The body has dealt with many obstacles since it was created, but the most severe of those challenges have arisen in the past few years. To respond to these difficulties, Congress enacted the Foreign Investment Risk Review Modernization Act ("FIRRMA") in 2018.[3] FIRRMA represents the most significant effort to modernize CFIUS to date.

This Article explains the events that gave rise to FIRRMA, how the law operates, and the issues CFIUS will likely face in implementing the Act. Part I briefly outlines the history of CFIUS and its development. Part II explains the changing landscape of foreign investment that prompted legislative and executive action to modernize CFIUS. Part III presents an overview of the key provisions of FIRRMA. Finally, Part IV highlights several issues that CFIUS will confront as it implements the statute—topics likely to be ripe for further research and scholarship in the decades to come.

I. Past as Prologue: A Brief History of CFIUS

Before tackling the modern challenges of CFIUS, it is necessary to understand what exactly CFIUS is and why it came to be. To do so, one must first grasp the enduring importance overseas investment has

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with "primary continuing responsibility within the Executive Branch for monitoring the impact of foreign investment in the United States").

2 *See* 50 U.S.C. § 4565 (2012). The members of CFIUS include: the Secretary of the Treasury, the Secretary of Homeland Security, the Secretary of Commerce, the Secretary of Defense, the Secretary of State, the Attorney General of the United States, the Secretary of Energy, the Secretary of Labor (nonvoting, ex officio), the Director of National Intelligence (nonvoting, ex officio), "and [t]he heads of any other executive department, agency, or office, as the President determines appropriate," 50 U.S.C. § 4565(k)(2), which currently includes the United States Trade Representative and the Director of the Office of Science and Technology Policy. Exec. Order No. 13,456, 3 C.F.R. § 171 (2008). The Director of the Office of Management and Budget, the Chairman of the Council of Economic Advisers, the Assistant to the President for National Security Affairs, the Assistant to the President for Economic Policy, and the Assistant to the President for Homeland Security and Counterterrorism also have oversight roles in which they sometimes present their findings to the President. *Id.*

3 John S. McCain National Defense Authorization Act for Fiscal Year 2019, Pub. Law 115-232, 132 Stat. 1636, 2174 (to be codified at 50 U.S.C. § 4565) ("Defense Authorization Act"). FIRRMA was originally introduced in the House and Senate as the "Foreign Investment Risk Review Modernization Act of 2017." S. 2098, 115th Cong. (2017); H.R. 4311, 115th Cong. (2017). These bills were ultimately incorporated into the Defense Authorization Act as the "Foreign Investment Risk Review Modernization Act of 2018." §§ 1701–1728, 132 Stat. at 2174–2207.

had on the American economy, and why the need to review these kinds of transactions arose. Finally, understanding how CFIUS has developed over the years—both with respect to the ambit of its authority and how it operated prior to FIRRMA—is imperative to set the stage for analysis of present-day CFIUS issues.

A. Importance of Foreign Investment in the United States

Before the United States became an independent nation, the 13 British colonies were financed in large part by their mother country of Great Britain.[4] Foreign investment was part of American life well before 1776 and carried on into the new Republic.[5] In his famous *Report on the Subject of Manufactures*, Alexander Hamilton, our first Secretary of the Treasury,[6] argued that foreign capital was not a threat to domestic investment, but was instead a "precious acquisition" fostering U.S. economic growth.[7] Throughout the 19th and 20th centuries, foreign capital funded the construction of America, from railways to city skylines, and helped make innovations such as the automobile a reality.[8] Foreign investment has also brought significant benefits to American workers and their families in the form of economic growth and well-paid jobs.[9]

The same is true today, with the total stock of foreign direct investment in the United States standing at a staggering $4.46 trillion in 2019.[10] Numerous studies have demonstrated that the benefits from foreign investment in the United States are substantial.[11] Majority-

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4 *See generally* Mira Wilkins, The History of Foreign Investment in the United States to 1914 (1989). Much of the same was true of territories then held by France and Spain. *Id.*

5 *Id.* at x.

6 *Alexander Hamilton (1798–1795)*, U.S. Dep't. of the Treasury, https://home.treasury.gov/about/history/prior-secretaries/alexander-hamilton-1789-1795 [https://perma.cc/6JJW-9MUW].

7 *See Alexander Hamilton's Final Version of the Report on the Subject of Manufactures, [5 December 1971]*, Nat'l Archives: Founders Online, https://founders.archives.gov/documents/Hamilton/01-10-02-0001-0007 [https://perma.cc/X7WD-VZQM].

8 *See* Wilkins, *supra* note 4, at v.

9 *See The Benefits of International Investment*, U.S. Chamber of Commerce, https://www.uschamber.com/report/benefits-international-investment [https:perma.cc/P2H9-GBXA].

10 *See* Bureau of Econ. Analysis, U.S. Dep't of Commerce, Direct Investment by Country and Industry, 2019, at 1 (2020), https://www.bea.gov/sites/default/files/2020-07/dici0720_0.pdf [https://perma.cc/VEH6-RNK2].

11 *See, e.g.*, SelectUSA, FDI in Manufacturing: Advancing U.S. Competitiveness in a Global Economy 1 (2017), https://www.selectusa.gov/servlet/servlet.FileDownload?file=015t00000000gKi [https://perma.cc/P3SJ-E68R]; SelectUSA, High-Tech Industries: The Role of FDI in Driving Innovation and Growth 1 (2017), https://www.selectusa.gov/servlet/servlet.FileDownload?file=015t0000000U1eE [https://perma.cc/7L8K-9FUR].

owned U.S. affiliates of foreign entities accounted for nearly one quarter of total U.S. goods exports in 2017.[12] They also accounted for 15.6% of the U.S. total expenditure on research and development by businesses in 2017.[13] They employed 7.4 million U.S. workers in 2017.[14] One study estimated that spillovers from foreign direct investment in the United States accounted for between 8% and 19% of *all* U.S. manufacturing productivity growth between 1987 and 1996.[15]

It is therefore not surprising that the official policy of the U.S. government for nearly four decades has been that an "open international investment system responding to market forces provides the best and most efficient mechanism to promote global economic development,"[16] and therefore "[t]he United States accords foreign investors the same fair, equitable, and non-discriminatory treatment it believes all governments should accord foreign direct investment under international law."[17] More recently, President Donald Trump affirmed that "sustaining the strong, open investment environment to

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12 *See* Bureau of Econ. Analysis, U.S. Dep't of Commerce, Activities of U.S. Affiliates of Foreign Multinational Enterprises, 2017, at 6 (2019), https://www.bea.gov/system/files/2019-11/imne1119_0.pdf [https://perma.cc/Y8CM-6AJS] [hereinafter BEA Report II] (illustrating that in 2017, majority-owned U.S. affiliates of foreign entities exported $387.2 million in U.S. goods); *Annual Trade Highlights: 2018 Press Highlights*, U.S. Census Bureau (2018), https://www.census.gov/foreign-trade/statistics/highlights/annual.html [https://perma.cc/PWZ6-WMQ8] (noting the U.S. exported $1.5 trillion in U.S. goods in 2017).

13 *See* BEA Report II at 2.

14 *See id.* at 1.

15 *See* Wolfgang Keller & Stephen R. Yeaple, *Multinational Enterprises, International Trade, and Productivity Growth: Firm Level Evidence from the United States*, 91 Rev. Econ. & Stat. 821, 828 (2009).

16 President Ronald W. Reagan, Statement on International Investment Policy, 2 Pub. Papers 1243, 1246 (Sept. 9, 1983); *see also* President George H.W. Bush, Message to the Congress on the China National Aero-Technology Import and Export Corporation Divestiture of MAMCO Manufacturing, Incorporated, 1 Pub. Papers 144, 144 (Feb. 1, 1990) ("The United States welcomes foreign direct investment in this country; it provides foreign investors fair, equitable, and nondiscriminatory treatment. This Administration is committed to maintaining that policy."); President William J. Clinton, Remarks at the American University Centennial Celebration, 1 Pub. Papers 206, 212 (Feb. 26, 1993) ("We will welcome foreign investment in our businesses knowing that with it come new ideas as well as capital, new technologies, new management techniques, and new opportunities for us to learn from one another and grow."); President George W. Bush, Statement on International Trade and Investment Policy, 1 Pub. Papers 561, 561–62 (May 10, 2007) ("A free and open international investment regime is vital for a stable and growing economy, both here at home and throughout the world."); President Barack H. Obama, Statement on the United States Commitment to Open Investment Policy, 1 Pub. Papers 685 (June 20, 2011) (reaffirming commitment to maintaining the United States's open investment policy and observing that "[i]nvestments by foreign-domiciled companies and investors create well-paid jobs, contribute to economic growth, boost productivity, and support American communities.").

17 Reagan, *supra* note 16, at 1244.

which our country is committed and which benefits our economy and our people" is the present administration's take on the matter.[18] Yet despite its many benefits, foreign investment has not always been without its downfalls. CFIUS was established to address that fact.

B. *Creation of CFIUS*

The roots of CFIUS stretch back more than a century. On the eve of America's entry into World War I, German acquisitions in the U.S. chemical sector and other war-related industries became a cause of grave concern.[19] In particular, it was revealed that the German government made a number of concealed investments in the United States. Among them was the establishment of the Bridgeport Projectile Company, which "was in business merely to keep America's leading munitions producers too busy to fill genuine orders for the weapons the French and British so desperately needed."[20] The company placed an order for "five million pounds of gunpowder and two million shell cases with the intention of simply storing them."[21] The plot was exposed when a German spy inadvertently left his briefcase containing the incriminating documents on a New York City streetcar, which resulted in the documents being placed in the custody of the Treasury Department.[22] Congress subsequently passed the Trading with the Enemy Act,[23] giving the President broad powers to block investments during times of war and national emergency.[24]

During the Great Depression and World War II, international investment flows dropped dramatically.[25] In the boom years of the 1950s and 1960s—as many countries devastated by World War II were re-

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18 Jeff Cox, *Trump's Plan to Crack Down on Foreign Investment is Much Less Harsh than Expected*, CNBC (June 27, 2018, 7:45 AM), https://www.cnbc.com/2018/06/27/treasury-secretary-mnuchin.html [https://perma.cc/6GUX-3M6P].

19 *See* Edward M. Graham & David M. Marchick, US National Security and Foreign Direct Investment 4–8 (2006).

20 Ernest Wittenberg, *The Thrifty Spy on the Sixth Avenue El*, 17 Am. Heritage (Dec. 1965), https://www.americanheritage.com/thrifty-spy-sixth-avenue-el [https://perma.cc/SAA5-J8YY].

21 *Id.*

22 *Id.*

23 50 U.S.C. § 4305.

24 The Trading with the Enemy Act, originally passed in 1917, empowered the President to "investigate, regulate, direct and compel, nullify, void, prevent or prohibit, any acquisition holding, withholding, use, transfer, withdrawal, transportation, importation or exportation of, or dealing in, or exercising any right, power, or privilege with respect to, or transactions involving, any property in which any foreign country or a national thereof has any interest." *Id.* § 4305(b)(1)(B).

25 Graham & Marchick, *supra* note 19, at xvi, 14, 18.

building their economies—investment in the United States from abroad was unsurprisingly modest compared to outflows.[26] Indeed, for the first time ever, America became a net source, rather than a destination, of investment capital.[27] And what foreign investment did exist posed little risk, since America's main strategic adversaries—the Soviet Union and its satellites—were communist countries whose economic systems were largely isolated from the U.S. economy.[28]

1. *CFIUS's Beginnings: Silent Monitor*

When the post-war trend changed in the 1970s,[29] however, CFIUS was born. The oil shock that made Organization of the Petroleum Exporting Countries ("OPEC") countries wealthy aroused concerns that petrodollars might be used to acquire significant U.S. assets.[30] In 1975, President Gerald Ford issued an Executive Order creating the first iteration of CFIUS.[31] Far from being a revolutionary development, that policy prescription was intended to be a conservative, measured approach to monitoring foreign investment flows.[32] In fact, CFIUS effectively preempted potential legislation that would have discriminated against OPEC, which had implemented a "politically motivated oil embargo on the United States."[33] Even though the embargo hit the U.S. economy hard, there was concern that legislative reprisals against

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26 *Id.* at 19.

27 *Id.*

28 *See id.*

29 *See id.* at 20.

30 *See id.*

31 Exec. Order 11,858, *supra* note 1.

32 Prior to issuing the Executive Order, President Ford signed into law the Foreign Investment Study Act of 1974, Pub. L. No. 93-479, 88 Stat. 1450 (1974), authorizing the collection of data regarding foreign investments. In signing the bill, President Ford emphasized: "As I sign this act, I reaffirm that it is intended to gather information only. It is not in any sense a sign of a change in America's traditional open door policy towards foreign investment. We continue to believe that the operation of free market forces will direct worldwide investment flows in the most productive way.". *See* Gerald R. Ford, Statement on Signing the Foreign Investment Study Act of 1974, U.C. SANTA BARBARA: THE AM. PRESIDENCY PROJECT, https://www.presidency.ucsb.edu/documents/statement-signing-the-foreign-investment-study-act-1974 [https://perma.cc/YKW4-PKGY].

33 *See* David Zaring, *CFIUS as a Congressional Notification Service*, 83 S. CAL. L. REV. 81, 92 (2009). The embargo resulted from OPEC Arab members' disdain for the United States due to its supporting Israel in the 1973 Arab-Israeli or Yom Kippur War. *See* Rüdiger Graf, *Between* National *and* Human Security*: Energy Security in the United States and Western Europe in the 1970s*, 35 HIST. SOC. RES. 329, 337 (2010); Euclid A. Rose, *OPEC's Dominance of the Global Oil Market: The Rise of the World's Dependency on Oil*, 58 MIDDLE E.J. 424, 434–35 (2004); *Oil Embargo, 1973–1974*, OFF. OF THE HISTORIAN, U.S. DEP'T OF STATE, https://history.state.gov/milestones/1969-1976/oil-embargo [https://perma.cc/QRZ4-FA94].

OPEC could further discourage foreign direct investment that was beneficial to America.[34]

CFIUS was initially established with six members: the Secretaries of Treasury (as Chairman), State, Defense, and Commerce; the Assistant to the President for Economic Affairs; and the Executive Director of the Council on International Economic Policy.[35] President Ford directed that CFIUS was to have the "primary continuing responsibility within the Executive Branch for monitoring the impact of foreign investment in the United States," but he did not direct CFIUS to stop those acquisitions that posed national security threats.[36] Specifically, the then-limited powers of CFIUS allowed it 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; and
(4) consider proposals for new legislation or regulations relating to foreign investment as may appear necessary.[37]

While it was an important step toward a U.S. investment security framework, the initial iteration of CFIUS could do little more than monitor foreign acquisitions of American businesses. CFIUS did have a voice on policy issues, but it appears to have been largely silent. In fact, CFIUS purportedly met only 10 times from 1975 to 1980,[38] per-

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34 Zaring, *supra* note 33, at 91–92; *see* Hunter Deeley, *The Expanding Reach of the Executive in Foreign Direct Investment: How* Ralls v. CFIUS *Will Alter the FDI Landscape in the United States*, 4 AM. U. BUS. L. REV. 125, 131–32 (2015) (explaining that the Treasury Department studied the policy impact of increasing FDI in the United States, including the effect of OPEC investments on U.S. foreign and domestic policy, before the first CFIUS meeting); *see also* JAMES K. JACKSON, CONG. RESEARCH SERV., RL33388, THE COMMITTEE ON FOREIGN INVESTMENT IN THE UNITED STATES (CFIUS) 4 (2020), https://fas.org/sgp/crs/natsec/RL33388.pdf [https://perma.cc/P3NV-NV6R].

35 Exec. Order No. 11,858, *supra* note 1, § 1(a). As Chairman, the Secretary of the Treasury (or his designee) could also invite other representatives from other departments to participate in CFIUS activities, *id.*

36 *Id.* § 1(b). There is of course the threshold question of whether the President has the authority under the U.S. Constitution to block transactions absent an act of Congress that could have been delegated to CFIUS in the first place.

37 *Id.*

38 *See* 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

haps due to reduced public concern over investments by OPEC countries.

2. *Exon-Florio Amendment*

During the 1980s, the Reagan Administration emphasized the benefits of foreign investment instead of its potential drawbacks.[39] President Reagan aimed to grow the U.S. economy while significantly investing in America's national defense against the Soviet Union, which he believed had become resurgent during the 1970s.[40] Capital flows into the United States from non-communist countries helped to achieve both aims. Indeed, foreign direct investment nearly quintupled, from $83 billion in 1980 to over $408 billion in 1989.[41]

By the late 1980s, however, concerns arose that companies within some of the most sensitive American industries were more frequently finding themselves the acquisition targets of foreign companies. For example, in 1987 the Japanese[42] electronics company, Fujitsu Ltd., attempted to buy a U.S. computer chip manufacturer and military contractor, Fairchild Semiconductor Corporation.[43] The Defense

(2016) ("In its first five years after its establishment, the CFIUS Committee had met only ten times, making it unrealistic to respond to national security concerns of foreign direct investment in the United States." (footnote omitted)). Although others thought CFIUS lacked the legal authority to collect the foreign investment data specified within President Ford's Executive Order to address this claim, the International Investment Survey Act of 1976, Pub. L. No. 94-472, 90 Stat. 2059 (codified at 22 U.S.C. §§ 3102–3108 (2018)), unambiguously authorized the President to collect international investment data, to analyze foreign direct investment in the United States, and to report publicly on this information. *See* JAMES K. JACKSON, CONG. RESEARCH SERV., RL33388, THE COMMITTEE ON FOREIGN INVESTMENT IN THE UNITED STATES (CFIUS) 6 (2020).

39 *See* Terry R. Spencer & Christian B. Green, *Foreign Direct Investment in the U.S.: An Analysis of Its Potential Costs and Benefits and a Review of Legislative Tools Available to Shape Its Future Course*, 6 TRANSNAT'L LAW. 539, 543 (1993).

40 See Andrew E. Busch, *Ronald Reagan and the Defeat of the Soviet Empire*, 27 PRESIDENTIAL STUD. Q. 451, 452 (1997); *see* Keith L. Shimko, *Reagan on the Soviet Union and the Nature of International Conflict*, 13 POL. PSYCHOL. 353, 368 (1992).

41 Stephen K. Pudner, Commentary, *Moving Forward from Dubai Ports World—The Foreign Investment and National Security Act of 2007*, 59 ALA. L. REV. 1277, 1279 (2008) ("At least partially because of [President Reagan's open-door foreign investment] policy, foreign direct investment (FDI) coming into the United States increased from $83 billion in 1980, when Reagan was elected, to more than $408 billion in 1989, when Reagan left office . . . .").

42 Congress was particularly concerned about Japan's rapidly growing economy and Japanese counterparts' recent acquisitions of U.S. corporations; many feared that U.S. companies were susceptible to foreign takeovers. Others worried that Japanese FDI in the United States was weakening U.S. technology. *See* JAMES K. JACKSON, CONG. RESEARCH SERV., RL33388, THE COMMITTEE ON FOREIGN INVESTMENT IN THE UNITED STATES (CFIUS) 7 (2020).

43 W. Robert Shearer, Comment, *The Exon-Florio Amendment: Protectionist Legislation Susceptible to Abuse*, 30 HOUS. L. REV. 1729, 1730 (1993).

Secretary and Commerce Secretary reportedly requested that the President block the transaction for national security reasons.[44] Yet it was unclear whether the President could have taken such action absent specific statutory authorization. While Congress had afforded the President blunt powers under the International Economic Emergency Powers Act ("IEEPA")[45] to take actions with respect to certain countries, there was no law that vested the President with the definite ability to prevent a foreign takeover of an individual U.S. firm or to order divestment when a specific transaction threatened national security.[46] Furthermore, one congressman lamented that CFIUS had "only reviewed 29 cases since it was established . . . and ha[d] never concluded that a prospective acquisition required any Federal intervention."[47] Faced with the relatively weak track record of CFIUS, there was widespread concern that additional authority was a necessary prerequisite for real action.

In response, Congress enacted the Exon-Florio Amendment in 1988.[48] The law created Section 721 of the Defense Production Act of 1950, which to this day remains the statutory cornerstone of CFIUS.[49] Under Exon-Florio, the President could, for the first time, block the foreign acquisition of a U.S. company or order divestment where the transaction posed a threat to national security without first declaring an emergency.[50] Specifically, the amendment gave the President (or his designee) the ability to investigate, suspend, or prohibit any foreign mergers, acquisitions, or takeovers that could harm U.S. national security interests.[51]

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44 David E. Sanger, *Japanese Purchase of Chip Maker Canceled After Objections in U.S.*, N.Y. TIMES (Mar. 17, 1987), https://www.nytimes.com/1987/03/17/business/japanese-purchase-of-chip-maker-canceled-after-objections-in-us.html [https://perma.cc/37U7-NLHE].

45 *See* 50 U.S.C. §§ 1701–1702 (2012).

46 *See* Yang Wang, Comment, *Incorporating the Third Branch of Government into U.S. National Security Review of Foreign Investment*, 38 HOUS. J. INT'L L. 323, 329–30 (2016) (explaining that Presidents have avoided declaring a national emergency under the IEEPA because that would be considered "a hostile declaration against the country involved").

47 135 CONG. REC. H902 (daily ed. Apr. 3, 1989) (statement of Rep. Wolf).

48 Pub. L. No. 100–418, § 5021, 102 Stat. 1107, 1425 (1988); *see* Will Gent, Note, *Tilting at Windmills: National Security, Foreign Investment, and Executive Authority in Light of* Ralls Corp. v. CFIUS, 94 OR. L. REV. 455, 462 (2016). Although the parties eventually abandoned the transaction, by passing the Exon-Florio Amendment Congress sought to avoid similar concerns in the future by increasing the President's power to regulate foreign investment policy. *Id.*; Sanger, *supra* note 44.

49 Omnibus Trade and Competitiveness Act of 1988, Pub. L. 100-418 § 5021, 102 Stat. 1107, 1425–26 (1988); *see* 50 U.S.C. § 4565 (2012).

50 Omnibus Trade and Competitiveness Act § 5021.

51 *Id.* ("The President or the President's designee may make an investigation to determine the effects on national security of mergers, acquisitions, and takeovers . . . by or with foreign

While Exon-Florio granted the President new powers, it also sought to put reasonable constraints on them. The President could suspend or prohibit a foreign transaction only if (1) he or she found "credible evidence" that the "foreign interest exercising control" could threaten U.S. national security; and (2) other laws were inadequate or inappropriate to protect U.S. national security.[52] In making his or her findings, the President could consider a variety of factors, including whether domestic industries could meet national defense and security requirements.[53] Additionally, if the President decided to suspend or prohibit a foreign transaction, then he or she was required to provide a written report to Congress immediately.[54]

Four months after Exon-Florio became law, President Reagan issued Executive Order 12,661, delegating his authority to administer the provision to CFIUS.[55] In November 1991, the Treasury Department promulgated regulations to effectuate the implementation of Exon-Florio and created a voluntary notification system.[56] Although voluntary, parties to a proposed foreign acquisition tended to notify CFIUS, given that they could be subjected to forced divestment if they failed to comply.[57] In the three decades leading up to FIRRMA, the CFIUS process created by Exon-Florio was largely consistent: (1) a voluntary notice of a transaction was sent to CFIUS, (2) a 30-day review period ensued, (3) transactions that required more time by CFIUS were subject to additional national security review, and (4) the President would make a decision to accept, block, or impose conditions on the merger within 15 days.[58]

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persons which could result in foreign control of persons engaged in interstate commerce in the United States."); Zaring, *supra* note 33, at 93 ("The test created by Congress permitted the [P]resident to act if there was 'credible evidence' that a transaction would 'impair' national security and that the impact could not be lessened by any other legal provision . . . .").

52 Omnibus Trade and Competitiveness Act § 5021.

53 *Id.*

54 *Id.*

55 Exec. Order No. 12,661 § 3-201, 3 C.F.R. 618, 620–21 (1989) (giving CFIUS significant authority to conduct reviews and investigations and make recommendations to the President about whether a foreign transaction should be suspended or blocked.); JAMES K. JACKSON, CONG. RESEARCH SERV., RL33388, THE COMMITTEE ON FOREIGN INVESTMENT IN THE UNITED STATES (CFIUS) 6 (2020); Spencer & Green, *supra* note 39, at 568.

56 JAMES K. JACKSON, CONG. RESEARCH SERV., RL33388, THE COMMITTEE ON FOREIGN INVESTMENT IN THE UNITED STATES (CFIUS) 8 (2020). Pursuant to Exon-Florio, "[t]he President shall direct the issuance of regulations to carry out" the provision. Omnibus Trade and Competitiveness Act § 5021.

57 JAMES K. JACKSON, CONG. RESEARCH SERV., RL33388, THE COMMITTEE ON FOREIGN INVESTMENT IN THE UNITED STATES (CFIUS) 8 (2020).

58 *Id.* at 14. In practice, firms have often also engaged in an informal review process with

3. *Byrd Amendment*

During the five years after Exon-Florio, CFIUS investigated a total of 16 transactions and blocked one acquisition.[59] Congress again expressed concern that CFIUS had failed to use its "broad latitude to determine what constitutes a threat to national security . . . ."[60] There was also general agreement that acquisitions by sovereigns and their instrumentalities required additional scrutiny over and above that typically applied to foreign private sector enterprises.[61] As a result, Congress passed the Byrd Amendment to the National Defense Authorization Act for Fiscal Year 1993.[62]

Under the Byrd Amendment, CFIUS was required to proceed to the 45-day investigation phase where two criteria were met: (1) the acquirer is "controlled by or acting on behalf of a foreign government;" and (2) the acquisition results in "control of a person engaged in interstate commerce in the United States" that could threaten U.S. national security.[63] In making its determination about whether to suspend or prohibit a foreign transaction, the Byrd Amendment provides that CFIUS may consider "the potential effects of the proposed or pending transaction on sales of military goods, equipment, or technology to any country" that "supports terrorism," "missile proliferation," or chemical and biological weapons proliferation.[64] The Byrd Amendment further provides that CFIUS may consider the "potential effects of the proposed or pending transaction on United States international technological leadership in areas affecting United States national security."[65]

CFIUS before filing an official notification to identify potential issues and prepare to address them. *Id.* at 8–9.

59 Zaring, *supra* note 33, at 93. In 1990, President George H.W. Bush ordered China National Aero-Technology Import and Export Corporation ("CATIC"), a Chinese government agency, to divest its acquisition of Mamco Manufacturing, Inc., a Seattle-based aerospace supplier, citing national security concerns. Harriet King, *China Ends Silence on Deal U.S. Rescinded*, N.Y. TIMES (Feb. 20, 1990), https://www.nytimes.com/1990/02/20/business/china-ends-silence-on-deal-us-rescinded.html [https://perma.cc/4LDB-HW2M].

60 138 CONG. REC. S6599 (daily ed. May 13, 1992) (statement of Sen. Byrd).

61 *See* National Defense Authorization Act for Fiscal Year 1993, Pub. L. No. 102-484, § 837(a)(2)(b), 106 Stat. 2315, 2463–64 (1992).

62 The Byrd Amendment to the National Defense Authorization Act for Fiscal Year 1993 amended § 721 of the Defense Production Act of 1950 to further expand the Exon-Florio provision. National Defense Authorization Act § 837.

63 *Id.* § 837(a)(2)(b).

64 *Id.* § 837(b); *see also* Zaring, *supra* note 33, at 81, 94 n.59.

65 National Defense Authorization Act § 837(b)(5).

In addition to imbuing CFIUS with greater authority, the Byrd Amendment also made CFIUS more accountable to Congress.[66] Under the Amendment, CFIUS was required to provide Congress with "a written report of the President's determination *of whether or not to*" suspend or prohibit a foreign transaction, "including a detailed explanation" of the President's findings.[67]

4. *FINSA*

In the years that followed, it became evident that CFIUS and Congress disagreed about when the 45-day investigation period was discretionary rather than mandatory—a rift that was more clearly exposed in the wake of the Dubai Ports ("DP") World controversy.[68] In 2006, DP World purchased a British maritime company, Peninsular & Oriental Steam Navigation Company, thereby gaining access to container shipping facilities in six major U.S. ports.[69] CFIUS cleared the deal, leading to "a firestorm of criticism on Capitol Hill."[70]

Although Congress interpreted the Byrd Amendment to require a mandatory 45-day investigation if the foreign firm involved in a transaction is owned or controlled by a foreign government, CFIUS read the Amendment's requirements differently.[71] With respect to DP World specifically, CFIUS found the case did not warrant a full 45-day investigation because even though the first criterion of the Byrd Amendment was met (i.e., DP World was controlled by a foreign government), the second was not because CFIUS had concluded during the 30-day review phase that the transaction would not affect national

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66 *Cf.* Mary Ellen Stanley, Note, *From China with Love: Espionage in the Age of Foreign Investment*, 40 BROOK. J. INT'L L. 1033, 1041 (2015) ("The CFIUS review process is structurally protected from politicization by Congress, because the oversight powers of Congress are retrospective only.").

67 National Defense Authorization Act § 837(a)(2)(c) (emphasis added). In contrast, under the Exon-Florio provision, the President was required to provide a written report to Congress *only if* he or she decided to suspend or prohibit a foreign transaction. Omnibus Trade and Competitiveness Act of 1988, Pub. L. 100-418, § 5021, 102 Stat. 1107, 1425–26 (1988).

68 JAMES K. JACKSON, CONG. RESEARCH SERV., RL33388, THE COMMITTEE ON FOREIGN INVESTMENT IN THE UNITED STATES (CFIUS) 9 (2020).

69 *Id.* at 4. DP World gained access to ports in New York City, Newark, Philadelphia, Baltimore, Miami, and New Orleans. *Dubai Company Abandons Bid to Manage U.S. Ports Amid Row; Transfers Management to U.S. Company*, FACTS ON FILE WORLD NEWS DIG., Mar. 9, 2006, at A3 [hereinafter *Dubai Company Abandons Bid*].

70 Matthew R. Byrne, Note, *Protecting National Security and Promoting Foreign Investment: Maintaining the Exon-Florio Balance*, 67 OHIO ST. L.J. 849, 852 (2006).

71 JAMES K. JACKSON, CONG. RESEARCH SERV., RL33388, THE COMMITTEE ON FOREIGN INVESTMENT IN THE UNITED STATES (CFIUS) 9 (2020).

security.[72] Even after DP World and CFIUS agreed to reopen the case and proceed to the 45-day investigation period, the House Appropriations Committee voted overwhelmingly to prohibit the transaction.[73] Following public outcry over national security concerns, DP World agreed to transfer its management of U.S. port operations to an American company.[74]

While media coverage of the DP World controversy died down, interest in legislative reforms remained. Unlike the debate surrounding Exon-Florio, the focus was less on the power and jurisdiction of CFIUS and more on the body's perceived lack of transparency and other procedural flaws.[75] In order to instill greater procedural rigor and accountability into the CFIUS process, Congress enacted the Foreign Investment and National Security Act of 2007 ("FINSA").[76] The law formally established CFIUS as an entity with a defined membership and codified its structure and processes.[77] In so doing, FINSA made several major changes to CFIUS.

First, FINSA expanded the membership of CFIUS, adding the Secretary of Energy, the Director of National Intelligence, and the Secretary of Labor as non-voting, ex officio members.[78] At the same time, it authorized the President to add members on a case-by-case basis as had been done in the past.[79] Under FINSA, the National In-

72 Press Release, U.S. Dep't of the Treasury, CFIUS and the Protection of the National Security in the Dubai Ports World Bid for Port Operations (Feb. 24, 2006), https://www.treasury.gov/press-center/press-releases/Pages/js4071.aspx [https://perma.cc/6KFM-ZMND]; JAMES K. JACKSON, CONG. RESEARCH SERV., RL33388, THE COMMITTEE ON FOREIGN INVESTMENT IN THE UNITED STATES (CFIUS) 9 (2020).

73 Byrne, *supra* note 70, at 852; *Dubai Company Abandons Bid*, *supra* note 69, at A3; Carl Hulse, *In Break With White House, House Panel Rejects Port Deal*, N.Y. TIMES (Mar. 9, 2006), https://www.nytimes.com/2006/03/09/politics/in-break-with-white-house-house-panel-rejects-port-deal.html [https://perma.cc/3YY2-9A93].

74 *Dubai Company Abandons Bid*, *supra* note 69, at A3.

75 *See* Jason Cox, *Regulation of Foreign Direct Investment After the Dubai Ports Controversy: Has the U.S. Government Finally Figured Out How to Balance Foreign Threats to National Security without Alienating Foreign Companies?*, 34 J. CORP. L. 293, 297–98 (2008) ("FINSA purports to clarify national security in the Exon-Florio Amendment and enhance reporting requirements of the CFIUS, adding to the transparency of CFIUS reviews.").

76 Pub. L. No. 110-49, 121 Stat. 246 (2007).

77 *Id.*

78 *Id.* § 3(k)(2). Under FINSA, CFIUS membership included the Secretaries of Treasury, Homeland Security, Commerce, Defense, State, Energy, and Labor (nonvoting, ex officio); the Attorney General of the United States; the Director of National Intelligence (nonvoting, ex officio); and the "heads of any other executive department, agency, or office, as the President determines appropriate, generally or on a case-by-case basis." *Id.* FINSA also established an Assistant Secretary of the Treasury to undertake CFIUS's duties as delegated by the Secretary of the Treasury. *Id.* § 3(k)(4). The author held this post from 2017–2019.

79 *Id.* § 3(k)(2).

telligence Council was required to analyze national security threats posed by a foreign transaction within 20 days so CFIUS could act based on input from the U.S. intelligence community.[80] In addition, FINSA permitted the Treasury Secretary to delegate the lead responsibility for reviewing particular foreign transactions to other CFIUS members so the requisite expertise was brought to bear in every case.[81] Since the passage of FINSA through the present, the practice has been for the Treasury Department to serve as co-chair in every case while also appointing one or more additional CFIUS agency members to serve as co-chair(s).[82]

Second, FINSA added new factors for CFIUS to consider in determining whether to suspend or prohibit a transaction, a timeline for presidential action, and authorization for CFIUS to reopen past cases.[83] FINSA directed CFIUS to consider factors such as the possible national security impacts on America's "critical infrastructure" as well as "critical technologies."[84] Both of these factors would play an important part in the FIRRMA legislation to come one decade later.[85] FINSA also specified that if CFIUS concluded its investigation phase without approving or otherwise resolving the case, then the President had 15 days to announce a decision regarding whether he or she would suspend or disallow the foreign transaction.[86] In addition, FINSA answered the question whether CFIUS had the authority to reopen reviews and investigations in the affirmative.[87] Specifically, FINSA permitted CFIUS to revoke its prior approval if it discovered afterwards that a party "submitted false or misleading material information" or "omitted material information."[88] The same was true when

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80 *Id.* § 2(b)(4).

81 *See id.* § 2(b)(5).

82 *See* U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-18-249, COMMITTEE ON FOREIGN INVESTMENT IN THE UNITED STATES: TREASURY SHOULD COORDINATE ASSESSMENTS OF RESOURCES NEEDED TO ADDRESS INCREASED WORKLOAD 18 (2018).

83 Foreign Investment and National Security Act §§ 4–6.

84 *Id.* § 4(6)–(7).

85 *See supra* Part II.

86 Foreign Investment and National Security Act § 6(d)(2). Under FINSA, the President's decision was not subject to judicial review. *Id.* § 6(e).

87 *See id.* § 2(b)(1)(D).

88 *Id.* § 2(b)(1)(D)(ii). *See also* 31 C.F.R. § 800.601 (2018) (noting that the President and/or the Committee will not exercise their authority to reopen reviews or investigations under certain conditions); *cf.* Stanley, *supra* note 66, at 1042 (explaining that parties to a transaction often voluntarily file notice of their proposed or pending transaction because CFIUS can retroactively compel review of the transaction).

a party entered into a mitigation agreement with CFIUS in order to secure clearance and then subsequently violated that agreement.[89]

Third, FINSA increased congressional oversight.[90] At the request of certain members of Congress, CFIUS was required to provide confidential briefings on foreign mergers, acquisitions, and takeovers for which CFIUS has concluded its process.[91] Additionally, FINSA required CFIUS to submit an annual report to Congress detailing all the reviews and investigations completed during the year, including an analysis of all filings, investigations, withdrawals, and decisions or actions, and the methods used by CFIUS to protect U.S. national security.[92] Many provisions of FINSA still remain in force today.[93]

II. The Road to FIRRMA

More than one decade after FINSA and three decades after Exon-Florio, CFIUS found itself at another historic turning point. During the 2010s, the national security landscape as it related to foreign investment began shifting in ways that overshadowed the magnitude of any other shift in the 45-year history of CFIUS. These seismic changes provoked legislative debates about investment security, which culminated in a rare moment of bipartisan action.

A. Challenges Facing CFIUS in the 2010s

In the decade following the global financial crisis of 2008, CFIUS case volumes increased substantially. At the same time, traditional

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89 Foreign Investment and National Security Act § 2(b)(1)(D)(iii) (providing for revocation when a party "intentionally materially breaches a mitigation agreement" and "no other remedies" are available). The Foreign Investment Risk Review Modernization Act of 2018 ("FIRRMA"), further expands the authority of CFIUS to engage in unilateral reviews, authorizing it to do so in the case of any breach of a prior agreement with CFIUS where there are no other "adequate or appropriate" remedies, even if the breach was unintentional. Pub. L. No. 115-232, § 1708(2)(D)(iv), 132 Stat. 2174, 2187 (2018).

90 Foreign Investment and National Security Act § 7.

91 *Id.*

92 *Id.* As part of the annual report, FINSA required CFIUS to provide "an evaluation of whether there is credible evidence of a coordinated strategy . . . to acquire United States companies involved in research, development, or production of critical technologies for which the United States is a leading producer" and an evaluation of any "industrial espionage activities directed or directly assisted by foreign governments against private United States companies aimed at obtaining commercial secrets related to critical technologies." *Id.* FINSA further required CFIUS to publish an unclassified version of report for the public. *Id.*; *see also Resource Center: Reports and Tables*, U.S. Dep't of the Treasury, https://www.treasury.gov/resource-center/international/foreign-investment/Pages/cfius-reports.aspx [https://perma.cc/S94W-Y5K9] (providing these annual reports).

93 *See, e.g.*, 50 U.S.C. § 4565 (2012).

private sector mergers and acquisitions gave way to various new types of foreign investment that featured more sovereign direction and complex fund structures. Some of these transactions revealed critical gaps in the jurisdiction of CFIUS. As the 2010s also brought major advances in technology and the use of data, the substance of CFIUS investigations also began to change. Finally, the United States was confronted with the military and economic rise of China, which had announced a new plan for its country to lead the world in various industries it deemed strategic. These challenges provided the needed impetus for legislative changes to modernize CFIUS.

1. *Increasing Caseloads*

The most noticeable challenge CFIUS faced in the 2010s was its increased caseload. In raw numbers, the average volume of CFIUS cases grew steadily from fewer than 100 in 2009 and 2010 (the two years following the financial crisis) to nearly 240 in 2017.[94] At the same time, the staff assigned to CFIUS at the Treasury Department and other member agencies remained relatively the same.[95] But volume was not the only challenging aspect of the increased caseload—the cases had also become far more complex than in earlier decades.[96]

While it is difficult to measure case complexity in real terms, one indicator is the rate at which cases proceed to the 45-day investigation stage, which is more resource intensive for CFIUS. In 2007, approximately four percent of cases went to the investigation stage.[97] By 2017, approximately 70% did.[98] Another potential measure of complexity is the number of cases in which CFIUS determined that mitigation or prohibition was necessary to address national security concerns. Mitigation generally requires that the parties negotiate measures that are ultimately approved by CFIUS in order for the transaction to be

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94 COMM. ON FOREIGN INV. IN THE U.S., ANNUAL REPORT TO CONGRESS 4 (2017), https://www.treasury.gov/resource-center/international/foreign-investment/Documents/CFIUS-Public-Annual-Report-CY-2016-2017.pdf [https://perma.cc/9AGR-45NU].

95 U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-18-249, COMMITTEE ON FOREIGN INVESTMENTS IN THE UNITED STATES: TREASURY SHOULD COORDINATE RESOURCES NEEDED TO ADDRESS INCREASED WORKLOAD 19 (2018).

96 *Id.* at 13.

97 *See* COMM. ON FOREIGN INV. IN THE U.S., ANNUAL REPORT TO CONGRESS 3 (2008), https://www.treasury.gov/resource-center/international/foreign-investment/Documents/CFIUS-Annual-Rpt-2008.pdf [https://perma.cc/EN7Y-WSXE].

98 *See* COMM. ON FOREIGN INV. IN THE U.S., ANNUAL REPORT TO CONGRESS 4 (2017), https://www.treasury.gov/resource-center/international/foreign-investment/Documents/CFIUS-Public-Annual-Report-CY-2016-2017.pdf [https://perma.cc/9AGR-45NU].

cleared.[99] Aspects of the transaction can also be prohibited. For example, target U.S. business could be required to divest of a sensitive product line or a subsidiary before consummation of an investment by a foreign buyer.[100] As a consequence, these kinds of cases typically require significantly more staff time and resources.[101] From roughly 2008 through 2015, such cases represented fewer than 10% of the total covered transactions CFIUS reviewed.[102] By 2017, this figure had doubled to approximately 20% of the total covered transactions CFIUS reviewed during that year.[103]

2. New Investment Trends

At the same time, the added complexity of the transactions CFIUS was confronting was influenced by new investment trends. The 2010s saw foreign sovereigns—especially China—pursuing investments in the United States to further national objectives,[104] such as the China 2025 plan, highlighted more fully below.[105] The change from primarily financial or business rationales for investments in the United States made the traditional CFIUS analysis of threats and vulnerabilities even more painstaking.[106] In addition, many controlling investments in U.S. companies were not made by other industrial corporations but instead through multilayered private equity, venture

99 *See id.* at iii. CFIUS also must expend significant resources monitoring compliance with mitigation agreements. *See* U.S. Gov't Accountability Office, GAO-18-249, Committee on Foreign Investments in the United States: Treasury Should Coordinate Resources Needed to Address Increased Workload 20 (2018).

100 *See* U.S. Gov't Accountability Office, GAO-18-249, Committee on Foreign Investments in the United States: Treasury Should Coordinate Resources Needed to Address Increased Workload 26 (2018).

101 *See id.* at 20.

102 *See CFIUS Reform: Administration Perspectives on the Essential Elements: Hearing on Examining the Role of the Committee on Foreign Investment in the United States Before the S. Comm. on Banking, Housing, & Urban Affairs*, 115th Cong. 4 (2018) (testimony of Hon. Heath P. Tarbert, Assistant Secretary of the Treasury) [hereinafter *CFIUS Reform Hearing*].

103 *Id.*

104 *See CFIUS Reform: Examining the Essential Elements: Hearing on Examining the Essential National Security Elements Underlying a Comprehensive Proposal to Reform the Review Process Used by the Committee on Foreign Investment in the United States Before the S. Comm. on Banking, Housing, & Urban Affairs* 115th Cong. 3 (2018) (statement of Sen. John Cornyn) (noting that foreign adversaries were "vacuuming up [the U.S.'s] cutting-edge . . . technology" to undercut the U.S. economy and threaten national security); *see also id.* at 6 (noting that foreign investors were increasingly "seek[ing] to capture the intellectual property of leading edge technology companies in our country for their home country's military uses").

105 *See infra* Section II.A.5.

106 *See* U.S. Gov't Accountability Office, GAO-18-249, Committee on Foreign Investments in the United States: Treasury Should Coordinate Resources Needed to Address Increased Workload 17 (2018).

capital, and other kinds of investment funds.[107] With such funds sometimes having hundreds of limited partners with varying equity stakes and voting rights, it became more difficult for CFIUS to discern who would ultimately control the U.S. target company.[108]

3. *Military vs. Commercial Applications*

Continued evolution in the relationship between national security and commercial activity also contributed to the complexity of these transactions. There has always been the issue of "dual use" products with both military and civilian applications.[109] Previously, advances in the defense industry spurred commercial innovations, such as the jet aircraft, the internet, and the global positioning system ("GPS").[110] But as the 2010s unfolded, it became clear that military capabilities were also rapidly building on top of commercial innovations.[111] The use of drones, driverless vehicles, and advanced semiconductors could serve as the foundational technologies for future military applications even if they did not at the time.

Moreover, the ever-growing, digital, data-driven economy created national security vulnerabilities that had never been seen before. Whether it be social networks, healthcare, or finance, volumes upon volumes of personally identifiable information ("PII") about American citizens were housed in companies purchased by foreign investors.[112] For perhaps the first time in the history of CFIUS, there was a serious need to understand the data vulnerabilities posed in each indi-

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107 *Id.* at 16–17.

108 *Id.*

109 *See* AM. ACAD. OF ARTS & SCIS., *Introduction*, *in* GOVERNANCE OF DUAL-USE TECHNOLOGIES: THEORY AND PRACTICE 4, 4 (Elisa D. Harris ed., 2016) (defining "dual-use" technologies).

110 *See* PETER L. SINGER, INFO. TECH. & INNOVATION FOUND., FEDERALLY SUPPORTED INNOVATIONS: 22 EXAMPLES OF MAJOR TECHNOLOGY ADVANCES THAT STEM FROM FEDERAL RESEARCH SUPPORT 11, 14, 28 (2014).

111 *See* Debra Werner, *Military Turns to Private Sector for Rapid Space Innovation*, SPACENEWS (Oct. 9, 2019), https://spacenews.com/warfare-satellite-innovation-2019/ [https://perma.cc/GMX7-ZKFH]; Jared Serbu, *Pentagon Announces Big Push to Incorporate 5G Technology for Military Use*, FED. NEWS NETWORK (Oct. 24, 2019, 9:05 AM), https://federalnewsnetwork.com/defense-main/2019/10/pentagon-announces-big-push-to-incorporate-5g-technology-for-military-use/ [https://perma.cc/KG9K-6JQD].

112 *See, e.g.*, David E. Sanger, *Grindr is Owned by a Chinese Firm, and the U.S. is Trying to Force It to Sell*, N.Y. TIMES (Mar. 28, 2019), https://www.nytimes.com/2019/03/28/us/politics/grindr-china-national-security.html [https://perma.cc/MQ3X-4VBB]; Geoffrey Gertz, *Is TikTok a Threat to National Security?*, WASH. POST (Nov. 11, 2019), https://www.washingtonpost.com/politics/2019/11/11/is-tiktok-threat-national-security/ [https://perma.cc/G8EM-JY4E].

vidual case.[113] All told, by the late 2010s the acquisition of a Silicon Valley startup was sometimes raising just as serious concerns from a national security perspective as the acquisition of a defense or aerospace company, the traditional areas of focus for CFIUS.

4. *Jurisdictional Gaps*

As CFIUS's caseload was rapidly changing, its jurisdiction quickly became ossified. The problem lay in the fact that CFIUS's jurisdictional grant was three decades old, originating with the Exon-Florio Amendment of 1988 and maintained through FINSA.[114] Under Exon-Florio and its progeny, CFIUS had the authority to review only those mergers, acquisitions, and takeovers that resulted in foreign "control" of a U.S. business.[115] That made sense in the 1980s and even in the first decade of the 21st century. But by the 2010s, non-controlling investments and joint ventures were becoming ever more popular.[116] Many of these did not fit nicely into formal jurisdictional ambit of CFIUS. As a result, CFIUS was often made aware of transactions it lacked the jurisdiction to review but which posed similar national security concerns to those already before it.[117] These gaps were becoming dangerously wide as more and more threatening actors sought to exploit them.

Certain transactions that CFIUS identified as presenting national security risks—such as investments that were not passive, but simultaneously did not convey "control" in a U.S. business—nonetheless remained outside its purview.[118] Similarly, CFIUS surmised that some parties had been deliberately structuring their transactions to come just below the control threshold to avoid governmental review.[119] At the same time, others had moved critical technology and associated expertise from American companies to offshore joint ventures in an effort to avoid the "U.S. business" jurisdictional hook.[120] Congressman Denny Heck (D-WA-10), an initial sponsor of FIRRMA, put it

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113 *See* U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-18-249, COMMITTEE ON FOREIGN INVESTMENTS IN THE UNITED STATES: TREASURY SHOULD COORDINATE RESOURCES NEEDED TO ADDRESS INCREASED WORKLOAD 17 (2018).

114 *See supra* Section I.B.

115 *See* 50 U.S.C. § 4565 (2012).

116 *See CFIUS Reform Hearing*, *supra* note 102, at 4 (testimony of Hon. Heath P. Tarbert, Assistant Secretary of the Treasury).

117 *See id.*

118 *See id.*

119 *Id.*

120 Robert D. Williams, *CFIUS Reform and U.S. Government Concerns over Chinese Investment: A Primer*, LAWFARE (Nov. 17, 2017, 7:34 AM), https://www.lawfareblog.com/cfius-re-

bluntly: "there are strategic competitors who want what we know" and "[t]here are companies who are seeking to do an end run around the rules . . . ."[121] Officials would later testify that while there could be space for creative deal making, purposeful attempts to evade CFIUS review had put America's security at risk.[122]

Notwithstanding the evolving investment environment, CFIUS also contended with gaps that likely never should have existed at all—even back in 1988. For example, the purchase of a U.S. business in close proximity to a sensitive military installation was subject to CFIUS review, but the purchase of real estate (i.e., raw land) at the same location was not.[123] These gaps were susceptible to exploitation and created the potential for disparate outcomes in transactions presenting identical national security threats.

5. *"Made in China 2025"*

While all of the aforementioned factors challenged CFIUS during the 2010s, there was a single motif underlying them all: the rise of an assertive China. During much of the 2000s, China had grown rapidly but purported, at least on the surface, to participate in the global free enterprise system and make various democratic reforms.[124] In the aftermath of the 2008 financial crisis, however, President Xi Jinping came to power determined to reform many of China's policies from the preceding decade.[125] Under his leadership, the Chinese government centralized political power to pursue bold national objectives—some of which were purportedly designed to embody an alternative to Western values.[126]

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form-and-us-government-concerns-over-chinese-investment-primer [https://perma.cc/24P6-TB68].

121 *Evaluating CFIUS: Administration Perspectives: Hearing Before the Subcomm. on Monetary Policy & Trade*, 115th Cong. 3 (2018) (statement of Rep. Denny Heck) [hereinafter *Evaluating CFIUS*].

122 *See CFIUS Reform Hearing*, *supra* note 102, at 4 (testimony of Hon. Heath P. Tarbert, Assistant Secretary of the Treasury).

123 *Evaluating CFIUS*, *supra* note 121, at 9–10, 13 (testimony of Eric Chewning, Deputy Assistant Secretary for Manufacturing & Industrial Base Policy, U.S. Department of Defense) (noting that under pre-FIRRMA law, a foreign entity could purchase real estate next to a U.S. military base and escape CFIUS review, but a lemonade stand on the same land could not).

124 *See* Jacques deLisle & Avery Goldstein, *Introduction: China's Economic Reform and Opening at Forty*, *in* To Get Rich is Glorious 1–26 (Jacques deLisle & Avery Goldstein ed., 2019).

125 *Id.* at 1–2.

126 Sangkuk Lee, *An Institutional Analysis of Xi Jinping's Centralization of Power*, 26 J. Contemp. China 325, 333 (2017).

In 2015, President Xi announced the "Made in China 2025" Plan, which aimed to make China the dominant leader in 10 high-tech fields within the decade.[127] To further these aspirations, the Chinese government pursued an ambitious industrial policy that harnessed the hundreds of billions of U.S. dollars gained through decades of trade deficits to finance targeted subsidies, intellectual property procurement, state-owned enterprises, and the acquisitions of cutting-edge tech companies in the United States, Europe, Japan, and Korea.[128] The reaction from the West, and America in particular, was unsurprisingly one of concern.[129]

The following year, the U.S.-China Economic and Security Review Commission urged Congress to:

> Analyze the impact of China's state-directed plans such as "Made in China 2025" . . . on U.S. economic competitiveness and national security, and examine the steps Congress can take to strengthen U.S. high-tech and high-value-added industries such as artificial intelligence, autonomous vehicles and systems, and semiconductors.[130]

During the 2016 U.S. Presidential Election, the nominees of both political parties made China's trade and investment policies part of their prospective plans for White House priorities. Former Secretary of State Hillary Clinton promised she would impose targeted tariffs

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127 *'Made in China 2025' Plan Issued*, STATE COUNCIL: PEOPLE'S REPUBLIC OF CHINA (May 19, 2015), http://english.www.gov.cn/policies/latest_releases/2015/05/19/content_281475110703534.htm [https://perma.cc/BBK3-QRWS] (listing 10 sectors in the 10-year action plan: "new information technology;" "high-end numerically controlled machine tools and robots;" "aerospace equipment;" "ocean engineering equipment and high-end vessels;" "high-end rail transportation equipment;" "energy-saving cars and new energy cars;" "electrical equipment;" "farming machines;" "new materials, such as polymers;" and "bio-medicine and high-end medical equipment").

128 *See* James McBride & Andrew Chatzky, *Is 'Made in China 2025' a Threat to Global Trade?*, COUNCIL ON FOREIGN REL. (May 13, 2019), https://www.cfr.org/backgrounder/made-china-2025-threat-global-trade [https://perma.cc/AZ94-LX6P]; Thomas Hout & Pankaj Ghemawat, *China vs the World: Whose Technology Is It?*, HARV. BUS. REV. (Dec. 2010), https://hbr.org/2010/12/china-vs-the-world-whose-technology-is-it [https://perma.cc/GMU3-UYGN].

129 *See* Kristen Hopewell, *What Is 'Made in China 2025'—And Why Is it a Threat to Trump's Trade Goals?*, WASH. POST (May 3, 2018, 8:30 AM), https://www.washingtonpost.com/news/monkey-cage/wp/2018/05/03/what-is-made-in-china-2025-and-why-is-it-a-threat-to-trumps-trade-goals/ [https://perma.cc/5J7L-Y4JD]; Jason Fang & Michael Walsh, *Made in China 2025: Beijing's Manufacturing Blueprint and Why the World Is Concerned*, ABC NEWS (Apr. 28, 2018, 9:08 PM), https://www.abc.net.au/news/2018-04-29/why-is-made-in-china-2025-making-people-angry/9702374 [https://perma.cc/ZYB3-QXMN].

130 U.S.-CHINA ECON. & SEC. REVIEW COMM'N, 2016 REPORT TO CONGRESS 29 (2016), https://www.uscc.gov/sites/default/files/annual_reports/2016%20Annual%20Report%20to%20Congress.pdf [https://perma.cc/F9QK-U2YL].

and ramp up the U.S. system that monitors trade.[131] Donald Trump, who would go on to win the presidency in 2016, was even more direct, accusing China of gaming the trade system and warning that its "days of currency manipulation and cheating [were] over."[132] The scene was thus set for an overhaul of CFIUS.

B. *Legislative Action: A Bipartisan Moment*

The 2016 election was among the most divisive in U.S. political history. Upon taking office, President Trump's agenda faced considerable headwinds from the opposition party who had expected to retain the White House.[133] Nonetheless, it became clear that the perceived threat of forcible technological dominance by China—by now an admitted "strategic competitor" to the United States—required a unified, bipartisan response from the American government.[134] This was further compounded by threats from North Korea, whose backing by China only amplified concerns.[135] The potential for serious harm to national security was acknowledged by multiple individuals within the defense and intelligence communities, including Defense Secretary James Mattis, who observed that CFIUS was "outdated" and "needs to be updated to deal with today's situation,"[136] and Director of Na-

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131 *See* Heather Long, *Clinton Suddenly Sounds a Lot Like Trump on Trade*, CNN Bus. (Aug. 11, 2016, 4:18 PM), https://money.cnn.com/2016/08/11/news/economy/hillary-clinton-trade/index.html [https://perma.cc/JY5M-GVBE]. Clinton further promised she would not let China "go after our information, our private sector information or our public sector information." Pepe Escobar, Opinion, *Why Hillary Clinton Is a Bigger Concern for China than Donald Trump*, S. China Morning Post (Oct. 15, 2016, 9:00 PM), https://www.scmp.com/week-asia/politics/article/2027847/why-hillary-clinton-bigger-concern-china-donald-trump [https://perma.cc/VDH4-X332].

132 *See* Geoff Dyer & Tom Mitchell, *Hillary Clinton: The China Hawk*, Fin. Times (Sept. 5, 2016), https://www.ft.com/content/92b23c8e-7349-11e6-bf48-b372cdb1043a [https://perma.cc/35JZ-YTAM].

133 *See* Janet Hook, *Democrats Are United Against Trump, Divided on Everything Else*, Wall Street J. (Oct. 26, 2017, 11:21 AM), https://www.wsj.com/articles/democrats-struggle-with-their-own-tea-party-moment-1509031265 [https://perma.cc/8YR7-YFW5].

134 *See* U.S. Dep't of Def., Summary of the 2018 National Defense Strategy of the United States of America: Sharpening the American Military's Competitive Edge 1–2 (2018), https://dod.defense.gov/Portals/1/Documents/pubs/2018-National-Defense-Strategy-Summary.pdf [https://perma.cc/Q4PT-945R].

135 *See* Susan Heavey, *Top Senate Democrat Urges Trump to Block China Deals over North Korea*, Reuters (Aug. 1, 2017, 9:21 AM), https://www.reuters.com/article/us-northkorea-missiles-usa-china/top-senate-democrat-urges-trump-to-block-china-deals-over-north-korea-idUSKBN1AH4EL [https://perma.cc/4VZ4-FVAN].

136 Phil Stewart, *U.S. Weighs Restricting Chinese Investment in Artificial Intelligence*, Reuters (June 13, 2017, 3:53 PM), https://www.reuters.com/article/us-usa-china-artificialintelligence/u-s-weighs-restricting-chinese-investment-in-artificial-intelligence-idUSKBN1942OX [https://perma.cc/AS5Y-P98Z].

tional Intelligence Dan Coats, who said "a significant review of the current CFIUS situation" was needed "to bring it up to speed."[137]

On October 18, 2017, Congress took its first steps toward addressing the multitude of expressed concerns by introducing FIRRMA in the Senate.[138] While many of the Trump Administration's initiatives had been met with fierce political rancor, the proposed legislation was notable for immediately garnering widespread, bipartisan support.[139] Senators John Cornyn (R-TX) and Dianne Feinstein (D-CA), who co-sponsored the Senate version of the bill, issued a joint statement noting they had spent eight months working on the text, which sought to "take[ ] a measured approach by providing long overdue reforms to better protect our country, while also working to ensure that beneficial foreign investment is not chilled."[140] Congressman Robert Pittenger (R-NC-9) was more pointed in articulating his reasons for sponsoring companion legislation in the House, observing: "China is buying American companies at a breathtaking pace. While some are legitimate business investments, many others are part of a backdoor effort to compromise U.S. national security . . . ."[141]

Introduction of the bill was met with uniform praise throughout the Executive Branch. Treasury Secretary Mnuchin stated he "support[s] the goals of FIRRMA, which will help to ensure that CFIUS has the tools necessary to protect the national security of the United States, while simultaneously maintaining our open investment environment."[142] The defense community was equally vocal in its support.

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137 Press Release, Office of Senator John Cornyn, U.S. Senate, Cornyn, Feinstein, Burr Introduce Bill to Strengthen the CFIUS Review Process, Safeguard National Security (Nov. 8, 2017), https://www.cornyn.senate.gov/content/news/cornyn-feinstein-burr-introduce-bill-strengthen-cfius-review-process-safeguard-national [https://perma.cc/5SRJ-39FH].

138 *See* Foreign Investment Risk Review Modernization Act of 2017, S. 2098, 115th Cong. (2017). The House Companion bill was introduced shortly after, in November 2017. *See* Foreign Investment Risk Review Modernization Act of 2017, H.R. 4311, 115th Cong. (2017).

139 In the Senate, the bill had 13 co-sponsors (5 Democrats and 8 Republicans). *See* S. 2098. In the House, the bill had 50 co-sponsors (8 Democrats and 42 Republicans). *See* H.R. 4311.

140 Press Release, Office of Senator John Cornyn, *supra* note 137.

141 Diane Bartz, *U.S. Lawmakers Introduce Bipartisan Bills on Foreign Investment amid China Worries*, REUTERS (Nov. 8, 2017, 10:36 AM), https://www.reuters.com/article/us-usa-regulation-m-a/u-s-lawmakers-introduce-bipartisan-bills-on-foreign-investment-amid-china-worries-idUSKBN1D8267 [https://perma.cc/J3F2-M4H6]. Senator Cornyn similarly observed that "[b]y exploiting gaps in the existing CFIUS review process, potential adversaries, such as China, have been effectively degrading our country's military technological edge by acquiring, and otherwise investing in, U.S. companies." Press Release, Office of Senator John Cornyn, *supra* note 137.

142 Press Release, Senator John Cornyn, U.S. Senate, Cornyn Announces New Support for Legislation to Reform CFIUS Review Process (Dec. 15, 2017), https://www.cornyn.senate.gov/node/4506 [https://perma.cc/74X8-Q26P].

Defense Secretary Mattis stressed the bill "would help close related gaps that exist in both [CFIUS] and export control processes, which are not presently keeping pace with today's rapid technological changes" and "appreciate[d] the broadening of the scope of review of real estate transactions implicating co-location in close proximity to a military facility and the heightened ability to protect intellectual property and related defense industrial capabilities."[143] Admiral Harry Harris of U.S. Pacific Command similarly commented that "[e]xisting and emerging technologies are vital to maintaining our technological edge and military superiority" and expressed support both for FIRRMA and CFIUS, which he described as "absolutely essential to protecting our defense technologies, military capabilities, and critical infrastructure."[144]

Congress held a series of hearings on the operation of CFIUS and FIRRMA's potential impact on its work.[145] Additionally, CFIUS provided several classified briefings to congressional committee members to ensure legislators had a complete understanding of the risks they were protecting against.[146] Yet throughout this process, and even as

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143 Letter from James Mattis, Sec'y of Def., to John Cornyn, U.S. Senate (Dec. 15, 2017), https://www.cornyn.senate.gov/sites/default/files/Final%20CFIUS%20Letter%20Signed%20-%20SecDef.pdf [https://perma.cc/55BL-5C7T].

144 Letter from Harry B. Harris, Jr., Commander, U.S. Pac. Command, to John Cornyn, U.S. Senate (Jan. 3, 2018), https://www.cornyn.senate.gov/sites/default/files/US-PACOM%20Letter%20to%20Sen%20Cornyn.pdf [https://perma.cc/8UB6-DQWU].

145 The first hearing on FIRRMA involving CFIUS members was held on January 25, 2018 before the Senate Committee on Banking, Housing, and Urban Affairs. *Evaluating CFIUS*, *supra* note 121, at 13. Three Administration witnesses testified, including Assistant Secretary for Export Administration, U.S. Department of Commerce, Richard Ashooh; Deputy Assistant Secretary for Manufacturing and Industrial Base Policy, U.S. Department of Defense, Eric Chewning; and myself. *Id.* at 5. Assistant Secretary Ashooh, given Commerce's unique role as both a CFIUS member and the primary administrator of our nation's export control laws, *see infra* Section IV.A, focused specifically on this issue in his testimony, noting it was "important" that the export control system and CFIUS "be applied in ways that complement, and not duplicate, the other." *Id.* at 41. Ashooh highlighted in particular that some risks to U.S. national security, including the potential transfer of sensitive technology from a U.S. firm to a foreign owner, could well "fall under the purview of both mechanisms" and that FIRRMA was capable of striking the proper balance between the two in order to ensure that the systems were overlapping and complementary. *Id.* From his perspective at the Pentagon, Deputy Assistant Secretary Chewning emphasized that the bill "should be considered a whole of Government response to [a] critical national security challenge, an insurance policy on the hundreds of billions of dollars per year we invest in our own defense industrial base." *Id.* at 9.

146 Concerns regarding China's pursuit of next-generation connected devices and networks, and the related implications for U.S. economic competitiveness and national security, were separately considered by the U.S.-China Economic and Security Review Commission during a hearing held on March 8, 2018. *Hearing on China, The United States, and Next Generation Connectivity: Hearing Before the U.S.-China Econ. & Sec. Review Comm'n*, 115th Cong. (2018),

the merit of specific provisions were being debated, FIRRMA continued to enjoy widespread support from both the public and private sectors. While acknowledging support for proposed amendments to FIRRMA intended to refine the role of CFIUS review as distinct from that of export controls, the Business Roundtable thanked "the bills' original sponsors for bringing forward legitimate national security concerns, for the bipartisanship that this issue has enjoyed, and for Congress's willingness to work to ensure our national security, while also keeping the United States open to foreign investment."[147]

FIRRMA was ultimately reported unanimously out of its respective committees of jurisdiction in both the House and the Senate—a rare instance of bipartisanship on a substantial piece of legislation.[148] The final version of the legislation, which was included in the annual National Defense Reauthorization Act,[149] passed with overwhelming bipartisan support, receiving a vote of 359-54 in the House and 87-10 in the Senate.[150] It was signed into law on August 13, 2018.[151] At a subsequent roundtable on FIRRMA, President Trump emphasized that "[t]his new authority will enhance our ability to protect cutting-edge American technology and intellectual property vital to our national security."[152]

https://www.uscc.gov/sites/default/files/transcripts/Hearing%20Transcript%20-%20March%208,%202018.pdf [https://perma.cc/5QGB-ZV9W]. In a prepared statement, Commissioner Michael R. Wessel even went so far as to say, "[W]e can't forget that China's leaders are tightening their grip on their economy and their people. Technology is used to advance the Party's and the state's interests. Many of their interests are in direct conflict with our own goals and ideals." *Id.* at 9.

147 *Business Roundtable Joint Association Letter on FIRRMA and CFIUS*, BUS. ROUNDTABLE, (May 21, 2018), https://www.businessroundtable.org/archive/resources/business-roundtable-joint-association-letter-firrma-and-cfius [https://perma.cc/JZM3-ACR4].

148 H.R. REP. NO. 115-1122, at 168 (2019); Press Release, U.S. Senate Comm. On Banking, Hous., & Urban Affairs, Banking Committee Advances CFIUS Legislation (May 22, 2018), https://www.banking.senate.gov/newsroom/press/banking-committee-advances-cfius-legislation [https://perma.cc/T99H-TWVK].

149 John S. McCain National Defense Authorization Act for Fiscal Year 2019, Pub. L. No. 115-232, 132 Stat. 1636, 2174 (2018).

150 John S. McCain National Defense Authorization Act for Fiscal Year 2019, H.R. 5515, 115th Cong. (2018), https://www.congress.gov/bill/115th-congress/house-bill/5515/actions [https://perma.cc/FDP7-JNGM].

151 John S. McCain National Defense Authorization Act For Fiscal Year 2019, Pub. L. No. 115-232, 132 Stat. 1636, 2423 (2018).

152 Remarks by President Trump at a Roundtable on the Foreign Investment Risk Review Modernization Act (FIRRMA), 2018 DAILY. COMP. PRES. DOC. 1 (Aug. 23, 2018).

III. Key Provisions of FIRRMA

The centerpiece of FIRRMA is its enlarged jurisdictional grant, equipping CFIUS with the authority to review new kinds of investments that could be used to weaken U.S. national security.[153] In addition, there are a number of other important provisions that modernize the CFIUS process.

A. New Covered Transactions

FIRRMA retains the original authority for CFIUS to review "[a]ny merger, acquisition, or takeover" by or with any foreign person that could result in foreign control of any U.S. business.[154] But for the first time in 30 years, the law updates and expands CFIUS's authority beyond mere control by adding four new types of "covered" transactions, as follows:

1) ***Non-controlling yet non-passive investments***[155] that afford a foreign person:
   - "access to any material nonpublic technical information" held by the U.S. business;[156]
   - membership or observer rights on—or the right to nominate an individual to a position on—the board of directors of the U.S. business;[157] or
   - any other fundamental decisionmaking rights, other than shareholder voting rights, regarding:[158]

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153 *See* John S. McCain National Defense Authorization Act for Fiscal Year 2019, Pub. L. No. 115-232, 132 Stat. 1636, 2177–2207 (to be codified at 50 U.S.C. § 4565) (2018). On January 17, 2020, the Treasury Department promulgated two regulations to implement FIRRMA's changes to the jurisdiction and processes of CFIUS: (1) Regulations Pertaining to Certain Investments in the United States by Foreign Persons, 31 C.F.R. § 800 (2020); and (2) Provisions Pertaining to Certain Transactions by Foreign Persons Involving Real Estate in the United States, 85 Fed. Reg. 3,158 (Jan. 17, 2020) (to be codified at 31 C.F.R. pt 802).

154 § 1703(a)(4)(B)(i), 132 Stat. at 2177 (2018).

155 *Id.* § 1703(a)(4)(D)(i). Subsequent Treasury regulations have clarified that FIRRMA's new authority applies only to non-controlling investments in U.S. businesses that: (1) produce, design, test, manufacture, fabricate, or develop one or more critical technologies, which is defined to include certain items subject to export controls and other existing regulatory schemes; (2) own, operate, manufacture, supply, or service critical infrastructure; or (3) maintain or collect sensitive personal data of U.S. citizens that may be exploited in a manner that threatens national security. 31 C.F.R. § 800.248. These businesses are referred to in the CFIUS regulations as "TID U.S. business[es]" for technology, infrastructure, and data. *Id.*

156 *Id.* § 1703(a)(4)(D)(i)(I).

157 *Id.* § 1703(a)(4)(D)(i)(II).

158 *Id.* § 1703(a)(4)(D)(i)(III).

- "the use, development, acquisition, safekeeping, or release of sensitive personal data of [U.S.] citizens . . . ;"[159]
- "the use, development acquisition, or release of critical technologies;[160] or"
- "the management, operation, manufacture, or supply of critical infrastructure."[161]

2) Any ***change in a foreign investor's rights*** resulting in control or a non-controlling yet non-passive investment;[162]
3) The purchase, lease, or concession of REAL ESTATE located in proximity to sensitive U.S. government facilities;[163] and
4) Any other action designed to be a CIRCUMVENTION OF THE JURISDICTION OF CFIUS.[164]

The first two kinds of non-passive, non-controlling transactions—transactions providing access to certain nonpublic technical data or authority on board of directors—were designated as covered transactions to close loopholes in CFIUS review. The most important is arguably the first. As CFIUS had witnessed non-controlling, non-passive

159 *Id.* § 1703(a)(4)(D)(i)(III)(aa). Later Treasury regulations define "sensitive personal data" to include 10 categories of data maintained or collected by U.S. businesses that: (1) target or tailor products or services to certain demographics, including U.S. military members and employees of federal agencies with national security responsibilities; (2) collect or maintain such data on at least one million individuals; or (3) have a demonstrated business objective to maintain or collect such data on greater than one million individuals and such data is an integrated part of the U.S. business's primary products or services. 31 C.F.R. § 800.241(a). The categories of data include financial, geolocation, and health data, among others. *Id.*

160 § 1703(a)(4)(D)(i)(III)(bb), 132 Stat. at 2179. Under FIRRMA, "critical technologies" is defined to include "[e]merging and foundational technologies controlled pursuant to section 1758 of the Export Control Reform Act of 2018 ["ECRA"]." *Id.* § 1703(a)(6)(A)(vi). ECRA, in turn, complements FIRRMA by creating a formal interagency process to identify emerging and foundational technologies that "are essential to the national security of the United States" and are not otherwise controlled for export purposes. 50 U.S.C. § 4817(a)(1)(A) (2018).

161 § 1703(a)(4)(D)(i)(III)(cc), 132 Stat. at 2179. With respect to critical infrastructure, the later regulations identify key subsectors that will be subject to CFIUS review, including utilities, energy, and transportation. *See* 31 C.F.R. § 800 app. A.

162 § 1703(a)(4)(A)(iv), 132 Stat. at 2180.

163 *Id.* § 1703(a)(4)(C)(ii). Subsequent Treasury regulations provide that FIRRMA applies to real estate transactions that afford a foreign person three or more of the following rights to the property: (1) physical access; (2) ability to exclude others; (3) ability to improve or develop; or (4) right to affix structures or objects. 31 C.F.R. § 802.233. Coverage focuses on transactions in and around specific airports, maritime ports, and military installations. *See* 31 C.F.R. § 802.210. Treasury regulations also create certain exceptions for real estate transactions, including those in an "urbanized area" or "urban cluster," as defined by the Census Bureau, except those relating to relevant ports and those in "close proximity" (i.e., one mile) to certain military installations. *See* 31 C.F.R. § 802.216.

164 § 1703(a)(4)(B)(v), 132 Stat. at 2178.

investments in sensitive sectors effectively avoid CFIUS review, Congress moved to eliminate the control requirement for certain kinds of investments.[165] Specifically, this category—often referred to as the "other investments" clause—focuses on U.S. businesses that are relevant to: (1) critical technologies, (2) critical infrastructure, and (3) sensitive personal data of U.S. citizens.[166] CFIUS jurisdiction in these cases is therefore based both on the attributes of the U.S. business as well as the nature of the rights the investor would enjoy, even though they might not rise to the level of "control."

The real estate provision is more straightforward, at least conceptually. Congress meant to allow for CFIUS review of transactions triggering proximity issues, for example, where a piece of property (though not necessarily a "U.S. business") was near enough to a sensitive site to raise national security concerns.[167] In implementing this provision, CFIUS has focused on properties located near specific airports, maritime ports, and military installations.[168] Congress sought to restrict review over single-family residential properties and those in densely populated areas to prevent the CFIUS docket from increasing exponentially.[169] In promulgating its regulations implementing FIRRMA, CFIUS has accordingly excluded many kinds of transactions within an "urbanized area" or "urban cluster," as defined by the Census Bureau.[170]

The jurisdictional grants concerning changes in investors' rights and attempts to circumvent review afford CFIUS greater latitude in attempting to prevent parties from exploiting legal loopholes and evading CFIUS review. Ensuring that a change in a foreign investor's rights would trigger another round of CFIUS review is intended to address, among other things, a situation where CFIUS clears a notice, only for the arrangement to later change substantially.[171] For example, suppose a foreign investor initially takes a 15% stake in a company with board observer rights only. Thereafter, the arrangement is changed, allowing the foreign investor to hold a majority of the board

165 *See Evaluating CFIUS*, *supra* note 121, at 13 (testimony of Hon. Heath P. Tarbert, Assistant Secretary of the Treasury).

166 § 1703(a)(4)(B)(iii), 132 Stat. at 2178.

167 *See Evaluating CFIUS*, *supra* note 121, at 13 (testimony of Hon. Heath P. Tarbert, Assistant Secretary of the Treasury).

168 31 C.F.R. § 802.

169 *See* § 1703(a)(4)(C)(i), 132 Stat. at 2178 (stating that a "real estate purchase, lease, or concession . . . does not include . . . a single 'housing unit'" or "real estate in 'urbanized areas'" as those terms are defined by the Census Bureau).

170 *See* 31 C.F.R. § 802, app. A.

171 *See* § 1703(a)(4)(iv), 132 Stat. at 2178.

seats and block any major transaction involving the U.S. business. Under FIRRMA, CFIUS has the opportunity to reconsider transactions under these changed circumstances.[172] Finally, there is a general anti-evasion jurisdictional prong to capture structures designed to circumvent CFIUS review, as opposed to legitimate structures designed to ensure the passivity of the investment or otherwise reduce risks to U.S. national security.[173]

B. Declarations Process

An additional key feature of FIRRMA was the creation of a new process involving "declarations" alongside the lengthy "notice" filings that have been the unitary, standard CFIUS application for decades.[174] A declaration is essentially an executive summary of the standard notice filing.[175] Congress intended it to serve two critical purposes: (1) alert CFIUS of proposed or pending transactions potentially within its jurisdiction, and (2) allow for the fast-tracking of routine, low risk reviews.[176]

One concern CFIUS has perennially faced is the possibility of transactions that are subject to its jurisdiction yet are never filed. These are often referred to as "non-notified" transactions.[177] Until FIRRMA, all filings with CFIUS were voluntary.[178] Non-notified covered transactions are often difficult to identify and CFIUS has historically lacked the resources to proactively and systematically identify such transactions.[179] In response, FIRRMA created the concept of "declarations," a streamlined filing that parties could voluntarily make in lieu of lengthier notices for covered transactions.[180] To address the concern about non-notified transactions more fully, FIRRMA requires *mandatory* declarations for transactions where a foreign gov-

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172 *See id.* Rather than being a new "authority" under FIRRMA, this was considered a congressional confirmation and statutory codification of what CFIUS had believed was within its power under the original jurisdictional grant of Exon-Florio.

173 § 1703(a)(4)(B)(v), 132 Stat. at 2178.

174 *Id.* § 1706.

175 *See id.*

176 *See id.*

177 COMM. ON FOREIGN INV. IN THE U.S., ANNUAL REPORT TO CONGRESS 39 (2018), https://home.treasury.gov/policy-issues/international/the-committee-on-foreign-investment-in-the-united-states-cfius/cfius-reports-and-tables [https://perma.cc/6ELY-F2BB].

178 *See* 50 U.S.C. § 4565 (2012).

179 *See* U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-18-249, COMMITTEE ON FOREIGN INVESTMENTS IN THE UNITED STATES: TREASURY SHOULD COORDINATE RESOURCES NEEDED TO ADDRESS INCREASED WORKLOAD 19–20 (2018).

180 § 1706, 132 Stat. at 2184.

ernment has, directly or indirectly, a "substantial interest;"[181] and transactions involving a U.S. business that "produces, designs, tests, manufactures, fabricates, or develops one or more critical technologies."[182]

Thus, Congress has effectively required short-form filings for state-owned enterprises and investment funds as well as for any foreigners making non-passive investments in critical technology companies.[183]

Generally under five pages in length, declarations do not automatically trigger a full CFIUS review.[184] Upon receiving a declaration, CFIUS must take one of four actions within 30 days: (1) request the filing of a regular notice; (2) initiate a unilateral review of the transaction; (3) inform the parties that CFIUS is unable to conclude action on the basis of only a declaration; or (4) clear the transaction and notify the parties in writing.[185]

The option for CFIUS to clear a transaction by writing represents a potential sea change to the CFIUS process and could facilitate increased foreign investment in the United States. By enabling CFIUS to clear a transaction on the basis of a declaration only, CFIUS will be able to make the process much smoother for frequent filers who are known to the U.S. government and whose investments and acquisitions raise no national security concerns. This will bring additional certainty for parties whose transactions are unlikely to raise national

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181 *Id.* § 1706(b)(1)(c)(v)(IV)(bb).

182 *Id.* § 1706(b)(1)(c)(v)(IV)(cc).

183 Following the passage of FIRRMA, CFIUS implemented a pilot program pending passage of the final regulations, imposing mandatory declaration filing requirements for foreign investments in any U.S. business that produces, designs, tests, manufactures, fabricates, or develops a critical technology that is either used "in connection with the U.S. business's activity in one or more Pilot Program Industries . . . ; or [ ] designed by the U.S. business specifically for use in one or more Pilot Program Industries." *See Fact Sheet: Interim Regulations for FIRRMA Pilot Program*, U.S. DEP'T OF THE TREASURY (Oct. 10, 2018), https://home.treasury.gov/system/files/206/Fact-Sheet-FIRRMA-Pilot-Program.pdf [https://perma.cc/KZ6K-V5LR]. Pilot program industries, in turn, was defined by reference to 27 North American Industry Classification System ("NAICS") codes that were specifically chosen in order to discourage "certain strategically motivated foreign investment [that] could pose a threat to U.S. technological superiority and national security." *Id.* The substance of the pilot program, including the mandatory filing requirement, has been largely maintained in the final regulations, although CFIUS anticipates issuing additional proposed rules in the future that would revise the mandatory declaration requirement for critical technology from one based on NAICS codes to one based instead on export control licensed requirements *See* Provisions Pertaining to Certain Investments in the United States by Foreign Persons, 85 Fed. Reg. 3,112, 3,112–13 (Jan. 17, 2020) (to be codified at 31 C.F.R. pt. 800, 801).

184 *Id.* at 3,122.

185 *See id.* at 3,144.

security issues, but who may prefer the transaction to be officially cleared by CFIUS. Also, in furtherance of this objective, FIRRMA lengthened the review period for a notice from 30 days to 45 days.[186] While this change might seem counterintuitive, the intention was to prevent transactions from being pushed into the 45-day investigation phase simply because CFIUS staff could not clear the transaction during the review period.[187] So far, the evidence seems to indicate the lengthened review period, which took effect immediately upon the passage of FIRRMA, has led to a higher percentage of transactions being cleared in the review phase relative to the subsequent investigation phase.[188]

C. Clarification for Investment Fund Participants

As noted earlier, the proliferation of investment funds has sometimes complicated the control analysis performed by CFIUS.[189] Many in the investment community expressed concerns that a more powerful CFIUS might result in more searching reviews of not only the manager of a given fund but of every investor or limited partner investing in that fund.[190] Such an expansion of CFIUS powers could have a potentially adverse impact on capital formation, particularly in investment sectors vital to U.S. technological development, such as the venture capital fund industry.

To address this concern, FIRRMA makes clear that indirect investments by foreign persons through investments funds will not be considered "covered investments," even if a foreign investor obtains membership on an advisory board or fund committee.[191] This would be the case where: (1) the fund is managed by a U.S. general partner

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186 § 1709, 132 Stat. at 2187–88.

187 *See id.*; JAMES K. JACKSON, CONG. RESEARCH SERV., RL33388, THE COMMITTEE ON FOREIGN INVESTMENT IN THE UNITED STATES (CFIUS) 17 (2020) (noting that the increasing complexity and number of covered transactions in recent years have placed significant demands on limited staff).

188 COMMITTEE ON FOREIGN INVESTMENT IN THE UNITED STATES, ANNUAL REPORT TO CONGRESS 2–5 (2020), https://home.treasury.gov/system/files/206/CFIUS-Public-Annual-Report-CY-2019.pdf [https://perma.cc/GMG7-CA7M].

189 *See supra* Section II.A.4.

190 *See See CFIUS Reform Hearing*, *supra* note 102, at 7–8 (testimony of Scott Kupor, Chairman, Nat'l Venture Capital Ass'n); Letter from Bobby Franklin, President and CEO, Nat'l Venture Capital Ass'n, to Jeb Hensarling, Chairman, House Comm. on Fin. Services (Apr. 11, 2018) (expressing concern that CFIUS investigations may extend to "passive investments" where investors obtain only a minority stake in the company and do not have access to sensitive information), https://nvca.org/wp-content/uploads/2018/04/FIRRMA-statement-for-record-House-Financial-Services-hearing.pdf [https://perma.cc/5U7F-U6ZD].

191 § 1703(a)(4)(D)(i)(II), 132 Stat. at 2179.

or a U.S. managing member (or equivalent), (2) the relevant advisory board or committee does not approve, disapprove, or control the fund's investment decisions, (3) the foreign person does not otherwise have the ability to control the fund, and (4) the foreign person does not have access to material nonpublic technical information as a result of its advisory board or committee membership.[192]

D. Black Lists and White Lists

During the four decades preceding FIRRMA, the jurisdiction of CFIUS had never been predicated on an investment coming from one or more particular countries. Rather, all foreign investors faced the potential for CFIUS review regardless of their country of domicile.[193] In the debates leading up to FIRRMA, some argued that any expanded CFIUS jurisdiction should apply only to investments coming from specific countries. They urged Congress to amend the law to incorporate a "black list" of countries that would trigger enhanced scrutiny or additional CFIUS review.[194] The converse option was a "white list" of countries whose investors would be excluded from any new jurisdiction granted to CFIUS.[195]

Like all prior CFIUS legislation, FIRRMA does not single out any specific country. Rather, CFIUS addresses the national security risks posed by foreign investment in the United States, regardless of where the investment originates.[196] At the same time, however, FIRRMA allows CFIUS to consider whether a covered transaction involves a "country of special concern"—that is, a country "that has a demonstrated or declared strategic goal of acquiring a type of critical technology or critical infrastructure that would affect United States leadership in areas related to national security."[197]

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192 *Id.* § 1703(a)(4)(D)(iv).

193 *See* 50 U.S.C. § 4565 (2012).

194 *See Perspectives on Reform of the CFIUS Review Process: Hearing Before the Subcomm. on Dig. Commerce & Consumer Prot. of the H. Comm. on Energy & Commerce*, 115th Cong. 34–35 (2018) (debate between Hon. Heath Tarbert and Rep. Welch regarding blacklists).

195 *See Treasury Releases Proposed CFIUS Regulations to Implement FIRRMA*, AKIN GUMP STRAUSS HAUER & FELD LLP (Sept. 20, 2019), https://www.akingump.com/en/news-insights/treasury-releases-proposed-cfius-regulations-to-implement-firrma.html [https://perma.cc/8HAL-B9Y2].

196 §§ 1702–28, 132 Stat. at 2174–2207.

197 § 1702(c)(1), 132 Stat. at 2176. FIRRMA further authorized CFIUS to take into account "how a foreign person is connected to a foreign country or foreign government, and whether the connection may affect the national security of the United States" in issuing regulations related to FIRRMA's real estate and "other investment" provisions. *Id.* § 1703(a)(4)(E). Subsequent regulations implement this directive by creating the concept of "excepted investors"—that is, investors with sufficiently strong ties to certain "excepted foreign states," which CFIUS has initially

E. International and Domestic Information Sharing

Recognizing that our own national defense can turn on the investment security methods employed by our closest allies, FIRRMA requires the Treasury Secretary, as CFIUS Chairman, to establish a formal process for the exchange of information important to national security with foreign allies, as well as with domestic government counterparts (e.g., the states).[198] FIRRMA expressly notes that, subject to the Treasury Secretary's discretion, any such process should "provide for the sharing of information with respect to specific technologies and entities acquiring such technologies" to "ensure national security."[199]

F. Increased Reporting Requirements

Congress wanted to ensure the expanded authority of CFIUS was matched with greater accountability. FIRRMA therefore expands congressional reporting obligations—including by requiring additional detail on the volume and outcome of CFIUS notices, reviews, and investigations.[200] Additionally, under FIRRMA, the Commerce Secretary must produce a biennial report through 2026 that includes statistics regarding all Chinese foreign direct investment into the United States and an analysis of Chinese investment patterns, including alignment with the objectives set forth in the Made in China 2025 plan.[201] The report must also include a comparative analysis of the size of Chinese foreign direct investment in the United States as compared to other countries.[202]

G. Process Enhancements

In addition to its substantive changes, FIRRMA improves the procedures governing CFIUS's work to enhance its functionality. As

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identified as Australia, Canada, and the United Kingdom and Northern Ireland. *See* Provisions Pertaining to Certain Investments in the United States by Foreign Persons, 85 Fed. Reg. 3,112, 3,116 (to be codified at 31 C.F.R. pt. 800, 801). These countries were chosen "due to aspects of their robust intelligence-sharing and defense industrial base integration mechanisms with the United States." *Id*. Importantly, excepted investors are not fully exempt from CFIUS review; rather, CFIUS will continue to review transactions initiated by "excepted investors" where they result in control of a U.S. business. *Id.* CFIUS indicated that it may expand the country list in the future and the three countries initially identified will be reevaluated following a two-year period. *Id.*

198 § 1713(3), 132 Stat. at 2191.

199 *Id.* § 1713(3)(B)(ii).

200 *See id.* § 1719.

201 *See id.* § 1719(b).

202 *Id.*

noted above, FIRRMA gives CFIUS extra time to review each transaction by extending the review period from 30 to 45 days.[203] In addition to reducing the percentage of transactions likely to go to the investigation stage, it will also likely reduce the need for foreign investors to withdraw and refile CFIUS notices one or more times with respect to transactions that necessitate a more thorough review.[204] FIRRMA also authorizes CFIUS to extend any investigation for one 15-day period in "extraordinary" circumstances, as defined in regulation.[205] Additionally, FIRRMA grants CFIUS special hiring authority and establishes a fund for collection of newly authorized CFIUS filing fees to be established by regulation.[206] Finally, FIRRMA established a new position within the Treasury Department—the Assistant Secretary for Investment Security—to oversee the day-to-day CFIUS process on a full-time basis.[207]

IV. The Path Forward

Some aspects of FIRRMA were immediately self-effectuating, and the Treasury Department subsequently promulgated detailed implementing regulations that have fully operationalized the other sections of FIRRMA. But the real test of FIRRMA will be in how CFIUS handles the challenges it will necessarily face in the years to come. These challenges include working in parallel with the export controls regime, confronting the evolving risks of "Big Data," increasing coordination with our allies, maintaining an exclusive focus on national security, and fast-tracking low risk investments.

A. *Working in Parallel with Export Controls*

Throughout its history, CFIUS has repeatedly acknowledged that it is just one part of a system of U.S. laws that safeguard our country's national security.[208] One of the most significant parallel regimes—which regularly informs the work performed by CFIUS—centers on

203 *Id.* § 1709.

204 *See* U.S. Gov't Accountability Office, GAO-18-249, Committee on Foreign Investments in the United States: Treasury Should Coordinate Resources Needed to Address Increased Workload 9–10 (2018).

205 § 1709, 132 Stat. at 2188–89.

206 *Id.* § 1723.

207 *Id.* § 1717. On September 12, 2019, the Honorable Thomas P. Feddo was the first individual confirmed by the Senate to hold this post. *Thomas P. Feddo*, U.S. Dep't of the Treasury https://home.treasury.gov/about/general-information/officials/thomas-p-feddo [https://perma.cc/B6H3-RYLS].

208 *See* Committee on Foreign Investment in the United States, Annual Report to Congress, at iii (2017), https://www.treasury.gov/resource-center/international/foreign-in-

the administration of export controls by the Commerce Department.[209] The importance of export controls to CFIUS cannot be overstated. Whereas the CFIUS regime focuses on foreign investments in U.S. businesses, the export control regime focuses on foreign purchases of various U.S. items, including patents and technology.[210] The concept of a "deemed export" applies whenever a controlled item falls into the hands of the foreign person.[211] In other words, the controlled item need not be physically moved outside the United States to be considered "exported."

Under FINSA, CFIUS acted only if it concluded that other authorities—including those governing export controls—were neither adequate nor appropriate to address the national security risk posed by the transaction under review.[212] In practice, this has meant that, if the sole concern of CFIUS related to the potential transfer of controlled technology, then CFIUS would be considered unnecessary because the Commerce Department export controls would be sufficient to address the concern.[213] Although FIRRMA maintains that limit on CFIUS's authority, it also explicitly ties together the efforts of CFIUS and the Commerce Department with respect to the evolving landscape of emerging and foundational technologies.[214]

Alongside FIRRMA, Congress simultaneously passed the Export Control Reform Act ("ECRA"),[215] which was also included in the National Defense Authorization Act. In one of its key reforms, ECRA provides a permanent statutory authorization for the Export Administration Regulations ("EAR"), which are administered by the Commerce Department's Bureau of Industry and Security ("BIS") and

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vestment/Documents/CFIUS-Public-Annual-Report-CY-2016-2017.pdf [https://perma.cc/9AGR-45NU].

209 *See* Export Administration Act of 1979 (EAA), Pub. L. No. 96-72, 93 Stat. 503, *amended and repealed by* Export Controls Act of 2018, 50 U.S.C. § 4801 et seq. (2018); *see also* Export Administration Regulations, 15 C.F.R. ch. VII, subch. C (2020) (implementing the export control statutory provisions).

210 *See* § 4801 et. seq.

211 15 C.F.R. § 734.2(b)(2)(ii).

212 *See* 15 C.F.R. § 721(d)(4)(B).

213 *See* U.S. Gov't Accountability Office, GAO-18-249, Committee on Foreign Investments in the United States: Treasury Should Coordinate Resources Needed to Address Increased Workload 8 (2018). Other federal departments, including the Defense Department, participate in the exports control regime. In addition, the State Department oversees a separate set of controls implemented through the International Traffic in Arms Regulations ("ITAR"). *See* 22 U.S.C. § 2778 (2018).

214 *See* John S. McCain National Defense Authorization Act for Fiscal Year 2019, Pub. L. No. 115-232, § 1758, 132 Stat. 1636, 2218–23 (2018) (to be codified at 50 U.S.C. § 4817).

215 *Id.* §§ 1741–68.

regulate the export, re-export, and in-country transfer abroad of U.S. commercial, dual-use items, and less sensitive military commodities, software, and technologies.[216] The export and subsequent movement of these items are subject to restrictions and licensing requirements imposed by the EAR based on the type of item at issue, the ultimate end user, and its intended end use.[217] In passing ECRA, Congress acknowledged that establishing a permanent U.S. export control regime was crucial to enhancing the stability and predictability of U.S. export controls, which had been administered under temporary emergency authority for almost 20 years.[218]

In addition to providing a permanent statutory authorization for the EAR, however, ECRA offered the first substantive update of the U.S. export control regime since 1979, during the Cold War era.[219] Given the widescale technological advances that have occurred since then—and their concomitant impact on items with dual-use applications—updating the export control regime to protect the strategic advantage held by our military and intelligence services was of paramount importance to both Congress and the Executive Branch, especially the Defense Department.[220] Indeed, in introducing the bill, Representative Ed Royce (R-CA-39), then Chairman of the House Foreign Affairs Committee, stressed that export control reform was critical given that the United States's "competitive edge is increasingly under attack by policies from China and Russia and from others that seek to obtain advanced technologies and intellectual property by hook or by crook."[221] A number of commentators had suggested that

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216 *Id.* § 1758(b).

217 *Id.*

218 *See id.* § 1752 (statement of policy). ECRA repealed most of the Export Administration Act of 1979, which provided the statutory basis for the EAR and expired on August 20, 2001. IAN F. FERGUSSON & PAUL K. KERR, CONG. RESEARCH SERV., R41916, THE U.S. EXPORT CONTROL SYSTEM AND THE EXPORT CONTROL REFORM INITIATIVE 2 (2020), https://fas.org/sgp/crs/natsec/R41916.pdf [https://perma.cc/WQ6C-PA7H]. Prior to ECRA's passage, the EAR had been kept in force by executive orders issued pursuant to the International Emergency Economic Powers Act. Approximately 34,000 licenses were processed in 2017 for "exports of sensitive technology" pursuant to this temporary authority—a status quo Congress ultimately deemed to be untenable. *See* Press Release, U.S. House of Representatives, Comm. on Foreign Affairs, Engel Remarks on Modernizing Export Control (Mar. 14, 2018), https://foreignaffairs.house.gov/press-releases?ContentRecord_id=5F9A2327-00D5-4C1C-B41A-64A4328B9972 [https://perma.cc/UN83-9PDS].

219 IAN F. FERGUSSON ET AL., CONG. RESEARCH SERV., R41916, THE U.S. EXPORT CONTROL SYSTEM AND THE EXPORT CONTROL REFORM INITIATIVE 2 (2020), https://fas.org/sgp/crs/natsec/R41916.pdf [https://perma.cc/WQ6C-PA7H].

220 *Id.* at 1.

221 *Modernizing Export Controls: Protecting Cutting-Edge Technology and U.S. National*

the Commerce Department and the pre-ECRA export controls regime did not place adequate limits on the transfer of newly developed technologies.[222] Accordingly, one of the key changes effected by ECRA was its establishment of a formal, ongoing process to identify and review "emerging and foundational technologies that . . . are essential to the national security of the United States" and assign them appropriate export controls.[223]

Under the new ECRA interagency review process—the Departments of Commerce, Defense, Energy, and State—as well as other relevant federal agencies, will rely on a range of sources (including classified reports and information relating to CFIUS cases) for the purpose of identifying emerging and foundational technologies warranting control.[224] Their assessment will encompass factors including: (1) the development of similar technologies in other countries, (2) the effect U.S. export controls would have on the development of the technologies in the United States, and (3) the effectiveness of export controls on limiting the proliferation of the technologies to foreign countries.[225] ECRA does not mandate a timeline for designating a

Security: Hearing Before the H. Comm. on Foreign Affairs, 115th Cong. 1 (2018) (statement of Rep. Royce).

222 *See, e.g.*, MICHAEL BROWN & PAVNEET SINGH, DEF. 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 2 (2018), https://admin.govexec.com/media/diux_chinatechnologytransferstudy_jan_2018_(1).pdf [https://perma.cc/ZKG9-EAAP] ("Export controls are effective at deterring exports of products to undesirable countries and can be used to prevent the loss of advanced technologies but controls were not designed to govern early-stage technologies or investment activity.").

223 50 U.S.C. § 4817(a)(1) (2018). Under the EAR, all items are classified by an Export Control Classification Number ("ECCN") based on the item's characteristics and applications, as defined in the Commerce Control List ("CCL"). Items subject to the EAR but not designated on the CCL—including new technology—are classified as "EAR99" and subject to limited export restrictions only. While the Commerce Department had authority under the EAR to impose temporary controls on previously unidentified technology because it provided a significant military or intelligence advantage to the United States or for foreign policy reasons, companies were not obligated to seek Commerce review before exporting them, resulting in a significant gap in the export control regime.

224 *See id.* § 4817(a).

225 *Id.* § 4817(a)(2). ECRA does not define what constitutes "emerging and foundational" technologies, but it does exclude items already on the CCL, the U.S. Munitions List of the ITAR, certain nuclear equipment and materials, and certain biological agents and toxins review is expected to encompass cutting-edge technologies relied on by our military, including robotics, artificial intelligence, 5G, financial technology, and virtual or augmented reality. *See* BROWN & SINGH, *supra* note 222, at 3.

technology as "emerging and foundational," but designations under the statute are subject to a public notice and comment period.[226]

Designation of a new technology as "emerging and foundational" will not only trigger controls on the export, re-export, or in-country transfer of these technologies, but it also requires the Commerce Department to impose a license requirement on the export, re-export, or in-country transfer of such technology to or in any "country subject to an embargo, including an arms embargo, imposed by the United States."[227] This provision is designed to ensure that it will be illegal for an emerging or foundational technology to be exported to a country such as China or placed in the hands of one of its citizens without first obtaining an affirmative license to do so. Moreover, in addition to being subject to export licensing requirements, any designated emerging or foundational technologies are automatically treated as "critical technologies" for the purposes of CFIUS review under FIRRMA.[228] FIRRMA also takes the added step of clarifying that the CFIUS process can be used to identify technologies to be considered for enhanced controls under ECRA.[229]

By explicitly linking CFIUS review to the export control regime, Congress created complementary and overlapping systems intended to ensure that our nation's most advanced and sensitive technologies cannot leave the country unchecked and be used by foreign competitors to close capability gaps. The interplay between FIRRMA and ECRA further reflects Congress's acknowledgment that protecting national security necessarily requires a whole of government approach. As a consequence, the critical challenge facing CFIUS in the years ahead will be working in parallel with export controls. The failure to do so could create (or recreate) a significant risk to our national security.

B. Confronting the Evolving Risks of "Big Data"

Although CFIUS's historical roots lie in protecting our domestic military infrastructure, technological advances have opened new fronts in the battle to protect national security. In 2015, Chinese intelligence entities allegedly launched a cyberattack against the Office of Personnel Management ("OPM")—the federal agency that serves as

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226 50 U.S.C. § 4817(a)(2)(C).

227 *Id.* § 4817(b)(2)(C).

228 *See supra* note 160.

229 John S. McCain National Defense Authorization Act for Fiscal Year 2019, Pub. L. No. 115-232, § 1703(a)(4), 132 Stat. 1636, 2177(2018); 50 U.S.C. § 4565(a)(4).

the human resources department for the federal government—and accessed millions of sensitive records containing background check data, personnel files, and digital images of government employee fingerprints.[230] This is but one example: cyberattacks have been launched against multiple American companies in recent years—including Facebook, Marriott, Equifax, and Anthem, exposing the personal and financial data of millions of U.S. citizens.[231] Our increasingly data-driven society, combined with the technology's continued evolution and development, means the protection of the information such technology generates could rise to the level of a national security risk.

Concerns regarding the potential exploitation of U.S. citizens' data are more than academic. It is feared, for example, that information accessed in the OPM breach could be used to create opportunities for hackers to blackmail those with access to sensitive national security information.[232] Indeed, as of October 2017, nearly three million Americans possessed national security clearances.[233] Additional threats include the potential of identity theft and fraud,[234] or the surveillance and targeting of American citizens when abroad based on their health data or other sensitive details regarding their personal lives.

CFIUS has long been aware of this reality and the dangers it presents. In its annual report to Congress for calendar years 2016 and

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230 Brendan I. Koerner, *Inside the Cyberattack that Shocked the US Government*, WIRED (Oct. 23, 2016, 5:00 PM), https://www.wired.com/2016/10/inside-cyberattack-shocked-us-government/ [https://perma.cc/P9X7-XSLA]; Andrea Peterson, *OPM Says 5.6 Million Fingerprints Stolen in Cyberattack, Five Times as Many as Previously Thought*, WASH. POST (Sept. 23, 2015, 2:00 PM), https://www.washingtonpost.com/news/the-switch/wp/2015/09/23/opm-now-says-more-than-five-million-fingerprints-compromised-in-breaches/ [https://perma.cc/DYF9-PYTD].

231 Dipayan Ghosh, *Don't Give Up on Your Digital Privacy Yet*, SLATE (July 17, 2020, 9:00 AM), https://slate.com/technology/2020/07/data-privacy-surveillance-law-marketers.html [https://perma.cc/5XTM-GM4W].

232 Kim Zetter & Andy Greenberg, *Why The OPM Breach Is Such a Security and Privacy Debacle*, SLATE (June 11, 2015, 10:40 PM) https://www.wired.com/2015/06/opm-breach-security-privacy-debacle/ [https://perma.cc/282R-D6NN].

233 NAT'L COUNTERINTELLIGENCE & SEC. CTR., FISCAL YEAR 2017 ANNUAL REPORT ON SECURITY CLEARANCE DETERMINATIONS 4 (2018), https://www.dni.gov/files/NCSC/documents/features/20180827-security-clearance-determinations.pdf [https://perma.cc/KD64-N7WT].

234 In 2018, the Federal Trade Commission took in nearly three million consumer reports, of which identity theft comprised 15% (444,602 reports). FED. TRADE COMM'N, CONSUMER SENTINEL NETWORK: DATA BOOK 2018, at 4 (2019), https://www.ftc.gov/system/files/documents/reports/consumer-sentinel-network-data-book-2018/consumer_sentinel_network_data_book_2018_0.pdf [https://perma.cc/UXL4-D2JV]. Within this category, credit card fraud was by far the most prevalent, with the FTC receiving more than 167,000 reports from people who said their information was misused on an existing account or to open a new account, representing a 24% increase from the prior year. *Id.* at 14.

2017, CFIUS noted its review of transactions presenting a broad range of national security considerations, including those involving U.S. businesses "hold[ing] substantial pools of potentially sensitive data about U.S. persons and businesses that have national security importance" in a "number of sectors, including, for example, the insurance sectors, health services, and technology services."[235] In a statement delivered before the Senate Select Committee on Intelligence, former Director of National Intelligence Dan Coats observed that China's pursuit of "US Person data[ ] remains a significant threat to the US government and private sector."[236] Congress acted on these concerns in FIRRMA, expressly noting its sense that CFIUS, in considering national security risks, could take into account "the extent to which a covered transaction is likely to expose, either directly or indirectly, personally identifiable information, genetic information, or other sensitive data of United States citizens to access by a foreign government or foreign person that may exploit that information in a manner that threatens national security."[237]

FIRRMA also provides CFIUS important tools to protect the data of American citizens. As noted earlier, Congress lowered the previous jurisdictional "control" threshold for transactions involving U.S. businesses that maintain or collect "sensitive personal data" of U.S. citizens that could be exploited in a manner that threatens national security.[238] Subsequent regulation defines "sensitive personal data" to include not only traditional personal information, but also health, financial, behavioral, and genetic information.[239] The test set forth in FIRRMA's implementing regulations recognizes that for a kind of data to rise to the level of being truly "sensitive" both its intrinsic features and magnitude must be considered. The definition applies in several circumstances. First, it applies when the U.S. business targets or tailors its products or services to sensitive U.S. government personnel or contractors.[240] This category acknowledges that some data is so sensitive, e.g., data related to projects and services for the

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235 COMM. ON FOREIGN INV. IN THE U.S., ANNUAL REPORT TO CONGRESS 27 (2018), https://www.treasury.gov/resource-center/international/foreign-investment/Documents/CFIUS-Public-Annual-Report-CY-2016-2017.pdf [https://perma.cc/GW66-DR69].

236 Dan Coats, Dir. of Nat'l Intelligence, Annual Threat Assessment Opening Statement 5 (Jan. 29, 2019), https://www.dni.gov/files/documents/Newsroom/Testimonies/2019-01-29-ATA-Opening-Statement_Final.pdf [https://perma.cc/ML5U-3AEU].

237 H.R. 5515, 115th Cong. § 1702(c)(5) (2018).

238 *See supra* Section III.A.

239 *See* 31 C.F.R. § 800.241(a)(1)(i)(C) (2019).

240 *Id.* § 800.241(a)(1)(i)(A).

U.S. government, that magnitude does not matter. Second, it will apply when a U.S. business maintains or collects data on one million individuals or more.[241] This category recognizes that the sheer volume of data itself sometimes matters, with a million people being substantial enough to trigger potential CFIUS jurisdiction. Finally, the definition will extend to any company with a demonstrated objective to maintain or collect data on more than a million people and that data will be an integrated part of the U.S. business's primary products or services with respect to any of the following ten categories:

- Data that could be used to infer an individual's financial distress or hardship;
- Certain data included in consumer reports;
- Data included in insurance applications (health, life, mortgage, etc.);
- Data related to an individual's physical, mental, or psychological health;
- Certain nonpublic electronic communications, including email, messaging, or chat communications, between or among users of a U.S. business's products;
- Geolocation data collected using positioning systems, cell phone towers, or WiFi access points;
- Biometric enrollment data, including facial, voice, retina/iris, and palm/fingerprint templates;
- Data stored and processed for generating a state or federal government identification card;
- Data concerning U.S. government personnel security clearance status; or
- Data included in a U.S. government personnel security clearance or application for employment in a position of public trust.[242]

Additionally, genetic information, such as "[t]he results of an individual's genetic tests, including any related genetic sequencing data, whenever such results constitute identifiable data" is encompassed by the definition, regardless of the above parameters.[243] This last category focuses not on what the U.S. business is doing now, but on what it intends to do.

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241 *Id.* § 800.241(a)(1)(i)(B).

242 *Id.* § 800.241(a)(1)(i)(C), (a)(1)(ii)(A)–(J).

243 *Id.* § 800.241(a)(2).

The scope of the sensitive personal data jurisdictional prong demonstrates the commitment of CFIUS to confine its review process to those transactions most likely to raise national security issues. It is a balancing act to be sure. The objective is to allow for CFIUS review before it is too late. While the list of potentially affected U.S. businesses is broad, FIRRMA's implementing regulations would clearly exclude tens of thousands of American enterprises that collect relatively small amounts of everyday data, e.g., email addresses, phone numbers, etc. to conduct their businesses and have far fewer than one million customers.

Despite the reasonable approach CFIUS has taken initially, Big Data will remain a challenge in the years ahead. More and more businesses will trigger the thresholds. Indeed, most businesses in the decades ahead may learn to rely on data analytics for better understanding the behavior patterns and preferences of their individual customers and prospects. Moreover, it is hard to fathom a promising tech startup without the business objective to surpass one million customers. Data privacy laws and related frameworks addressing the issue of Big Data may become a factor in the equation. Nevertheless, CFIUS will likely have to revisit its regulations every five years, or perhaps more frequently, to ensure it continues to strike the right balance.

C. *Increasing Coordination with Our Allies*

Another continuing challenge for CFIUS will be increasing cooperation with our allies. FIRRMA recognizes that our own national security is linked to the security of our closest allies, many of whom face similar threats and are in the process of reviewing their own domestic authorities to review foreign investment.[244] There are several reasons for this.

First, there are a significant number of companies that straddle borders, with operations in both the United States and in foreign countries. Engineers, scientists, and other technical experts are working every hour of every day, exchanging knowledge and insights in real time by email, video, shared technology resources, and in person. This free flow of information and collaboration fuels innovation and the benefits such innovation brings. It also means, however, that it is no longer possible to think about addressing risks related to foreign

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244 *See, e.g.*, John S. McCain National Defense Authorization Act for Fiscal Year 2019, Pub. L. No. 115-232, § 1713, 132 Stat. 1636, 2190 (2018) (requiring CFIUS to share information with allies).

investment on a purely national basis. Any given piece of technology held by a foreign company may have been developed in the United States or developed with the United States.

Second, the national security effects on the United States of foreign acquisition of a technology may not differ based on whether the technology was developed wholly in the United States or abroad. Ultimately, the capabilities of a company located in a foreign allied country may be sensitive from a U.S. national security standpoint. This is not because of the U.S. origin of its technology, but because of the military capabilities the technology can enable. Similarly, a strategic adversary's acquisition of military applicable capabilities from the United States may have national security implications for a foreign ally regardless of whether companies within the foreign allied country contributed to those capabilities.

Third, value chains continue to be tightly integrated across borders.[245] Companies in foreign allied countries will continue to be trusted sources for critical components in many U.S. defense and critical infrastructure platforms. As a consequence, acquisition of those companies may pose real threats to the integrity of these critical supply chains.

Finally, as an overlay to these other realities, the author is aware of instances in which companies that are unable to successfully complete acquisitions in the United States due to national security concerns look to acquire similar capabilities in other countries where the legal authorities or systems to manage such risks are not yet in place.

Given all of this, it is no coincidence that American allies and partners are considering questions about inward investment reviews as well.[246] FIRRMA is intended to serve as a model for these countries. It does so in several key ways. First, FIRRMA requires the Treasury Secretary to establish a formal, regularly recurring process for the exchange of information "important to the national security analysis or actions of the Committee" with foreign allies and partners.[247] Sec-

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245 *See* McKinsey Global Inst., Globalization in Transition: The Future of Trade and Value Chains 14 (2019), https://www.mckinsey.com/~/media/mckinsey/featured%20insights/innovation/globalization%20in%20transition%20the%20future%20of%20trade%20and%20value%20chains/mgi-globalization%20in%20transition-the-future-of-trade-and-value-chains-full-report.pdf [https://perma.cc/7G4S-VTHL].

246 *See, e.g.*, Roslyn Layton, *8 Keys to Developing an Effective Foreign Investment Review Mechanism*, Forbes (July 9, 2020, 11:30 PM) https://www.forbes.com/sites/roslynlayton/2020/07/09/8-keys-to-developing-an-effective-foreign-investment-review-mechanism/#2680741a4046 [https://perma.cc/JB5F-WLA3].

247 § 1713(3), 132 Stat. at 2190–91.

ond, FIRRMA directs the CFIUS chairperson to "harmoniz[e] . . . action" with foreign allies and partners "with respect to trends in investment and technology that could pose risks" to their national security as well as our own.[248] Finally, FIRRMA calls for the "sharing of information with respect to specific technologies and entities acquiring such technologies as appropriate to ensure national security."[249] FIRRMA thus recognizes that action by the United States alone is no longer sufficient to protect our national security.

As we move forward under the new regime established by FIRRMA, it is in our mutual interests to consider how to strengthen investment review authorities appropriately, enhance our collective understanding of the risk environment, and consider how to better collaborate to address such risks. It is unquestionable that the security of our allies reinforces the security of the United States.

D. Maintaining the Exclusive Focus on National Security

Resisting the temptation to employ the powers of CFIUS for trade and non-defense goals remains another key challenge. Throughout its history, CFIUS has focused exclusively on national security—and not on broader economic or policy interests—when reviewing transactions. This singular focus respects the role of free markets in driving commercial decisions, reserving government intervention for an area in which it has principal responsibility and unique competence: national security.

In advance of FIRRMA's introduction, some argued that CFIUS should expressly consider how certain transactions affect the U.S. economy.[250] Alternatively, it was argued that foreign acquisitions should be reviewed to determine the potential "loss of market share in critical industries" as well as the "foreign investor's home country's domestic policies on foreign investment that may distort U.S. markets."[251] There is some intuitive force to the position—unlike prior times in our history, we now have reliable ways to assess the likely effects of an individual investment on jobs, growth, and tax revenue

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248 *Id.*

249 *Id.*

250 *See, e.g.*, United States Foreign Investment Review Act of 2017, S. 1983, 115th Cong. (2017) (introduced "to establish a process to review foreign investment to determine the economic effect of the investment on the United States, and for other purposes").

251 A BETTER DEAL ON TRADE AND JOBS: FIGHTING BACK AGAINST CORPORATIONS THAT OUTSOURCE AMERICAN JOBS AND COUNTRIES THAT MANIPULATE TRADE LAWS 4 (2017) https://www.democrats.senate.gov/imo/media/doc/2017/07/A-Better-Deal-on-Trade-and-Jobs-FINAL.pdf [https://perma.cc/F4L6-HERS].

which would, in turn, allow CFIUS to protect American business owners from potentially harmful external competition.

Ultimately, however, while FIRRMA does expand CFIUS's jurisdictional scope to permit it to review certain types of non-controlling direct investment, the legislation maintains CFIUS's historical, sole focus on national security. The choice was deliberate: from its inception, CFIUS has been designed as a national security mechanism. It works in conjunction with export controls as well as our defense and intelligence communities to guard against all forms of national security threats, including the unlawful transfer of dual-use technologies and know-how, and attempts to block U.S. access to strategic sites and assets. Expansion of CFIUS's jurisdiction to include economic considerations as part of its deliberations would necessarily diminish its ability to carry out these core functions effectively. Moreover, although there are more reliable means of evaluating the impact of an individual investment on American businesses, imposition of an economic test would have raised an entire host of new questions, including what factors should be considered and the weight they should be given. An economic test also runs counter to the open investment policy that our country has long championed. Had Congress imposed such a test, it could have hurt American consumers and left CFIUS vulnerable to lobbying by special interest groups, each intent on protecting their respective industries.

CFIUS's exclusive remit, as reinforced by FIRRMA, makes clear that the United States welcomes foreign investment and continues to be one of the most open countries in the world to foreign investors. Former Treasury Deputy Secretary Bob Kimmitt has explained: "If we want to continue to grow well-paying FDI jobs in the United States, we must send a clear message that we are open to investment except in those instances where a CFIUS process focused squarely on national security determines an investment must be blocked."[252] While Congress reaffirmed this longstanding approach in FIRRMA, it remains up to CFIUS to resist any consideration of non-national security factors—particularly in the face of public support and political pressure to do so.

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252 *See Examining the Operations of the Committee on Foreign Investment in the United States (CFIUS): Hearing Before the Subcomm. on Monetary Pol'y and Trade of the H. Comm. on Fin. Servs.*, 115th Cong. 41–42 (2017) (statement of Ambassador Robert M. Kimmitt, Former Deputy Secretary and General Counsel of the U.S. Treasury). https://financialservices.house.gov/uploadedfiles/12.14.2017_robert_m._kimmitt_testimony.pdf [https://perma.cc/47XH-37Z5].

E. *Fast-tracking Low Risk Investments*

A final challenge for CFIUS will be ensuring low risk investments are not impeded by the expanded jurisdiction of FIRRMA. This Article began with an overview of the immense benefits of foreign investment, and for good reason. James Baker, Former Secretary of State and Treasury, once called foreign investment our nation's "ace in the hole."[253] The last thing FIRRMA was intended to do was to gum up the works for foreign investments posing little or no national security risk.

FIRRMA sets forth several key provisions specifically intended to encourage foreign direct investment within the United States. Arguably the most important of these is the new concept of voluntary declarations. As explained above,[254] declarations are short-form filings listing basic information about a transaction that parties may submit in lieu of filing a regular notice. Upon receiving a declaration, CFIUS is empowered under FIRRMA to clear the transaction and notify the parties in writing within 30 days.[255]

The potential impact of this provision on both business and CFIUS itself cannot be overstated. For low risk transactions—involving, for example parties with a positive history before CFIUS and U.S. assets that are considered benign—the voluntary declarations process should facilitate a faster and more cost-effective review. At the same time, use of declarations can allow CFIUS to focus its attention and resources on those transactions that most merit scrutiny based on the potential threat they pose to U.S. national security. If administered properly, the voluntary declarations process should thus encourage greater foreign investment in the United States.

The challenge for CFIUS in the years ahead will be making effective use of the thirty-day window to clear transactions on the basis of only a declaration. However, there may be an inherent bias at work. Government civil servants generally, and CFIUS staff in particular, tend to err on the side of caution. That is normally a virtue. If CFIUS clears a transaction raising unresolved national security concerns, then it has failed. At the same time, CFIUS must be mindful that being overly cautious also has its price. The vast majority of foreign investments provide tremendous benefits to our nation. They should not

253 *Id.* at 39 (quoting James Baker).

254 *See supra* Section III.B.

255 *See supra* Section III.B.

therefore be discouraged by an unnecessarily lengthy process—a point Congress hammered home in FIRRMA.

Conclusion

In his State of the Union Address of 1793, George Washington observed that "if we desire to secure peace, one of the most powerful instruments of our rising prosperity [is to ensure] that we are at all times ready for War."[256] In making that observation, President Washington simultaneously recognized two principles that remain connected to this day. First, economic prosperity is vital to our nation. Second, we must take advantage of that prosperity to strengthen our national defense. For more than four decades, CFIUS has stood at the intersection of foreign investment and national security. Its work has enabled foreign capital flows to bolster our economy while strengthening, rather than undermining, our nation's security. FIRRMA now equips CFIUS with the modern tools necessary to achieve that critical mission.

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256 33 George Washington, The Writings of George Washington From the Original Manuscript Sources 166 (John C. Fitzpatrick et al. eds., 1940).