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# THE FOREIGN INVESTMENT RISK REVIEW MODERNIZATION ACT: THE DOUBLE-EDGED SWORD OF U.S. FOREIGN INVESTMENT REGULATIONS

*J. Russell Blakey\**

## I. INTRODUCTION

Operating behind closed doors, the Committee of Foreign Investment in the United States (CFIUS or the “Committee”) has always been somewhat mysterious. For four and a half decades, the Committee’s sole purpose has been to protect the United States from foreign investments and transactions with the potential to harm our nation’s national security. For those four and a half decades, the only thing that was certain regarding CFIUS’s review and investigatory process was what *kind* of investments and transactions it held jurisdiction over. Those days are now gone.

With the passing and introduction of the Foreign Investment Risk Review Modernization Act of 2018 (FIRRMA or the “Act”), the Committee’s scope of review has transformed from something solid and tangible into something unrecognizable with a seemingly boundless jurisdictional capacity. This seemingly unending jurisdictional expansion stems from three phrases that lack any clarifying definition in FIRRMA: “critical infrastructure,” “critical technologies,” and “sensitive personal data.”<sup>1</sup> This Note will unpack the Committee’s legislative history, analyze the past interpretation of

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1. Foreign Investment Risk Review Modernization Act of 2018, Pub. L. No. 115-232, § 1703(a)(4)(B)(iii), 132 Stat. 1636, 2177–83.

CFIUS's power and authority to block foreign investments and transactions, examine how FIRRMA will likely obscure all previously established notions of which types of future transactions will be subject to the Committee's newly expanded reviewing powers, and ultimately question the likelihood of FIRRMA accomplishing what Congress designed it to do: protect U.S. national security interests.

## II. THE COMMITTEE OF FOREIGN INVESTMENT IN THE UNITED STATES: A (LEGISLATIVE) HISTORY

### A. Genesis

On May 7, 1975, President Gerald Ford signed Executive Order 11858, establishing CFIUS.<sup>2</sup> The Committee was originally created to assist the President with issues found at the crossroads of national security and foreign investment.<sup>3</sup> Pursuant to a Treasury Department memorandum published soon after the Committee's formation, CFIUS was initially established as an inter-agency committee contained within the Treasury Department, designed to appease congressional concerns over increased foreign investments into American portfolio assets (notably Treasury securities, corporate stocks, and bonds) by the Organization of the Petroleum Exporting Countries (OPEC).<sup>4</sup> Of course, much of this Congressional sentiment came as a result of the 1973 Oil Crisis.<sup>5</sup>

On October 19, 1973, immediately following President Nixon's request for Congress to make available \$2.2 billion in emergency aid to Israel for the conflict known as the Yom Kippur War, the Organization of Arab Petroleum Exporting Countries (OAPEC)<sup>6</sup> instituted an oil embargo on the United

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2. JAMES K. JACKSON, CONG. RESEARCH SERV., RL33388, THE COMMITTEE ON FOREIGN INVESTMENT IN THE UNITED STATES (CFIUS) 1 (2016).

3. *Id.*

4. *Id.*; *Committee of Foreign Investment in the United States (CFIUS)*, U.S. DEP'T TREASURY, <https://www.treasury.gov/about/organizational-structure/offices/International-Affairs/Pages/cfius-index.aspx> (last updated Nov. 13, 2010).

5. Michael Corbett, *Oil Shock of 1973-74*, FED. RES. HIST. (Nov. 22, 2013), [https://www.federalreservehistory.org/essays/oil\\_shock\\_of\\_1973\\_74](https://www.federalreservehistory.org/essays/oil_shock_of_1973_74).

6. OPEC and OAPEC are pursuing similar objectives:

[OPEC] was formed in Baghdad in 1960 with 12 member petroleum producing members including Arab and non-Arab countries. OPEC's objective is to coordinate and unify petroleum policies among its member countries, and to identify best approaches to protect their individual and collective interests. The Organization seeks the optimal message to secure price stability in global market,

States (Reich 1995). The embargo ceased US oil imports from participating OAPEC nations, and began a series of production cuts that altered the world price of oil. These cuts nearly quadrupled the price of oil from \$2.90 a barrel before the embargo to \$11.65 a barrel in January 1974. In March 1974, amid disagreements within OAPEC on how long to continue the punishment, the embargo was officially lifted.<sup>7</sup>

In the wake of the 1973 Oil Crisis, this national security concern continued to grow as Congress worried that “much of the OPEC investments were being driven by political, rather than by economic, motives.”<sup>8</sup>

Since its inception, the Committee’s primary goal has always been to monitor foreign investments and their potential implications on U.S. national security.<sup>9</sup> More specifically, CFIUS’s operations have been statutorily directed, under executive order, to:

- (1) arrange for the preparation of analyses of trends and significant developments in foreign investments in the United States;
- (2) provide guidance on arrangements with foreign governments for advance consultations on prospective major foreign governmental investments in the United States;
- (3) review investments in the United States which, in the judgment of the Committee, might have major implications for United States national interests; [and]
- (4) consider proposals for new legislation or regulations relating to foreign investment as may appear necessary.<sup>10</sup>

As part of these four main statutorily imposed objectives, CFIUS also engages in a number of other more specific actions including:

- (1) obtaining, consolidating, and analyzing information on foreign investment in the United States;

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so as to eliminate address and [sic] unnecessary volatility. The Organization further endeavors to help member countries boosted [sic] their development plans by gaining fixed income from their exports. [OAPEC:] [f]rom the list of current OAPEC members seven are members of OPEC: Saudi Arabia, Kuwait, Libya, Iraq, United Arab Emirates, Algeria, and Qatar.

*Frequently Asked Questions*, ORG. ARAB PETROLEUM EXPORTING COUNTRIES, <http://www.oape.org/Home/FAQs> (last visited Apr. 5, 2020).

7. Corbett, *supra* note 5.

8. JACKSON, CFIUS, *supra* note 2, at 1.

9. Exec. Order No. 11,858, 3 C.F.R. § 990 (1971–1975).

10. *Id.*

- (2) improving the procedures for the collection and dissemination of information on such foreign investment;
- (3) the close observing of foreign investment in the United States;
- (4) preparing reports and analyses of trends and of significant developments in appropriate categories of such investment;
- (5) compiling data and preparing evaluation of significant transactions; and
- (6) submitting to the Committee on Foreign Investment in the United States appropriate reports, analyses, data, and recommendations as to how information on foreign investment can be kept current.<sup>11</sup>

Although these guiding principles provided a general outline of the Committee's purpose and direction, much of CFIUS's operations remained in general obscurity.<sup>12</sup> "President Ford's Executive Order also stipulated that information submitted 'in confidence shall not be publicly disclosed' and that information submitted to CFIUS be used 'only for the purpose of carrying out the functions and activities' of the order."<sup>13</sup> This secrecy continues even today.<sup>14</sup> Despite Congress's desire for a committee capable of reviewing international investments, questions arose almost immediately after the Committee's creation as to whether it was legally able to collect the information prescribed by Executive Order 11858.<sup>15</sup> In order to reaffirm Congress of the Committee's legality, President Ford signed the International Investment Survey Act in 1976, giving the President the "'clear and unambiguous authority' to collect information on 'international investment.'"<sup>16</sup>

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11. JACKSON, CFIUS, *supra* note 2, at 2.

12. *See id.* at 1.

13. *Id.* at 2.

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

15. JACKSON, CFIUS, *supra* note 2, at 2.

16. *Id.* at 2-3; *see also* International Investment Survey Act of 1976, Pub. L. No. 94-472, § 4, 90 Stat. 2059 (codified as amended at 22 U.S.C. § 3101-3108) ("The President shall, to the extent he deems necessary and feasible . . . (3) study the adequacy of information, disclosure, and reporting requirements and procedures relating to international investment; recommend necessary improvements in information recording, collection, and retrieval and in statistical analysis and presentation relating to International investment; and report periodically to the Committees on Foreign Relations and Commerce of the Senate and the Committee on Foreign Affairs of the House of Representatives on national and international developments with respect to laws and regulations affecting international investment . . .").

By 1980, only five years after the Committee's creation, some members of Congress grew frustrated with CFIUS, arguing that it had failed to accomplish what it was intended to do.<sup>17</sup> Those concerns stemmed from the Committee's infrequent meetings, meeting only ten times in its first five years,<sup>18</sup> and CFIUS's narrow focus on the political implications of foreign investments rather than their overall economic benefit.<sup>19</sup> In response, however, the Committee investigated several foreign investments in the following years, mostly at the request of the Department of Defense.<sup>20</sup> Several of these investigations were primarily focused on its most prominent competitor at the time: Japan.<sup>21</sup> As a result, CFIUS saw its first major legislative revision in 1988: the Exon-Florio provision.<sup>22</sup>

### B. *The Exon-Florio Provision*

The Exon-Florio provision of 1988 provided a substantial increase in the discretionary authority of the executive branch to take whatever "action [the President] considers to be 'appropriate' to suspend or prohibit proposed or pending foreign acquisitions, mergers, or takeovers which 'threaten to impair the national security.'"<sup>23</sup> However, this newly established power came with a catch: in order to use this power, the President must (1) find that "there is credible evidence . . . that the foreign interest exercising control might take action that threatens to impair the national security" and that (2) "provisions of law . . . do not in the President's judgment provide adequate and appropriate authority for the President to protect the national security in the matter before the President."<sup>24</sup> Surprisingly, "national security" was never specifically defined, but was generally interpreted in a broad manner.<sup>25</sup>

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17. JACKSON, CFIUS, *supra* note 2, at 3.

18. *Id.*

19. *Id.* (quoting *The Operations of Federal Agencies in Monitoring, Reporting on, and Analyzing Foreign Investments in the United States: Hearings Before the Subcomm. of the Comm. on Gov't Operations H.R.*, 96th Cong. 5 (1979) (statement of Mary P. Azevedo)).

20. *Id.*

21. *Id.*

22. *Id.*; see also Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100-418, 102 Stat. 1107 (codified as amended at 19 U.S.C. § 2901–2906) (passage of the Exon-Florio provision).

23. JAMES K. JACKSON, CONG. RESEARCH SERV., RS22863, FOREIGN INVESTMENT, CFIUS, AND HOMELAND SECURITY: AN OVERVIEW 2 (2011), <https://fas.org/sgp/crs/homesecc/RS22863.pdf>.

24. Omnibus Trade and Competitiveness Act of 1988 § 5021, 102 Stat. at 1425–26.

25. JACKSON, FOREIGN INVESTMENT, *supra* note 23, at 2.

Ironically, just as Executive Order 11858 gave the executive branch the power to gather information required for CFIUS, the legislature grew wary of its own decision to push through the Exon-Florio provision, believing “that the United States could not prevent foreign takeovers of U.S. firms *unless* the President declared a national emergency or regulators invoked federal antitrust, environmental, or securities laws.”<sup>26</sup> Additionally, as a result of CFIUS and the Exon-Florio provision, Congress faced the economic challenge of “balanc[ing] public concerns about the economic impact of certain types of foreign investment with the nation’s long-standing international commitment to maintaining an open and receptive environment for foreign investment.”<sup>27</sup>

While the political and economic impact of the Exon-Florio provision remained relatively unclear, the direct implementation, specifically the time constraints of the provision, left little room for imagination.<sup>28</sup> The provision established a three-step process for CFIUS’s review of qualifying foreign mergers, acquisition, and takeovers: (1) “CFIUS has 30 days to conduct a review;” (2) “45 days to conduct an investigation;” and (3) “then the President has 15 days to make his determination.”<sup>29</sup> Pursuant to this provision, only the President has the ability to prohibit or bar foreign investments that fall within the Committee’s reviewing jurisdiction.<sup>30</sup>

### C. *The Byrd Amendment*

The Committee’s official power and jurisdiction was further expanded in 1992 as a result of what is commonly referred to as the Byrd Amendment.<sup>31</sup> While the Byrd Amendment did not alter CFIUS’s original jurisdiction as established by Executive Order 11858, it did act as a supplement to “the Exon-Florio statute through Section 837(a) of the National Defense Authorization Act for Fiscal

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26. *Id.* (emphasis added).

27. *Id.*

28. *Id.*

29. *Id.*

30. *Id.*

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

Year 1993 (P.L. 102-484),” balancing the President’s new greater discretionary power with additional hardline rules.<sup>32</sup>

In response to the Exon-Florio provision giving greater discretionary power to the President, the Byrd Amendment mandated that the Committee *must* investigate and review certain investments, so long as those investments satisfy two distinct criteria: “(1) the acquirer is controlled by or acting on behalf of a foreign government; and (2) the acquisition results in control of a person engaged in interstate commerce in the United States that could affect the national security of the United States.”<sup>33</sup> When these factors were met, the President’s duty to conduct a review of qualifying investments was triggered, mandating a compulsory investigation. This new requirement, however, did not displace the additional short-list of factors that the Exon-Florio provision provided to the President when “deciding to block a foreign acquisition,” merger, or takeover.<sup>34</sup> This list included the following elements:

- (1) domestic production needed for projected national defense requirements;
- (2) the capability and capacity of domestic industries to meet national defense requirements, including the availability of human resources, products, technology, materials, and other supplies and services;
- (3) the control of domestic industries and commercial activity by foreign citizens as it affects the capability and capacity of the U.S. to meet the requirements of national security;
- (4) the potential effects of the transactions on the sales of military goods, equipment, or technology to a country that supports terrorism or proliferates missile technology or chemical and biological weapons; and . . .
- (5) the potential effects of the transaction on U.S. technological leadership in areas affecting U.S. national security.<sup>35</sup>

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32. JAMES K. JACKSON, CONG. RESEARCH SERV., RL33312, THE EXON-FLORIO NATIONAL SECURITY TEST FOR FOREIGN INVESTMENT 8 (2013); *see also* National Defense Authorization Act for Fiscal Year 1993 § 837(a)–(b), 106 Stat. at 2463–64.

33. JACKSON, EXON-FLORIO, *supra* note 32, at 8.

34. *Id.* at 17.

35. *Id.*



As a result of the Byrd Amendment, the Committee experienced its first noticeable power shift since its inception away from the executive branch and instead toward the legislature. Congress initiated this shift not by explicitly removing any authority from the executive branch, but rather by passing unambiguous legislation determining when a Committee investigation and review was required, irrespective of the President's personal opinion as to its necessity.

*D. The Foreign Investment and National Security Act of 2007*

The final alteration to CFIUS's review process prior to FIRRMA's implementation was the Foreign Investment and National Security Act of 2007 (FINSAs).<sup>36</sup> This third amendment to the Committee's oversight and the scope of CFIUS review was yet another example of Congress's attempt at restructuring and reorganizing the balance of powers with respect to foreign investment oversight between Congress and the President. Addressing Congress's concern that the Exon-Florio provision limited its own power in favor of granting the executive with more discretionary oversight concerning foreign investment, FINSAs reasserted congressional power in two foundational ways:

First, Congress enhanced its oversight capabilities by requiring greater reporting to Congress by CFIUS on the Committee's actions either during or after it completes reviews and investigations and by increasing reporting requirements on CFIUS. Second, Congress fundamentally altered the meaning of national security in the Exon-Florio provision by including critical infrastructure and homeland security as areas of concern comparable to national security.<sup>37</sup>

While these two provisions reflect FINSAs's most notable changes, they were not the only changes the amendment created. FINSAs required the Committee to investigate all transactions "[i]f the Committee determines that the covered transaction is a foreign government-controlled transaction," meaning any "transaction that

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36. See Foreign Investment and National Security Act of 2007, Pub. L. No. 110-49, 121 Stat. 246 (codified as amended at 50 U.S.C. app. § 2170); JAMES J. JACKSON, CONG. RESEARCH SERV., RL34561, FOREIGN INVESTMENT AND NATIONAL SECURITY: ECONOMIC CONSIDERATIONS 16 (2013).

37. JACKSON, ECONOMIC CONSIDERATIONS, *supra* note 36, at 16.

could result in the control of any person engaged in interstate commerce in the United States by a foreign government or an entity controlled by or acting on behalf of a foreign government.”<sup>38</sup> Additional changes required that the Director of National Intelligence conduct an independent and “thorough analysis of any threat to the national security of the United States posed by any covered transaction.”<sup>39</sup> FINSA also provided the Committee and the President with additional factors to consider during their investigations, including the subject country’s adherence to nuclear nonproliferation control regimes (voluntary and nonbinding arrangements designed to prevent the proliferation of weapons of mass destruction) and diplomatic history in cooperating with the United States in counterterrorism efforts.<sup>40</sup>

Despite these amendments, congressional attitudes shifted with an increased sense of criticism regarding both the Exon-Florio provision and the Committee’s then-current effectiveness. Certain CFIUS scholars, most notably James K. Jackson, have argued that this increased criticism of the Exon-Florio provision originated from the terrorist attacks of September 11, 2001.<sup>41</sup> Select members of Congress criticized the Committee’s “perceived lack of responsiveness,”<sup>42</sup> and in February of 2006, former Assistant Secretary of Defense for Global Strategic Affairs Richard Perle similarly described his disappointment with CFIUS, stating that “[t]he committee almost never met, and when it deliberated it was usually at a fairly low bureaucratic level . . . . I think it’s a bit of a joke [if we were serious about scrutinizing foreign ownership and foreign control, particularly since September 11.]”<sup>43</sup> This shift was most apparent in 2006 following what would come to be known as the Dubai Ports World Debacle.

### 1. The Dubai Ports World Debacle

In October 2005, news surfaced over the mainstream media that Dubai Ports World (“DP World”) was interested in acquiring British-owned Peninsular and Oriental Steam Navigation Company, or P&O

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38. Foreign Investment and National Security Act of 2007 § 2, 121 Stat. at 246–52.

39. *Id.*

40. *Id.* § 4.

41. JACKSON, ECONOMIC CONSIDERATIONS, *supra* note 36, at 6.

42. JACKSON, FOREIGN INVESTMENT, *supra* note 23, at 3.

43. *Political Backlash over Port Deal*, CBS NEWS (Feb. 22, 2016, 9:11 AM), <https://www.cbsnews.com/news/political-backlash-over-port-deal/>.

Ports (“P&O”).<sup>44</sup> DP World was and continues to run as a major global port operator founded as a result of the 2005 merger of Dubai Ports Authority and Dubai Ports International,<sup>45</sup> led by Dubai Sultan Ahmed bin Sulayem as its CEO.<sup>46</sup> After a bidding war with Singapore’s government-owned Port of Singapore Authority, CFIUS approved DP World’s \$6.8 billion bid for P&O.<sup>47</sup> Among P&O’s assets, however, were container terminals in the ports of Baltimore, Miami, New Orleans, New York-New Jersey, and Philadelphia,<sup>48</sup> sounding the alarm bell for several members of Congress.<sup>49</sup>

Democrats like Senator Charles E. Schumer of New York warned that the port operations could be “infiltrated” by terrorists exploiting the ownership in Dubai, an emirate known for its open trade. Dubai had been the transfer point starting in the late 90’s for nuclear components shipped by the largest illicit nuclear technology network in the world.<sup>50</sup>

DP World’s purchase of P&O also drew criticism in the press because of its potential effect on unsuspecting American businesses. At the time of DP World’s acquisition of P&O, a subsidiary of Eller & Co., a Florida cruise line firm,<sup>51</sup> was partnered with P&O and was in the midst of resolving various contract issues.<sup>52</sup> Eller & Co., however, found itself in a precarious situation: as a result of DP World’s successful acquisition of P&O, the firm would “become involuntarily a business partner with the government of Dubai.”<sup>53</sup> These concerns, combined with the ever-lingering security interests that naturally accompany a foreign government’s influence over vital U.S. ports, only increased congressional anxiety over the DP World-

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44. JULIO J. ROTEMBERG, *THE DUBAI PORTS WORLD DEBACLE AND ITS AFTERMATH* 1 (Harvard Bus. Sch. rev. 2007).

45. *Id.* at 2.

46. *See Board of Directors*, DP WORLD, <https://www.dpworld.com/who-we-are/leadership> (last visited Apr. 5, 2020).

47. ROTEMBERG, *supra* note 44, at 2.

48. *Id.*

49. *See* David E. Sanger, *Under Pressure, Dubai Company Drops Port Deal*, N.Y. TIMES (Mar. 10, 2006), <https://www.nytimes.com/2006/03/10/politics/under-pressure-dubai-company-drops-port-deal.html>.

50. *Id.*

51. Neil King Jr. & Greg Hitt, *Small Florida Firm Sowed Seed of Port Dispute: Eller’s Suits and Lobbying Lie Behind Dubai Furor; Approval Delayed in U.K.*, WALL ST. J. (Feb. 28, 2006, 12:01 AM), <https://www.wsj.com/articles/SB114105320594384271>.

52. ROTEMBERG, *supra* note 44, at 4.

53. King & Hitt, *supra* note 51.

P&O merger. But these concerns, which were previously disregarded by the Committee, were precisely what provided the legislature with the traction needed to fight back.

As the DP World deal grew increasingly unpopular and controversial in the public eye as a result of its national security implications, bipartisan congressional support grew for the insistence that the Committee conduct an investigation. “While on a fact-finding tour of ports, Senate majority leader Bill Frist (Republican, Tennessee) threatened to pass a law to put the deal on hold unless the White House initiated a more thorough 45-day CFIUS ‘investigation.’”<sup>54</sup> In opposition to Congress’s growing resistance to the deal, President George W. Bush increased his efforts to sway Republican Congress members to support the deal, all while maintaining that the merger posed no threat to American national security.<sup>55</sup> In fact, on February 21, 2006, President Bush released a statement to the press, stating that “[i]f there was any chance that this transaction would jeopardize the security of the United States, it would not go forward.”<sup>56</sup>

Irrespective of the White House’s support for the deal, what began as an enticing investment opportunity for DP World had blossomed into a public relations nightmare and international debate with the spotlight on DP World. Accordingly, DP World itself requested a forty-five-day CFIUS investigation in an attempt to calm any national security concerns and formally legitimize the transaction.<sup>57</sup> At this point, however, lawmakers demanded more, insisting that the Committee’s report be provided to Congress and that Congress, not the White House, ultimately decide the final decision of either approving or barring DP World’s acquisition of P&O.<sup>58</sup> As the resistance to the DP World-P&O merger continued to grow, “[t]he

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54. ROTEMBERG, *supra* note 44, at 4.

55. *Id.*

56. *Id.*; *Fact Sheet: The CFIUS Process and The DP World Transaction*, THE WHITE HOUSE (Feb. 22, 2006), <https://georgewbush-whitehouse.archives.gov/news/releases/2006/02/20060222-11.html>.

57. Press Release, U.S. Dep’t of the Treasury, CFIUS Welcomes Dubai Ports Worlds Announcement to Submit to New Review (Feb. 26, 2006), <https://www.treasury.gov/press-center/press-releases/Pages/js4072.aspx>.

58. See ROTEMBERG, *supra* note 44, at 4; see also David E. Sanger, *Review of Port Deal Will Leave Decision to Bush*, N.Y. TIMES (Feb. 27, 2006), <https://www.nytimes.com/2006/02/27/politics/review-of-port-deal-will-leave-decision-to-bush.html>.

state-owned Dubai company seeking to manage some terminal operations at six American ports dropped out of the deal.”<sup>59</sup> On December 11, 2006, DP World sold its U.S. holdings to the American insurance company, American International Group for an undisclosed price, finally bringing a bitter conclusion to the DP World debacle.<sup>60</sup>

### *E. Modern Chinese Investment*

More recently, as economic global powers shift, greater emphasis and attention has been placed on Chinese investments and the potential national security threats that come along with those investments. In 2014 and 2015, Chinese investments represented the largest amount of CFIUS covered investments, with twenty-four and twenty-nine covered transactions, respectively.<sup>61</sup> As Chinese investments continued to grow, a variety of different congressional committees began theorizing on how to preempt national security threats by re-evaluating CFIUS’s role.

“[O]n October 8, 2012, the House Permanent Select Committee on Intelligence published a report on ‘the counterintelligence and security threat posed by Chinese telecommunications companies doing business in the United States.’”<sup>62</sup> This report specifically addressed the potential threat created by the acquisitions, takeovers, or mergers of American companies by Chinese telecommunication giants, most notably the Chinese government-owned Huawei and ZTE.<sup>63</sup>

But telecommunication transactions by Chinese tech giants like Huawei and ZTE are not the only manner in which Chinese investments into the U.S. economy raise potential red flags. Chinese investments into the U.S. economy and technologies have also targeted startups through venture capitalist endeavors. Although

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59. David E. Sanger, *Under Pressure, Dubai Company Drops Port Deal*, N.Y. TIMES (Mar. 10, 2006), <https://www.nytimes.com/2006/03/10/politics/under-pressure-dubai-company-drops-port-deal.html>.

60. Heather Timmons, *Dubai Port Company Sells Its U.S. Holdings to A.I.G.*, N.Y. TIMES (Dec. 12, 2006), <https://www.nytimes.com/2006/12/12/business/worldbusiness/12ports.html>.

61. Memorandum from Latham & Watkins LLP on Overview of the CFIUS Process 4 (2017), <https://www.lw.com/thoughtLeadership/overview-CFIUS-process>.

62. JACKSON, CFIUS, *supra* note 2, at 31 (quoting MIKE ROGERS & DUTCH RUPPERSBERGER, HOUSE PERMANENT SELECT COMM. ON INTELLIGENCE, INVESTIGATIVE REPORT ON THE U.S. NATIONAL SECURITY ISSUES POSED BY CHINESE TELECOMMUNICATIONS COMPANIES HUAWEI AND ZTE iv (2012), [https://stacks.stanford.edu/file/druid:rm226yb7473/Huawei-ZTE%20Investigative%20Report%20\(FINAL\).pdf](https://stacks.stanford.edu/file/druid:rm226yb7473/Huawei-ZTE%20Investigative%20Report%20(FINAL).pdf)).

63. *See id.*

Chinese venture capitalist investments typically reflect private rather than governmental investment, these investments “still typically target firms in industries the government has prioritized as strategic, such as [artificial intelligence (AI)], autonomous vehicles, virtual reality, robotics, and blockchain technology.”<sup>64</sup> According to research by the Defense Innovation Unit, a United States Department of Defense initiative, Chinese participation in U.S. venture-backed startups accounted for between 10 and 16 percent of global venture deals in the United States between 2015 and 2017 and has increased rapidly since 2010.<sup>65</sup> Between 2015 and 2017, China was the largest foreign source of equity investments in U.S. companies, investing a combined \$24 billion in U.S. venture-backed companies, or 13 percent of worldwide investment in the United States.<sup>66</sup> Specifically regarding artificial intelligence technologies, “while China accounted for only 10% of global AI deals in 2017, Chinese AI startups took 48% of all AI funding dollars that year, surpassing the US in AI funding for the first time.”<sup>67</sup> This increase in Chinese investment has also made the U.S. tech-economy the target of increasing levels of cyber espionage carried out by, or with the assistance of, the Chinese government.<sup>68</sup> According to James Lewis, a senior vice president at the Center for U.S.-China Economic and Security Review Commission Strategic and International Studies, over the past two decades Chinese cyber espionage has likely cost the U.S. economy between \$20 billion and \$30 billion annually.<sup>69</sup> These acts of cyber espionage do not only harm profit margins for affected intellectual property (IP) owners, but also pose a far larger theoretical threat to IP creators and the economy: the

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64. SEAN O’CONNOR, U.S.-CHINA ECON. & SEC. REV. COMM’N, HOW CHINESE COMPANIES FACILITATE TECHNOLOGY TRANSFER FROM THE UNITED STATES 6 (2019), <https://www.uscc.gov/sites/default/files/Research/How%20Chinese%20Companies%20Facilitate%20Tech%20Transfer%20from%20the%20US.pdf>; see also MICHAEL BROWN & PAVNEET SINGH, DEF. INNOVATION UNIT EXPERIMENTAL, CHINA’S TECHNOLOGY TRANSFER STRATEGY: HOW CHINESE INVESTMENTS IN EMERGING TECHNOLOGY ENABLE A STRATEGIC COMPETITOR TO ACCESS THE CROWN JEWELS OF U.S. INNOVATION 7–8 (2018), [https://admin.govexec.com/media/diux\\_chinatechnologytransferstudy\\_jan\\_2018\\_\(1\).pdf](https://admin.govexec.com/media/diux_chinatechnologytransferstudy_jan_2018_(1).pdf).

65. BROWN & SINGH, *supra* note 64, at 2.

66. *Id.* at 28.

67. *China Is Starting to Edge Out the US in AI Investments*, CBINSIGHTS (Feb. 12, 2019), <https://www.cbinsights.com/research/china-artificial-intelligence-investment-startups-tech/>.

68. O’CONNOR, *supra* note 64, at 8.

69. James Andrew Lewis, *How Much Have the Chinese Actually Taken?*, CTR. FOR STRATEGIC & INT’L STUD. (Mar. 22, 2018), <https://www.csis.org/analysis/how-much-have-chinese-actually-taken>.

unlawful access and utilization of “technical data, negotiating positions, and sensitive and proprietary internal communications.”<sup>70</sup> “For example, in October 2018 the U.S. Department of Justice indicted an official from China’s Ministry of State Security for economic espionage and attempting to steal trade secrets from GE Aviation, a subsidiary of General Electric, and other U.S. aviation and aerospace companies.”<sup>71</sup> While economic threat accompanying the manipulation or outright theft of emerging technologies and intellectual property pose a very real and tangible problem, it is the technology’s use and its underlying information *against* the United States that encapsulates the heart of the Committee and its purpose.

Similar issues were identified in a separate report published the following month by the U.S.-China Economic and Security Review Commission.<sup>72</sup> This congressionally created commission was designed to “monitor, investigate, and submit to Congress an annual report on the national security implications of the bilateral trade and economic relationship between the United States and the People’s Republic of China, and to provide recommendations, where appropriate, to Congress for legislative and administrative action.”<sup>73</sup> The report explained more fundamentally where the threat lies in allowing foreign investments. “[S]ome observers argued that economic concerns focused on the possibility that state-backed Chinese companies choose to invest ‘based on strategic rather than market-based considerations,’ and are free from the constraints of market forces because of generous state subsidies.”<sup>74</sup> This concept, similar to the OPEC transactions of the 1970s, set forth a variety of potential CFIUS amendments that would address the issue of Chinese investments and acquisition transactions:

- (1) requir[ing] a mandatory review of all controlling transactions by Chinese state-owned and state-controlled companies investing in the United States;

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70. O’CONNOR, *supra* note 64, at 9.

71. *Id.*

72. See U.S.-CHINA ECON. & SEC. REVIEW COMM’N, 2018 REPORT TO CONGRESS 1 (2018).

73. U.S.-China Econ. & Sec. Review Comm’n—*Fact Sheet*, U.S.-CHINA ECON. & SECURITY REV. COMMISSION, [https://www.uscc.gov/about/fact\\_sheet](https://www.uscc.gov/about/fact_sheet) (last visited Apr. 5, 2020); see also Floyd D. Spence National Defense Authorization Act for Fiscal Year 2001, Pub. L. No. 106-398, 114 Stat. 1654 (2000).

74. JACKSON, CFIUS, *supra* note 2, at 15.

- (2) add[ing] a net economic benefit test to the existing national security test that CFIUS administers; and
- (3) prohibit[ing] investment[s] in a U.S. industry by a foreign company whose government prohibits foreign investment in that same industry.<sup>75</sup>

Other suggested modifications to CFIUS included expanding its authority to evaluate and review “‘greenfield’ investments, or investments in new industrial plants and facilities.”<sup>76</sup> Although Chinese investments remained the most problematic during this period, the concern over greenfield investments originated from Russian space agency Roscosmos’s interest in developing six Global Positioning System monitor stations throughout the United States.<sup>77</sup> This proposition was supported by the State Department, which saw it as potentially strengthening international relations, but was criticized by the Central Intelligence Agency and Defense Department, which feared Russia’s increased ability to spy more effectively on the United States.<sup>78</sup>

Although the threat of Chinese investment into the United States economy has only continued to increase, no amendment to the scope of the Committee’s authority has ever explicitly addressed the issue underlying U.S.-Chinese transactions. But this fear nevertheless acted as the catalyst for the most recent legislative amendment to CFIUS’s jurisdiction: the Foreign Investment Risk Review Modernization Act of 2018.

#### *F. The State of CFIUS and Its “Covered Transactions” Prior to FIRRMA*

Understanding CFIUS’s development, history, and evolving role over time is essential in distinguishing between its parameters regarding “covered transactions” *prior* to the passing of the Act and after the implementation of FIRRMA. For all “covered transactions,” or transactions that directly fall under the mandatory review of CFIUS, the Committee must “determine whether a transaction threatens to impair the national security, or the foreign entity is controlled by a foreign government, or it would result in control of any ‘critical

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75. *Id.*

76. *Id.*

77. *Id.*

78. *Id.* at 15–16.



infrastructure that could impair the national security.”<sup>79</sup> Under FINSA, “a ‘covered’ foreign investment transaction refers to any merger, acquisition or takeover which results in foreign control of any person engaged in interstate commerce in the United States.”<sup>80</sup>

As an inter-agency committee contained within its bounds, the Treasury Department also makes clear what transactions are *not* covered by CFIUS. First and foremost, all transactions that are merely for investment purposes only, or “an investment in which the foreign investor has ‘no intention of determining or directing the basic business decisions of the issuer,’” are affirmatively *not* transactions subject to the Committee’s review.<sup>81</sup> Title 31 of the Code of Federal Regulations defines transactions that are solely for investment purposes by applying a two-part test:

- (1) Transaction that result in ownership of 10% or less of the voting securities of the firm; and
- (2) “investments that are undertaken directly by a bank, trust company, insurance company, investment company, pension fund, employee benefit plan, mutual fund, finance company, or brokerage company ‘in the ordinary course of business for its own account.”<sup>82</sup>

Other transactions not covered under CFIUS’s jurisdiction include: (1) “stock split[s] or pro rata stock dividend[s] that do[] not involve a change in control;” (2) “acquisition[s] of any part of an entity or of assets, if such part of an entity or assets do not constitute a U.S. business;” (3) “acquisition[s] of securities by a person acting as a securities underwriter, in the ordinary course of business and in the process of underwriting;” and (4) “an acquisition pursuant to a condition in a contract of insurance relating to fidelity, surety, or casualty obligations if the contract was made by an insurer in the ordinary course of business.”<sup>83</sup>

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79. *Id.* at 16.

80. Memorandum, Baker Botts L.L.P. and U.S.-China Energy Cooperation Program, A Guide to Demystify the CFIUS Process 5 (last visited June 2, 2020), <http://docplayer.net/37687000-A-guide-to-demystify-the-cfius-process-presented-by-baker-botts.html>.

81. JACKSON, CFIUS, *supra* note 2, at 16.

82. *Id.*; *see also* 31 C.F.R. § 800.302 (a)–(f) (2018) (defining transactions that are not covered).

83. 31 C.F.R. § 800.302 (a)–(g) (2018) (defining transactions that are not covered); *see also* JACKSON, CFIUS, *supra* note 2, at 16.

Conceptually, distinguishing between CFIUS's covered and non-covered transactions is relatively easy to understand. What tends to complicate this determination is the more nuanced sub-issue as to what exactly qualifies as a "controlling" investment—an essential element for establishing CFIUS's jurisdiction. While no numerical definition of "control" is provided by the Committee's statute, the Treasury Department's regulations do provide an expansive list of considerations that assist the Committee in evaluating how *much* "control" various foreign transactions result in.

The term *control* means the power, direct or indirect, whether or not exercised, through the ownership of a majority or a dominant minority of the total outstanding voting interest in an entity, board representation, proxy voting, a special share, contractual arrangements, formal or informal arrangements to act in concert, or other means, to determine, direct, or decide important matters affecting an entity; in particular, but without limitation, to determine, direct, take, reach, or cause decisions regarding the following matters, or any other similarly important matters affecting an entity:

- (1) The sale, lease, mortgage, pledge or other transfer of any of the tangible or intangible principal assets of the entity, whether or not in the ordinary course of business;
- (2) The reorganization, merger, or dissolution of the entity;
- (3) The closing, relocation, or substantial alternation of the production, operational, or research and development facilities of the entity;
- (4) Major expenditures or investments, issuances of equity or debt, or dividend payments by the entity, or approval of the operating budget of the entity;
- (5) The selection of new business lines or ventures that the entity will pursue;
- (6) The entry into, termination, or non-fulfillment by the entity of significant contracts;
- (7) The policies or procedures of the entity governing the treatment of non-public technical, financial, or other proprietary information of the entity;
- (8) The appointment or dismissal of officers or senior managers;

(9) The appointment or dismissal of employees with access to sensitive technology or classified U.S. Government information; or

(10) The amendment of the Articles of Incorporation, constituent agreement, or other organizational documents of the entity with respect to the matters described in paragraphs (a)(1) through (9) of this section.<sup>84</sup>

The Securities Exchange Act of 1934 requires any person holding 5 percent or more of the publicly traded securities of a United States firm to report the acquisition of the shares to the Securities and Exchange Commission.<sup>85</sup> Similarly, Title 15 of the Code of Federal Regulations, section 806.15 defines foreign direct investment control as “the ownership or control, directly or indirectly, by one foreign person of 10 per centum or more of the voting securities of an incorporated U.S. business enterprise or an equivalent interest in an unincorporated U.S. business enterprise, including a branch.”<sup>86</sup>

Ultimately, while these numbers can help assess the amount of influence a certain entity maintains over their investment, “control” nevertheless remains a relatively elusive term that shifts depending on who the investor is, what the investment covers, and the state of the current international relationship between the United States and the investor’s home country. Irrespective of the subjective nature surrounding “controlling” investments, it still remains the case that prior to FIRRMA’s 2018 introduction, the Committee *only* maintained review and investigation powers over “controlling” foreign investments.<sup>87</sup> This distinction, however, would become irrelevant with the application of FIRRMA.

### III. THE FOREIGN INVESTMENT RISK REVIEW MODERNIZATION ACT OF 2018

The most recent and arguably most revolutionizing expansion to CFIUS’s reviewing power and jurisdiction came from the Foreign Investment Risk Review Modernization Act of 2018, or FIRRMA.

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84. Regulations Pertaining to Mergers, Acquisitions, and Takeovers by Foreign Persons, 73 Fed. Reg. 70,702, 70,718 (Nov. 21, 2008) (to be codified at 31 C.F.R. pt. 800).

85. 15 U.S.C. § 78m(d) (2018).

86. 15 C.F.R. § 806.15(a)(1) (2012).

87. Fact Sheet, U.S. Dep’t of the Treasury, Proposed CFIUS Regulations to Implement FIRRMA 2 (Sept. 17, 2019), <https://home.treasury.gov/system/files/206/Proposed-FIRRMA-Regulations-FACT-SHEET.pdf>.

The Act was passed in the Senate on August 1, 2018 and signed into law by President Donald J. Trump on August 13, 2018, becoming the first major overhaul to CFIUS operations in over a decade and marking a new era in regulating foreign investment in the U.S. economy.<sup>88</sup> While commonly described as an amendment designed to “close the gaps” that were previously exploitable under CFIUS’s scope, the general consensus is that “closing the gaps” is merely a euphemism for establishing more restrictions specifically targeting Chinese direct investments into the United States.<sup>89</sup>

#### A. *FIRRMA Greatly Expands CFIUS’s Jurisdiction*

Prior to FIRRMA’s enactment, the Committee’s power to review certain foreign investments remained contingent on the level of control the purchaser would possess over the entity following the transaction: if the investment resulted in the investor receiving sufficient control of the U.S. entity or business, then CFIUS could review the transaction, but if it did not, the Committee had no authority to intervene on the proposed acquisition, merger, or takeover.<sup>90</sup> Following FIRRMA, however, the rules of the game had been changed quite profoundly, expanding the scope of the Committee’s regulatory review authority to cover both controlling and *non-controlling* investments.

Under section 1703 of FIRRMA, “covered transactions” subject to CFIUS review were expanded to include both controlling and *non-controlling* foreign investments, stirring debate concerning the Act’s general ambiguity as to where the scope of CFIUS’s regulatory review ends. The new parameters surrounding CFIUS covered transaction are as follows:

(A) IN GENERAL.—Except as otherwise provided, the term ‘covered transaction’ means—

(i) any transaction described in subparagraph (B)(i); and

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88. See Foreign Investment Risk Review Modernization Act of 2018, Pub. L. No. 115-232, §§ 1701–1728, 132 Stat. 1636, 2174–2207.

89. See Farhad Jalinous et al., *CFIUS Reform Becomes Law: What FIRRMA Means for Industry*, WHITE & CASE (Aug. 13, 2018), <https://www.whitecase.com/publications/alert/cfius-reform-becomes-law-what-firma-means-industry>; Farhad Jalinous et al., *How FIRRMA Changed National Security Reviews in 2018*, LAW360 (Dec. 17, 2018, 4:03 PM), <https://www.law360.com/articles/1111900/how-firma-changed-national-security-reviews-in-2018>.

90. See Fact Sheet, U.S. Dep’t of the Treasury, *supra* note 87, at 2.

(ii) any transaction described in clauses (ii) through (v) of subparagraph (B) that is proposed, pending, or completed on or after the effective date set forth in section 1727 of the Foreign Investment Risk Review Modernization Act of 2018.

(B) TRANSACTIONS DESCRIBED.—A transaction described in this subparagraph is any of the following:

(i) Any merger, acquisition, or takeover that is proposed or pending after August 23, 1988, by or with any foreign person that could result in foreign control of any United States business, including such a merger, acquisition, or takeover carried out through a joint venture.

(ii) Subject to subparagraphs (C) and (E), the purchase or lease by, or a concession to, a foreign person of private or public real estate that—

(I) is located in the United States;

(II)(aa) is, is located within, or will function as part of, an air or maritime port; or

(bb)(AA) is in close proximity to a United States military installation or another facility or property of the United States Government that is sensitive for reasons relating to national security;

(BB) could reasonably provide the foreign person the ability to collect intelligence on activities being conducted at such an installation, facility, or property;

**or**

(CC) could otherwise expose national security activities at such an installation, facility, or property to the risk of foreign surveillance; **and**

(III) meets such other criteria as the Committee prescribes by regulation, except that such criteria may not expand the categories of real estate to which this clause applies beyond the categories described in subclass (II).

(iii) Any other investment, subject to regulations prescribed under subparagraphs (D) and (E), by a foreign person in any unaffiliated United States business that—

(I) owns, operates, manufactures, supplies, or services *critical infrastructure*;

(II) produces, designs, tests, manufactures, fabricates, or develops one or more *critical technologies*; or  
(III) maintains or collects *sensitive personal data* of United States citizens that may be exploited in a manner that threatens national security.<sup>91</sup>

While much of the covered transactions contained within section B(i) and B(ii) remained consistent with CFIUS's earlier jurisdiction before FIRRMA, the center of the debate focuses on the text of section (B)(iii). Under this subsection, FIRRMA expands the Committee's jurisdiction by opening the door to reviews concerning all transactions, controlling or non-controlling, that involve "critical infrastructure," "critical technologies," and the "sensitive personal data" of Americans.<sup>92</sup> At first glance, this alteration to the scope of CFIUS review may seem inconsequential, but this revision to the Committee's power has left many asking what these terms mean and how they will impact the Committee's review capabilities.<sup>93</sup> In order to comprehend the vast ambiguity surrounding the Committee's newly established scope of review, it must first be understood exactly how FIRRMA defines, or utterly fails to define, "critical infrastructure," "critical technologies," and "sensitive personal data."

### 1. "Critical Infrastructure"

"Critical infrastructure," as defined by the Act, refers to all "systems and assets, whether physical or virtual, so vital to the United States that the incapacity or destruction of such systems or assets would have a debilitating impact on national security."<sup>94</sup> Despite the fact that this description could feasibly include almost anything depending on its interpretation, "this wording mirrors the language used in FINSA and by the Department of Homeland Security to describe the sixteen critical infrastructure sectors of the U.S. economy."<sup>95</sup> Those sixteen sectors include:

- Chemical Sector

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91. Foreign Investment Risk Review Modernization Act of 2018 § 1703(a)(4), 132 Stat. at 2177-78 (emphasis added).

92. *Id.* § (a)(4)(B)(iii).

93. See Jalinous et al., *CFIUS Reform Becomes Law*, *supra* note 89.

94. Foreign Investment Risk Review Modernization Act of 2018 § 1703(a)(5), 132 Stat. at 2181.

95. Michael Greshberg & Justin Schenck, *The CFIUS Reform Bill*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Aug. 26, 2018), <https://corpgov.law.harvard.edu/2018/08/26/the-cfius-reform-bill/>.

- Commercial Facilities Sector
- Communications Sector
- Critical Manufacturing Sector
- Dams Sector
- Defense Industrial Base Sector
- Emergency Services Sector
- Energy Sector
- Financial Services Sector
- Food and Agriculture Sector
- Government Facilities Sector
- Healthcare and Public Health Sector
- Information Technology Sector
- Nuclear Reactors, Materials, and Waste Sector
- Transportation Systems Sector
- Water and Wastewater Systems Sector.<sup>96</sup>

Accordingly, it is likely that much of what will come under CFIUS review pursuant to FIRRMA will remain unchanged from what it was during the FINSA era. However, the following two categories, “critical technologies” and “sensitive personal data,” will prove to be far more elusive and likely expand the Committee’s jurisdiction beyond all prior understandings.

## 2. “Critical Technologies”

The second major category left exposed for CFIUS review following the passing of FIRRMA is “critical technologies.” The Act defines “critical technologies” as follows:

(A) IN GENERAL.—The term ‘critical technologies’ means the following:

(i) Defense articles or defense services included on the United States Munitions List set forth in the International Traffic in Arms Regulations under sub-chapter M of chapter I of title 22, Code of Federal Regulations.

(ii) Items included on the Commerce Control List set forth in Supplement No. 1 to part 774 of the Export Administration Regulations under subchapter C of chapter VII of title 15, Code of Federal Regulations, and controlled—

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96. *Critical Infrastructure Sectors*, CYBERSECURITY & INFRASTRUCTURE SECURITY AGENCY, <https://www.cisa.gov/critical-infrastructure-sectors> (last updated Mar. 24, 2020).

(I) pursuant to multilateral regimes, including for reasons relating to national security, chemical and biological weapons proliferation, nuclear nonproliferation, or missile technology; or

(II) for reasons relating to regional stability or surreptitious listening.

(iii) Specially designed and prepared nuclear equipment, parts and components, materials, software, and technology covered by part 810 of title 10, Code of Federal Regulations (relating to assistance to foreign atomic energy activities).

(iv) Nuclear facilities, equipment, and material covered by part 110 of title 10, Code of Federal Regulations (relating to export and import of nuclear equipment and material).

(v) Select agents and toxins covered by part 331 of title 7, Code of Federal Regulations, part 121 of title 9 of such Code, or part 73 of title 42 of such Code.

(vi) ***Emerging and foundational technologies*** controlled pursuant to section 1758 of the Export Control Reform Act of 2018.<sup>97</sup>

The crucial change here was the inclusion of “emerging and foundational technologies controlled pursuant to section 1858 of the Export Control Reform Act of 2018” (ECRA) in subsection (vi). ECRA, along with FIRRMA, were both contained within a larger legislative work, the John S. McCain National Defense Authorization Act for Fiscal Year 2019 (NDAA).<sup>98</sup> “In Section 1758 of the NDAA, the ECRA authorized [Department of Commerce] to establish appropriate controls . . . on the export, re-export, or transfer (in country) of (1) emerging and (2) foundational technologies.”<sup>99</sup> Apart from identifying these “emerging and foundational technologies,” the ERCA simultaneously required that the deliberation process also

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97. Foreign Investment Risk Review Modernization Act of 2018 § 1703(a)(6)(A), 132 Stat. at 2181–82 (emphasis added).

98. See John S. McCain National Defense Authorization Act for Fiscal Year 2019, Pub. L. No. 115-232, 132 Stat. 1636 (2018); Farhad Jalinous et al., *Congress Finalizes CFIUS and Export Control Reform Legislation*, WHITE & CASE (July 26, 2018), <https://www.whitecase.com/publications/alert/congress-finalizes-cfius-and-export-control-reform-legislation>.

99. Richard Burke et al., *Department of Commerce Review of Export Controls on Emerging Technologies*, WHITE & CASE (Nov. 28, 2018), <https://www.whitecase.com/publications/alert/department-commerce-review-export-controls-emerging-technologies>.



consider “[t]he development of emerging and foundational technologies in foreign countries; [t]he effect export controls may have on the development of such technologies in the United States; and [t]he effectiveness of export controls on limiting the proliferation of emerging and foundational technologies in foreign countries.”<sup>100</sup>

Arguably, this description of emerging and foundation technologies provides little to no more help than the definition contained within the text of FIRRMA when trying to understand exactly what the term “critical technologies” means. However, on November 19, 2018, the Bureau of Industry and Security published an advance notice of proposed rulemaking (“November ANPRM”) in the Federal Register that provided a proposed list of “representative technology categories” that would fall under CFIUS as “critical technologies.”<sup>101</sup> Those categories include:

- (1) Biotechnology, such as:
  - (i) Nanobiology;
  - (ii) Synthetic biology;
  - (iv) Genomic and genetic engineering; or
  - (v) Neurotech.
- (2) Artificial intelligence (AI) and machine learning technology, such as:
  - (i) Neural networks and deep learning (*e.g.*, brain modelling, time series prediction, classification);
  - (ii) Evolution and genetic computation (*e.g.*, genetic algorithms, genetic programming);
  - (iii) Reinforcement learning;
  - (iv) Computer vision (*e.g.*, object recognition, image understanding);
  - (v) Expert systems (*e.g.*, decision support systems, teaching systems);
  - (vi) Speech and audio processing (*e.g.*, speech recognition and production);
  - (vii) Natural language processing (*e.g.*, machine translation);
  - (viii) Planning (*e.g.*, scheduling, game playing);
  - (ix) Audio and video manipulation technologies (*e.g.*, voice cloning, deepfakes);

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100. *Id.*

101. Review of Controls for Certain Emerging Technologies, 83 Fed. Reg. 58,201, 58,202 (Nov. 19, 2018) (to be codified at 15 C.F.R. pt. 744).

- (x) AI cloud technologies; or
- (xi) AI chipsets.
- (3) Position, Navigation, and Timing (PNT) technology.
- (4) Microprocessor technology, such as:
  - (i) Systems-on-Chip (SoC); or
  - (ii) Stacked Memory on Chip.
- (5) Advanced computing technology, such as:
  - (i) Memory-centric logic.
- (6) Data analytics technology, such as:
  - (i) Visualization;
  - (ii) Automated analysis algorithms; or
  - (iii) Context-aware computing.
- (7) Quantum information and sensing technology, such as
  - (i) Quantum computing;
  - (ii) Quantum encryption; or
  - (iii) Quantum sensing.
- (8) Logistics technology, such as:
  - (i) Mobile electric power;
  - (ii) Modeling and simulation;
  - (iii) Total asset visibility; or
  - (iv) Distribution-based Logistics Systems (DBLS).
- (9) Additive manufacturing (*e.g.*, 3D printing);
- (10) Robotics such as:
  - (i) Micro-drone and micro-robotic systems;
  - (ii) Swarming technology;
  - (iii) Self-assembling robots;
  - (iv) Molecular robotics;
  - (v) Robot compliers; or
  - (vi) Smart Dust.
- (11) Brain-computer interfaces, such as
  - (i) Neural-controlled interfaces;
  - (ii) Mind-machine interfaces;
  - (iii) Direct neural interfaces; or
  - (iv) Brain-machine interfaces.
- (12) Hypersonics, such as:
  - (i) Flight control algorithms;
  - (ii) Propulsion technologies;
  - (iii) Thermal protection systems; or
  - (iv) Specialized materials (for structures, sensors, etc.).

- (13) Advanced Materials, such as:
- (i) Adaptive camouflage;
  - (ii) Functional textiles (*e.g.*, advanced fiber and fabric technology); or
  - (iii) Biomaterials.
- (14) Advanced surveillance technologies, such as: Faceprint and voiceprint technologies.<sup>102</sup>

Following the publication of the November ANPRM, the “critical technologies” category experienced a shift from what was once an unclear and theoretical concept that left prospective investors scratching their heads to now a comprehensively defined list consisting of several of the most cutting-edge scientific investment opportunities. The November ANPRM, however, was conscious of the list’s potential chilling effect on foreign investment, stating that “[r]esponses to this ANPRM will help [the Department of] Commerce and other agencies identify and assess emerging technologies for the purposes of updating the export control lists *without impairing national security or hampering the ability of the U.S. commercial sector to keep pace with international advances in emerging fields.*”<sup>103</sup>

Even more troubling than the potentially vast CFIUS coverage stemming from FIRRMA was the fact that the Committee’s operations and review still remained secretive, conducted behind closed doors. There is no case law or open hearing process that provides prospective foreign investors with a benchmark to determine whether *their* investments will be covered by the Committee. All that is made public are the select transactions that are publicly announced to be under the Committee’s review and the news of the subsequent decision that accompanies the CFIUS investigation. While it is safe to say most transactions being reviewed by the Committee will not be nearly as colossal as this one, easily the most notable transaction scrutinized by CFIUS following FIRRMA’s passing was Broadcom’s attempted \$117 billion acquisition of Qualcomm.<sup>104</sup>

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102. *Id.*

103. *Id.* (emphasis added).

104. See Peter Henderson, *President Trump Halts Broadcom Takeover of Qualcomm*, REUTERS (Mar. 12, 2018, 6:59 AM), <https://www.reuters.com/article/us-qualcomm-m-a-broadcom-merger/president-trump-halts-broadcom-takeover-of-qualcomm-idUSKCN1GO1Q4>.

a. *The Broadcom-Qualcomm saga: A tale of two microchip giants*

President Trump's opinion of Broadcom was not always one of suspicion. In November 2017, President Trump praised Broadcom as "one of the really, great, great companies" after CEO Hock Tan announced Broadcom's plan to relocate its legal headquarters out of Singapore and into the United States for tax purposes.<sup>105</sup> Friendlier tax rates, however, was not the only reason for this move; only a few days later, "Mr. Tan announced that his company had offered to buy another major chip maker, Qualcomm, for \$105 billion, in what would be the biggest takeover in the history of the technology industry."<sup>106</sup>

Qualcomm, based in San Diego, California, is a technology giant, manufacturing digital wireless communication devices.<sup>107</sup> Having traditionally relied on a mixture of both microchip sales and patent licensing to garner profits, "the latest plan show[ed] Qualcomm leaning heavily on its chip side for future growth."<sup>108</sup> More specifically, Qualcomm is a "leading company in so-called 5G technology development and standard setting," competing closely with China's Huawei Technologies Co.<sup>109</sup> As a leader in American 5G communications research, the Committee was immediately alerted by Broadcom's announcement, fearing that "Broadcom would starve Qualcomm of research dollars that would allow it to compete."<sup>110</sup> CFIUS's investigation was also the result of U.S. military concerns regarding Broadcom's relationship with "third party foreign entities," less cryptically known as Huawei.<sup>111</sup> In the U.S. military's opinion, if Broadcom's acquisition of Qualcomm was successful, "within 10 years, 'there would essentially be a dominant player in all of these technologies and that's essentially Huawei, and then the American

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105. Michael J. de la Merced, *Broadcom Targets Qualcomm in Largest-Ever Tech Deal*, N.Y. TIMES (Nov. 6, 2017), <https://www.nytimes.com/2017/11/06/business/dealbook/broadcom-qualcomm-merger.html>.

106. *Id.*

107. *QUALCOMM Inc (QCOM US Equity)*, BLOOMBERG L., <https://www.bloomberglaw.com/company/ticker/QCOM%20US%20Equity> (last visited Apr. 5, 2020).

108. Dan Gallagher, *Qualcomm Stacks All Its Chips on 5G*, WALL ST. J. (Nov. 20, 2019, 9:49 AM), <https://www.wsj.com/articles/qualcomm-stacks-all-its-chips-on-5g-11574261397?mod=searchresults&page=1&pos=4>.

109. Henderson, *supra* note 104.

110. *Id.*

111. *Id.*

carriers would have no choice. They would just have to buy Huawei (equipment).”<sup>112</sup>

By CFIUS stepping in to intervene and prevent Broadcom’s bid on the basis of national security, the Committee safeguarded Qualcomm’s sizable market share of the 5G global market and preserved Qualcomm’s control of its essential 5G patents (approximately 15 percent of the world’s essential 5G patents).<sup>113</sup> That being said, Huawei remains the major 5G force in China, which is expected to become the world’s leading 5G market, amassing an estimated one-third of all 5G network users.<sup>114</sup> Apart from firmly holding the market in China, Huawei has also increased its commercial market-share in “several lucrative markets, including countries that are longstanding U.S. allies.”<sup>115</sup> With all that in mind, the decision to halt and review this transaction was based upon the relatively obvious implications of the purchase and its likely effect on U.S. national security.<sup>116</sup> President Trump’s decision to block Broadcom’s bid for Qualcomm revealed a rare moment in his administration receiving praise on both sides of the political aisle; “Senator Chuck Schumer, the top Democrat in the U.S. Senate, praised Trump’s decision, calling China’s trade practices ‘rapacious.’”<sup>117</sup>

While much can be learned from Broadcom’s attempted acquisition of Qualcomm, it still leaves much to the imagination for foreign investors, especially considering that the vast majority of foreign investment into U.S. “critical technologies” will be noticeably smaller than what would have literally been the largest technology merger of all time.<sup>118</sup> And despite the list provided from the November ANPRM, investors will often have to simply wait and see if their investment into these emerging technologies flags the interest of the

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112. *Id.*

113. Eric Auchard & Stephen Nellis, *What Is 5G and Who Are the Major Players?*, REUTERS (Mar. 15, 2018, 4:37 AM), <https://www.reuters.com/article/us-qualcomm-m-a-broadcom-5g/what-is-5g-and-who-are-the-major-players-idUSKCN1GR1IN>.

114. *Id.*

115. Eric Auchard & Sijia Jiang, *China’s Huawei Set to Lead Global Charge to 5G Networks*, REUTERS (Feb. 22, 2018, 11:32 PM), <https://www.reuters.com/article/us-telecoms-5g-china/chinas-huawei-set-to-lead-global-charge-to-5g-networks-idUSKCN1G70MV>.

116. *Id.*

117. Shrvanth Vijayakumar et al., *Timeline: Broadcom-Qualcom Saga Comes to an Abrupt End*, REUTERS (Mar. 14, 2018, 7:27 AM), <https://www.reuters.com/article/us-qualcomm-m-a-broadcom-timeline/timeline-broadcom-qualcomm-saga-comes-to-an-abrupt-end-idUSKCN1GQ22N>.

118. See de la Merced, *supra* note 105.

executive branch or the Committee. According to the Rhodium Group, an independent research provider specializing in economic data and policy insights, “15-25% of Chinese venture deals will be reviewable under the new regime, but if a broad definition is adopted, that could rise to 75% of deals.”<sup>119</sup>

On the other hand, Silicon Valley startups receiving foreign Chinese investments have also begun to grow wary of the once welcomed Chinese financial backing.<sup>120</sup> Previously, entrepreneurs welcomed Chinese money as the Chinese investors often agreed to higher valuations in exchange for access to the deal.<sup>121</sup> Occasionally, startup entrepreneurs were not even aware of the fact that their capital came from Chinese investors “because China’s sovereign, provincial and local governments, state-owned enterprises, firms and individual investors often form their own funds and pool their money in each other’s investment vehicles,” all under the guise of Western-sounding names, such as Westlake Ventures.<sup>122</sup> As a result, those startups that continued to accept more Chinese backing have recently begun to feel the pressure resulting from the ever-escalating tech-arms race between the United States and China. One entrepreneur recently commented on the impact of unknowingly accepting Chinese money from Danhau Capital, a Chinese venture-capital firm based near Stanford University: “You’re going in blind. If there are issues down the line you may not know who you’re dealing with.”<sup>123</sup> But despite all this, foreign investment, specifically from China, continues to provide capital, albeit at a declining rate, for numerous smaller, minority investments into new startups still focused on what has clearly now been defined as “critical technologies” pursuant to the November ANPRM.<sup>124</sup>

Regardless of its size, it is safe to say that if any lesson is learned from the Broadcom-Qualcomm saga, it is this: any major investment

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119. *Silicon Valley Gets Queasy About Chinese Money*, ECONOMIST (Aug. 9, 2018), <https://www.economist.com/business/2018/08/09/silicon-valley-gets-queasy-about-chinese-money>.

120. *Id.*

121. *Id.*

122. *Id.*

123. *Id.*

124. Burke et al., *supra* note 99; see also Thilo Hanemann et al., *Net Negative: Chinese Investment in the US in 2018*, RHODIUM GROUP (Jan. 13, 2019), <https://rhg.com/research/chinese-investment-in-the-us-2018-recap/> (describing a noticeable lowering in Chinese investment into tech startups following the passing of FIRMA).

that will likely give China, or nations closely associated with China, an upper hand on what the U.S. military finds vital to national security will most certainly catch the Committee's attention and likely be blocked. What lingers is discovering what that means for American startups in the future. How broadly will "critical technologies" be defined and applied by CFIUS? Will the Chinese continue to invest, but more selectively? If not, where else will that money go, possibly marking the beginning of a new Silicon Valley far from American shores? This balance of both encouraging investment into the U.S. tech-economy and simultaneously rejecting certain investments deemed problematic by CFIUS will likely have FIRRMA's desired effect: blocking Chinese investments that pose a threat to U.S. national security. But the long-term consequences of FIRRMA may likely extend beyond its initial purpose.

### 3. "Sensitive Personal Data"

Third and most ambiguous of the newly included FIRRMA categories concerns the "sensitive personal data" of all Americans.<sup>125</sup> Unlike other amendments to CFIUS's review scope, neither "sensitive personal data," nor any variation of the term, has ever been referenced by CFIUS standards before, essentially equating this term to unknown territory for foreign investors. This text was added late in the legislative process following the House's request for its inclusion, so naturally, absolutely no formal definition was provided for what actually constitutes "sensitive personal data."<sup>126</sup> As a primer to inform investors on what it could mean, the Treasury Department did provide this description:

**Sensitive personal data:** CFIUS may review transactions related to U.S. businesses that maintain or collect sensitive personal data of U.S. citizens that may be exploited in a manner that threatens national security. "Sensitive personal data" is defined to include ten categories of data maintained or collected by U.S. businesses that (i) target or tailor products or services to sensitive populations, including U.S.

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125. Foreign Investment Risk Review Modernization Act of 2018, Pub. L. No. 115-232, § 1703(a)(4)(B)(iii)(III), 132 Stat. 1636, 2177-78.

126. David R. Hanke, *CFIUS 2.0: 'Sensitive Personal Data' in the National Security Context*, ARENT FOX LLP (Sept. 3, 2019), <https://www.arentfox.com/perspectives/alerts/cfius-20-sensitive-personal-data-national-security-context>.

military members and employees of federal agencies involved in national security, (ii) collect or maintain such data on at least one million individuals, or (iii) have a demonstrated business objective to maintain or collect such data on greater than one million individuals and such data is an integrated part of the U.S. business's primary products or services. The categories of data include types of financial, geolocation, and health data, among others. Genetic information is also included in the definition regardless of whether it meets (i), (ii), or (iii).<sup>127</sup>

Despite the Treasury Department's attempt to resolve initial questions regarding the meaning of "sensitive personal data" and, of course, to be consistent with "critical infrastructure" and "critical technologies," "sensitive personal data" is seemingly as vast a term as those interpreting it are willing to go. It should be noted, however, that FIRRMA's use of "sensitive personal data" does depart from the more standard term "personally identifiable information," and many believe that this was a deliberate move, viewing "sensitive personal data" as another means to further extend the Committee's reviewing scope.<sup>128</sup> While the two likely have some overlap, drawing the distinguishing line will likely be challenging for foreign investors. "Sensitive personal data" may include "personally identifiable information," such as one's social security number or educational history, but the former may also cover information that has traditionally not been associated with "personally identifiable information," such as an individual's biometric information or internet history and social media data.<sup>129</sup> Ultimately, what's most troubling about this category is that there simply are no supplemental materials, other than the Treasury Department's statement, that provide *any* basis on how CFIUS will interpret this section of FIRRMA or enforce it. Accordingly, foreign investors are left with two options: either wait for further instructions on exactly which types of transactions are likely to be flagged under FIRRMA or continue on ahead, risking that their investment might be terminated by the Committee.<sup>130</sup>

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127. Fact Sheet, U.S. Dep't of the Treasury, *supra* note 87, at 3.

128. Hanke, *supra* note 126.

129. *Id.*

130. This Note does not address the Treasury Department's final two regulations regarding the implementation of FIRRMA and the Committee's reviewing power. These regulations were introduced immediately prior to the publication of this Note and, accordingly, the author was unable



## IV. THE OBSCURITY OF FOREIGN INVESTMENTS UNDER FIRRMA

At its outset, this Note analyzed CFIUS's legislative history and examined the jurisdictional implications that FIRRMA would have on the Committee, but the most important, and yet unresolved, question is whether this Act will truly assist in furthering the legislative goal of FIRRMA: enhancing protection of U.S. national security interests. In addressing this issue, however, the question must be broken into two parts: how will FIRRMA impact U.S. national security in the short term *and* in the long term?

As far as the *short-term* effects of FIRRMA go, there are certain benefits to CFIUS's ability to reject certain mergers, acquisitions, and takeovers that it finds issue with, assuming it has the bandwidth and personnel needed to review all the transactions it desires. Years of international relations or national security experience are not necessary to generally understand the potential implications that the Broadcom-Qualcomm acquisition could have posed to U.S. national security, but transactions of this magnitude are obvious and conspicuous.

The Achilles's heel of FIRRMA, however, is embedded within its *long-term* effect: if broad definitions of "critical infrastructure," "critical technologies," and especially "sensitive personal data" are adopted by the Committee resulting in more and more blocked foreign investments, investors will simply go elsewhere. And as a result, the likely departure of U.S. technological innovation to distant shores may ultimately endanger U.S. national security interests to an even greater extent than the investments FIRRMA was designed to block.<sup>131</sup>

Despite Silicon Valley being the uncontested leader in the tech world, other regions are rising to the challenge. "Of 63 private companies reaching 'unicorn' valuations of \$1B+ [during 2018], 38—or nearly two-thirds—of them came from *outside* the US."<sup>132</sup> From January 2012 to May 2018, Silicon Valley received \$140 billion in

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to provide a full analysis of these newly presented regulations. See Press Release, U.S. Dep't of the Treasury, Treasury Releases Final Regulations to Reform National Security Reviews for Certain Foreign Investments and Other Transactions in the United States (Jan. 13, 2020), <https://home.treasury.gov/news/press-releases/sm872>.

131. Steve Croley et al., *How FIRRMA Changes the Game for Tech Cos. and Investors*, LAW360 (Oct. 10, 2018, 4:08 PM), <https://www.law360.com/articles/1090123/how-firma-changes-the-game-for-tech-cos-and-investors>.

132. Marcelo Ballvé, *Silicon Valley's Competition*, CBINSIGHTS (Sept. 6, 2018), <https://www.cbinsights.com/research/silicon-valleys-competition/> (emphasis added).

fundraising for tech startups, but Beijing and Shanghai received a combined \$95 billion.<sup>133</sup> Despite Silicon Valley being the reigning champion of the global tech-economy, Asia's rise is undeniable as it becomes the focus of early-stage startups entering the market, consistently receiving substantial dollar investments with most of this funding and growth being allocated to Chinese startups.<sup>134</sup>

Not only does Asia have the technological know-how to assist and foster these companies, but there are often other “nuts and bolts” factors that make operating out of Asian markets more feasible for fledgling tech-companies, most notably real estate.<sup>135</sup> When it comes to deciding between housing in either Silicon Valley or Beijing, Beijing's economic advantage is irrefutable. Given that the medium price for a home in the San Francisco Bay Area is a staggering \$940,000, Ajay Royan of investment fund Mithril Capital put it best: “How are you supposed to have a startup in a garage if the garage costs millions of dollars?”<sup>136</sup>

CFIUS, with all of its amendments expanding its reviewing scope since its original enactment in 1975, has always been reactionary, following unanticipated shifts in the economy and national security. For four and a half decades, CFIUS has been playing a never-ending game of catch up with whatever it perceives as a threat to U.S. national security interests. But despite its best efforts and good intentions, FIRRMA may have gone too far. In an attempt to halt China's ever-increasing investments into emerging technologies in the United States, FIRRMA may currently be viewed as a shield protecting against such investments but is likely to manifest itself as a double-edged sword. While FIRRMA will undoubtedly fend off investments that are likely accompanied by suspicious Chinese motives, at the same time it is also likely to divert future funding for America's tech-economy and, in an ironic twist, send prized future innovation to the very shores it was designed to withhold that technology from. The only entity that can truly determine the Committee's fate is the Committee itself, especially regarding its decision as to how exactly

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133. *Global Tech Hubs*, CBINSIGHTS, <https://www.cbinsights.com/research/report/global-tech-hubs/> (last visited Apr. 5, 2020).

134. *Id.*

135. *See Silicon Valley Is Changing, and Its Lead Over Other Tech Hubs Narrowing*, ECONOMIST (Sept. 1, 2018), <https://www.economist.com/briefing/2018/09/01/silicon-valley-is-changing-and-its-lead-over-other-tech-hubs-narrowing>.

136. *Id.*

“critical infrastructure,” “critical technologies,” and “sensitive personal data” will be defined. After all, the interpretation of these terms will determine the jurisdictional scope of the Committee going forward, and subsequently, affect the willingness of foreign investors to enter U.S. markets. In the end, as the old saying goes, only time will tell.