

THE FOREIGN RISK REVIEW MODERNIZATION ACT: HOW CFIUS BECAME A TECH OFFICE

Evan J. Zimmerman[†]

International trade and its deep links to investment have a long history in American policymaking. The first major law passed by the United States Congress was the Tariff Act of 1789.¹ As a result of that Act and its progeny, tariffs generated the majority of federal tax revenue until the U.S. Constitution was amended in 1915 to allow income taxes.² On top of driving revenue, controlling imports formed the basis for Alexander Hamilton’s theory of development, where “infant industries” were protected from foreign competition thus stimulating domestic investment. Economists called this theory “import substitution” when it was revived in the 1950s and 1960s.³

The historical profile of international trade and investment is also political and strategic. The Tariff Act was justified not only by calling for the paying off of national debts but also “the encouragement and protection of manufactures.”⁴ Hamilton’s *Report on Manufactures*, which made the original case for American industrial policy, was “largely military and strategic in nature,” reminiscing on the material wants of the Revolutionary War.⁵ At the turn of the century, the Trading with the Enemy Act of 1917⁶ was used to

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[†] J.D. Candidate, 2020, University of California, Berkeley, School of Law. I am appreciative of comments from Cathleen Cimino-Isaacs (Congressional Research Service), Mark Cohen (Berkeley Law), James K. Jackson (Congressional Research Service), Scott Kupor (Andreessen Horowitz), and Robert Merges (Berkeley Law).

1. 1 Stat. 24.

2. See Andrew Reamer, U.S. Int. Trade Comm., A CENTENNIAL HISTORY OF THE UNITED STATES INTERNATIONAL TRADE COMMISSION, USITC 4744, 35 (2017).

3. See Anne O. Krueger, *Trade Policy and Economic Development: How We Learn*, 87 AM. ECON. R. 1, 11–12 (1997). Import substitution fell out of favor when the experience of the Asian tigers, such as Taiwan, South Korea, and China, departed from this conventional wisdom, leading to the more modern Washington consensus.

4. 1 Stat. 24.

5. RON CHERNOW, ALEXANDER HAMILTON 374 (2005). The result was a dispute between Treasury and State. Jefferson and Hamilton frequently duelled over the scope of their offices, as Treasury entirely depended on tariffs, thus causing foreign policy and economics to clash. *Id.* at 394. Echoes of this dispute appear throughout the history of CFIUS, with the GAO frequently clashing with Treasury over CFIUS’s scope.

6. 40 Stat. 411. This act is still in force.

nationalize assets during World War I⁷ and to block all foreign investment during World War II.⁸ International commerce still sits at the nexus of politics and economics today, as recently leaked Chinese documents indicated that China was retaliating against American tariffs by targeting specific political constituencies with their own retaliatory tariffs.⁹

The Committee for Foreign Investment in the United States (CFIUS) has lurked quietly in the background. CFIUS is an interagency committee that can block mergers, acquisitions, and takeovers by foreign entities that could create a national security risk.¹⁰ Despite that significant power, it is the subject of few law review articles¹¹ and has only been party to a single lawsuit.¹² Furthermore,

7. See Daniel A. Gross, *The U.S. Confiscated Half a Billion Dollars in Private Property During WWI*, SMITHSONIAN MAG. (July 28, 2014), <https://www.smithsonianmag.com/history/us-confiscated-half-billion-dollars-private-property-during-wwi-180952144/> [<https://perma.cc/EMU9-D9QE>]. Among other German pharmaceutical and chemical houses, Bayer was seized, placing aspirin in the public domain by nationalizing the patent.

8. See M. Maureen Murphy, Cong. Research Serv., RL34254, EXECUTIVE ORDER 13438: BLOCKING PROPERTY OF CERTAIN PERSONS WHO THREATEN STABILIZATION EFFORTS IN IRAQ 5 (2011).

9. See Samuel Wade, *Minitrue: On U.S.-China Trade Tensions*, CHINA DIGITAL TIMES (June 29, 2018), <https://chinadigitaltimes.net/2018/06/minitrue-on-u-s-china-trade-tensions/> [<https://perma.cc/PWS4-QMUH>] (describing the “tit for tat” strategy). The targeting appears to have worked, as 82% of counties affected by recent Chinese tariffs, especially soyabean tariffs, opted for President Donald Trump over Hillary Clinton in 2016. See Mark Muro et al., Brookings Institution, *How China’s Proposed Tariffs Could Affect U.S. Workers and Industries* (Apr. 9, 2018), <https://www.brookings.edu/blog/the-avenue/2018/04/09/how-chinas-tariffs-could-affect-u-s-workers-and-industries/> [<https://perma.cc/9KQT-24GY>] (“[T]he Chinese tariff lists seem optimally designed to especially agitate President Trump’s red-state base.”).

10. National security is generally difficult to define, and even many well-known definitions are vague or circular. See, e.g., WALTER LIPPMANN, U.S. FOREIGN POLICY: SHIELD OF THE REPUBLIC 51 (1943) (“A nation has security when it does not have to sacrifice its legitimate interests to avoid war, and is able, if challenged, to maintain them by war.”); HAROLD LASSWELL, NATIONAL SECURITY AND INDIVIDUAL FREEDOM 51 (1950) (“The distinctive meaning of national security means freedom from foreign dictation.”); Arnold Wolfers, “National Security” as Ambiguous Symbol, 67 POL. SCI. Q. 481, 485 (1952) (“[S]ecurity, in an objective sense, measures the absence of threats to acquired values, in a subjective sense, the absence of fear that such values will be attacked.”); JOSEPH J. ROMM, DEFINING NATIONAL SECURITY 5 (1993) (“National security . . . is best described as a capacity to control those domestic and foreign conditions that the public opinion of a given community believes necessary to enjoy its own self-determination or autonomy, prosperity, and wellbeing.”) (quoting Charles Maier’s 1990 definition). This difficulty is evidenced by the lack of an explicit definition for national security in the context of CFIUS. See James K. Jackson, Cong. Research Serv., RL33312, THE EXON-FLORIO NATIONAL SECURITY TEST FOR FOREIGN INVESTMENT 7 (2010) (“Neither Congress nor the Administration have attempted to define the term national security as it appears in the Exon-Florio statute.”).

11. A Westlaw search turns up only 391 law review articles with the term “CFIUS” anywhere in the text as of February 6, 2019; far fewer mention CFIUS as more than a passing example. WESTLAW NEXT, <http://www.next.westlaw.com> (Go to “Secondary Sources”; click “Law Reviews & Journals”; then search for “CFIUS”).

12. *Ralls Corp. v. Comm. on Foreign Inv. in the U.S.*, 758 F.3d 296 (D.C. Cir. 2014).

most of the data it uses for its decisions is classified, so the public's only window into its operations is its public testimony, Congressional research reports, and mandated reports since 2007. Thus, though it has played a key role in some important transactions, it remains little known. In the wake of the Foreign Investment Risk Review Modernization Act (FIRRMA), the newly-passed, largest-ever expansion of CFIUS, the scramble to understand CFIUS is more furious than ever. This Note addresses just that in three parts.

Part I reviews the history and review process of CFIUS. It was created haphazardly and became an important part of the national security apparatus not by design but by circumstance. This Part shows that CFIUS historically evolved through a consistent pattern. Its profile tended to increase in response to high-profile tentpole transactions involving the potential takeover of a U.S. firm by a foreign acquirer from a politically sensitive country. During those times, a consistent set of long-simmering disputes came to a boil and were resolved by new legislation. All such legislation tended towards increasing CFIUS's power, expanding the scope of national security it is charged with considering, and increasing its disclosure to Congress.

Part II explains the context and content of FIRRMA itself. FIRRMA was born out of the nexus of increased fear regarding China's growing strategic and economic clout and the potential loss of American technology supremacy, with urgency injected by the attempted Broadcom-Qualcomm merger. The resulting legislation attracted significant industry attention, especially from venture capital. FIRRMA expands CFIUS in three principal ways. First, it expands CFIUS's *mandate* by requiring it to prevent the transfer of critical technologies and consider new factors in approving a transaction. Second, it expands CFIUS's *scope* by covering new types of transactions, including passive investments. Third, it expands CFIUS's *authority* by establishing it as a full-fledged and fully-funded agency with vast new powers.

Part III argues that though CFIUS's expansion is motivated by protecting American technology, FIRRMA does not properly equip CFIUS to succeed in its new, technology-oriented role. First, its scope cannot fulfill its mandate, as technology transfer usually occurs outside of CFIUS's purview. Second, its authority does not meet its mandate, as CFIUS does not have the technical resources or incentives to operate competently. Lastly, CFIUS's new mandate itself is difficult to define due to the tricky nature of protecting national technological supremacy, risking inconsistency and mission creep.

This paper concludes by framing FIRRMA in the larger context of an overall American technology strategy. FIRRMA is just the first step of a broader realignment towards more restrictive trade policies, especially surrounding technology, pitting the Western world increasingly against China. It can also be seen as part of a more restrictive domestic economic framework.

Furthermore, the nature of important emerging technologies in the coming years will cause CFIUS's scope to potentially touch most high-tech businesses.

I. A BRIEF HISTORY OF THE ACCIDENTAL AGENCY

Though obscure, CFIUS has a relatively long history compared to many other modern, better-known agencies: it is 2.6 times older than the TSA is and three years older than the Government Office of Ethics.¹³ CFIUS was created in 1975 by an executive order from President Gerald Ford, not by legislation.¹⁴ Originally, it was an eight-member advisory body intended to advise and inform the President on foreign investment in the United States.¹⁵ Its specific charges related mostly to the compiling of reports and statistics, and its “primary continuing responsibility” was “monitoring the impact of foreign investment in the United States.”¹⁶ A Treasury memorandum indicated that the purpose of the committee was, ironically, to “dissuade” Congressional regulation in the face of aggressive investment on the part of OPEC state-owned enterprises (SOEs).¹⁷

The first change to CFIUS, four years later and also by executive order under President Jimmy Carter, was mostly cosmetic, adding more CFIUS principals without expanding its authority.¹⁸ Though there is little in the public record indicating what work CFIUS did during its early years, it seems fair to say that CFIUS remained largely unchanged for its first thirteen years of life, during which time it did little of importance. In fact, Richard Perle, the Assistant Secretary of Defense for Global Strategic Affairs under President Ronald Reagan, reflected that during his tenure CFIUS “almost never met, and

13. See Aviation and Transportation Security Act, Pub. L. No. 107-71 (creating the TSA in 2001); Ethics in Government Act of 1978, Pub. L. No. 95-521 (creating the Office of Government Ethics in 1978).

14. See Exec. Order No. 11858, 40 F.R. 20263 (May 7, 1975).

15. The original principals were the Secretaries of State, Defense, Treasury, and Commerce, as well as the United States Trade Representative, the Chairman of the Council of Economic Advisors, the Attorney General, and the Director of the Office of Management and Budget. *Id.* at § 1(a). The original key figure appears to have been the Secretary of Commerce, who was the only cabinet member furnished with specific, substantive duties. *Id.* at § 2. This would later change, as CFIUS is now housed under Treasury.

16. *Id.* at § 1(b). In 1976, President Ford signed the International Investment and Trade in Services Survey Act of 1976, granting the President “unambiguous authority” to collect data on “international investment.” 22 U.S.C. § 3101. This was apparently in response to concerns that the President lacked the authority to collect such information. See James K. Jackson, Cong. Research Serv., RL33388, THE COMMITTEE ON FOREIGN INVESTMENT IN THE UNITED STATES (CFIUS) 4 (2018).

17. *The Operations of Federal Agencies in Monitoring, Reporting on, and Analyzing Foreign Investments in the United States: Hearing Before the H. Subcomm. on Government Operations*, 96th Cong. 334–45, 335 (statement of C. Fred Bergsten). According to this testimony, CFIUS only met six times in its first few years.

18. Exec. Order No. 12188, 45 F.R. 989 (Jan. 2, 1980) §§ 1-105(f)(1)–(2).

when it deliberated it was usually at a fairly low bureaucratic level.”¹⁹ This is perhaps unsurprising, as it was not until 1988—the last year of the Reagan Administration—that CFIUS would have a mandate other than study.

On October 23, 1986, Fujitsu, a Japanese electronics conglomerate, announced that it would purchase 80% of Fairchild Semiconductor,²⁰ sparking a public panic. Fujitsu’s acquisition offer came on the heels of a Japanese buying spree of American firms and assets, including supercomputers,²¹ the Mobil building in New York City,²² and a Ford Motors steel subsidiary.²³ Paul Harvey, a radio broadcaster, declared the Japanese wave as “buying our country with our money” and on the way to an “economic Pearl Harbor.”²⁴ Though Japan’s lost decades were just around the corner, at the time there was a real American fear that Japan would buy the whole world.

The potential acquisition of Fairchild, though, was seen as particularly chilling. Fairchild was a computer chip company created by former employees of the failed startup Shockley Semiconductor, named for co-inventor of the semiconductor Bill Shockley.²⁵ Fairchild and its spinoff “Fairchildren” created Silicon Valley²⁶ and supplied technology critical to national security tools like missile guidance systems. As such, efforts led by Commerce Secretary Malcolm Baldrige singled out the semiconductor industry for protection²⁷ out of fear that it was the “opening gun” of a broader Japanese assault on American

19. *Bush, Congress in Dark About Port Deal*, CBS 4 DENVER (Feb. 22, 2006), https://web.archive.org/web/20060310080155/http://cbs4denver.com/national/topstories_story_053102937.html [<https://perma.cc/SVW3-MR4Z>]

20. See Susan Chira, *International Report; Fujitsu, A Match for I.B.M., Making Further Inroads in U.S.*, N.Y. TIMES (Nov. 3, 1986), <https://www.nytimes.com/1986/11/03/business/international-report-fujitsu-a-match-for-ibm-making-further-inroads-in-us.html> [<https://perma.cc/55TA-XADX>].

21. *Japanese Firm Buys US Computer*, MILWAUKEE J., Apr. 1, 1987, at 5C.

22. *Japanese Buy Mobil Building in New York*, EUGENE REGISTER-GUARD, Aug. 28, 1987, at 10B.

23. Hamish McDonald, *Japan Buys into Ford Steel*, SYDNEY MORNING HERALD, July 23, 1982, at 14.

24. Paul Harvey, *Japan Buys US with Our Money*, KY. NEW ERA, Sept. 6, 1988, at 4A.

25. WALTER ISAACSON, *THE INNOVATORS: HOW A GROUP OF HACKERS, GENIUSES, AND GEEKS CREATED THE MODERN WORLD* 184–85 (2014). Bill Shockley co-invented the semiconductor at Bell Labs, for which he shared the Nobel Prize in Physics.

26. *Id.* at 199. Silicon Valley is literally named for silicon, the chemical semiconductor used in computer chips.

27. See Douglas A. Irwin, *Trade Politics and the Semiconductor Industry*, in *THE POLITICAL ECONOMY OF AMERICAN TRADE POLICY* 11-72, 11 (Anne O. Kreuger, 1996) (“Few industries ever receive the sustained, high-level attention needed to result in the negotiation of a governmental agreement on trade in just one sector.”). American action in the semiconductor industry was quite aggressive in contrast to most other industries. In 1987, President Reagan instituted the then-only ever unilateral tariffs against an allied nation. Further, in 1986 Japan and the United States reached an agreement in response to the threat of a WTO anti-dumping action, which would have been unprecedented if taken.

technological supremacy.²⁸ There appeared to be no law or governmental tool to stop the incursion, shocking the public consciousness. Fujitsu had awakened the beast: Fairchild was CFIUS's only investigation that year,²⁹ and it would result in Congress's first substantive CFIUS legislation.

After nearly a year of hearings, Congress enacted the Exon-Florio amendment as part of the Omnibus Trade and Competitiveness Act of 1988.³⁰ The President and its designees were empowered to review any and all mergers and acquisitions that may result in foreign control of "persons engaged in interstate commerce" for purposes of national security.³¹ If the President determined that such control would "impair national security," the office was to take such action necessary to suspend or prohibit the takeover.³² President Reagan quickly delegated this responsibility to CFIUS, thus cementing its place as a body of consequence in international investment even though it never actually appears in the text.³³ He also added the Attorney General and Director of the Office for Management and Budget as CFIUS members.³⁴ In November 1991, the Secretary of Treasury released its regulations governing the Exon-Florio notification process.³⁵ Fujitsu's acquisition offer for Fairchild collapsed, and most of its assets were acquired later that year by National Semiconductor at a discount.³⁶

Importantly, Exon-Florio's legislative history indicates that this expanded power was only intended for national security and not for economic purposes, as the omnibus bill was originally vetoed in part to remove "essential commerce" from its mission.³⁷ Congress itself was also concerned with

28. William C. Rempel & Donna K.H. Walters, *The Fairchild Deal: Trade War: When Chips Were Down*, L.A. TIMES, Nov. 30 1987, http://articles.latimes.com/1987-11-30/news/mn-16900_1_fairchild-semiconductor [<https://perma.cc/82PB-HKW9>].

29. *Id.*

30. Omnibus Trade and Competitiveness Act of 1988 ("Exon-Florio"), Pub. L. No. 100-418 § 5021.

31. *Id.* at § 5021(a).

32. *Id.* at § 5021(d).

33. *See* Exec. Order No. 12661, 54 F.R. 779 (Dec. 27, 1988).

34. *Id.* The makeup of CFIUS would change several more times, either in responses to statutory expansions of CFIUS or the creation of new agencies. President Bill Clinton added the Director of the Office of Science and Technology Policy, the National Security Advisor, and the Assistant of the President for Economic Policy. *See* Exec. Order No. 12860, 58 F.R. 47201 (Sept. 3, 1993). President George W. Bush would add the Secretary of Homeland Security upon its creation and, later, the United States Trade Representative, as well as adding five observer agencies. *See* Exec. Order No. 13286, 68 F.R. 10619 (Mar. 5, 2003); Exec. Order No. 13456, 73 F.R. 4677 (Jan. 23, 2008).

35. Regulations Pertaining to Mergers, Acquisitions, and Takeovers by Foreign Persons. 31 C.F.R. § 800.

36. Andrew Pollack, *Fairchild Being Sold to National*, N.Y. TIMES (Sept. 1, 1987), <https://www.nytimes.com/1987/09/01/business/fairchild-being-sold-to-national.html> [<https://perma.cc/D99H-5PAZ>].

37. Jackson, *supra* note 16, at 6.

disturbing the generally open investment climate of the U.S. economy.³⁸ Indeed, the President was only enabled to take action if other remedies were insufficient to the national security threat posed.³⁹ Nonetheless, the President was still directed to consider domestic production necessary to fulfill national security needs as one of its three factors for consideration, foreshadowing future neuroses.⁴⁰

The Exon-Florio regime essentially instated a four-step process. First, a domestic target company would voluntarily notify CFIUS of a contemplated foreign acquisition, merger, or takeover.⁴¹ For various reasons, companies were incentivized to self-report.⁴² This informal notice consultation, though not required, was common. Once reported, CFIUS had a thirty-day window to decide whether to investigate the transaction, which they then have forty-five days to complete. If they determined a risk to national security, the President had fifteen days to act to block the transaction. This action had unclear judicial review until recently. CFIUS could also require a mitigation agreement, in which the companies agreed to certain national security measures to ensure clearance.

CFIUS activity increased sharply from 1989–1992.⁴³ At its peak in 1990, CFIUS reviewed just shy of 300 transactions. However, even after the initial rush of notices subsided, there was a new normal. Far from meeting on average twice per year, CFIUS issued dozens of notifications every year. However, as Figure 1 shows,⁴⁴ notifications rarely led to full investigations, and although some deals collapsed under political pressure following a CFIUS investigation,

38. *Id.* at 7.

39. Exon-Florio §§ 5021(c)–(d).

40. *Id.* at § 5021(e)(1). In any case, the very next section of that law declared as its first finding that “[t]he future well-being of the United States economy depends on a strong manufacturing base and requires continual improvements in manufacturing technology.” *Id.* at § 5111. During the 2010s American production capacity would once again emerge as a flashpoint in the larger CFIUS debate.

41. This is typically a joint filing with the foreign company proposing the merger, acquisition, or takeover.

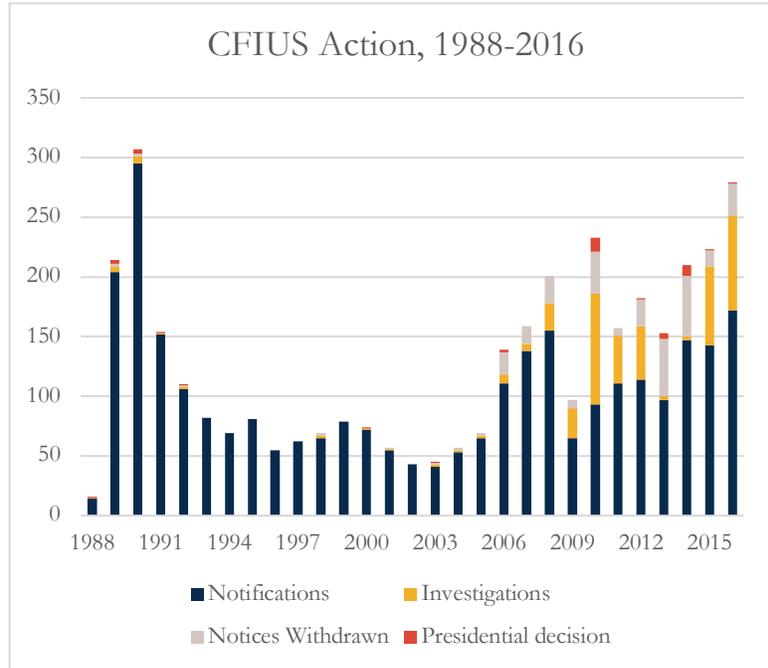
42. See Kristy E. Young, *The Committee on Foreign Investment in the United States and the Foreign Investment and National Securities Act of 2007: A Delicate Balancing Act That Needs Revision*, 15 U.C. DAVIS J. OF INT. L. & POL’Y 43, 49 (2009). Note that prior to this step companies frequently enter discussions with CFIUS informally. Companies are incentivized to report to avoid public embarrassment and political outrage, as well as to secure a favorable mitigation agreement.

43. EDWARD GRAHAM & DAVID MARCHICK, US NATIONAL SECURITY AND FOREIGN DIRECT INVESTMENT 57 (2006).

44. The data for Figure 1 comes from Graham and Marchick for 1988–2007 and the FINSIA-mandated reports published by CFIUS for 2008–2016. See *id.* at 57.

almost no investigations ever led to presidential action. Indeed, some commentators thought the Exon-Florio regime was too lenient.⁴⁵

Figure 1.



So, too, did Congress. In the intervening years, several acquisitions had taken place involving SOEs. Examples include the possible acquisition of LTV Corporation, a missile company, by Thomson C.S.F., a French corporation, and of MAMCO by CATIC, a Chinese company, which earned President George H.W. Bush's sole CFIUS action during his presidency.⁴⁶ The result was the Byrd Amendment to the 1993 National Defense Authorization Act.⁴⁷ The Byrd Amendment's key provisions introduced mandatory review of transactions involving persons acting on behalf of foreign governments, which included SOEs, and review of the "potential effects" of the sale of military equipment and technological know-how in areas relevant to national security.⁴⁸

45. See, e.g., Deborah M. Mostaghel, *Dubai Ports World Under Exon-Florio: A Threat to National Security or a Tempest in a Teapot?*, 70 ALB. L. REV. 583, 600 (2007) ("[MAMCO and Thomson-LTV] fueled Congress's belief that Exon-Florio must be revised to be able to aggressively protect national security.").

46. See Young, *supra* note 42, at 46–47.

47. See National Defense Authorization Act of 1993 ("Byrd Amendment"), Pub. L. No. 102-484, § 837.

48. *Id.*

This was also criticized as too lax,⁴⁹ particularly by the U.S. Government Accountability Office (GAO), which considered Treasury's definition of national security too narrow and feared that CFIUS was too timid for fear of dampening foreign investment.⁵⁰ This debate would come to a boil in 2005 when Dubai Ports World ("DP World") proposed an acquisition of Peninsular and Oriental Steam Navigation Company, a British company that owned six American ports. DP World's offer had the misfortune of arriving within a few months of a highly contentious all-cash offer for Unocal Oil by China's state oil company, CNOOC.⁵¹ The combination of the two contentious offers created a flare-up in Congress.

DP World was a political nightmare due to the UAE's associations with al-Qaida, but it was also much more: it was such an operational catastrophe that its failure would shape CFIUS reform. There was no initial indication that the transaction would be controversial. Out of caution, DP World met with CFIUS for several briefings prior to its takeover announcement.⁵² CFIUS quickly reached a mitigation agreement and declined a formal review. This was received poorly by Congress, whose attitudes towards international investment had fundamentally shifted after the September 11th attacks.⁵³ In response to public outcry, DP World resubmitted for a formal review. During this time, there was a communication breakdown, and senior CFIUS officials often heard about key developments about DP World from the news.⁵⁴ Congress thus did not receive timely communications from CFIUS.⁵⁵ Furthermore, there was a disconnect between Congress and CFIUS on the interpretation of the Byrd Amendment and whether the DP World takeover required a formal review.⁵⁶ Due to political pressure, not CFIUS action—CFIUS had not yet

49. See, e.g., Christopher F. Corr, *A Survey of United States Controls on Foreign Investment Operations: How Much is Enough?*, 9 AM. U. INT'L. & POL'Y 417, 431 (1994) (noting that Exon-Florio already permitted such investigations and that foreign governments would presumably already raise suspicion).

50. See U.S. Gen. Accounting Office, GAO-05-686 DEFENSE TRADE: ENHANCEMENTS TO THE IMPLEMENTATION OF EXON-FLORIO COULD STRENGTHEN THE LAW'S EFFECTIVENESS, 13–15, 18–19 (2005).

51. See Jonathan Weisman & Peter S. Goodman, *China's Oil Bid Riles Congress*, WASH. POST (June 24, 2005), <http://www.washingtonpost.com/wp-dyn/content/article/2005/06/23/AR2005062302065.html> [<https://perma.cc/884U-SWEE>]. This transaction was also investigated by CFIUS.

52. See *CFIUS and the Protection of the National Security in the Dubai Ports World Bid for Port Operations*, DEP'T OF THE TREASURY (Feb. 24, 2006), <https://www.treasury.gov/press-center/press-releases/Pages/js4071.aspx> [<https://perma.cc/8PEZ-F456>].

53. See Jackson, *supra* note 16, at 1–2.

54. See H.R. REP. NO. 110-24, at 12 (2007).

55. See *id.*

56. *Briefing by Representatives from the Departments and Agencies Represented on the Committee on Foreign Investment in the United States (CFIUS) to Discuss the National Security Implications of the*

finished its formal investigations of either transaction—both CNOOC and DP World abandoned their offers.⁵⁷

Nonetheless, the cat was out of the bag. DP World was such a flashpoint that in 2006, all four external links on CFIUS's website related to DP World.⁵⁸ Congress acted to strengthen CFIUS with the Foreign Investment and National Security Act of 2007 (FINSAs).⁵⁹ FINSAs formalized all aspects of CFIUS, including its existence.⁶⁰ Its expanded board included nine principals, with Presidential authority to add to it as necessary.⁶¹ The Director of National Intelligence was added as an *ex officio* member whose role includes acting as a liaison between CFIUS and the intelligence community.⁶² The Secretary of Labor was also added as a nonvoting member.⁶³

The expansion of CFIUS's membership paled in comparison to the expansion of its scope. FINSAs expanded CFIUS's scope to review any "covered transaction" of a U.S. company.⁶⁴ Though the beginning of the FINSAs text could be read as a codification of the Exon-Florio-Byrd process,⁶⁵ it actually expanded the Byrd Amendment by requiring a CFIUS review not only of mergers, acquisitions, and takeovers when there was a foreign government-controlled acquirer, but also any time an acquisition threatened national security or would result in foreign control of "critical infrastructure."⁶⁶ Though "control" was rigorously defined in the regulations, "national security" was not.⁶⁷ The statutory considerations for a covered transaction review were also broadened. In addition to national security, CFIUS was to

Acquisition of Peninsular and Oriental Steamship Navigation Company by Dubai Ports World, a Government-Owned and -Controlled Firm of the United Arab Emirates (UAE), S. Armed Services Comm., 109th Cong. 109-782 (2006).

57. See Young, *supra* note 42, at 52–55 (describing the regulatory process by which neither transaction ultimately proceeded).

58. *Committee on Foreign Investments in the United States (CFIUS)*, WAYBACK MACHINE (Mar. 25, 2006), <https://web.archive.org/web/20060325064442/https://www.treas.gov/offices/international-affairs/exon-florio/> (last visited Dec. 24, 2019) [<https://perma.cc/9WNY-XZXT>].

59. Foreign Investment and National Security Act of 2007 (FINSAs), Pub. L. No. 110-49.

60. *Id.* § 3.

61. *Id.* § 3.

62. *Id.* § 2(b)(4).

63. *Id.* § 2(b)(3).

64. FINSAs § 2(b)(1)–(2). This language is similar to the term "covered securities" in the Securities Act of 1933. 48 Stat. 74 § 18(b). "Covered transaction" is any transaction that falls under the purview of CFIUS, and the rhetorical framework for FINSAs and FIRRMA is in defining whether a transaction is covered or not.

65. *Id.* § 2(b)(1)(A)–(D).

66. *Id.* § 2(b)(2)(B)(III).

67. See Christopher M. Tipler, *Defining 'National Security': Resolving Ambiguity in the CFIUS Regulations*, 35 U. PA. J. INT'L L. 1223, 1239 (2014).

consider the impact of a transaction on critical infrastructure and even long-term national energy requirements.⁶⁸

The review process itself kept the basic outline of Exon-Florio but was otherwise overhauled. For each covered transaction Treasury had to designate a “lead agency” for each investigation.⁶⁹ FINSA codified the use of mitigation agreements by empowering CFIUS to enforce its agreements as necessary,⁷⁰ as determined by the lead agency.⁷¹ It also granted authority for unilateral review of previously approved transactions if the parties submitted “false or misleading material information” during the investigation or if the parties “materially breached” the mitigation agreement.⁷² Any such information had to be certified by the acquiring company’s CEO.⁷³ Furthermore, FINSA clarified that any Presidential action was not subject to judicial review.⁷⁴ It also addressed Congress’s longstanding disclosure concerns, creating a formalized reporting system thorough enough that CFIUS has been called a “Congressional notification service.”⁷⁵

While FINSA completely overhauled CFIUS, its history fit into the same broad pattern as the other CFIUS legislation: a political panic in response to foreign investment from one of the United States’ main rivals, resulting in an expansion of CFIUS intended to strike a balance between the perceived need for more oversight and preservation of the generally permissive U.S. investment climate. It codified many aspects of CFIUS that previously existed only by custom or executive action, expanded them, and introduced new vocabulary. This set the stage for FIRRMA, which was also borne from a political panic surrounding a rising Asian power.

II. CFIUS’S NEW GROOVE AS A TECHNOLOGY AGENCY

A. HOW WE GOT HERE: CONTEXT AND LEGISLATIVE HISTORY

Previous expansions of CFIUS began with a bang, with Congress reacting to a particular, high-profile tentpole transaction. Like its predecessors,

68. FINSA § 4(4).

69. *Id.* § 3.

70. *Id.* § 5.

71. *Id.*

72. *Id.* § 2(b)(1)(D)(ii). This was actually a codification of a mitigation agreement in the Alcatel-Lucent merger, one of the Bush Administration’s attempts to mollify Congress. See Stephanie Kirchaessner, *Alcatel Completes Acquisition of Lucent*, FIN. TIMES (Nov. 30, 2006), <https://www.ft.com/content/f25293f4-80b6-11db-9096-0000779e2340> [https://perma.cc/YM9S-ZWV2].

73. FINSA § 8. There is a similar provision in Sarbanes-Oxley. See Young, *supra* note 42, at 57.

74. FINSA § 6.

75. See, e.g., David Zaring, *CFIUS As a Congressional Notification Service*, 83 S. CAL. L. REV. 81 (2009).

FIRMA was born out of fear of a rival, in this case China. During the Obama Administration, Congress began to show increasing skepticism of Chinese investment in American companies. Initially, many major acquisitions, like Lenovo's 2005 purchase of IBM Thinkpad, received approval with no objections.⁷⁶ In 2011, members of Congress rang the alarm over the potential acquisition of 3Leaf Systems by Huawei, a Chinese telecom giant, and CFIUS's posture regarding sovereign wealth funds more generally.⁷⁷ In 2013, Congress expressed concern over a potential acquisition of Smithfield, a pork processor and producer, by Shanghui, a Chinese food company. Senator Debbie Stabenow declared that CFIUS must take Shuanghui's "troubling track record on food safety into account," connecting national security and the health of American families more generally.⁷⁸ In 2016, CFIUS again ignored loud Congressional fears when it allowed ChemChina to acquire Syngenta.⁷⁹ Syngenta had previously turned down an offer from American agriculture giant Monsanto, much to Congress's consternation.⁸⁰

An environment of suspected intellectual property theft by a rising China during this period introduced a general cloud of suspicion towards Chinese motivations. Though China employs several techniques to acquire foreign technology, the most brazen and controversial methods include hacking or inserting moles into American companies, as in the theft of the Boeing C-17 designs.⁸¹ Chinese IP theft, unsurprisingly, tends to spike in areas of strategic interest. For example, ex-Apple engineer Xiaolang Zhang was dramatically arrested while boarding his flight to Beijing at San Jose Airport and indicted for stealing Apple trade secrets relating to autonomous vehicles, a recent area of interest for China.⁸²

76. See Mike Musgrove, *U.S. Panel Clears IBM Deal With Chinese Firm*, WASH. POST (Mar. 10, 2005), <https://www.washingtonpost.com/archive/business/2005/01/29/national-security-panel-will-evaluate-ibm-deal/90b98e69-ba9b-421a-a13e-8baa261647af/> [<https://perma.cc/N5M4-QRNV>]. Note that this does not mean that China was viewed as harmless—indeed, even the 1999 Cox Commission report indicated that China used acquisitions to acquire advanced technology. See H.R. REP. NO. 105-851, at 44 (1999).

77. See James K. Jackson, Cong. Research Serv., RL33388, *THE COMMITTEE ON FOREIGN INVESTMENT IN THE UNITED STATES* 2, 22 (2012).

78. Christopher Doering, *Secretive U.S. Panel Eyes China's Smithfield Deal*, U.S.A. TODAY (June 9, 2013), <https://www.usatoday.com/story/money/business/2013/06/09/smithfield-foods-pork-foreign-investment/2396187/> [<https://perma.cc/6E49-FAWC>].

79. See Jacob Bunge et al., *Powerful U.S. Panel Clears Chinese Takeover of Syngenta*, WALL ST. J. (Aug. 23, 2016), <https://www.wsj.com/articles/powerful-u-s-panel-clears-chinese-takeover-of-syngenta-1471914278> [<https://perma.cc/X6FZ-9F86>] (describing Senator Grassley's concerns over the Syngenta acquisition).

80. See Arno Schuetze & Pamela Barbaglia, *UPDATE 4-ChemChina Close to Striking Deal for Syngenta -Sources*, REUTERS (Feb. 2, 2016), <http://www.reuters.com/article/syngent-ag-ma-chemchina-idUSL3N15H4AJ> [<https://perma.cc/GCX5-9UNQ>].

81. See Plea Agreement, *U.S. v. Su Bin*, No. SA CR 14-131 (C.D.C.A. 2016), Exhibit A.

82. See Complaint at 11, 12, *U.S. v. Zhang*, No. 5:18-mj-70919-MAG (N.D.C.A. 2018).

Congressional concerns also extended more generally to commerce. In 2012, Congress controversially recommended that American telecom companies purchase no Huawei equipment.⁸³ In a 2012 hearing, Representative Peter Visclosky expressed concern that Chinese acquisitions led to lost jobs and lost technology, combining economic and national security concerns, while David Gordon of the Eurasia Group testified that “commitment to openness can’t be at the expense of all of these other factors.”⁸⁴ The Obama Administration, however, held steady to its commitment to an “open investment policy” with the traditional justification that “inbound investment has long been an important component of our overall economy.”⁸⁵

That posture would not last, and CFIUS became far more aggressive in the Administration’s second term. The quantity of CFIUS notices increased overall, as well as the number of failed transactions. In 2012, President Obama blocked a deal by Ralls Corporation,⁸⁶ the first formal presidential action since 1990,⁸⁷ over concerns that it would acquire real estate near a sensitive naval base.⁸⁸ Ralls immediately filed suit and, on appeal, established that its due process rights had been violated,⁸⁹ though many questions remained

83. *Who’s afraid of Huawei?*, *ECONOMIST* (Aug. 4, 2012), <https://www.economist.com/leaders/2012/08/04/whos-afraid-of-huawei> [https://perma.cc/82NZ-W7F5]. In contrast, Lenovo was permitted to purchase Thinkpad, an IBM personal computer subsidiary, a few years earlier.

84. *Chinese State-Owned and State-Controlled Enterprises: Hearing Before the H. U.S.-China Economic and Security Review Commission*, 112th Cong. 52 (2012) (statement of Peter J. Visclosky). *Id.* at 115 (statement of David F. Gordon).

85. *Statement by the President on United States Commitment to Open Investment Policy*, WHITE HOUSE (June 20, 2011), <https://obamawhitehouse.archives.gov/the-press-office/2011/06/20/statement-president-united-states-commitment-open-investment-policy> [https://perma.cc/2EPD-ETHF].

86. *See* 77 F.R. 60281 (Oct. 3, 2012).

87. *See* Edward J. Krauland et al., *CFIUS Report: Significant Increase In Scuttled Deals*, *MONDAQ* (Jan. 13, 2014), http://www.mondaq.com/unitedstates/x/285836/international+trade+investment/CFIUS+Report+Significant+Increase+In+Scuttled+Deals&email_access=on [https://perma.cc/6NSA-HSHS].

88. *See* Rachelle Younglai, *Obama Blocks Chinese Wind Farms in Oregon Over Security*, *REUTERS* (Sept. 28, 2012), <https://www.reuters.com/article/us-usa-china-turbines/obama-locks-chinese-wind-farms-in-oregon-over-security-idUSBRE88R19220120928> [https://perma.cc/PU5Y-38EN]. Ultimately, Ralls would be required to divest its Oregon wind farm assets.

89. *Ralls Corp. v. Comm. on Foreign Inv. in the U.S.*, 758 F.3d 296, 302 (D.C. Cir. 2014), (“[T]he orders violate the Due Process Clause . . . because neither CFIUS nor the President . . . provided Ralls the opportunity to review and rebut the evidence upon which they relied.”). *Ralls Corporation and the Obama Administration eventually settled. Joint Status Rep. and Joint Mot. Stay Litigation Deadlines, Ralls Corp. v. Comm. on Foreign Inv. in the U.S.*, No. 1:12-cv-01513-ABJ (D.D.C. 2015), Doc. 79.

unanswered.⁹⁰ Chinese transactions were disproportionately represented among CFIUS investigations from 2013–2015—almost double the next highest country, Canada⁹¹—and almost all formally blocked acquisitions were Chinese. In contrast, the first FINSA report in 2009 did not even mention China as a significant country.⁹² The numbers understate the extent of CFIUS’s stringency towards Chinese acquisitions, as CFIUS is also less favorable towards mitigation agreements with Chinese acquirers.⁹³ The most high-profile CFIUS cases of the modern era have been almost exclusively post-FINSA and have included a Chinese counterparty about half the time.⁹⁴ A Rhodium Group report found that in 2017, CFIUS either blocked or forced the abandonment of three deals alone worth \$8 billion.⁹⁵

Many of the notable Chinese transactions investigated or blocked by CFIUS related to technology, especially telecommunications and semiconductors. In 2016, President Obama blocked the acquisition of Aixtron,⁹⁶ a semiconductor manufacturer, by Fujian Grand, a Chinese company, in the first use of CFIUS to block a transaction prior to its consummation.⁹⁷ Treasury noted that the national security risks included “the military applications of the overall technical body of knowledge and experience of Aixtron.”⁹⁸ CFIUS also moved to block acquisitions that would expose sensitive information, like the attempted Ant Financial acquisition of

90. See, e.g., Judy Wang, *Ralls Corp. v. CFIUS: A New Look at Foreign Direct Investments to the US*, 54 COLUM. J. TRANSNAT’L L. BULL. 30, 53 (2016) (describing potential challenges by the plaintiffs).

91. See 2015 CFIUS Ann. Rep. at 16 (Table I-8).

92. See generally 2008 CFIUS Ann. Rep. at 43.

93. See David Blumenthal et al., *CFIUS and Chinese Investments in the United States—A Closed Door?*, Latham & Watkins Article Reprint Number 2352, 1 (June 4, 2018) (originally published in the Financial Times in Chinese) (outlining several challenges Chinese firms face in the CFIUS process).

94. See generally James K. Jackson, Cong. Research Serv., RL33388 THE COMMITTEE ON FOREIGN INVESTMENT IN THE UNITED STATES 21–29 (2017) (specifying the twenty most significant covered transactions).

95. Thilo Hanemann & Daniel H. Rosen, *Chinese FDI in the US in 2017: A Double Policy Punch*, RHODIUM GROUP (Jan. 17, 2018), <https://rhg.com/research/chinese-fdi-us-2017-double-policy-punch/> [<https://perma.cc/7FA5-8SDG>] (“Prominent transactions that were abandoned during the year because of unresolved CFIUS concerns included Canyon Bridge Capital’s acquisition of Lattice Semiconductor, Zhongwang’s acquisition of Aleris Corp, Orient Hontai’s acquisition of a stake in Applovin and HNA’s acquisition of a stake Global Eagle Entertainment.”).

96. 81 F.R. 88607 (Dec. 7, 2016).

97. See Mark Plotkin et al., *President Obama Blocks Chinese Acquisition of Aixtron SE*, COVINGTON (Dec. 5, 2016), https://www.cov.com/-/media/files/corporate/publications/2016/12/president_obama_blocks_chinese_acquisition_of_aixtron_se.pdf [<https://perma.cc/V9EX-LSKE>].

98. Statement on the President’s Decision Regarding the U.S. Business of Aixtron SE, TREASURY DEP’T (Dec. 2, 2016), <https://www.treasury.gov/press-center/press-releases/Pages/jl0679.aspx> [<https://perma.cc/C2BE-8V82>].

MoneyGram.⁹⁹ Most notably, in 2018, President Trump moved to block Broadcom from acquiring Qualcomm,¹⁰⁰ a merger of semiconductor giants that if completed, would have been the largest technology acquisition of all time.¹⁰¹ This is particularly significant because Broadcom is Singaporean, not Chinese—however, the race to 5G against China, and Huawei in particular, colored the entire public debate.¹⁰² Treasury made a novel argument that one of the largest impacts of the acquisition on national security was not the acquisition of military know-how but the “reduction in Qualcomm’s long-term technological competitiveness and influence in standard setting,”¹⁰³ most likely due to Broadcom’s reputation for private equity-style hollowing out of R&D spending.¹⁰⁴

This novel argument came on the heels of significant Chinese investment in American technology firms. China has long been accused of intellectual property theft, but in recent years it was perceived as using joint ventures (JVs) and minority investments to circumvent CFIUS, which could only review mergers and acquisitions.¹⁰⁵ Chinese foreign direct investment (FDI) in the

99. See Greg Roumeliotis, *U.S. Blocks MoneyGram Sale to China’s Ant Financial on National Security Concerns*, REUTERS (Jan. 2, 2018), <https://www.reuters.com/article/us-moneygram-intl-m-a-ant-financial/u-s-blocks-moneygram-sale-to-chinas-ant-financial-on-national-security-concerns-idUSKBN1ER1R7> [<https://perma.cc/DVK5-N54C>].

100. 83 F.R. 11631 (Mar. 12, 2018).

101. Cecilia Kang & Alan Rappeport, *Trump Blocks Broadcom’s Bid for Qualcomm*, N.Y. TIMES (Mar. 12, 2018), <https://www.nytimes.com/2018/03/12/technology/trump-broadcom-qualcomm-merger.html> [<https://perma.cc/GX7B-KYG7>].

102. Qualcomm had a tricky relationship with Huawei prior to the acquisition. They are competitors in 5G technology even though Huawei purchases Qualcomm chips for its consumer products. Furthermore, Huawei licenses patents from Qualcomm, which has the largest 5G patent portfolio in the world. See Adam Jourdan, *Balancing act: Chip Giant Qualcomm Caught Between Washington and Beijing*, REUTERS (Mar. 14, 2018), <https://www.reuters.com/article/us-qualcomm-m-a-broadcom-china/balancing-act-chip-giant-qualcomm-caught-between-washington-and-beijing-idUSKCN1GR0M0> [<https://perma.cc/Z6NH-8G87>].

103. Letter from Aimen N. Mir, Deputy Assistant Secretary of Investment Security at Dep’t of Treasury, to Mark Plotkin, Covington and Burling, and Theodore Kassinger, O’Melveny & Myers, 2 (Mar. 5, 2018), https://www.sec.gov/Archives/edgar/data/804328/000110465918015036/a18-7296_7ex99d1.htm#Exhibit99_1_081114 [<https://perma.cc/9BRF-T4VC>].

104. See Alex Sherman, *Microsoft and Google Have Concerns with Broadcom’s Attempt to Buy Qualcomm, Sources Say*, CNBC (Dec. 8, 2017), <https://www.cnn.com/2017/12/08/microsoft-google-concerned-about-broadcom-qualcomm-deal.html> [<https://perma.cc/7ES7-LQTF>] (“The companies have also privately expressed concerns with Tan’s reputation of cutting costs at the expense of increasing spending on innovation, two of the people said.”).

105. Heidi Vogt, *U.S. Companies Brace for Wider Scrutiny of Chinese Deals*, WALL ST. J. (Jan. 29, 2018), <https://www.wsj.com/articles/u-s-companies-brace-for-wider-scrutiny-of-chinese-deals-1517230800> [<https://perma.cc/86B6-X34Q>] (“Several security experts say China has been sidestepping [CFIUS] controls by taking minority stakes in U.S. technology companies or entering joint licensing ventures.”).

United States soared in the 2010s,¹⁰⁶ especially in technology, where investment continues to treble even as Chinese FDI in the United States generally fell over the last two years.¹⁰⁷ Hone Capital, the venture outlet for Chinese billionaire Shan Xiangshuang, was credibly reported to be the most prolific seed investor in American startups in 2017.¹⁰⁸ In corporate venture capital, Alibaba and Tencent, the two largest Chinese technology firms, have replicated their strategy of strategic investment over American-style acquisitions, thus becoming important players in American technology. Tencent alone has invested in over forty technology firms since 2011, including Snap and Tesla.¹⁰⁹

At the same time, China now rivals America in technology. It is perceived as competitive, though not necessarily leading, in areas like artificial intelligence and biotechnology.¹¹⁰ The world's largest venture-backed company, Ant Financial, and largest startup, Bytedance, are both Chinese,¹¹¹ and Chinese startups achieve a billion dollar valuation roughly eighteen months faster than American ones.¹¹² China also has several big-dollar initiatives to improve its technology in other areas, including the National Medium and Long Term

106. See Thilo Hanemann et al., *Two-Way Street: 2018 Update US-China Direct Investment Trends*, RHODIUM GROUP (Apr. 10, 2018), <https://rhg.com/research/two-way-street-2018-update-us-china-direct-investment-trends/> [<https://perma.cc/H9DA-VQN2>] (plotting cumulative value of FDI in Figures ES- 1 and ES-2).

107. See Don Weinland, *Chinese VC funds pour \$2.4bn into Silicon Valley start-ups*, FIN. TIMES (July 17, 2018), <https://www.ft.com/content/463b162a-8a3d-11e8-b18d-0181731a0340> [<https://perma.cc/FQ6B-U2K2>].

108. See Michael J. Coren, *A Chinese Billionaire Has Quietly Become One of the Biggest Seed Investors in Silicon Valley*, QUARTZ (Dec. 11, 2017), <https://qz.com/1150944/a-chinese-billionaire-started-a-fund-in-2015-that-is-now-the-biggest-seed-investor-in-silicon-valley/> [<https://perma.cc/K7MT-3KAF>] (describing Hone Capital's investment strategies).

109. See Steven Russolillo & Wayne Ma, *Tencent Continues to Snap Up Stakes in U.S. Startups*, WALL ST. J. (Nov. 8, 2017), <https://www.wsj.com/articles/tencent-continues-to-snapup-stakes-in-u-s-startups-1510187357> [<https://perma.cc/2Z7E-N8A9>] (detailing Tencent's portfolio).

110. See, e.g., Jeffrey Ding, *Deciphering China's AI Dream*, U. OF OXFORD, 1–2 (Mar. 2018), https://www.fhi.ox.ac.uk/wp-content/uploads/Deciphering_Chinas_AI-Dream.pdf [<https://perma.cc/FH3H-KEUR>].

111. See Adam Jourdan & Cate Cadell, *Ant Financial Raises \$14 Billion in World's Largest-Ever Single Fundraising*, REUTERS (June 7, 2018), <https://www.reuters.com/article/us-ant-financial-fundraising/ant-financial-raises-14-billion-in-worlds-largest-ever-single-fundraising-idUSKCN1J407Y> [<https://perma.cc/GF6L-J6CB>]; *Meet the 35-Year-Old Chinese Software Engineer Behind ByteDance, the World's Most Valuable Start-Up*, S. CHINA MORNING POST (Oct. 1, 2018), <https://www.scmp.com/tech/start-ups/article/2166424/meet-35-year-old-chinese-software-engineer-behind-bytedance-worlds> [<https://perma.cc/5KR6-RV6Y>].

112. Kane Wu & Julie Zhu, *What Bubble? China's Record-Breaking Venture Capitalists Charge Ahead*, REUTERS (July 25, 2018), <https://www.reuters.com/article/us-china-venturecapital-analysis/what-bubble-chinas-record-breaking-venture-capitalists-charge-ahead-idUSKBN1KG0I6> [<https://perma.cc/5W6H-356V>] (citing Pitchbook data).

Plan¹¹³ and the approximately \$49 billion Big Fund, intended to fund improvements in semiconductors.¹¹⁴ On the basis of these facts, American technology luminaries like Michael Moritz of Sequoia and Reid Hoffman of Greylock are enthusiastic about Chinese technology,¹¹⁵ while Chinese technologists like Kai-Fu Lee are openly confident.¹¹⁶ This development came as a shock to Congress when Mark Zuckerberg would not say that today Facebook could only be created in America, citing “strong Chinese internet companies” to the flabbergasted indignation of Senator Dan Sullivan and the viral delight of Chinese Weibo users.¹¹⁷

Though specific reference to China ultimately does not appear in the final text of FIRRMA with one small reporting exception, early versions of the bill and statements by members of Congress make clear that FIRRMA was drafted with China firmly in mind. Senator Marco Rubio and Representative Chris Smith demanded strengthening CFIUS as part of a package to “challeng[e] [the] Chinese government to abide by its international commitments” and “[r]espond to [d]igital [p]rotectionism.”¹¹⁸ In fact, an early version of the 2019 National Defense Authorization Act reinstated sanctions against ZTE.¹¹⁹

113. See generally THE STATE COUNCIL OF THE PEOPLE’S REPUBLIC OF CHINA, *The National Medium-and Long-Term Science and Technology Development Plan Outline (2006–2020): An Outline* (2005) [hereinafter “Medium and Long Term Plan”].

114. See Cheng Ting-Fang, *China’s semiconductor ‘Big Fund’ to focus on advanced chips*, NIKKEI ASIAN REV. (Mar. 16, 2018), <https://asia.nikkei.com/Business/Business-Trends/China-semiconductor-Big-Fund-to-focus-on-advanced-chips> [https://perma.cc/K859-ZZMF] (noting that the Big Fund had raised \$21.95 billion at then-present yuan-dollar exchange rates with plans to raise at least \$26.9 billion more, totaling at \$48.8 billion).

115. See *The Next Silicon Valley Is...?*, MASTERS OF SCALE (Dec. 9, 2017), <https://mastersofscale.com/linda-rottenberg-the-next-silicon-valley-is/> [https://perma.cc/3KYN-4CFE] (Reid Hoffman interviewing Linda Rottenberg, CEO of Endeavor) (“Beyond Silicon Valley itself, I believe that the next Silicon Valley is undoubtedly China.”); Michael Moritz, *Silicon Valley Would Be Wise to Follow China’s Lead*, FIN. TIMES (Jan. 17, 2018), <https://www.ft.com/content/42daca9e-facc-11e7-9bfc-052cbba03425> [https://perma.cc/ET3K-GRTD] (“As the Chinese technology companies push ever harder outside the mainland, the habits of western companies will start to seem antique.”).

116. See Jon Russell, *China is Beating the US on AI, Says Noted Investor Kai-Fu Lee*, TECHCRUNCH (Sept. 5, 2018), <https://techcrunch.com/2018/09/05/china-is-beating-the-us-on-ai-says-noted-investor-kaifu-lee/> [https://perma.cc/R9VJ-QR5P] (“‘Coming from way behind, now [China] is actually ahead of the U.S. in AI implementation,’ Lee said.”).

117. Shanghaiist, *Zuckerberg Praised by Chinese Netizens for Surprising Answer to Senator’s Question on China*, SHANGHAIIST.COM (Apr. 11, 2018), <https://medium.com/shanghaiist/zuckerberg-praised-by-chinese-netizens-for-surprising-answer-to-senators-question-on-china-c3be6160639f> [https://perma.cc/X362-3GMD].

118. Letter from Senator Marco Rubio and Representative Chris Smith to President Donald Trump (Oct. 31, 2017), <https://www.rubio.senate.gov/public/index.cfm/press-releases?ID=8A3E1AE0-55A3-4A35-853C-86BC7662761D> [https://perma.cc/YP4L-2UTR].

119. See John S. McCain National Defense Authorization Act for Fiscal Year 2019, H.R. REP. NO. 115-874 at 918.

Senator Rubio later tweeted that Congress “had to cave on #ZTE in order to get” FIRRMA to pass.¹²⁰ Congress’s official website for legislative information still lists “China” as a tag for both drafts of FIRRMA.¹²¹

Due to the technology focus of FIRRMA, the technology and venture capital industries became intensely interested in it. CFIUS was frequently covered by the technology industry press throughout the legislative process.¹²² Congress heard from important figures in technology, including Scott Kupor, managing partner at top venture capital firm Andreessen Horowitz and president of the National Venture Capital Association (NVCA), and Christopher Padilla, a Vice President of policy at IBM.¹²³ The Information Technology Industry Council, a technology industry trade group, lobbied Congress so aggressively that Senator John Cornyn rebuked it in a speech on the Senate floor.¹²⁴

On November 8, 2017, FIRRMA was introduced in the House as H.R. 4311 by Representative Robert Pittenger¹²⁵ and in the Senate as S. 2098 by Senator Cornyn.¹²⁶ H.R. 4311 had 50 cosponsors and S. 2098 received 12 cosponsors, both with bipartisan support. The final text was passed in the

120. Marco Rubio (@marcorubio), TWITTER (July 20, 2018, 7:48 AM), <https://twitter.com/marcorubio/status/1020274310437572609> [<https://perma.cc/B28E-3LUQ>].

121. *Congress.gov Congressional Search*, WAYBACK MACHINE (Dec. 18, 2018), <https://web.archive.org/web/20181218195418/https://www.congress.gov/search?q=%7B%22source%22%3A%22legislation%22%2C%22congress%22%3A%22115%22%2C%22ge-o-subject%22%3A%22China%22%27D&searchResultViewType=expanded> [<https://perma.cc/94UT-LZ82>].

122. *See, e.g.*, Erica Pandey & Dan Primack, *Scoop: Anti-China Investment Bill Gets Pro-Business Changes*, AXIOS (Mar. 15, 2018), <https://www.axios.com/cfius-china-cornyn-feinstein-foreign-investment-changes-a2df9ec1-00f6-4bf0-86d8-f78d35131d45.html> [<https://perma.cc/72JA-DYL8>] (describing pro-business changes to FIRRMA); Saleha Mohsin & Ben Brody, *Tech Firms May Beat Trump in Debate Over Chinese Joint Ventures*, BLOOMBERG (Apr. 17, 2018), <https://www.bloomberg.com/news/articles/2018-04-17/tech-firms-may-beat-trump-in-debate-over-chinese-joint-ventures> [<https://perma.cc/H22V-K8DK>] (describing tech lobbying on FIRRMA); Bobby Franklin, *A New Foreign Investment Bill Will Impact Venture Capital and the US Startup Ecosystem*, TECHCRUNCH (Aug. 17, 2018), <https://techcrunch.com/2018/08/17/a-new-foreign-investment-bill-will-impact-venture-capital-and-the-u-s-startup-ecosystem/> [<https://perma.cc/PQJ2-KR3P>] (describing FIRRMA to a tech industry audience).

123. *CFIUS Reform: Examining the Essential Elements*, Hearing Before the S. Committee on Banking, Housing, and Urban Affairs, 115th Cong. (2018).

124. *See* Saleha Mohsin & Ben Brody, *A Top Senate Republican Slams Tech Lobby’s CFIUS Bill Push*, BLOOMBERG (Apr. 19, 2018), <https://www.bloomberg.com/news/articles/2018-04-19/top-senate-republican-cornyn-slams-tech-lobby-s-cfius-bill-push> [<https://perma.cc/FSZ3-RTNF>].

125. H.R. 4311, 115th Cong. (2017).

126. S. 2098, 115th Cong. (2017).

John. S. McCain National Defense Authorization Act for Fiscal Year 2019 under Title XVII Subtitle A.¹²⁷

B. KEY FIRRMA PROVISION

FIRRMA changes CFIUS in three primary ways. First, FIRRMA expands CFIUS's mandate by transforming it from an entity with a clear mission to one with a more open-ended one. While before CFIUS was intended to prevent the foreign control of assets sensitive for national security, under FIRRMA it has a vaguer mandate to maintain technological supremacy. Second, FIRRMA expands CFIUS's scope by vastly increasing the range of covered transactions beyond mergers, acquisitions, and takeovers. The most significant change is coverage of minority investments, but there are several other ways previously exempt transactions may become covered. Finally, FIRRMA expands CFIUS's authority by turning it into a quasi-agency. For the first time, CFIUS will have its own staff, dedicated funding, and new powers to enforce its decisions.

1. *First Expansion: Mandate*

The first key expansion is one of mandate. Prior to FIRRMA, CFIUS was primarily an agency whose purpose was to prevent the acquisition of sensitive companies and critical technologies by foreign actors. While this purpose remains, CFIUS is now also charged with protecting America's important technology capabilities. Indeed, the sense of Congress makes clear that the primary interest in expanding the universe of covered transactions was primarily one of protecting general technological supremacy.¹²⁸ Thus, rather than "threats," CFIUS is appropriately now in the business of assessing "risks."¹²⁹

CFIUS's mandate explicitly includes technology in a more expansive sense than before. For example, CFIUS may now consider whether a potential transaction "would affect United States leadership" or whether the acquirer has a "pattern" of acquiring similar sensitive assets and the effects of the acquisition on "the availability of human resources," directly echoing the concerns expressed in the Broadcom-Qualcomm merger.¹³⁰ The sense of Congress is that CFIUS may even consider whether a foreign entity's country has a "strategic goal" or interest in a particular technology.¹³¹ Codifying the concerns of some recent cases, CFIUS is to consider whether a transaction would expose "sensitive data" of U.S. citizens that a foreign entity could

127. Foreign Investment Risk Review and Modernization Act of 2018 (FIRRMA), Pub. L. No. 115-232, Title XVII Sub. A. Though FIRRMA was ultimately passed as part of the 2019 NDAA, it originally passed as H.R. 5841 by a resounding, bipartisan 400–2 vote.

128. FIRRMA § 1702(c) (detailing Congress's considerations on covered transactions).

129. *Id.* § 1718(4)(A)(iii) (amending 50 U.S.C. § 4565(I)(2)(A)).

130. *Id.* § 1702(c)(1)–(4).

131. *Id.* § 1702(c)(1).

“exploit.”¹³² And though the definition of critical technologies is mostly external, CFIUS is no bystander: it can participate in the interagency process and recommend classifying a technology as critical.¹³³

Though no country or company in particular is targeted in FIRRMA, it does empower CFIUS to do so. CFIUS may now also consider a company’s “history of complying with United States laws,” a subtle reference to companies like ZTE that escaped sanction, as well as cybersecurity more generally.¹³⁴ Indeed, CFIUS must also prescribe regulations to consider a foreign entity’s relationship with a foreign government.¹³⁵ Furthermore, CFIUS now covers transactions where the foreign governments have a “substantial interest” in the foreign acquirer directly or indirectly, even if the entity is not an SOE,¹³⁶ or if the transaction would result in a foreign government acquiring a substantial interest in a domestic company, even indirectly.¹³⁷ Furthermore, CFIUS is to include homeland security in its national security mandate,¹³⁸ a longtime concern of Representative Peter King that went mostly unaddressed by FINSAs.¹³⁹ These measures were actually watered-down from previous versions of FIRRMA, which would have permitted CFIUS to whitelist¹⁴⁰ or blacklist¹⁴¹ individual countries.

2. *Second Expansion: Scope*

The next key expansion of CFIUS is one of scope. Previously, CFIUS only covered mergers, acquisitions, and takeovers, but now is intended to cover a vast new expanse of investment activity. Most significantly, covered transactions now include “any other investment” in businesses that operate

132. *Id.* § 1702(c)(5). Interestingly, the section references not just personally identifiable information but also genetic information. Unlike the other types of sensitive information, like financial data, there has not yet been a notable public CFIUS case involving genetic information.

133. FIRRMA § 1703(6) (amending 50 U.S.C. § 4565(a)(6)(B)(i)).

134. *Id.* § 1702(c)(3), (6). Note that the cybersecurity considerations explicitly include election cybersecurity.

135. *Id.* § 1703 (amending 50 U.S.C. § 4565(a)(4)(E)).

136. *Id.* § 1706 (amending 50 U.S.C. § 4565(b)(1)(C)(v)(IV)(bb)(AA)).

137. *Id.* § 1703(7) (amending 50 U.S.C. § 4565(a)(7)).

138. FIRRMA § 1703 (amending 50 U.S.C. § 4565(a)(1)).

139. *See The Need for CFIUS to Address Security Concerns: Full Hearing Before H. Comm. of Homeland Security*, 109th Cong. (May 24, 2006), <https://www.gpo.gov/fdsys/pkg/CHRG-109hhrg37216/html/CHRG-109hhrg37216.htm> [<https://perma.cc/63G2-QHNU>].

140. *See* S. 2098 § 3(a)(5)(C)(iii) (applying CFIUS unless the foreign entity was from an “identified country,” such as a NATO signatory).

141. *See* H.R. 4311 § 3(a)(4) (empowering CFIUS to consider whether the foreign entity was from a “country of special concern” and applying special conditions on such transactions).

critical infrastructure, produce critical technologies, or hold sensitive data.¹⁴² In other words, in addition to mergers, acquisitions, and takeovers, minority investments without a change of control now fall within CFIUS's purview. CFIUS shall specify which "critical technologies" qualify in future regulations.¹⁴³ The expansion of covered transactions to cover certain minority investments appears to have been spurred by an unpublished Pentagon report titled "How Chinese Investments in Emerging Technology Enable a Strategic Competitor to Access the Crown Jewels of U.S. Innovation," which claimed that the Chinese government was specifically using minority stakes to avoid CFIUS oversight.¹⁴⁴

The governing principles of minority investments are control and access to information. A minority investment is a covered transaction if it grants a foreign person access to "material nonpublic technical information" regarding a critical technology.¹⁴⁵ Specifically, "knowledge, know-how, or understanding, not available in the public domain" related to critical infrastructure or nonpublic information related to the production or operation of critical technologies, "including processes, techniques, or methods."¹⁴⁶ Confidential financial performance data is exempt.¹⁴⁷ Furthermore, an investment that would grant a foreigner representation on a "governing body" or influence over "substantive decisionmaking" is a covered transaction.¹⁴⁸

However, this language collides with the reality of venture capital in two important ways. First, many venture funds have foreign investors, even if they are entirely domestic and run by American persons. However, fund-investor relationships are defined by limited partner agreements, which "by design" give investors "very limited rights in the ongoing fund entity."¹⁴⁹ As such,

142. FIRRMA § 1703 (amending 50 U.S.C. § 4565(a)(4)(B)(iii)). The major change is that by expanding from mergers, acquisitions, and takeovers, CFIUS now covers mere minority investments. Note that if the nature of a transaction changes so that an investment would result in foreign ownership of a business that would otherwise not qualify as a covered transaction, the change is itself a covered transaction. *Id.* § 1703 (amending 50 U.S.C. § 4565(a)(4)(B)(iv)).

143. *Id.* § 1703 (amending 50 U.S.C. § 4565(a)(4)(D)(ii)(I)).

144. Paul Mozur & Jane Perlez, *China Tech Investment Flying Under the Radar, Pentagon Warns*, N.Y. TIMES (Apr. 7, 2017), <https://www.nytimes.com/2017/04/07/business/china-defense-start-ups-pentagon-technology.html> [<https://perma.cc/CGX2-VZ98>].

145. FIRRMA § 1703 (amending 50 U.S.C. § 4565(a)(4)(D)(i)(I)).

146. *Id.* § 1703 (amending 50 U.S.C. § 4565(a)(4)(D)(ii)(I)).

147. *Id.* § 1703 (amending 50 U.S.C. § 4565(a)(4)(D)(ii)(II)).

148. *Id.* § 1703 (amending 50 U.S.C. § 4565(a)(4)(D)(i)(II)–(III)).

149. *CFIUS Reform: Examining Essential Elements: Hearing Before the S. Committee on Banking, Housing, and Urban Affairs*, Jan. 18, 2018 (written testimony of Scott Kupor) [hereinafter "Kupor testimony"]. Limited partner agreements allow for minimal to no influence over investment decisions and provide for periodic reports on fund performance but little more, meaning that foreign limited partners have no real avenue to obtain confidential technical information or influence the decisions of a foreign company.

NVCA suggested clarifications of FIRREA's original language for funds to "reflect true passivity," as most limited partner agreements provide no access to nonpublic technical information.¹⁵⁰ Second, corporate venture capital (CVC) is increasingly international and has risen to "its highest levels in history,"¹⁵¹ with around a third of all venture rounds featuring a CVC.¹⁵² CVCs often provide strategic assistance and, most critically, provide financing for later rounds that increasingly require a scale of capital only found on balance sheets.¹⁵³ Consequently, the original language would penalize important strategic relationships that rarely expose technical information.

These concerns are directly addressed by the special clarification for investment funds.¹⁵⁴ So long as the investment fund is solely managed by a domestic general partner and its advisory committees (which may have foreign members) cannot control or influence any investments or access material nonpublic technical information, investment by domestic funds are not deemed covered transactions.¹⁵⁵ Furthermore, investors that have no means to influence critical technologies other than through voting by shares are exempt, thus saving many strategic investors from CFIUS coverage.¹⁵⁶

In addition to minority investments, CFIUS now covers other types of transactions. Real estate transactions, either by sale or lease, are covered transactions if they meet certain national security requirements, including impairing national security or creating opportunities for surveillance.¹⁵⁷ Furthermore, mere proximity to certain government properties like military installations is sufficient to qualify for CFIUS coverage¹⁵⁸ so long as the land in question is in "close proximity" to the relevant government interest.¹⁵⁹ This section is a direct codification of the desired outcome in *Ralls*.¹⁶⁰ CFIUS may

150. Letter from Bobby Franklin, CEO of NVCA, to Congresspeople Jeb Hensarling, Andy Barr, Maxine Waters, and Gwen Moore, 3 (Apr. 11, 2018), <https://nvca.org/wp-content/uploads/2018/04/FIRREA-statement-for-record-House-Financial-Services-hearing.pdf> [<https://perma.cc/FS63-YQ8L>] [hereinafter "Franklin letter"].

151. Louis Lehot & Mark F. Radcliffe, *Corporate venturing hitting record highs, intensifying global innovation*, DLA PIPER (Mar. 2018), <https://www.dlapiper.com/en/us/insights/publications/2018/03/corporate-venturing-hitting-record-highs-intensifying-global-innovation/>.

152. See Teddy Himler, *Corporate VC Is On The Rise: Here's What To Know*, FORBES (Feb. 14, 2017), <https://www.forbes.com/sites/valleyvoices/2017/02/14/corporate-vc-on-the-rise/#17edfa21bbf2> [<https://perma.cc/Q3H9-26V2>] (describing the benefits of a CVC approach).

153. See Franklin letter, *supra* note 150, at 5 (detailing the importance of foreign strategic corporate investors specifically).

154. FIRREA § 1703 (amending 50 U.S.C. § 4565(a)(4)(D)(iv)).

155. *Id.* § 1703 (amending 50 U.S.C. § 4565(a)(4)(D)(iv)(I)).

156. *Id.* § 1703 (amending 50 U.S.C. § 4565(a)(4)(D)(i)(III)).

157. *Id.* § 1703 (amending 50 U.S.C. § 4565(a)(4)(B)(ii)).

158. *Id.* § 1703 (amending 50 U.S.C. § 4565(a)(4)(B)(ii)(II)(bb)(AA)).

159. FIRREA § 1703 (amending 50 U.S.C. § 4565(a)(4)(C)(ii)).

160. See *Ralls Corp. v. Comm. on Foreign Inv. in the U.S.*, 758 F.3d 296 (D.C. Cir. 2014).

also request that the written filing include partnerships or side agreements.¹⁶¹ CFIUS's purview is now also expanded to cover bankruptcy proceedings,¹⁶² which seems to be intended to fill a gap identified when Avatar Integrated Systems attempted to purchase sensitive assets in the bankruptcy of ATop Tech, a semiconductor manufacturer, with no formal review by CFIUS.¹⁶³

Just as important is what is not included. The above provisions all relate to inbound investment, but early versions of FIRRMA were aggressive in controlling not only the investment activity into U.S. corporations, but their outbound business activities as well. The House bill originally deemed as a covered transaction the contribution of a foreign entity to an American critical technology or critical intellectual property by “any type of arrangement,” including JVs.¹⁶⁴ The only exception was an “ordinary customer relationship.”¹⁶⁵ As “any type of arrangement” did not specify foreign or domestic, this would have granted CFIUS the ability to control American outbound investment, creating significant concern that CFIUS would turn into what Padilla called a “supra-export control agency” that would duplicate existing regulations and “unilaterally limi[t] the ability of American firms to do business around the world.”¹⁶⁶ As such, the final FIRRMA text makes no mention of anything related to outbound investment.

3. *Third Expansion: Authority*

The last key expansion is one of authority, as CFIUS grows from a small coordination agency in FINSA to a well-funded investment control body in FIRRMA. A GAO report noted that from 2011 to 2016, the number of CFIUS cases increased 55% while its staff only increased 11%, sparking concerns that it was unequipped to deal with the increasing volume and complexity of an anticipated increased workload.¹⁶⁷ This report was cited in the “Sense of Congress” and motivated an increase in resources.¹⁶⁸ In total, Congress granted CFIUS funding of \$20 million per year for five years¹⁶⁹ and granted it the right

161. FIRRMA § 1705 (amending 50 U.S.C. § 4565(b)(1)(C)(iv)).

162. *Id.* § 1703 (amending 50 U.S.C. § 4565(a)(4)(F)).

163. Cory Bennett & Bryan Bender, *How China acquires 'the crown jewels' of U.S. technology*, POLITICO (May 22, 2018, 5:10 AM), <https://www.politico.com/story/2018/05/22/china-us-tech-companies-cfius-572413> [<https://perma.cc/GQH9-3CXN>].

164. H.R. 4311 § 3 (proposing amending 50 U.S.C. § 4565(a)(5)(B)(v)).

165. *Id.*

166. *CFIUS Reform: Examining Essential Elements: Hearing Before the S. Committee on Banking, Housing, and Urban Affairs*, 115th Cong. 2, 4 (Jan. 18, 2018) (statement of Christopher Padilla).

167. See U.S. Gen. Accounting Office, GAO 18-249, COMMITTEE ON FOREIGN INVESTMENT IN THE UNITED STATES: TREASURY SHOULD COORDINATE ASSESSMENT OF RESOURCES NEEDED TO ADDRESS INCREASED WORKLOAD 14-18 (2018) [hereinafter GAO FIRRMA report].

168. FIRRMA § 1702(a)(4)–(5).

169. *Id.* § 1723 (amending 50 U.S.C. § 4565(p)(2)).

to levee fees to review transactions equal to the lesser of \$300,000 or 1% of the transaction value, with the right to request more funds from Congress.¹⁷⁰ To complement its enlarged role, CFIUS also has more extensive reporting requirements.¹⁷¹

The committee itself will now be composed of dedicated staff members, as every member agency will be required to designate a Senate-confirmed Assistant Secretary to CFIUS, including the newly-created Treasury Assistant Secretary of Investment Security.¹⁷² The lead agency structure is preserved, and lead agencies are now also encumbered with the responsibility of creating and adhering to all compliance plans.¹⁷³ In addition, the CFIUS chair, as well as all member agencies, may request additional staff and are required to submit a staffing plan.¹⁷⁴ Critically, these “coordination and collaboration” functions may be centralized in CFIUS itself.¹⁷⁵ CFIUS is also broadly empowered to share information with other agencies and allied countries.¹⁷⁶

With these new resources come new powers. FIRRMA updates the review process by bifurcating it into a so-called light filing and an updated Exon-Florio investigation. The expedited light filing will consist of a declaration of no more than five pages,¹⁷⁷ which CFIUS must define by regulation.¹⁷⁸ For those transactions that require a more thorough review, the Exon-Florio process has been extended and deepened. CFIUS must act within thirty days of receiving a voluntary declaration.¹⁷⁹ Furthermore, CFIUS shall produce regulations expanding the universe of mandatory declarations beyond the Byrd amendment, which only mandated a declaration when the purchaser was a government or SOE.¹⁸⁰ However, even the Byrd amendment itself has expanded to include mandatory declarations for entities where a foreign

170. *Id.* § 1723 (amending 50 U.S.C. § 4565(p)(1), (3)).

171. *Id.* § 1719. The reporting requirements include a specific report on Chinese investment in the United States and a report on China’s Made in China 2025 initiative. *Id.* § 1719(b). The Made in China 2025 initiative is a government program to increase Chinese manufacturing in certain strategic industries. *See generally* “Made in China 2025” Plan Unveiled to Boost Manufacturing, GB TIMES (May 20, 2015), <https://gbtimes.com/made-china-2025-plan-unveiled-boost-manufacturing> [<https://perma.cc/LT7E-8A9U>] (describing the China Made in 2025 initiative).

172. FIRRMA § 1717(a) (amending 50 U.S.C. § 4565(k)(4)(A)(i)) (giving the agency special hiring authority).

173. *Id.* § 1718(7)(C) (amending 50 U.S.C. § 4565(l)).

174. *Id.* § 1721(a)–(b).

175. *Id.* § 1724 (amending 50 U.S.C. § 4565(q)).

176. *Id.* § 1713 (amending 50 U.S.C. § 4565(c)(2)–(3)).

177. The pilot program light filing regulations are quite extensive, with eighteen separate requirements, many of which have several subparts. 31 C.F.R. § 801.403.

178. FIRRMA § 1706 (amending 50 U.S.C. § 4565(b)(1)(C)(v)(II)).

179. *Id.* § 1706 (amending 50 U.S.C. § 4565(b)(1)(C)(v)(III)(bb)).

180. *Id.* § 1706 (amending 50 U.S.C. § 4565(b)(1)(C)(v)(IV)(aa)).

government would merely acquire a “substantial interest.”¹⁸¹ Furthermore, CFIUS is granted the authority to undertake unilateral reviews¹⁸² and must police transactions that are non-identified and non-declared even though they should have been.¹⁸³ Once an investigation begins, CFIUS now has forty-five days, not thirty, to complete its investigation, and may request a fifteen-day extension for “extraordinary circumstances.”¹⁸⁴ Heeding the *Ralls* court, CFIUS investigations are subject to judicial review in the D.C. Circuit with *ex parte* and *in camera* provisions for privileged information.¹⁸⁵

CFIUS has enlarged, new powers both during and after its investigations. During an investigation, CFIUS has the authority to suspend a transaction.¹⁸⁶ It has the power to impose mitigation agreements even if a transaction is abandoned as a condition of such agreement¹⁸⁷ and is empowered to enforce any agreement it requires as a condition of approving a transaction.¹⁸⁸ CFIUS is barred from entering a mitigation agreement unless it actually resolves the national security concern in a way that is “effective,” allowing for compliance in a “verifiable way,” and “enabl[ing] effective monitoring.”¹⁸⁹ In any case, CFIUS will periodically review the “appropriateness” of its agreements and may modify or terminate them if they are no longer sufficient.¹⁹⁰ In the event of noncompliance, CFIUS may initiate a unilateral review of the covered transaction, resulting in a new agreement, or even seek injunctive relief.¹⁹¹

Thus, FIRRMA upgrades CFIUS to a full-fledged agency. Beyond that, it is no longer only an international investment outfit but a technology committee with the scope to oversee a large fraction of all FDI in the United States. Though many questions remain pending future regulation, it is abundantly clear that its presence in commerce will greatly increase. However, CFIUS may not be properly equipped to quite fill its new shoes.

181. *Id.* § 1706 (amending 50 U.S.C. § 4565(b)(1)(C)(v)(IV)(bb)). Under certain circumstances this can be waived. *Id.* (amending 50 U.S.C. 4565(b)(1)(C)(v)(IV)(bb)(CC)).

182. *Id.* § 1708(2)(B) (amending 50 U.S.C. § 4565(b)(1)(D)(i)).

183. FIRRMA § 1710 (amending 50 U.S.C. § 4565(b)(1)).

184. *Id.* § 1709(2) (amending 50 U.S.C. § 4565(b)(2)(C)(i)–(ii)).

185. *Id.* § 1715(2) (amending 50 U.S.C. § 4565(e)(2)–(3)).

186. *Id.* § 1718(3) (amending 50 U.S.C. § 4565(I)(1)).

187. *Id.* § 1718(4)(A)(ii) (amending 50 U.S.C. § 4565(I)(4)(A)(iv)).

188. FIRRMA § 1718(4)(A)(iv) (amending § 50 U.S.C. 4565(I)(3)(A)(ii)–(iii)).

189. *Id.* § 1718(4)(C) (amending 50 U.S.C. § 4565(I)(3)(C)(i)–(iii)).

190. *Id.* § 1718(4)(B) (amending 50 U.S.C. § 4565(I)(3)(B)).

191. *Id.* § 1718(7) (amending 50 U.S.C. § 4565(I)(6)(D)).

III. THE VERY MODEL OF AN UNPREPARED GENERALIST

A. MISMATCH 1: SCOPE CANNOT FULFILL MANDATE

There is broad recognition that China has a coordinated strategy to fill in gaps in its technology portfolio and leapfrog the competition,¹⁹² which CFIUS is intended to address as part of a constellation of programs. When conducting business abroad, multinational corporations typically consider a country's intellectual property rights: if they are weak, the company may prefer a wholly-owned foreign entity rather than a joint venture, where the risk of theft is greater.¹⁹³ Attempts by countries to require companies to enter into disadvantageous arrangements, or to otherwise share their technologies with foreign entities like SOEs, is called “forced technology transfer.” U.S. Ambassador to the WTO Dennis Shea recently called such practices the “unwritten rule for companies trying to access China's burgeoning marketplace” at the WTO.¹⁹⁴ The challenge is that much of China's forced technology transfer does not occur on American soil, meaning that CFIUS's scope does not match its mandate.¹⁹⁵

Forced technology transfer starts with total domestic control of ownership structure. In essence, China imposes inbound investment controls far more stringently than CFIUS. One is the use of Chinese JVs. So-called equity JVs are a popular means of doing business in China due to their comparatively lax requirements. Given that their stated purpose is to “raise the scientific and technological standards of China,” they may be capitalized by many means, including technology and international property rights.¹⁹⁶ For many industries, companies must be at least 51% owned by a Chinese national, thus ceding control.¹⁹⁷ By forcing companies to give up control, China induces technology transfer by requiring the training of locals and by introducing significant risk of theft.

There are three broad techniques China uses to force technology transfer outside of ownership structure: “lose the market,” “no choice,” and “violate

192. See Bennett & Bender, *supra* note 163.

193. See Mikhaelle Schiappacasse, *Intellectual Property Rights in China: Technology Transfers and Economic Development*, 2 BUFF. INTELL. PROP. L.J. 164, 172–73 (2004).

194. Tom Miles, *U.S. and China Clash Over 'Technology Transfer' at WTO*, REUTERS (May 28, 2018), <https://www.reuters.com/article/us-usa-trade-china/u-s-and-china-clash-over-technology-transfer-at-wto-idUSKCN1IT11G> [<https://perma.cc/LP9G-YYH5>].

195. Technology transfer is not in itself an offensive term. Many universities, for instance, license their intellectual property for commercial ventures through technology transfer offices.

196. See Roy J. Girasa, *Legal Aspects of Doing Business in China*, 20 WESTCHESTER B.J. 305, 309, 312–13 (1993).

197. See Francis Nocolai Acosta, *China Relaxes JV Ownership Rules*, FUND SELECTOR ASIA (Apr. 30, 2018), <https://fundselectorasia.com/china-relaxes-jv-ownership-rules/> [<https://perma.cc/KL74-DC7L>] (describing the 51% rule but also noting recent efforts to relax it).

the law.”¹⁹⁸ China uses its economic largesse to require technology transfer for market access, a “lose the market” technique that may even require teaching locals to transfer know-how.¹⁹⁹ Unfair intellectual property rulings may also force a company to transfer a technology by subjecting it to a “no choice” situation.²⁰⁰ Additionally, the Chinese government may exploit ambiguously written laws, such as export control laws, antitrust laws, and intellectual property licensing laws.²⁰¹ These statutes give Chinese authorities flexibility to define relevant terms, such as “essential” technologies, in ways that suit them. As a result, multinational corporations that innocently entered the Chinese market find themselves faced with the difficult choice of whether to fall afoul of a “violate the law” policy.²⁰² Outside of these broad categories are occasionally creative transfer techniques, such as expensively acquiring foreign talent.²⁰³

U.S. Trade Representative Robert Lighthizer’s recent 301 report outlined other examples of abuse.²⁰⁴ For instance, China has a myriad of administrative license regimes that often informally require technology transfer, such as the transfer of intellectual property rights to a Chinese partner.²⁰⁵ JV approval from the central Ministry of Commerce may require locating R&D facilities in China²⁰⁶ or placing cloud servers domestically, requiring companies to train locals.²⁰⁷ Administrative approvals, such as permission to build a factory, may require the disclosure of trade secrets to local officials.²⁰⁸ Furthermore, China attempts to acquire foreign technology through cyber espionage, and even has a dedicated military unit, 61398, for this purpose.²⁰⁹ The purpose of such techniques is to go through a process of “IDAR”: introducing new technology,

198. See Dan Prod’homme et al., “Forced Technology Transfer” Policies: Workings in China and Strategic Implications, 134 TECHNOLOGICAL FORECASTING & SOC. CHANGE 150, 157 (2018) (summarizing the “most significant” Chinese policies on “forced technology transfer”). The effectiveness of these techniques is dependent on the context in which they are used and the nature of the underlying technologies themselves. *Id.* at 162–64.

199. See *id.* at 157–58.

200. See *id.* at 158 (describing how intellectual property rulings are the primary vehicle for “no choice” policies).

201. See *id.* (describing the various legal regimes involved to obtain this end).

202. *Id.*

203. See Dan Wang, *The New Challenger In Memory Chips*, Gavekal Dragonomics at 5 (Mar. 7, 2018).

204. See generally Office of the U.S. Trade Rep., FINDINGS OF THE INVESTIGATION INTO CHINA’S ACTS, POLICIES, AND PRACTICES RELATED TO TECHNOLOGY TRANSFER, INTELLECTUAL PROPERTY, AND INNOVATION UNDER SECTION 301 OF THE TRADE ACT OF 1974 (2018) [hereinafter “301 report”].

205. *Id.* at 38.

206. *Id.* at 39.

207. *Id.* at 41.

208. *Id.* at 42.

209. 301 report, *supra* note 204, at 155.

digesting it, absorbing it in Chinese business, and “reinnovating” improvements.²¹⁰ This is especially relevant with JVs, where domestic technology transfer may be used to capitalize JVs but with several restrictions of the intellectual property rights of the JV that effectively result in a transfer of the technology to a local partner.²¹¹

The challenge is that outbound licensing and outbound investment are the main methods of forced technology transfer but remain outside of CFIUS’s scope. CFIUS does not, and indeed cannot, affect most such practices given their domestic nature. Forced technology transfer plays hand-in-hand with the “going out” strategy CFIUS can control and is intended to prevent.²¹² The original FIRRMA bill restricted domestic JVs,²¹³ which was rightfully removed for being too restrictive. This directly conflicts with its expanded mandate and stated purpose of protecting American technological supremacy²¹⁴ and enters the realm of export controls.

Licenses pose a particularly challenging loophole for CFIUS.²¹⁵ In China, technology licenses or transfers are valid consideration for the creation of a JV.²¹⁶ The Export Administration Act has a similar concept, where a controlled export need not physically leave the United States if a license produces “foreign availability,”²¹⁷ making the license itself an export.²¹⁸ Releasing any technical data of a controlled technology is a “deemed export” for export control purposes.²¹⁹ CFIUS’s control over outbound investment was removed from FIRRMA. This would leave the outright sale of technologies solely within the domain of export controls and totally uncovered by CFIUS, which only covers investments or corporate acquisitions, and would have to be amended by statute.

There may yet be a merger of export control and investment oversight. CFIUS is required to consider whether technologies factor into strategic

210. *Id.* at 12.

211. *Id.* at 49–50. Examples of the restrictions include providing the JV with the rights to technology improvements and indemnification of the local partner.

212. *Id.* at 66. The “going-out” strategy is the Chinese industrial policy of investing abroad in strategically important areas.

213. H.R. 4311 § 3 (proposing amending 50 U.S.C. § 4565(a)(5)(B)(v)).

214. FIRRMA § 1702(c)(1).

215. License reform did, however, take place under the Export Control Reform Act, but that is mostly in the domain of export control. Export Control Reform Act, Pub. L. No. 114-232 Title XVII Sub. B.

216. *See Girasa, supra* note 196, at 312–13 (“If the foreign party contributes industrial property rights or technology, it must furnish proof of its registration abroad as well as the basis for the value affixed to it.”).

217. 15 C.F.R. § 768.2; *see also* EDWARD G. HINKELMAN, *DICTIONARY OF INTERNATIONAL TRADE* 78 (6th ed. 2005) (defining foreign availability).

218. 22 C.F.R. § 120.17(b).

219. 22 C.F.R. § 120.17(a)(2).

national planning, which will necessarily involve coordination with export control authorities. Some of CFIUS's new powers, such as consideration of an entity's previous unlawful activity,²²⁰ call to mind parallel export control penalties, such as "debarment" from any participation in the export of any goods in the face of an egregious violation.²²¹ Intriguingly, there are three agencies that issue export licenses: State, Treasury, and Commerce,²²² all of which are represented on CFIUS. The United States has been weighing creating a single licensing agency for export control for about a decade, with little progress,²²³ and export controls already have a role in preventing technology transfer.²²⁴ Perhaps, as the business community feared, CFIUS will in fact become a supra-export control agency²²⁵ in the next round of export control reform. After all, export and investment control are but bricks in the same wall.

B. MISMATCH 2: AUTHORITY DOES NOT MEET MANDATE

CFIUS is not properly equipped to serve its new role, as its staffing structure has not adjusted to conform with its new technology focus, resulting in authority that does not match its new mandate. With the exception of the creation of an Assistant Secretary of Investment Security, the board of CFIUS has not expanded.²²⁶ Consequently, the sole scientific member of CFIUS is the Director of the Office of Science and Technology Policy as required in FINSAs.²²⁷ That excludes the agencies, such as USDA, FDA, USPTO, NIST, and NIH, that are relevant to many of China's "frontier technologies" of interest, including biotechnology and artificial intelligence.²²⁸ While CFIUS may consult with them, once consulted, they are not entitled to a vote while CFIUS members with little to no relevant domain expertise retain theirs.²²⁹ And in any case, even though CFIUS is enabled to centralize its coordinating powers, it is not required anywhere in FIRRMA to hire or even consult with technical staff.

220. FIRRMA § 1702(c)(3).

221. 22 C.F.R. § 127.7 (defining debarment in the arms control context).

222. State issues licenses through Directorate of Defense Trade Controls, Treasury through the Office of Foreign Asset Control, and Commerce through the Bureau of Industry and Security.

223. See Ian F. Fergusson & Paul K. Kerr, Cong. Research Serv., *R41916, The U.S. Export Control System and the President's Reform Initiative*, 10–13 (2013).

224. See generally Matthew Crane, *U.S. Export Controls on Technology Transfers*, 2001 DUKE L. & TECH. REV. 30 (2001).

225. See Padilla testimony, *supra* note 166, at 2.

226. FIRRMA § 1717(a) (amending 50 U.S.C. § 4565(k)(4)(A)(i)(II)).

227. FINSAs § 3(k)(2) (amending 50 U.S.C. App. 2170).

228. See Medium and Long Term Plan, *supra* note 113.

229. FIRRMA § 1724 (amending 50 U.S.C. § 4565(q)(1)). Note, however, that CFIUS is empowered to establish a non-CFIUS member as the lead agency, as it has done with USDA three times. See GAO FIRRMA report, *supra* note 167, at 18 tbl. 2.

This is concerning, as assessing technology and its impact is now part of CFIUS's mandate. It is supposed to determine whether an acquisition would result in foreign access to material nonpublic technical information.²³⁰ It is required to evaluate whether that information is already in the public domain, and if not, whether it is “necessary to design, fabricate, develop, test, produce, or manufacture” a critical technology.²³¹ As another example, CFIUS may now consider not only whether a transaction contributes to “cumulative control of, or pattern of recent transactions involving, any one type” but also whether there is a risk to such a pattern in and of itself—as well as how to balance that risk.²³² It is anyway unclear that even with more funding CFIUS will have the proper staffing to vet deals in a timely manner, likely resulting in oversights and time delays that would normally be untenable in a fast-paced environment.

These tasks require not just technical information, which can be provided, and not just context in the stream of commerce, which CFIUS already does on its own, but a broader technological context. For example, the controversial 2013 case of Wanxiang acquiring A123 Systems, a battery maker, in bankruptcy court requires not just an understanding of battery systems but also the general technological importance and current limitations of lithium-ion batteries, the national security implications of electric vehicles, and an understanding of the legitimate reasons that might be driving the acquisition. In this case, as Wanxiang also acquired Fisker Automotive in bankruptcy, its motivation was likely to create a full-stack electric automaker.²³³

CFIUS's new need for technological expertise heightens the need to incentivize cross-agency coordination. Establishing CFIUS as its own agency instead of a pure coordinating body risks the creation of a “soft hierarchy,” which often results in agency conflict.²³⁴ There is an inherent tension between centralization and coordination, as centralization can be a helpful tool for horizontal information sharing within an agency at the cost of disincentivizing vertical communication between agencies, hence deterring coordination.²³⁵ FIRRMA's broad mandate means that CFIUS reviews must cover more complex subject matter that touches a broader set of concerns, necessitating

230. FIRRMA § 1703 (amending 50 U.S.C. § 4565(a)(4)(D)(ii)).

231. *Id.* § 1703 (amending 50 U.S.C. § 4565(a)(4)(D)(ii)(I)(aabb)). This function is similar to USPTO, which regularly assesses the novelty and sufficiency of a technology's enablement.

232. *Id.* § 1702(c)(2).

233. See Susan Berfield, *Batteries With a Political Charge*, BLOOMBERG BUSINESSWEEK (Oct. 29, 2015), <https://www.bloomberg.com/news/articles/2015-10-29/batteries-with-a-political-charge-a123-s-chinese-led-turnaround> [<https://perma.cc/44TW-9SGW>] (describing A123's recovery under Wanxiang management).

234. See Daniel A. Farber & Anne Joseph O'Connell, *Agencies as Adversaries*, 105 CALIF. L. REV. 1375, 1394–95 (2017) (defining “soft hierarchy” relationships as those involving “adversarial actors in a mixed hierarchical and advisory relationship”).

235. See Ricardo Alonso et al., *When Does Coordination Require Centralization?*, 98 AM. ECON. REV. 145 (2008) (quoting research by Alfred D. Chandler).

more communication with more agencies, especially ones with essential technical knowledge. To do so, CFIUS should adopt a process by which it can regularly bring in non-CFIUS members on specific issues and give them a vote.

This mismatch extends to enforcement, as well. While FIRRMA's needs require technical staff and superior agency coordination, a wider set of challenges also requires a larger toolkit. CFIUS's raw enforcement powers are only mitigation agreements, which are enforced by vaguely defined injunctive relief²³⁶ and the raw realpolitik of visible, painful investigations that a sufficiently determined acquirer may anyway be able to overcome. This is in sharp contrast with the export control regime, which has dedicated administrative enforcement agencies. Commerce has the ability to impose crippling administrative sanctions²³⁷ and even deny export privileges,²³⁸ all with dedicated administrative judges.²³⁹ Technology is inherently complex, and a mandate to prevent its transfer must be met with a broad variety of strategies.

C. MISMATCH 3: A TECHNOLOGY MANDATE IS AMORPHOUS

In addition to CFIUS's inability to serve its new technology focus, its expansion as an agency muddies the mission itself, resulting in a mandate that is clearly new but protean at the same time. These ambiguities have always been present in CFIUS's mandate, but its expansion as a technology agency exacerbates this challenge.²⁴⁰ As civilian technologies exceed military capabilities, they enter military supply chains and become integral to military operations, such as a supercomputer built from PlayStation 3's.²⁴¹ As the "historical one-way street" of Chinese technology transfer becomes reciprocal, as it has in Canada,²⁴² legitimately co-developed technologies will become unavoidable. Control over critical technologies like semiconductors not only gives significant advantages in their use in military applications but also presents significant non-kinetic leverage.²⁴³ And many technologies that seem

236. FIRRMA § 1718(7)(C) (amending 50 U.S.C. § 4565(I)(4)(D)(iii)).

237. 15 C.F.R. § 764.3.

238. 15 C.F.R. § 766.25.

239. 15 C.F.R. § 766.2.

240. See, e.g., Amy Josselyn, *National Security at All Costs: Why the CFIUS Review Process May Have Overreached Its Purpose*, 21 GEORGE MASON L. REV. 1347 (2014) (arguing that CFIUS endangers international commerce in its pursuit of national security).

241. See Lisa Zyga, *US Air Force Connects 1,760 PlayStation 3's to Build Supercomputer*, PHYS.ORG (Dec. 2, 2010), <https://phys.org/news/2010-12-air-playstation-3s-supercomputer.html> [https://perma.cc/2TC8-DCMV].

242. Margaret McCuaig-Johnston, *From Field Surgery to Advanced Robotics: Sino-Canadian Relations in Science and Technology, 1938–2018*, 4 China Institute Occasional Paper Series No. 2 at 39 (2017).

243. *China Must Face its Weakness in Semiconductors Squarely, Says Head of State-Backed Fund*, S. CHINA MORNING POST (Aug. 24, 2018, 11:24 PM), <https://www.scmp.com/tech/article/2161178/china-must-face-its-weakness-semiconductors-squarely-says-head-state-backed>

innocuous may have dual uses, like social media, which can be used for sharing cat photos or for sophisticated election influence operations, which CFIUS is specifically charged with preventing. The scope of technology is broad and at times uncertain, so the mission's borders are amorphous.²⁴⁴

FIRRMA's Sense of Congress emphasizes the importance of international trade, explicitly rejecting the consideration of "national interest absent a national security nexus."²⁴⁵ The use of the term "national interest" is no accident—Chinese officials and scholars use it to justify the doctrine of "economic security,"²⁴⁶ in which the "continued stable development of China's economy and society" is a "core interest" alongside issues of sovereignty and security.²⁴⁷ Chinese power theory imagines a multidimensional "competition for comprehensive power," including both economic and technological considerations.²⁴⁸

This is in sharp contrast with the more traditional Washington consensus promoting free trade, though with notable national security exceptions enshrined in, for instance, GATT Article XXI²⁴⁹ and NAFTA,²⁵⁰ as well as American tariff laws.²⁵¹ Those texts, which supposedly limit protectionism to strict national security crises, are difficult to square with the United States' increasing adoption of a national interest policy in other contexts. Recent

[<https://perma.cc/GL9U-G3H2>] (explaining Chinese determination to develop a homegrown semiconductor industry).

244. Indeed, the recent proposed Commerce definition of "emerging technologies," which will influence which technologies CFIUS scrutinizes closely, is extremely broad. *See* 15 C.F.R. 744. Examples of such technology categories include "reinforcement learning," a fundamental artificial intelligence technique; "mobile electric power" in the context of manufacturing; and "genomic and genetic editing." *Id.* While these categories are broad and subject to change pending public comment, it is unclear what limiting principle would prevent CFIUS from expanding its purview to wide swathes of the entire technology industry.

245. FIRRMA § 1702(b)(9).

246. Daojiong Zha, *Chinese Considerations of "Economic Security"*, 5 J. OF CHINESE POL. SCI. 69, 82–83 (1999) (equating "economic security" with the Chinese search for "national greatness").

247. Michael D. Swaine, *China's Assertive Behavior Part One: On "Core Interests"*, 34 CHINA LEADERSHIP MONITOR 1, 4 (2011). This is strikingly similar to Dr. Gordon's exhortation to consider the balancing act of national security against other interests in his 2012 testimony on CFIUS. Gordon testimony, *supra* note 84 at 114–15. Recall that Exon-Florio's statutory history indicates that the review process is not intended to be an economic nationalist tool; this clause explicitly reaffirms that.

248. Yong Deng, *The Chinese Conception of National Interests in International Relations*, 154 CHINA Q. 308, 314–15 (1998). China has seven distinct institutional schools of thought regarding its national identity and the use of its power, though China's recent policies reflect the success of its realist, self-interested school. *See* David Shambaugh, *Coping with a Conflicted China*, 34 WASH. Q. 7, 9, 21–22 (2011).

249. *See* General Agreement on Tariffs and Trade art. xxi, Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194.

250. *See* N. Am. Free Trade Agreement art 1018(1) 32 ILM 289 (1993).

251. *See, e.g.*, Trade Expansion Act of 1962, Pub. L. No. 87-794 § 232.

Trump Administration actions have utilized national security exceptions, including steel tariffs against American allies,²⁵² that stretch credulity, especially in light of tweets by government officials that “Our Tariffs are in response to [Canada’s tariffs] of 270% on dairy!”²⁵³ Similarly, Treasury’s letter regarding the Broadcom-Qualcomm merger used language like “technological leadership” and “core R&D”²⁵⁴ that call to mind China’s language of core interests, as well as Xi Jinping’s new “core technologies” concept whereby the development of foundational technologies is in itself in the national interest.²⁵⁵ This is distinct from so-called “dual-use” technologies, which have both civilian and military use cases. Export control regimes have long regulated dual-use technologies through agreements like the Wassenaar Arrangement, but dual-use technologies are traditionally narrowly defined. The difficulty lies in the inherent tension between national security and domestic policy, especially in the United States, which has a civil-military “gap” in relations.²⁵⁶

Technology is complex and multifaceted, so a mandate based on general technology superiority instead of identifying specific dual-use technologies is inherently murkier. Consider, for instance, the acquisition of Genworth Financial by China Oceanwide, an investment company, which was eventually approved by CFIUS²⁵⁷ after refiling four different times since 2017, sparking initial skepticism that the merger would be approved.²⁵⁸ Genworth Financial is a largely profitable S&P 400 financial company primarily dealing with mortgages, making it a worthwhile target for any company. However, Genworth’s products involve significant personal data of American citizens, which would entail significant risk of exposure of such data. Indeed, Genworth

252. See Presidential Proclamation 9704 83 F.R. 11619 (Mar. 8, 2018).

253. Donald J. Trump (@realDonaldTrump), TWITTER (June 9, 2018, 7:04 PM), <https://twitter.com/realDonaldTrump/status/1005586562959093760> [<https://perma.cc/AW6V-6V23>].

254. Letter from Aimen N. Mir, *supra* note 103, at 2, 3.

255. Cao Densheng, *Breakthroughs in Core Technologies Called Imperative*, CHINA DAILY (July 14, 2018), <http://www.chinadaily.com.cn/a/201807/14/WS5b4933bda310796df4df66ae.html> [<https://perma.cc/H63Y-H6J2>].

256. See, e.g., Joseph J. Collins & Ole R. Holsti, *Civil-Military Relations: How Wide is the Gap?*, 24 INT’L SECURITY 199 (1999) (discussing the empirics of the civil-military “gap” in the United States).

257. See *Committee on Foreign Investment in the United States Completes Review of Proposed China Oceanwide and Genworth Financial Transaction*, GENWORTH INVESTOR RELATIONS (June 9, 2018), <http://investor.genworth.com/investors/news-releases/archive/archive/2018/Committee-on-Foreign-Investment-in-the-United-States-Completes-Review-of-Proposed-China-Oceanwide-and-Genworth-Financial-Transaction/default.aspx> [<https://perma.cc/2MKJ-WX2S>] (announcing the completion of review).

258. See Mike Maher, *Genworth Set To Fly On CFIUS Approval*, SEEKING ALPHA (June 11, 2018), <https://seekingalpha.com/article/4180777-genworth-set-fly-cfius-approval> [<https://perma.cc/ZS84-6ECQ>] (“Genworth and Oceanwide had withdrawn and reapplied to CFIUS four different times since the original application in January of 2017.”).

and China Oceanwide ultimately entered into a mitigation agreement with CFIUS involving a third-party service to protect American personal data, suggesting this was likely CFIUS's primary concern.²⁵⁹

That said, there are other national security considerations. For instance, control over the financial system is generally essential to national security tools, like enforcing sanctions through the Society for Worldwide Interbank Financial Telecommunications (“Swift”), the self-professed “utility” that produces interbank exchange codes.²⁶⁰ Furthermore, homeownership is considered the “engine of middle-class wealth”—and for most Americans, it is acquired through precisely the financial products provided by companies like Genworth.²⁶¹ What are the boundaries, and when does a general welfare concern stemming from a foreigner extend to national security? This is unclear, and FIRRMA gives CFIUS no guidance to make such a determination as to when an issue that affects Americans—perhaps even physically, like an issue of food safety—becomes a concern of national security. Paul Rosenzweig, a CFIUS official during the Bush Administration, mused that all the world is now touched by technology which “in some sense, means CFIUS really should be managing all global trade.”²⁶²

IV. WHY CAN'T WE JUST GIVE TRADE A CHANCE?

FIRRMA is arguably the largest expansion of CFIUS in its history. Unlike its predecessors, FIRRMA was born not out of outrage from a specific transaction that exposed a gap in an otherwise established process but a general malaise surrounding forced technology transfer. As such, it is qualitatively different. It turned the accidental agency into a significant center of power with its own staff and funding. CFIUS will now have the power to review a large fraction of total inbound investment in the United States. Most importantly, it changed CFIUS from a mere investment advisory committee into a technology agency charged with protecting America's most treasured secrets. But it may not be equipped to do the job.

The United States has long been the world's biggest beneficiary of trade and investment, but its financial dominance has been eroding. The United States no longer attracts 90% of venture dollars like in 1990; it attracted a mere

259. See GENWORTH INVESTOR RELATIONS, *supra* note 257.257.

260. Michael Peel & Jim Brunsten, *Swift Shows Impact of Iran Dispute on International Business*, FIN. TIMES (June 5, 2018), <https://www.ft.com/content/9f082a96-63f4-11e8-90c2-9563a0613e56> [<https://perma.cc/MJR8-YN5T>].

261. Christopher Ingraham, *The One Surefire Way to Grow Your Wealth in the U.S.*, WASH. POST (Sept. 28, 2017), <https://www.washingtonpost.com/news/wonk/wp/2017/09/28/the-one-surefire-way-to-grow-your-wealth-in-the-u-s/> [<https://perma.cc/XPC2-XHAU>]; see also GENWORTH INVESTOR RELATIONS, *supra* note 257 (explaining Genworth's business model).

262. Bennett & Bender, *supra* note 163.

54% in 2017.²⁶³ While American venture activity continues to reach new heights, this is driven by increasing deal size, not deal volume,²⁶⁴ and indeed American cities are falling in global startup cities rankings—not due to a deterioration of the American startup environment, but to increased competition with others.²⁶⁵ Unlike venture capital, FDI in the United States generally has “fallen near postcrisis lows” and may fall further in the face of ascendant protectionism and a softening global economy.²⁶⁶ In this light, CFIUS must be viewed as partially strategic and partially economic.

On the strategy side, CFIUS might turn out to just be an opening salvo in a broader trade dispute.²⁶⁷ China is currently subject to two²⁶⁸ rounds²⁶⁹ of Section 301 tariffs in direct response to its technology transfer and intellectual property practices and has been challenged by the United States at the WTO.²⁷⁰ The United States and China are also negotiating a Bilateral Investment Treaty, intended to grant American companies “equal [investment] rights as Chinese firms”²⁷¹ on issues like intellectual property. And though it is not in the headlines, Western countries are increasingly grappling with Chinese state-sponsored hacking of their industrial and military secrets. Looming in the

263. Kupor testimony, *supra* note 149, at 1 (citing Pitchbook data).

264. See PITCHBOOK, 3Q 2018 VENTURE MONITOR 3–5 (2018).

265. See *Rise of the Global Startup City*, CTR. FOR AM. ENTREPRENEURSHIP 3 (Oct. 2018), <http://startupsusa.org/global-startup-cities/report.pdf> [https://perma.cc/5R7D-U7AT] (“Though its relative share of global venture capital investment has declined, America’s absolute levels of venture capital investment have increased substantially.”).

266. Adam S. Posen, *The Cost of Trump’s Economic Nationalism: A Loss of Foreign Investment in the United States*, PETERSON INST. FOR INT’L ECON. BLOG (July 24, 2018), <https://piie.com/blogs/trade-investment-policy-watch/cost-trumps-economic-nationalism-loss-foreign-investment-united> [https://perma.cc/JTM5-75L2].

267. This dispute is certainly not purely in the domain of foreign policy. Recall that most forms of forced technology transfer actually involve domestic policy techniques. See *generally* 301 report, *supra* note 204.

268. See Office of U.S. Trade Rep., *USTR Issues Tariffs on Chinese Products in Response to Unfair Trade Practices* (June 2018), <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2018/june/ustr-issues-tariffs-chinese-products> [https://perma.cc/73CY-B4DA].

269. See Office of U.S. Trade Rep., *USTR Finalizes Second Tranche of Tariffs on Chinese Products in Response to China’s Unfair Trade Practices* (Aug. 2018), <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2018/august/ustr-finalizes-second-tranche> [https://perma.cc/95P2-QA9K].

270. See World Trade Organization, *China—Certain Measures Concerning the Protection of Intellectual Property Rights*, WTO Doc. WT/DS542/1 (Mar. 26, 2018).

271. *Bilateral Investment Treaty (BIT)*, US-CHINA BUS. COUNCIL, <https://www.uschina.org/advocacy/bilateral-investment-treaty> (last visited Feb. 11, 2019) [https://perma.cc/STN5-ZK8J].

background, however, is the specter of protectionism and “globally minded state capitalism” that may change the face of international trade forever.²⁷²

On the economic side, CFIUS is a piece in the puzzle of domestic policy competition for technology-heavy industries. Ideas and capital enable the creation of contemporary industry and job creation, but they are also fungible, meaning that domestic attractiveness is essential. Chief among those concerns is immigration, where H1-B visas have become so tight that tech workers are moving to countries with less restrictive policies like Canada’s Global Skills Visa²⁷³ and utilizing subsidies like China’s Thousand Talents Plan.²⁷⁴ Also critical is government investment in core R&D, which has stagnated.²⁷⁵ Though CFIUS’s professed aims relate to international investment, by potentially restricting capital inflows it also functions as a domestic policy in a suite of restrictions that further diminish American competitiveness.

State-guided investment generally has turned international trade on its head. Traditional international trade theory assumes that countries only limit supply in the form of protectionism; in the modern world, states also act as buyers of strategic assets as an extension of industrial or military policy.²⁷⁶ As such, there is a gap in international accords. There are international trade bodies, like the WTO, that address specific trade disputes, and international export control regimes, such as the Wassenaar Arrangement and Missile Technology Control Regime. There is no similar body or agreement governing international investment,²⁷⁷ and it is possible that as the world order continues

272. Quinn Slobodian, *You Live in Robert Lighthizer’s World Now*, FOREIGN POL’Y (Aug. 6, 2018), <https://foreignpolicy.com/2018/08/06/you-live-in-robert-lighthizers-world-now-trump-trade/> [https://perma.cc/UWL9-SRDZ].

273. See Ethan Baron, *H-1B: As immigration furor roils Silicon Valley, Canada smooths way for techies*, MERCURY NEWS (Oct. 13, 2018), <https://www.mercurynews.com/2018/10/08/h-1b-as-immigration-furor-roils-silicon-valley-canada-smooths-way-for-techies/> [https://perma.cc/3UHS-9FE2] (noting the popularity of a website, Moving2Canada.com, that has become popular among the American technology workers for this purpose).

274. Hepeng Jia, *China’s plan to recruit talented researchers*, 553 NATURE S8 (2018) (explaining the Chinese program to lure back Chinese professionals living abroad).

275. J. John Wu, *Why U.S. Business R&D Is Not as Strong as It Appears*, 6 INFO. TECH. & INNOVATION FOUND. (June 2018).

276. Jeffrey N. Gordon & Curtis J. Milhaupt, *China as a ‘National Strategic Buyer’: Towards a Multilateral Regime for Cross-Border M&A* at 4 (Columbia L. and Econ. Working Paper Series No. 585, 2018) (arguing that much of modern state activity is as a buyer of assets rather than as restraints on global supply, as in traditional trade theory).

277. While twenty-four of the largest sovereign wealth funds have agreed to a general statement of principles called the Santiago Principles, they only call for transparency in individual investments and state that the main principle of a sovereign wealth fund is to maximize returns. See *id.* at 35. Indeed, by failing to explicitly reject strategic investment, these funds arguably all but admitted that strategic national interests governed at least some investments.

to be rebuilt one of its new structures will be a new accord governing cross-border state investment.²⁷⁸ Presumably, CFIUS would expand to enforce it.

Rosenzweig's prediction that CFIUS will control all international trade and investment may turn out to be quite prescient. CFIUS's ability to propose critical technologies is the first step to enmeshing it in export control, as its recommendations may be included in future export control lists.²⁷⁹ However, CFIUS's tentacles could quickly expand past mere dual-use technologies, which are strictly defined through complex and detailed export control schedules. CFIUS's prerogative to consider the strategic interests of other countries and general American technological supremacy may lead to its limiting investment, and eventually the deemed export of, so-called "horizontal" technologies²⁸⁰ like artificial intelligence or genetic editing. Horizontal technologies are so broad that they are not merely dual-use but so fundamental that they are inputs themselves in purely commercial products. CFIUS's workings are mostly privileged, and so it could plausibly cover a horizontal technology so elementary that its coverage expands past any existing dual-use regime completely undetected. The strategic nature of these technologies means that CFIUS will almost surely be active in those technology spaces; their wide span of use makes it a near certainty that CFIUS, even accidentally, will interfere with global economic integration.

China may find that FIRRMA is just the first line of defense across the Western world. Germany, France, and Italy have called for a more rigorous, EU-wide process of restricting foreign investment in European companies out of a similar fear of Chinese forced technology transfer.²⁸¹ China itself is simultaneously liberalizing and tightening its trade posture. Jeremy Zucker, co-chair of International Trade and Government Regulation at Dechert LLP, noted that "when the Western world heard [China's Made in 2025], it sounded like a declaration of war."²⁸² Hopefully, the casualties will not include American competitiveness or technological progress.

278. *See id.* at 30–32 (exploring what such a regime might look like).

279. *See* FIRRMA § 1703 (amending 50 U.S.C. § 4565(a)(4)(D)(ii)(I)). "Critical technologies" is somewhat amorphous. But aside from a catch-all provision, Treasury does specifically draw on existing export control lists, such as ITAR and the Commerce Control List, and dual-use treaties. *See* 31 C.F.R. § 801.204 (listing newly controlled technologies for CFIUS purposes).

280. *See* Franklin letter, *supra* note 150, at 4–5.

281. Liz Alderman, *Wary of China, Europe and Others Push Back on Foreign Takeovers*, N.Y. TIMES (Mar. 15, 2018), <https://www.nytimes.com/2018/03/15/business/china-europe-canada-australia-deals.html> [<https://perma.cc/Q95C-CHHC>].

282. Jodi Xu Klein, *It's Not Just the U.S.: Around the World, Doors are Shutting on Chinese Investment*, POLITICO (Sept. 13, 2018, 5:10 PM), <https://www.politico.com/story/2018/09/13/china-us-investment-788834> [<https://perma.cc/SNH2-T7D4>].

