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## From China with Love: Espionage in the Age of Foreign Investment

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# FROM CHINA WITH LOVE: ESPIONAGE IN THE AGE OF FOREIGN INVESTMENT

*“It is obvious and unarguable that no governmental interest is more compelling than the security of the nation.”<sup>1</sup>*

## INTRODUCTION

In March, 2012, Ralls Corporation (“Ralls”), a Delaware corporation owned by Chinese executives, acquired four Oregon-based limited liability companies that were formed to develop wind farms.<sup>2</sup> The wind farms were located “in and around” a restricted U.S. Navy (“Navy”) airspace and bombing site.<sup>3</sup> Once the acquisition was complete, the Navy notified Ralls that it was concerned about the location of one of the wind farms.<sup>4</sup> Although Ralls moved the contested wind farm, the Committee on Foreign Investment in the United States (“CFIUS” or the “Committee”) compelled Ralls to file a notice with CFIUS to review the transaction.<sup>5</sup> After CFIUS investigated the transaction and attempted to mitigate the national security concerns,<sup>6</sup> CFIUS submitted its report and recommendation to President Obama.<sup>7</sup> On September 28, 2013, President Obama mandated Ralls divest all property interests in the project companies, terminate access to the project site, and refrain from selling the project companies to third parties.<sup>8</sup> Neither

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1. Haig v. Agee, 453 U.S. 280, 307 (1981) (quoting *Aptheker v. Sec’y of State*, 378 U.S. 500, 509 (1964)).

2. *Ralls Corp. v. Comm. on Foreign Inv. in U.S.*, 758 F.3d 296, 301 (D.C. Cir. 2014).

3. *Id.* at 304.

4. *Id.*

5. *Ralls Corp. v. Comm. on Foreign Inv. in U.S.*, 987 F. Supp. 2d 18, 24 (D.D.C. 2013) *rev’d and remanded sub. nom.* *Ralls Corp. v. Comm. on Foreign Inv. in U.S.*, 758 F.3d 296 (D.C. Cir. 2014).

6. Neither the July order nor the CFIUS orders disclose the nature of the national security threat or the evidence CFIUS utilized in making its determination and in issuing its orders. *Id.* at 305.

7. *Id.* President Obama’s veto was founded on CFIUS’s concerns regarding the proximity of Ralls’ assets to the U.S. Naval Base. Karlee Weinman, *In Rare Move, CFIUS Hands Over Cache Of Ralls Docs*, LAW360 (Nov. 26, 2014, 1:16 PM), <http://www.law360.com/articles/599760/in-unprecedented-move-cfius-hands-over-cache-of-ralls-docs>.

8. *Ralls Corp.*, 758 F.3d at 306.

CFIUS nor President Obama notified Ralls of the evidence supporting their decisions, and Ralls was never given an opportunity to rebut the evidence.<sup>9</sup>

After President Obama mandated that Ralls unwind the acquisition (the “Presidential Order”), Ralls became the first party to challenge CFIUS’s authority and the Presidential Order in court.<sup>10</sup> On July 15, 2014, the United States Court of Appeals for the District of Columbia issued a controversial decision in *Ralls Corporation v. Committee on Foreign Investment in the United States* and held that the Presidential Order deprived Ralls of its property interests in the companies without due process.<sup>11</sup> Subsequently, in an unprecedented decision,<sup>12</sup> the D.C. District Court ordered CFIUS to provide Ralls with the information that supported the Presidential Order to unwind Ralls’ acquisition of the wind farm companies.<sup>13</sup> The *Ralls* decision illustrates an ongoing conflict between foreign investors and the CFIUS review process. Additionally, the decision revived the debate about the efficacy and integrity of the mysterious reviews that consistently plague foreign direct investment (“FDI”) into the United States.<sup>14</sup>

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9. *Id.*

10. Stewart Baker and Stephen Heifetz, *Ralls May Give Foreign Investors More Leverage with CFIUS*, LAW360 (Dec. 11, 2014, 11:21 AM), <http://www.law360.com/articles/603312/ralls-may-give-foreign-investors-more-leverage-with-cfius>.

11. *Ralls Corp.*, 758 F.3d at 321.

12. James Rosen, *Judge Orders Obama to Explain Rejection of Chinese Bid to Buy Oregon Wind Farms on National Security Grounds*, MCCLATCHYDC (Nov. 7, 2014), <http://www.mcclatchydc.com/2014/11/07/246230/judge-orders-obama-to-explain.html>. See also *infra* Part II.C.

13. The Obama administration handed over 3,487 pages of documents to Ralls. CFIUS withheld two documents, citing privilege. Alex Guillén, *Administration Hands Over Documents to Ralls*, POLITICO (Nov. 25, 2014, 10:01 AM), <http://www.politico.com/morningenergy/1114/morningenergy16238.html>.

14. There is constant debate about the extent to which the U.S. government’s power should and may infringe on the rights of individuals when the nation’s security is at risk. As a result, procedural aspects of maintaining national security are in constant flux. Further, the U.S. government’s use of biased or unscrupulous means to protect the nation’s security arguably sacrifices the integrity of the U.S. government’s efforts. See generally, John Yoo, *The Legality of the National Security Agency’s Bulk Data Surveillance Programs*, 37 HARV. J.L. & PUB. POL’Y 901 (2014); David Jackson, *White House: Review Will Address Global NSA Concerns, World Leaders React to NSA Spying Reports*, USA TODAY (Oct. 29, 2013, 9:35 AM),

Throughout U.S. history, national security has been a paramount concern of the U.S. government.<sup>15</sup> In recent decades, burgeoning technologies and the rise of unconventional acts of terror have heightened fears for the nation's security. These fears have resulted in the perception of new threats to the nation's security and a labyrinthine definition of "national security."<sup>16</sup> Conventional acts of espionage—those primarily associated with identifiable persons or groups—have conceptually merged with cybersecurity breaches and industrial espionage.<sup>17</sup> The Federal Bureau of Investigation ("FBI") notably remarked that "[t]he Cold War is not over, it has merely moved to a new arena: the global marketplace."<sup>18</sup> This amalgamation of threats

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<http://www.usatoday.com/story/news/world/2013/10/28/obama-national-security-agency-surveillance-germany-merkel/3286709/>; Eileen Donahoe, *Why the NSA Undermines National Security*, REUTERS (Mar. 6, 2014), <http://blogs.reuters.com/great-debate/2014/03/06/why-nsa-surveillance-undermines-national-security/>; *Olmstead v. U.S.*, 277 U.S. 438 (1928) (stating that wire-tapping and disclosure in this case did not rise to the level of search or seizure as contemplated by the Fourth Amendment); *Rasul v. Bush*, 542 U.S. 466 (2004) (discussing the legality and conditions of alien's confinement in the United States at Guantanamo Bay, Cuba); *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004) (discussing petition for writ of habeas corpus on behalf of a U.S. citizen alleged to be an enemy combatant captured in Afghanistan); *Rumsfeld v. Padilla*, 542 U.S. 426 (2004) (discussing petition for writ of habeas corpus in which a prisoner, who was a U.S. citizen, challenged his detention as an "enemy combatant"); see *infra* Part III.

15. See generally Subversive Activities Control Act, ch. 1024, Pub. L. 81-831, 64 Stat. 987 (1950); Espionage Act, ch. 30, Pub. L. 65-24, 40 Stat. 217 (1917); Defense Production Act, ch. 932, Pub. L. 81-774, 64 Stat. 798 (1950).

16. These newly perceived national security threats include "non-state actors, including organized crime syndicates and transnational terrorists; and ordinarily legitimate business organizations." Robert Gray Bracknell, *Trust Not Their Presents, Nor Admit the Horse: Countering the Technically-Based Espionage Threat*, 12 ROGER WILLIAMS U. L. REV. 832, 833 (2007).

17. Industrial Espionage is defined as "spying directed towards discovering the secrets of a rival industrial company, manufacturer, etc." *Industrial Espionage*, OXFORD ENGLISH DICTIONARY, <http://www.oed.com/view/Entry/94848?redirectedFrom=industrial+espionage#eid538333> (last visited April 5, 2014).

18. Souvik Saha, *CFIUS Now Made in China: Dueling National Security Review Frameworks as a Countermeasure to Economic Espionage in the Age of Globalization*, 33 NW. J. INT'L L. & BUS. 199, 200 (2012) (citing *Economic Espionage*, FED. BUREAU OF INVESTIGATION, <https://www2.fbi.gov/hq/ci/economic.htm>). Additionally, Dennis C. Blair, former Director of National Intelligence stated, "[G]lobal economic turmoil and the instability it could ignite had outpaced terrorism as the most urgent

has created a “poisoned climate” in which to balance the nation’s economic prosperity and national security.<sup>19</sup> In this environment, cyber-espionage has threatened prominent U.S. businesses, including Home Depot and J.P. Morgan Chase.<sup>20</sup> These events illustrate widespread flaws in corporate and government security across the globe.

As globalization accelerates and the world’s largest corporations conduct cross-border transactions with increasing frequency,<sup>21</sup> businesses can be victims of espionage, or instead become vessels for espionage through FDI.<sup>22</sup> This can occur in two ways: first, when a State-owned or government-connected entity conducts business in the United States; and second, when a foreign entity purchases a U.S. business.<sup>23</sup> Foreign ownership

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threat facing the United States.” Blair attributed Pakistan’s problems to the fact that it was one of the countries most significantly affected by the economic crisis. Mark Mazzeti, *Global Economy Top Threat to U.S., Spy Chief Says*, N.Y. TIMES, Feb. 13, 2009, at A14, [http://www.nytimes.com/2009/02/13/washington/13intel.html?\\_r=0](http://www.nytimes.com/2009/02/13/washington/13intel.html?_r=0).

19. CLAUDE BARFIELD, AM. ENTERPRISE INST. ECON. STUD., TELECOMS AND THE HUAWEI CONUNDRUM: CHINESE FOREIGN DIRECT INVESTMENT IN THE UNITED STATES 10 (2011), [http://www.aei.org/wp-content/uploads/2011/11/telecoms-and-the-huawei-conundrum-chinese-foreign-direct-investment-in-the-united-states\\_103528582558.pdf](http://www.aei.org/wp-content/uploads/2011/11/telecoms-and-the-huawei-conundrum-chinese-foreign-direct-investment-in-the-united-states_103528582558.pdf).

20. Jessica Silver-Greenberg, Matthew Goldstein & Nicole Perlroth, *JPMorgan Chase Hacking Affects 76 Million Households*, N.Y. TIMES (Oct. 2, 2014, 12:50 PM), [http://dealbook.nytimes.com/2014/10/02/jpmorgan-discovers-further-cyber-security-issues/?\\_r=0](http://dealbook.nytimes.com/2014/10/02/jpmorgan-discovers-further-cyber-security-issues/?_r=0). In addition to the J.P. Morgan hack, which occurred overseas, it was reported that the group targeted additional companies including Citigroup, HSBC, E-Trade, Regions, and Automatic Data Processing Inc. Michael Riley & Jordan Robertson, *JPMorgan Hackers Said to Probe 13 Financial Firms*, BLOOMBERG (Oct. 9, 2014, 5:00 AM), <http://www.bloomberg.com/news/2014-10-09/jpmorgan-hackers-said-to-probe-13-financial-firms.html>.

21. For example, Morgan Stanley plans to sell its Global Oil Merchanting Business to Rosneft, Russia’s leader in the Petroleum industry. *Morgan Stanley to Sell Global Oil Merchanting Business to Rosneft*, MORGAN STANLEY (Dec. 20, 2013), <http://www.morganstanley.com/about/press/articles/00ddb583-1c3c-4dd9-b27f-6023c884aae3.html>.

22. Foreign direct investment is “investment by a company in a country other than that in which the company is based.” *Foreign Direct Investment*, Oxford ENGLISH DICTIONARY, <http://www.oed.com/view/Entry/73063?redirectedFrom=foreign+direct+investment#eid3752331>.

23. In this Note, “U.S. corporation” is used to refer generally to a business incorporated in one of the fifty states.

of U.S. entities establishes a foreign presence in the United States and enables theft of “American technology, intellectual property, and sensitive information pertaining to critical infrastructure.”<sup>24</sup>

While the FBI, Central Intelligence Agency, and National Security Agency address certain security concerns stemming from foreign investments, CFIUS is the government agency charged with preserving this nuanced component of national security.<sup>25</sup> CFIUS is an inter-agency committee of the U.S. government<sup>26</sup> and is authorized to review transactions that could “result in control of a U.S. business by a foreign person.”<sup>27</sup> CFIUS conducts such reviews to determine whether certain transactions pose national security threats.<sup>28</sup> However, this review places an additional burden on CFIUS’s duties as a governmental agency. CFIUS must maintain and protect U.S. national security while simultaneously balancing the business interests of foreign investors.<sup>29</sup>

CFIUS’s secretive evaluations—and its power—have become an increasingly contested political issue, both domestically and abroad.<sup>30</sup> In the United States, these debates have garnered significant legislative responses. For example, Congresswoman Rosa DeLauro recently proposed legislation to amend the CFIUS review process to include an evaluation of whether the transaction results in a “net benefit” to the United States.<sup>31</sup> In

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24. Matthew Crosston, *Soft Spying: Leveraging Globalization as Proxy Military Rivalry*, 28 INT’L J. OF INTELLIGENCE & COUNTERINTELLIGENCE 105, 109 (2014).

25. *Committee on Foreign Investment in the United States*, DEP’T TREASURY, <http://www.treasury.gov/resource-center/international/Pages/Committee-on-Foreign-Investment-in-US.aspx> (last updated Dec. 20, 2012) [hereinafter *CFIUS*, DEP’T TREASURY].

26. *Id.*

27. *Id.*

28. *Id.*

29. “[T]he very fact of foreign ownership is correlated with an increased risk of harm to the national security through such things as the leakage of critical defense technologies.” *CFIUS and the Role of Foreign Direct Investment in the U.S.: Hearing Before the Subcomm. on Domestic and International Monetary Policy, Trade and Technology of the H. Comm. On Fin. Services*, 109th Cong. 4, 60 (2006) (statement of Professor Daniel K. Tarullo, Geo. U. L. Center) [hereinafter *Hearing*].

30. See *infra* Parts II & III.

31. H.R. 5581, 113th Cong. §1 (2014). For further discussion of Congresswoman DeLauro’s Bill, see *infra* Part III.

the international arena, as a response to CFIUS reviews, nations such as the People's Republic of China ("China") have instituted their own protectionist regimes.<sup>32</sup> Critics of CFIUS assert a variety of complaints, alleging both inaction and prejudiced reviews.<sup>33</sup> The correct balance must be struck, between ensuring the nation's security and promoting FDI, if all the foregoing concerns are to be addressed.

This Note argues that the U.S. government should neither explicitly define "national security" in the context of CFIUS reviews, nor expand its definition to include a "net-benefit" or economic review, as proposed by Congresswoman DeLauro's legislation.<sup>34</sup> Rather, the definition of "national security" should remain undefined to allow the government to adapt its security reviews to unpredictable and evolving threats. Alternatively, the type of "covered transaction[s]" that CFIUS has the power to review should be amended. CFIUS jurisdiction should not hinge upon traditional, corporate law distinctions that define control only in terms of mergers, acquisitions, and takeovers. Rather, CFIUS's jurisdiction should maintain a more equitable approach to other types of nontraditional control that could pose a security threat.<sup>35</sup> An amended definition of a "covered transaction" should include leases, construction, and additional investments.<sup>36</sup> A more inclusive definition that directs the Committee's focus to examine the *substance and effect* of transactions, rather than merely *the structure*, will provide a more comprehensive review of FDI. These amendments will not only eliminate loopholes in the enacting legislation, but also increase the quality and integrity of CFIUS national security reviews. Additionally, such amendments will nurture the United States' presence in international markets by not further dis-

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32. See *infra* Part IV.

33. See *infra* Parts II & III.

34. H.R. 5581; see *infra* Part III.

35. The existence of equitable doctrines in corporate law, which includes concepts like estoppel, piercing the corporate veil, or alter ego theory, demonstrates that CFIUS's governing law, which is principally corporate, cannot solely rely on legal formalities.

36. This Note will focus on leases, but the scope of CFIUS's inquiry should be amended to include the construction of new facilities as well as additional or incremental investments. Such transactions implicate national security issues similar to those raised by leases, such as proximity to sensitive U.S. government facilities.

couraging FDI with a more economically focused and intrusive national security review.

Part I of this Note outlines CFIUS's structure and the multi-step CFIUS review process by examining Section 721 of the Defense of Production Act of 1950 ("Section 721"),<sup>37</sup> as amended by the Foreign Investment and National Security Act of 2007, and regulations at 31 C.F.R. Part 800.<sup>38</sup> Part II discusses prior international business transactions that have both successfully and unsuccessfully undergone CFIUS review. This discussion primarily focuses on international business transactions involving parties from China because such transactions have garnered the most political opposition. Part III addresses recently proposed legislation prompting the aggressive expansion of the scope of CFIUS reviews. Part IV surveys China's national security review of FDI and further compares and contrasts China's national security review with CFIUS's review procedures. Finally, Part V analyzes and evaluates the CFIUS review process. This Part concludes by proposing amendments to CFIUS's enacting legislation and articulating the positive effects such amendments would have on the quality of the review process and on the fairness, legitimacy, and security of FDI in the United States.

#### I: THE COMMITTEE ON FOREIGN INVESTMENT IN THE UNITED STATES

Since the Ford administration established CFIUS in 1975,<sup>39</sup> the Committee and its legal authority have undergone significant legal reforms to address the nuanced evolution of national security.<sup>40</sup> As a result, CFIUS's authority, purpose, multi-step review process, and disclosure obligations have been memorial-

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37. Foreign Investment and National Security Act, Pub. L. 110-49, 121 Stat. 246 (2007).

38. 31 C.F.R. § 800 (2008).

39. Exec. Order No. 11,858, 40 Fed. Reg. 20,263 (1975).

40. Paul Connell & Tian Huang, *An Empirical Analysis of CFIUS: Examining Foreign Investment Regulation in the United States*, 39 YALE J. INT'L L. 131, 132 (2014). Such reforms include the 2007 enactment of FINSA, the amendment of Executive Order 1188 in 2008, revision of CFIUS regulation in 2008, and publication of guidance on CFIUS's national security considerations in 2008. Additionally, Executive Orders that have altered the legal landscape of national security include 12661, 12860, 13286, 13456 from Presidents Reagan, Clinton, and Bush respectively. *CFIUS*, DEP'T TREASURY, *supra* note 25.

ized in various pieces of legislation. This Part will articulate CFIUS's structure, CFIUS's legislative history and authority, and the multiple steps of the CFIUS review process. Additionally, this part will also provide a statistical analysis of CFIUS's reviews from its Annual Reports.

### *A. Legislative Authority and Structure of CFIUS*

CFIUS currently operates pursuant to Section 721<sup>41</sup> and 31 C.F.R. Part 800.<sup>42</sup> Section 721 authorizes the President to suspend or prohibit a "covered transaction,"<sup>43</sup> which is defined as "any merger, acquisition or takeover . . . by or with any foreign person which could result in foreign control of any person engaged in interstate commerce in the United States."<sup>44</sup> A "covered transaction" does not include other types of transactions, however, such as greenfield investments,<sup>45</sup> asset acquisitions,<sup>46</sup> leases,<sup>47</sup> lending transactions,<sup>48</sup> and incremental acquisitions.<sup>49</sup>

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41. Foreign Investment and National Security Act (FINSA), Pub. L. 110-49, 121 Stat. 246 (2007). FINSA, signed into law by President Bush, instituted long-awaited reform. Most importantly, it asserts and maintains "the confidentiality of the CFIUS review process and involves Congress in that process only in an oversight role, with after-the-fact reports." Thomas E. Crocker & Joe D. Whitley, *Congress Enacts CFIUS Reform Legislation*, ADMIN. & REG. L. NEWS, Spring 2008, at 5.

42. *CFIUS*, DEP'T TREASURY, *supra* note 25. Section 721 was amended by FINSA, also known as the Exon Florio Amendment. *CFIUS*, DEP'T TREASURY, *supra* note 25.

43. Foreign Investment and National Security Act, sec 6.

44. Foreign Investment and National Security Act, sec. 2.

45. A "greenfield" investment is also known as a start-up investment. DEPARTMENT OF THE TREASURY, CFIUS REFORM: FINAL REGULATIONS ISSUED ON NOVEMBER 14, 2008, at 1 (2008), <http://www.treasury.gov/resource-center/international/foreign-investment/Documents/Summary-FinalRegs.pdf>.

46. An "asset acquisition" is not considered a covered transaction if the assets do not constitute a "U.S. business." *Id.*

47. "Long-term leases" are only covered if a foreign lessee "makes substantially all business decisions concerning operation of a leased U.S. business, as if it were the owner." *Id.*

48. A "lending transaction" is not a covered transaction unless the foreign person "acquires financial or governance rights characteristic of an equity investment, but not of a loan. Imminent default giving a foreign person actual control of collateral that constitutes a U.S. business is a covered transaction—but lenders in the ordinary course may qualify for an exception." *Id.*

49. "Incremental acquisitions" are not covered transactions. *Id.* ("After CFIUS concludes action on a covered transaction, the foreign person's acqui-

Importantly, the statute's finality provision exempts the President's findings from judicial review.<sup>50</sup>

CFIUS is an inter-agency committee for which the Secretary of the Treasury serves as chairperson.<sup>51</sup> Notices are "received, processed, and coordinated" by the CFIUS Staff Chairperson.<sup>52</sup> Additional members of the Committee include the heads of the Department of Justice, Department of Homeland Security, Department of Commerce, Department of Defense, Department of State, Department of Energy, Office of the U.S. Trade Representative, and Office of Science and Technology Policy.<sup>53</sup> The CFIUS review process is structurally protected from politicization by Congress, because the oversight powers of Congress are retrospective only.<sup>54</sup> Nevertheless, CFIUS still maintains ties to bipartisan politics.<sup>55</sup> To maintain accountability for CFIUS actions, Section 721 requires CFIUS to submit an annual report<sup>56</sup> to Congress detailing its reviews of international busi-

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sition of additional interest in a U.S. business is not a new covered transaction.")

50. Foreign Investment & National Security Act, Pub. L. 110-49, sec. 6, § 721 (d)(1), 121 Stat. 246, 256 (2007) ("The President may exercise the authority . . . only if the President finds that . . . there is credible evidence that leads the President to believe that the foreign interest exercising control might take action that threatens to impair the national security.").

51. *Composition of CFIUS*, DEPT. TREASURY, <http://www.treasury.gov/resource-center/international/foreign-investment/Pages/cfius-members.aspx> (last updated Dec. 1, 2010).

52. The CFIUS staff chairperson is the Director of the Office of Investment Security in the Department of the Treasury. *Id.* The Department of the Treasury, Homeland Security, Commerce and Justice typically are the most active in the review process. Joanna Rubin Travalini, *Foreign Direct Investment in the United States: Achieving a Balance between National Economy Benefits and National Security Interests*, 29 NW. J. INT'L L. & BUS. 779, 783 (2009).

53. When appropriate, the Office of Management & Budget, Council of Economic Advisors, National Security Council, National Economic Council, and Homeland Security Council observe and participate in Committee activities. *Id.*

54. 50 U.S.C. app. § 2170 (b)(3), (m) (2007); *see also supra* note 41.

55. *See infra* Part II. *See generally*, JAMES K. JACKSON, CONG. RESEARCH SERV., RL33388, THE COMMITTEE ON FOREIGN INVESTMENT IN THE UNITED STATES (2014); Matthew C. Sullivan, *CFIUS and Congress Reconsidered: Fire Alarms, Police Patrols, and a New Oversight Regime*, 17 WILLAMETTE J. INT'L L. & DISP. RESOL. 199 (2009).

56. The annual report includes the following: empirical data relating to the filed notices, reviews, investigations, withdrawn notices, and decisions, in-

ness transactions.<sup>57</sup> Additionally, the Committee must deliver a certified report to Congress upon completing an investigation—and the lead agency must transmit the contents and results of the investigation to members of Congress<sup>58</sup>—unless the matter was sent to the President for decision.<sup>59</sup> Some argue CFIUS has evolved into a “congressional notification service” due to the fact that Congress has responded to economic crises by expanding its supervision of CFIUS.<sup>60</sup>

### *B. The CFIUS Review Process*

CFIUS reviews proceed on both a voluntary and involuntary basis because parties to an international transaction are not required to file notice of a covered transaction with the Committee. However, due to procedural protections afforded to voluntary filers,<sup>61</sup> parties to a transaction have strong incentives to voluntarily file notice. These protections stem from a “safe harbor” provision<sup>62</sup> and from the President’s power to retroactively unwind a transaction after it has closed.<sup>63</sup> As a result, most parties file voluntarily.<sup>64</sup> If a party to a transaction de-

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formation about the business sectors involved in the filings, examples of mitigation measures and methods of compliance, the countries from which investments originated, and an analysis concerning critical technologies. Foreign Investment & National Security Act, Pub. L. 110–49, sec. 7, § 721(m)(1)–(3), 121 Stat. 246, 257–258 (2007).

57. *Id.* § 721(m).

58. Reports include specifically “a description of actions taken by the Committee with respect to the transaction” and “identification of the determinative factors considered under subsection (f).” *Id.* § 721(b)(3)(C)(i)(I)–(II).

59. *Id.* § 721(b)(3)(B).

60. All recent CFIUS amendments are preceded by congressionally opposed transactions. David Zaring, *CFIUS as a Congressional Notification Service*, 83 S. CAL. L. REV. 81, 90, 99 (2009).

61. Regulations Pertaining to Mergers, Acquisitions, and Takeovers by Foreign Persons 31 C.F.R. § 800.402 (2004).

62. 31 C.F.R. § 800.601 (2004). The safe harbor provision provides for the “Finality of actions under section 721.” The power of both the President and Committee under Section 721 remains at the President’s discretion. However, such authority will not be exercised if “The President has previously announced . . . his decision not to exercise his authority under section 721 with respect to the covered transaction.” *Id.*

63. *Id.*

64. Thomas S. Vaughn & Shang Kong, *Comply with Foreign Investment Rules, CFIUS Reviews Will Become More Common as Chinese Companies Invest More in the United States, but Careful Preparation Can Help Companies Navigate a Complex Process*, CHINA BUS. REV. (Nov. 25, 2013),

cides not to file a voluntary written notice with CFIUS, the President or CFIUS can unilaterally compel a review.<sup>65</sup>

Once a review commences, the initial review period may last up to thirty days.<sup>66</sup> During this time, the Committee examines the transaction to identify any national security concerns.<sup>67</sup> These concerns include the control of U.S. businesses that provide goods or services to the U.S. government; products or services that could expose vulnerabilities in cybersecurity; businesses involved in critical infrastructure,<sup>68</sup> defense, security, weapons, or munitions manufacturing; and businesses in close

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<http://www.chinabusinessreview.com/complying-with-foreign-investment-rules/>. Parties must file in compliance with the procedures stated in 31 C.F.R. § 800.401 and must include the information required in 31 C.F.R. § 800.402.

65. 50 U.S.C. App § 2170(b)(1)(D) (2007).

66. *Filing Instructions*, DEP'T TREASURY, <http://www.treasury.gov/resource-center/international/foreign-investment/Pages/cfius-filing-instructions.aspx> (last visited May 15, 2015).

67. *Process Overview*, DEP'T TREASURY, <http://www.treasury.gov/resource-center/international/foreign-investment/Pages/cfius-overview.aspx> (last visited May 15, 2015). The following factors may be considered in this calculus:

- (1) domestic production needed for national defense requirements,
- (2) the capability and capacity of domestic industries to meet national defense requirements . . .
- (3) the control of domestic industries and commercial activity by foreign citizens as it affects the capability and capacity of the United States to meet the requirements of national security,
- (4) the potential effects of the proposed or pending transaction on sales of military goods, equipment, or technology to any country . . . ,
- (5) the potential effects of the proposed or pending transaction on United States international technological leadership in areas affecting United States national security;
- (6) the potential national security-related effects on the United States critical technologies;
- (7) whether the covered transaction is a foreign government-controlled transaction . . . ,
- (10) the long-term projection of United States requirements for sources of energy and other critical resources and materials; and
- (11) such other factors as the president or the Committee may determine to be appropriate generally or in connection with a specific review or investigation.

50 U.S.C. app. § 2170(f).

68. 31 C.F.R. § 800.208 defines Critical Infrastructure as,

in the context of a particular covered transaction, a system or asset, whether physical or virtual, so vital to the United States that the incapacity or destruction of the particular system or asset of the entity over which control is acquired pursuant to that covered transaction would have a debilitating impact on national security.

proximity to certain U.S. government facilities.<sup>69</sup> Most reviews are completed within the initial thirty-day period. However, CFIUS may, under certain circumstances, initiate a subsequent investigation that must be completed within forty-five days after the initial thirty-day review.<sup>70</sup> Once an investigation is underway, parties to a transaction may request the withdrawal of their notice.<sup>71</sup> This request of withdrawal must be approved by CFIUS, which may impose conditions on the parties<sup>72</sup> and track the transaction thereafter.<sup>73</sup> In the event that a dispute is referred to the President for decision,<sup>74</sup> Section 721 requires the President to decide whether to “suspend or prohibit the transaction” within fifteen days of the completion of the CFIUS investigation.<sup>75</sup>

Parties often agree to mitigation measures to alleviate pressing security concerns.<sup>76</sup> Although public disclosure of the specifics of reviews is expressly prohibited, various examples of mitigation measures have been published in CFIUS's annual reports to Congress.<sup>77</sup> Examples of mitigation measures in the report include the following: “[e]nsuring only U.S. citizens handle certain products and services, and ensuring that certain activities and products are located only in the United States,” “[n]otifying relevant USG parties of any awareness of any vulnerability or security incidents,” and the “[t]ermination of specific activities of the U.S. business.”<sup>78</sup> Mitigation measures are monitored through means such as periodic reports to govern-

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69. COMMITTEE ON FOREIGN INVESTMENT IN THE UNITED STATES, ANNUAL REPORT TO CONGRESS CY 2012, at 22 (2013) [hereinafter 2012 ANNUAL REPORT].

70. 31 C.F.R. § 800.503–06.

71. 31 C.F.R. § 800.507.

72. These conditions are “interim protections to address specific national security concerns identified during the review or investigation of the withdrawn transaction.” COMMITTEE ON FOREIGN INVESTMENT IN THE UNITED STATES, ANNUAL REPORT TO CONGRESS CY 2013, at 20 (2015) [hereinafter 2013 ANNUAL REPORT].

73. 31 C.F.R. § 800.507(i)–(ii).

74. See generally, Exec. Order No. 13,456, 73 Fed. Reg. 4677, § 6(c) (2008); 31 C.F.R. § 800.506.

75. 50 U.S.C. app. § 2170(d)(1). *Process Overview*, *supra* note 67.

76. From 2011 to 2013, twenty-seven reviews resulted in the use of legally binding mitigation measures. In 2013 alone, there were eleven cases in which mitigation measures were used. 2013 ANNUAL REPORT, *supra* note 72, at 20.

77. *Id.*

78. 2013 ANNUAL REPORT, *supra* note 72, at 20.

ment agencies, on-site reviews, third-party audits, and remedial measures if breaches occur or are suspected.<sup>79</sup>

### C. Statistical Analysis of Recent Trends in CFIUS Review

The history of CFIUS activities in recent years is outlined in the *Committee on Foreign Investment in the United States Annual Report to Congress*.<sup>80</sup> In light of the continued recovery from the 2008–2009 global financial crisis, not only has the number of investigations increased,<sup>81</sup> but the number of notices withdrawn after the commencement of an investigation has also dramatically increased.<sup>82</sup> In total from 2009–2013, 480 notices were filed, 17 were withdrawn, 193 investigations were conducted, 38 notices were withdrawn after commencement of investigation, and one Presidential decision has been rendered.<sup>83</sup> Additionally, due to changes in international markets and new national security threats, the types of industries prompting review have either gained or diminished in prominence. In 2009, “Manufacturing” accounted for 32 percent of all notices filed, “Finance, Information, and Services” accounted for 34 percent, “Mining, Utilities, and Construction” accounted for 29 percent, and “Wholesale, Retail, and Transportation” ac-

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79. *Id.*

80. See generally 2012 ANNUAL REPORT, *supra* note 69; 2013 ANNUAL REPORT, *supra* note 72.

81. In 2009, twenty-five investigations were conducted; in 2010, thirty-five; in 2011, forty; in 2012, forty-five; in 2013, forty-eight. ANNUAL REPORT TO CONGRESS CY 2013, *supra* note 72, at 3. The increased number of investigations is attributed to “delays tied to the government’s shut down . . . [and] heightened scrutiny by the committee—as well as a renewed boldness among deal-makers, including Chinese outfits targeting a wider range of plays.” Furthermore, it also possible that Chinese investors are now moving into different investment sectors “where perhaps in the past they might’ve been reluctant to proceed” and that the increase indicates that “CFIUS . . . year over year, grows more sophisticated in its approach.” Karlee Weinmann, *Chinese Buyers Appear Undaunted as CFIUS Toughens Up*, LAW360 (Mar. 2, 2015, 6:01 PM), <http://www.law360.com/articles/626401/chinese-buyers-appear-undaunted-as-cfius-toughens-up>.

82. The number of “notices withdrawn after commencement of investigation” have dramatically increased from 2009–2012. However, the number decreased in 2013. In 2009, two notices were withdrawn; in 2010, six; in 2011, five; in 2012, twenty; in 2013, five. ANNUAL REPORT TO CONGRESS CY 2013, *supra* note 72, at 3.

83. *Id.*

counted for 5 percent.<sup>84</sup> More recently in 2013, “Manufacturing”<sup>85</sup> rose to 36 percent, “Finance, Information, and Services”<sup>86</sup> dropped to 33 percent, with “Mining, Utilities, and Construction”<sup>87</sup> dropping to 21 percent, and “Wholesale, Retail, and Transportation”<sup>88</sup> rising to 10 percent.<sup>89</sup>

## PART II: RECENT TRANSACTIONS AND CFIUS REVIEW

The following transactions illustrate the capacious scope of what constitutes a “national security” concern.<sup>90</sup> Additionally, the disputed deals referenced below exhibit the review’s implications in both politics and international diplomacy.

### *A. Recent Transactions Approved by CFIUS*

One prominent critique of CFIUS is that the scope of what constitutes “national security” is not clearly defined and thus allows CFIUS to conduct reviews of transactions that do not have clear national security implications.<sup>91</sup> An example of an unconventional use of the term “national security” is the con-

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84. *Id.* at 4.

85. “Manufacturing” includes the following sectors: “Computer and Electronic Product,” “Machinery,” “Transportation Equipment,” “Electrical Equipment, Appliance, and Component,” “Chemical,” “Fabricated Metal Product,” “Nonmetallic Mineral Product,” “Textile Product Mills,” “Primary Metal,” and “Plastics and Rubber Products.” *Id.* at 6.

86. “Finance,” “Information,” and “Services” include the following sectors: “Professional, Scientific and Technical Services,” “Telecommunications,” “Publishing Industries (except internet),” “Administrative and Support Staff,” “Real Estate,” “Securities, Commodities Contracts, and Other Financial Investments and Related Activities,” “Credit Intermediation and Related Activities,” “Rental and Leasing Services,” and “Data Processing, Hosting, and Related Services.” *Id.* at 9.

87. “Mining,” “Utilities,” and “Construction” include the following sectors: “Utilities,” “Mining,” “Oil and Gas Extraction,” “Support Activities for Mining,” “Specialty Trade Contractors,” and “Construction of Buildings.” *Id.* at 13.

88. “Wholesale,” “Retail,” and “Transportation” include the following sectors: “Support Activities for Transportation,” “Merchant Wholesalers, Nondurable Goods,” “Merchant Wholesalers, Durable Goods,” “Pipeline Transportation,” and “Water Transportation.” *Id.* at 15.

89. *Id.* at 4.

90. 50 U.S.C. App § 2170(b)(1)(D).

91. Jason Cox, *Regulation of Foreign Direct Investment After the Dubai Ports Controversy: Has the U.S. Government Finally Figured Out How to Balance Foreign Threats to National Security Without Alienating Foreign Companies?*, 34 U. IOWA J. CORP. L. 293, 307–309 (2009).

sideration of food safety as a national security concern. In May 2013, China's Shuanghui International ("Shuanghui") acquired the U.S. Company Smithfield Foods ("Smithfield") for \$7.1 billion,<sup>92</sup> creating the world's "Leading Global Pork Enterprise."<sup>93</sup> The two parties voluntarily submitted the transaction to CFIUS for review.<sup>94</sup> CFIUS approved the sale, despite the fact that the deal was met with a "fair amount of scrutiny"<sup>95</sup> through significant political opposition.<sup>96</sup> Several government officials appealed to CFIUS to scrutinize the deal<sup>97</sup> because

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92. Karlee Weinmann, *New Bill Rekindles CFIUS Debate 1 Year After Smithfield*, LAW360 (Sept. 25, 2014), <http://www.law360.com/articles/580895/new-bill-rekindles-cfius-debate-1-year-after-smithfield>. The \$4.7 billion bid was 31 percent over Smithfield's closing share price. Michael J. De La Merced & Mark Scott, *China's Big Food Deal*, N.Y. TIMES (May 29, 2013, 10:02 AM), <http://dealbook.nytimes.com/2013/05/29/morning-agenda-chinas-big-food-deal/>.

93. *Shuanghui International and Smithfield Foods Complete Strategic Combination, Creating a Leading Global Pork Enterprise*, SMITHFIELD FOODS (Sept. 26, 2013), <http://investors.smithfieldfoods.com/releasedetail.cfm?releaseid=793522>.

94. Dana Mattioli et al., *China Makes Biggest U.S. Play, Asian Meat Giant Strikes \$4.7 Billion Deal for Virginia's Smithfield Foods*, WALL ST. J., May 30, 2013, <http://www.wsj.com/articles/SB10001424127887324412604578512722044165756>.

95. *Foreign Ag Buyouts Concern Ag Committee Chairwoman Stabenow*, FARM FUTURES (Sept. 16, 2014) [hereinafter *Foreign Ag Buyouts*], <http://farmfutures.com/story-foreign-ag-buyouts-concern-ag-committee-chairwoman-stabenow-0-117715>.

96. *Id.* Senator Debbie Stabenow, Democrat from Michigan and chairwoman of the Senate Agriculture Committee, stated as follows:

It remains unclear what factors the committee took into account in making its decision. We still do not know if the potential impact on American food security, the transfer of tax-payer funded innovation to a foreign competitor, or China's protectionist trade barriers were considered. It's troubling that taxpayers have received no assurances that these critical issues have been taken into account in transferring control of one of America's largest food producers to a Chinese competitor with a spotty record on food safety.

Michael J. De La Merced, *U.S. Security Panel Clears a Chinese Takeover of Smithfield Foods*, N.Y. TIMES, Sept. 6, 2013, at B4, [http://dealbook.nytimes.com/2013/09/06/national-security-panel-approves-smithfield-sale-to-chinese-company/?\\_php=true&\\_type=blogs&r=0](http://dealbook.nytimes.com/2013/09/06/national-security-panel-approves-smithfield-sale-to-chinese-company/?_php=true&_type=blogs&r=0). Such opposition included numerous congressional hearings.

97. Helena Bottemiller, *Government Extends Review of Smithfield-Shuangui Deal*, FOOD SAFETY NEWS (July 25, 2013),

they were concerned the threat of food contamination was a national security concern.<sup>98</sup>

Another CFIUS review that questioned Chinese presence through a Canadian company located in the United States, but was nevertheless approved, was the takeover of Nexen, a Canadian oil and gas company, by China National Offshore Oil Corp. (“CNOOC”), a Chinese state-owned entity.<sup>99</sup> The acquisition was slated to give CNOOC “new offshore production in the North Sea, the Gulf of Mexico, and off western Africa, as well as oil-producing properties in the Middle East and Canada.”<sup>100</sup> The parties notified CFIUS of the transaction before it closed, but later withdrew their original notice and refiled “to accommodate mitigation measures proposed by CFIUS.”<sup>101</sup> However, the acquisition was approved despite CFIUS’s prior concerns in accordance with CNOOC’s 2005 failed attempt to buy UNOCAL Corp., a major petroleum producer, for \$18.5 billion.<sup>102</sup> The UNOCAL transaction<sup>103</sup> was blocked by CFIUS due to national security concerns.<sup>104</sup>

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<http://www.foodsafetynews.com/2013/07/government-extends-review-of-smithfield-shuangui-deal/#.VgRiAU10z5o>.

98. *Foreign Ag Buyouts*, *supra* note 95.

99. Roberta Rampton & Scott Haggett, *CNOOC-Nexen Deal Wins U.S. Approval, its Last Hurdle*, REUTERS (Feb. 12, 2013, 5:30 PM), <http://www.reuters.com/article/2013/02/12/us-nexen-cnooc-idUSBRE91B0SU20130212>.

100. *Id.*

101. Alexandra López-Casero, *A Year in Review: More Transactions Run into CFIUS Trouble*, NIXON PEABODY (Jan. 16, 2014), [www.nixonpeabody.com/files/167021\\_M\\_and\\_A\\_16JAN2014.pdf](http://www.nixonpeabody.com/files/167021_M_and_A_16JAN2014.pdf).

102. Rampton & Haggett, *supra* note 99.

103. CNOOC’s proposal raised great concern in Congress regarding national security issues related to the “possibility of a foreign company taking control of a U.S. company in an already tight energy market.” Congress produced a House Resolution, calling for President Bush to review the transaction. CNOOC, noting their readiness for CFIUS review, wrote letters to lobby Congress. CNOOC assured Congress that that “substantially all of the oil and gas produced by Unocal in the U.S. will continue to be sold in the U.S.” and pledged to “retain the jobs of substantially all of Unocal’s employees, including those in the U.S.” However, due to fierce political opposition, CNOOC withdrew their bid. Gaurav Sud, *From Fretting Takeovers to Vetting CFIUS: Finding a Balance in U.S. Policy Regarding Foreign Acquisitions of Domestic Assets*, 39 VAND. J. TRANSNAT’L L. 1303, 1305–06 (2006) (citing June 2005 letter from CNOOC to Congress).

104. Rampton & Haggett, *supra* note 99.

More illustrative of the current economic climate is the review of transactions concerning cyber-technology. Because of the pervasiveness of internet connectivity in daily life, national security concerns have largely shifted to the electronic realm. A recent deal implicating cybersecurity concerns was the purchase of a sector of International Business Machines Corp. (“IBM”) by Lenovo Group Ltd.<sup>105</sup> The \$2.3 billion deal proposed in January 2014, remained in extended limbo due to security concerns, including that “servers could be accessed remotely by Chinese spies or hackers or compromised through maintenance.”<sup>106</sup> Concerns were premised on the fact that the IBM x86 servers being acquired were utilized “in the nation’s communications networks and in data centers that support the Pentagon’s computer networks,”<sup>107</sup> and that “U.S. regulators were concerned ‘Chinese Spies’ may be able to access the Pentagon’s servers and weaken national security.”<sup>108</sup> Months after China’s Ministry of Commerce (“MOFCOM”) approved the buy-out, CFIUS gave the green light for the transaction to move forward.<sup>109</sup> The deal closed on October 1, 2014, with a lower closing price of \$2.1 billion due to changes in the valuation of inventory and deferred revenue liability.<sup>110</sup> This transaction’s

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105. In 2005, Lenovo faced review of its purchase of IBM’s personal computer business. The transaction was scrutinized due to concerns over China’s ability to infiltrate computer systems. The U.S. government demanded that the building Lenovo and IBM would share in North Carolina be sealed off to alleviate national security concerns. Saha, *supra* note 18, at 205.

106. Following this transaction, the U.S. Air Force returned shipments of Lenovo laptops after it was discovered that they made unauthorized connections to Chinese networks. Spencer E. Ante, *IBM, Lenovo Tackle Security Worries on Server Deal*, WALL ST. J., June 25, 2014, <http://online.wsj.com/articles/ibm-lenovo-tackle-security-concerns-over-server-deal-1403733716>.

107. *Id.*

108. Tom Spring, *Lenovo’s \$2.3 Billion IBM Deal Inches Closer to Approval*, CRN (July 7, 2014), <http://www.crn.com/news/data-center/300073332/lenovo-2-3-billion-ibm-deal-inches-closer-to-approval.htm>.

109. *IBM Issues Statement on U.S. Government Regulatory Approval of x86-Based Server Divestiture to Lenovo*, IBM (Aug. 15, 2014), <https://www-03.ibm.com/press/us/en/pressrelease/44588.wss>.

110. Gerry Shih, *Lenovo Says \$2.1 Billion IBM x86 Server Deal to Close on Wednesday*, REUTERS (Sept 29, 2014, 3:11 AM), <http://www.reuters.com/article/2014/09/29/us-lenovo-ibm-deals-idUSKCN0HO8N20140929>.

lower closing price exhibits another consequence of the prolonged and mysterious CFIUS review process.

Another collective criticism of CFIUS is that the review process has been manipulated into a biased political tool against foreign investors.<sup>111</sup> One of the most noteworthy reviews, the Dubai Ports World (“DPW”) controversy, prompted Congress to reform CFIUS with the passage of the Foreign Investment National Security Act (“FINSAs”) in 2007.<sup>112</sup> DPW proposed to acquire the British-owned Peninsula and Oriental Navigation Company, including its U.S. subsidiary, which operated sixteen sites at various U.S. ports.<sup>113</sup> CFIUS’s approval of the transaction<sup>114</sup> resulted in fierce bipartisan opposition<sup>115</sup> due to its national security implications. DPW is controlled by the government of Dubai and thus the United Arab Emirates (“UAE”), which was both an “ally in the war on terror” and a critical importer of U.S. goods.<sup>116</sup> Due to the political chaos, DPW later agreed to sell its U.S. port operations to AIG Global Investment

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111. See generally, Warren G. Lavey, *New Regulations for the Committee on Foreign Investment in the United States-Disclosures of Cyber Security Plans and Dealings with Sanctioned Countries Remain Uncertain*, 10 BUS. L. INT’L 253 (2009); EDWARD M. GRAHAM & DAVID M. MARCHICK, US NATIONAL SECURITY AND FOREIGN DIRECT INVESTMENT 123–43 (2006), [http://www.iie.com/publications/chapters\\_preview/3918/05iie3918.pdf](http://www.iie.com/publications/chapters_preview/3918/05iie3918.pdf); David McLaughlin, Jonathan D. Salant, & Patrick G. Lee, *Lenovo Said to Turn to U.S. Security Experts to Aid Deals*, BLOOMBERG (Feb. 3, 2014, 3:41 PM), <http://www.bloomberg.com/news/2014-02-03/lenovo-said-to-turn-to-u-s-security-experts-to-aid-deals.html>.

112. Cox, *supra* note 91, at 300.

113. *Dubai Firm Oks Sale of U.S. Port Contracts*, CHI. TRIB., Dec. 12, 2006, [http://articles.chicagotribune.com/2006-12-12/news/0612120309\\_1\\_dp-world-aig-global-investment-group-sultan-ahmed-bin-sulayem](http://articles.chicagotribune.com/2006-12-12/news/0612120309_1_dp-world-aig-global-investment-group-sultan-ahmed-bin-sulayem); *Key Questions about the Dubai Port Deal*, CNN (Mar. 6, 2006, 8:15 PM), [http://www.cnn.com/2006/POLITICS/03/06/dubai.ports.qa/index.html?\\_s=PM:POLITICS](http://www.cnn.com/2006/POLITICS/03/06/dubai.ports.qa/index.html?_s=PM:POLITICS).

114. *Key Questions about the Dubai Port Deal*, *supra* note 113.

115. New York Governor George Pataki and Maryland Governor Robert Ehrlich voiced concerns and stated that they may try to cancel leases at the ports in their states. *2 Governors Threaten to Void Port Leases*, CHI. TRIB., Feb. 21, 2006, [http://articles.chicagotribune.com/2006-02-21/news/0602210132\\_1\\_dubai-ports-world-united-arab-emirates-state-owned-business](http://articles.chicagotribune.com/2006-02-21/news/0602210132_1_dubai-ports-world-united-arab-emirates-state-owned-business).

116. Jonathan C. Stagg, *Scrutinizing Foreign Investment: How Much Congressional Involvement is Too Much?* 93 IOWA L. REV. 325, 344 (2007) (citing Lauren Etter, *Hot Topic: Dubai: Business Partner or Terrorist Hotbed?*, WALL ST. J., Feb. 25, 2006, at A9).

Group on its own accord.<sup>117</sup> It is interesting to note that six weeks after DPW announced the sale of the contested interests, the Department of Homeland Security announced it would be checking the names of four hundred thousand longshoremen and employees of port facilities against terrorist watch lists.<sup>118</sup>

### *B. Politically Disputed Transactions that CFIUS Declined to Review*

Currently, CFIUS jurisdiction hinges on traditional notions of control as defined in corporate law, but fails to address other forms of control that can undoubtedly raise national security concerns. Although CFIUS reviews only mergers, acquisitions, and takeovers, government officials have recognized the authorizing legislation's weaknesses and have appealed to CFIUS to evaluate other transactions, such as leases.<sup>119</sup> But the scope of such reviews, as stated in legislation and reinforced by statements from the agency, establishes that the agency is only authorized to review transactions that represent an "ownership transaction," excluding a simple lease.<sup>120</sup>

Recently, Republican Congressman Duncan Hunter requested CFIUS to review a thirty-five-year lease of a planned container port in Port Canaveral, Florida to UAE-based Gulftainer.<sup>121</sup> Although Port Canaveral volunteered for review, CFIUS

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117. *Dubai Firm Oks Sale of U.S. Port Contracts*, supra note 113.

118. The Department of Homeland Security Secretary, Michael Chertoff, stated "It is fundamental that individuals who pose a security threat do not gain access to our nation's ports." Meredith Cohn, Baltimore Sun, *Port workers' backgrounds to be screened, Feds to check 400,000 against terrorist lists*, CHI. TRIBUNE (Apr. 26, 2006) [http://articles.chicagotribune.com/2006-04-26/news/0604260105\\_1\\_rail-and-pipeline-workers-homeland-security-worker-checks](http://articles.chicagotribune.com/2006-04-26/news/0604260105_1_rail-and-pipeline-workers-homeland-security-worker-checks).

119. Kelly Riddell, *Middle Eastern Firm's Deal to Manage U.S. Cargo Port Raises Security Concerns*, WASH. TIMES, July 29, 2014, <http://www.washingtontimes.com/news/2014/jul/29/government-oks-arab-owned-company-operate-us-port/?page=all>.

120. Joseph Bonney, *Port Canaveral Gets Clearance for Gulftainer Lease*, JOC.COM, (Sept. 26, 2014) [http://www.joc.com/port-news/terminal-operators/port-canaveral-gets-clearance-gulftainer-lease\\_20140926.html?utm\\_source=feedburner&utm\\_medium=feed&utm\\_campaign=Feed%3A%20joc/aaajm%20%28Journal%20of%20Commerce%29](http://www.joc.com/port-news/terminal-operators/port-canaveral-gets-clearance-gulftainer-lease_20140926.html?utm_source=feedburner&utm_medium=feed&utm_campaign=Feed%3A%20joc/aaajm%20%28Journal%20of%20Commerce%29).

121. Paul Brinkmann, *Congressman seeks review of Port Canaveral-Gulftainer cargo deal*, ORLANDO SENTINEL (July 29, 2014), <http://www.orlandosentinel.com/business/brinkmann-on-business/os-congressman-review-canaveral-gulftainer-cargo-20140729-post.html>. Under

did not further review the lease because the transaction was not an asset sale, but rather a simple lease.<sup>122</sup> Since there was no ownership transfer, the transaction did not require “further review on national security grounds.”<sup>123</sup> Gulftainer, a “wholly owned subsidiary of United Arab Emirates based Crescent Enterprises,”<sup>124</sup> will be operating the U.S. terminal, located near Trident Turning Basin, the site the Navy uses to “support its fleet of nuclear ballistic missile submarines,”<sup>125</sup> and immediately south of both the Kennedy Space Center and Cape Canaveral Air Force Station.<sup>126</sup> The lease is expected to have a significant economic impact in favor of Florida, with Gulftainer’s pledge to hire 95 percent of its staff from Florida.<sup>127</sup> Furthermore, it is expected that the new container and cargo terminal will contribute more than \$630 million to Florida’s economy and \$280 million in revenue to Port Canaveral.<sup>128</sup>

### C. Transactions with CFIUS Denial

Although rare, in certain instances the President, at CFIUS’s recommendation, has chosen to unwind a closed transaction. In February 2011, CFIUS ordered China’s largest telecom equipment manufacturer, Huawei Technologies Inc. (“Huawei”)<sup>129</sup> to divest \$2 million worth of intellectual property

the lease agreement, Gulftainer will invest \$100 million in infrastructure, equipment, and local human capital. *Port Canaveral Signs 35-Year Agreement with Gulftainer USA*, BUSINESSWIRE (June 23, 2014, 12:30 PM), <http://www.businesswire.com/news/home/20140623005959/en/Port-Canaveral-signs-35-year-agreement-Gulftainer-USA#.VTFx285N3zI>.

122. Bonney, *supra* note 120.

123. *Id.*

124. Irene Klotz, *Mideast Firm to Operate New Cargo Terminal at Port Canaveral, Florida*, REUTERS (June 23, 2014, 4:39 PM), <http://www.reuters.com/article/2014/06/23/us-usa-florida-port-idUSKBN0EY2KF20140623>.

125. Riddell, *supra* note 119.

126. Klotz, *supra* note 124.

127. Brinkmann, *supra* note 121.

128. *In the Spotlight: Gulftainer Expands into USA*, GULFTAINER, <http://www.gulftainer.com/about-us/in-the-spotlight-2/> (last visited May 15, 2015).

129. Notably, Huawei was unsuccessful in prior attempts to obtain CFIUS approval for two different transactions. In 2008, CFIUS refused to permit Huawei’s investment in U.S. network security firm 3Com. Two years later, CFIUS again denied approval of an investment in home networking with 2Wire Inc. and Motorola Inc. Failure to obtain CFIUS approval was linked to

rights it had acquired from 3Leaf, a bankrupt Silicon Valley startup.<sup>130</sup> Huawei closed the transaction without seeking CFIUS approval.<sup>131</sup> The denial of this transaction exacerbated both the constant criticism of the politicization of CFIUS and the reportedly anti-Chinese political and economic climate in the United States.<sup>132</sup> It is interesting to note that in advance of the purchase, Huawei sought and received approval from the Bureau of Industry and Security at the Department of Commerce.<sup>133</sup>

Additionally, in recent years, CFIUS has blocked multiple transactions involving the acquisition of mining interests located next to U.S. military bases. First, in 2009, China's Northwest Non-Ferrous International Company<sup>134</sup> failed in its attempts "to acquire a controlling interest in Nevada-based Firstgold Corporation."<sup>135</sup> Firstgold Corporation ("Firstgold"), a small publicly traded company, owned "four-mining leases in Nevada."<sup>136</sup> After submitting notice to CFIUS, the parties to

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Huawei's alleged ties to "China's military and intelligence agencies." Vaughn & Kong, *supra* note 64.

130. BARFIELD, *supra* note 19, at 12.

131. Vaughn & Kong, *supra* note 64.

132. While some argue the deal's denial motivated China to formalize the national security review process as "protectionist backlash," it is equally plausible that this move was inevitable because such review was contemplated by Article 31 of China's Anti-trust law, entitled "Regulation on Implementing of the Security Review System for Mergers and Acquisitions of Domestic Enterprises by Foreign Investors." Saha, *supra* note 18, at 217 (citing *Economic Espionage*, FED. BUREAU INVESTIGATION, <http://www.fbi.gov/about-us/investigate/counterintelligence/economic-espionage> (last visited May 15, 2015)).

133. The Bureau confirmed that Huawei could export 3Leaf technology without an export license. Jeremy Zucker & Hrishikesh Hari, Symposium, *Gone With the Wind: The Ralls Transaction and Implications for Foreign Investment in the United States*, 8 GLOBAL TRADE & CUSTOMS J. 182, 187 (2013).

134. Northwest Non-Ferrous International Company is controlled by the Shaanxi provincial government. Matthew C. Sullivan, *Mining for Meaning: Assessing CFIUS's Rejection of the Firstgold Acquisition*, 4 BERKELEY J. INT'L L. PUBLICIST 12, 15 (2010).

135. Theodore W. Kassinger, *Location, Location, Location: Observations on CFIUS Opposition to Investment by Chinese Mining Company in Firstgold Corporation*, O'MELVENY & MYERS (Jan. 7, 2010), <http://www.omm.com/location-location-observations-on-cfius-opposition-to-investment-by-chinese-mining-company-in-firstgold-corporation-01-07-2010/>.

136. *Id.*

the transaction withdrew their notification, terminating the deal.<sup>137</sup> Firstgold disclosed that CFIUS intended to recommend that President Obama block the transaction and that the Committee found the transaction presented “serious, significant and consequential national security concerns” due to the “proximity of Firstgold’s properties to the Fallon Naval Air Station<sup>138</sup> and related facilities.”<sup>139</sup> Additionally, while expressing the company’s disappointment, CEO Terry Lynch stated that “the Firstgold property lies more than fifty miles from the Fallon base,” and was “surrounded by other mining facilities.”<sup>140</sup>

Subsequently, in 2012, CFIUS initiated a review for a similar transaction involving, once again, Firstgold and another Chinese company, Far East Golden Resources Investments Limited. However, both parties, due to CFIUS’s implementation of arduous mitigation measures, decided to abandon the transaction.<sup>141</sup>

Finally, in June 2013, CFIUS once again reviewed a transaction involving properties near Fallon Air Force Base.<sup>142</sup> Lincoln Corporation (“Lincoln”), a Canada-based mining company, engaged in a private placement transaction with Procon, a Chinese state-owned enterprise, and its affiliate, China National Machinery Industry Corporation.<sup>143</sup> The placement transaction resulted in Procon owning 29 percent of Lincoln’s issued and outstanding shares, and the power to appoint four of Lincoln’s seven directors. As in previous transactions, the parties an-

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137. *Id.*

138. Fallon Naval Air Station and the Fallon Range Training Complex are “the Navy’s premier integrated strike warfare training facilities supporting present and emerging National Defense Requirements.” *Id.* Furthermore, it is home to the TOPGUN flight training school. Daniel B. Pickard, Nova J. Daily & Usha Neelakantan, *CFIUS Forces Chinese Government-Backed Firms to Divest Interest in Canadian Mining Company With U.S. Operations*, WILEY REIN (June 25, 2013), <http://www.wileyrein.com/publications.cfm?sp=articles&id=8943>.

139. *Id.*

140. Sullivan, *supra* note 134.

141. Pickard, Daily & Neelakantan, *supra* note 138.

142. Lincoln also had properties near the Marine Air Corps Station in Yuma, Arizona. *CFIUS and Chinese Investment: Lessons Learned from the First Half of 2013*, WILSON SONSINI GOODRICH & ROSATI (Aug. 16, 2013), [https://www.wsgr.com/WSGR/Display.aspx?SectionName=publications/PDFS\\_earch/wsgalert-CFIUS-and-chinese-investment.htm](https://www.wsgr.com/WSGR/Display.aspx?SectionName=publications/PDFS_earch/wsgalert-CFIUS-and-chinese-investment.htm).

143. As Procon’s affiliate, “China National Machinery Industry indirectly owns 60% of Procon’s issued and outstanding shares.” *Id.*

nounced that they were withdrawing their CFIUS notification and agreed that “Procon will divest its investment in Lincoln to a third-party investor subject to review and approval by CFIUS.”<sup>144</sup>

The most historic unwinding of a transaction by CFIUS, which also epitomizes the shortcomings of the CFIUS review process, occurred in 2012 with the forced breakup of the Ralls transaction.<sup>145</sup> Ralls was mandated by presidential order to divest four Oregon wind farm companies Ralls had previously acquired.<sup>146</sup> Ralls, a U.S. company<sup>147</sup> incorporated in Delaware, is owned by the executives of the China-based and closely held Sany Group Co. (“Sany”).<sup>148</sup> Ralls’ owners serve as Sany’s chief financial officer and general manager.<sup>149</sup> In the disputed transaction, Ralls acquired wind farms from Terna Energy USA Holding Corporation, a Delaware Corporation owned by a publicly traded Greek company.<sup>150</sup> In acquiring the companies,

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144. *Id.* (citing *Divestment of Procon Investment in Lincoln Mining Required as a Result of US Regulatory Review*, LINCOLN MINING CORP. (June 18, 2013), [http://www.lincolnmining.com/news/index.php?&content\\_id=255](http://www.lincolnmining.com/news/index.php?&content_id=255)).

145. *Ralls Corp. v. Comm. on Foreign Inv. in U.S.*, 758 F.3d 296, 306 (D.C. Cir. 2014).

146. The assets of the acquired companies included: “easements with local landowners to access their property and construct windfarm turbines . . . transmission interconnection agreements and agreements for the management and use of shared facilities with other nearby windfarms; and necessary government permits and approvals to construct five windfarms at specific, approved locations.” *Ralls Corp. v. Comm. on Foreign Inv. in U.S.*, 758 F.3d 304 (D.C. Cir. 2014).

147. Despite Ralls being a U.S. corporation, the transaction was subjected to CFIUS review because Ralls is owned by Chinese nationals. *Id.* at 301.

148. Sarah Forden & Tom Schoenberg, *Chinese-Owned Ralls Corp. Sues U.S. Over Wind-Farm Order*, BLOOMBERG (Sept. 14, 2012), <http://www.bloomberg.com/news/print/2012-09-13/chinese-owned-ralls-corp-sues-u-s-over-wind-farm-order.html>; *Ralls Corp.*, 758 F.3d at 304. Sany Group is an industrial machinery construction company and its main products include: “concrete machinery, excavator [sic], hoisting machinery, pile driving machinery, road construction machinery, port machinery and wind turbine [sic].” *Corporate Overview*, SANY GROUP, <http://www.sanygroup.com/group/en-us/about/group.htm> (last visited Feb. 28, 2015).

149. Forden & Schoenberg, *supra* note 148.

150. *Ralls Corp. v. Comm. on Foreign Inv. in U.S.*, 987 F. Supp. 2d 18, 23 (D.D.C. 2013), *rev’d and remanded sub nom.* *Ralls Corp. v. Comm. on Foreign Inv. in U.S.*, 758 F.3d 296 (D.C. Cir. 2014).

Ralls planned to install Chinese-manufactured wind turbines.<sup>151</sup>

After the transaction had closed, the Navy notified Ralls that there were concerns pertaining to the location of one wind farm that was situated within a restricted Naval air space testing and bombing site.<sup>152</sup> Although Ralls addressed the concern by moving the contested windfarm,<sup>153</sup> months later, on June 28, 2013, CFIUS contacted Ralls and invited the corporation to file a voluntary notice to the Committee.<sup>154</sup> Subsequently, Ralls filed a notice detailing why Ralls maintained that its transaction, “did not pose a national security threat.”<sup>155</sup> CFIUS then initiated a thirty-day review, allowed Ralls to respond to CFIUS questions, and permitted Ralls to give a presentation.<sup>156</sup> On completion of the review period, CFIUS determined that the acquisition posed a national security threat and, on July 25, 2013, issued an “Order Establishing Interim Mitigation Measures” in an attempt to mitigate perceived concerns.<sup>157</sup>

151. *Id.* at 21.

152. *Id.* at 78. Ralls alleged in its complaint that Oregon Windfarms had also developed numerous other windfarm projects in same “general vicinity,” all of which used foreign-manufactured wind turbines. Ralls also argued that seven of the windfarms—one of which was owned by a foreign investor—were located in the restricted airspace. *Ralls Corp.*, 758 F.3d at 305. Previously, Chinese firms and projects such as “Goldwind’s Shady Oaks Project in Illinois and Sany’s other wind farm in Texas” had no pushback in their acquisitions. However, these projects were located far from sensitive areas. Edward Alden & Michael A. Spence, *Guest Post: Ralls vs. CFIUS: What Are the Implications for Chinese Investment?*, COUNCIL ON FOREIGN REL. (Oct. 5, 2012), <http://blogs.cfr.org/renewing-america/2012/10/05/ralls-vs-cfius-what-are-the-implications-for-chinese-investment/>.

153. After Ralls relocated the windfarms, the Navy supported Ralls’ efforts to obtain new permits from regulators. The Navy expressed no subsequent concerns about any of the other windfarms outside of the restricted space. Additionally, Ralls garnered regulatory clearance from the Federal Aviation Administration that included approval from the Department of Defense prior to the CFIUS rejection. Zucker & Hari, *supra* note 133, at 183, (citing Amended Complaint, *Ralls Corp. v. Obama*, No. 1:12-cv-01513-ABJ, 2012 WL 4931759 (D.D.C. Oct. 1, 2012)).

154. *Ralls Corp.*, 987 F. Supp. 2d at 24.

155. *Ralls Corp.*, 758 F.3d at 305.

156. *Id.*

157. The July order required Ralls to

- (1) cease all construction and operations at the Butter Creek project sites,
- (2) remove all stockpiled or stored items from the [project sites] no later than July 30, 2012, and . . . not deposit, stockpile, or store

Shortly after, on July 30, CFIUS launched an investigation. On August 2, three days into the investigation, CFIUS issued an additional “Amended Order Establishing Interim Mitigation Measures” to remain in effect “until CFIUS concludes action or the President takes action under section 721 or until express revocation by CFIUS or the President.”<sup>158</sup> After the investigation ended on September 13, CFIUS submitted its report and recommendation to President Obama and requested his decision.<sup>159</sup> On September 28, President Obama mandated Ralls “divest itself of all interests in the Project Companies,” “remove all items from the project sites,” “cease access to project sites,” refrain from “selling, transferring or facilitating the sale or transfer” of any items produced by Sany, and “adhere to restriction on the sale of the Project Companies and their assets to third parties.”<sup>160</sup>

After the Presidential Order, Ralls brought an action in the D.C. District Court.<sup>161</sup> Ralls challenged both CFIUS and the Presidential Order on the grounds that the Presidential Order was an unconstitutional violation of Ralls’ right to equal protection under the Fifth Amendment and was an unconstitutional deprivation of property without due process.<sup>162</sup> The court dismissed Ralls’ equal protection complaints, but also determined that the finality clause in Section 721 did not bar judicial review of Ralls’ due process claim, and allowed that portion of the claim to proceed on the merits.<sup>163</sup> Ralls appealed the decision, and on July 15, 2014, the D.C. Circuit reversed and remanded the District Court’s decision, holding that the Presi-

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any new items at the [project sites] and (3) cease all access to the project sites.

*Ralls Corp.*, 758 F.2d at 305.

158. Additional mitigation measures “prohibited Ralls from completing any sale of the Project Companies or their assets without first removing all items (including concrete foundations) from the Butter Creek project sites, notifying CFIUS of the sale and giving CFIUS ten business days to object to the sale.”  
*Id.*

159. *Id.*

160. *Id.* at 306.

161. *Ralls Corp. v. Comm. on Foreign Inv. in U.S.*, 987 F. Supp. 2d 18 (D.D.C. 2013), *rev’d and remanded sub nom. Ralls Corp. v. Comm. on Foreign Inv. in U.S.*, 758 F.3d 296 (D.C. Cir. 2014).

162. *Ralls Corp.*, 987 F. Supp. 2d at 21–22.

163. *Id.* at 22.

dential Order did indeed deprive “Ralls of its constitutionally protected property interests without due process of law.”<sup>164</sup>

Due to the holding of the D.C. Circuit on appeal, Ralls has the ability to challenge the Presidential Order. Additionally, District Court Judge Amy Jackson ordered CFIUS to provide Ralls with the information that informed President Obama’s decision to unwind the transaction and, if CFIUS withheld any material pursuant to executive privilege, the reasons for such withholding must also be provided.<sup>165</sup> Ralls will now have the opportunity to rebut the information, which would be followed by another CFIUS recommendation to the President.<sup>166</sup> Although Judge Jackson’s decision is monumental, it has been said that “Ralls gets a second bite at the apple, but no one expects the [P]resident’s order to be reversed.”<sup>167</sup> Additionally, Judge Jackson denied Ralls’ claim that the CFIUS order should be found moot, due to the fact that Ralls arranged to sell its acquired property, valued at \$6 million, to an undisclosed U.S. citizen for \$50,000—a transaction which CFIUS did not permit.<sup>168</sup> Judge Jackson stated that the “unusual circumstances . . . raise questions about the arm’s length nature of the proposed transaction.”<sup>169</sup>

### III: CURRENT LEGISLATION

In recent years, CFIUS has undergone harsh criticism for not only biased reviews, but also for its leniency in approving contested transactions.<sup>170</sup> CFIUS’s authority, as it stands, is not narrowly defined. The term “national security” remains undefined, allowing ample room for interpretation. The ambiguous nature of the term’s definition has arguably led to certain deals being inadequately evaluated, such as the acquisition of Smith-

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164. *Ralls Corp.*, 758 F.3d at 321.

165. Daniel B. Pickard, Nova J. Daly & Usha Neelakantan, *Judge Orders CFIUS to Disclose Unclassified Information to Ralls*, WILEY REIN (Nov. 7, 2014), <http://www.wileyrein.com/publications.cfm?sp=articles&id=10073>.

166. *Id.*

167. Bien Perez, *Ralls Gets Crack at Overturning US Order Blocking its Wind Farms Deal*, S. CHINA MORNING POST (Nov. 12, 2014, 6:39 AM), <http://www.scmp.com/business/china-business/article/1637678/ralls-gets-crack-overturning-us-order-blocking-its-wind>.

168. Rosen, *supra* note 12.

169. Perez, *supra* note 167.

170. *See generally* Jackson, *supra* note 55.

field by Shuanghui.<sup>171</sup> This approval garnered copious political opposition by members of the House who thought the transaction greatly implicated the national security of food.<sup>172</sup> Such political uproar has led to new legislative attempts to amend the CFIUS review process and its scope of authority.

In September 2014, Congresswoman Rosa DeLauro, Democrat from Connecticut, proposed legislation titled “Foreign Investment and Economic Security Act of 2014” (“FIESA”),<sup>173</sup> that would not only radically alter the CFIUS review process, but drastically extend its scope. The proposed legislation would expand CFIUS reviews beyond national security to include an analysis of transactions for a “net benefit” to U.S. interests, and for “other purposes.”<sup>174</sup> Specifically, the legislation would include an analysis of a transaction’s impact on other important interests of the nation, including “economic activity, employment, technology, productivity, public health and safety.”<sup>175</sup> Commentary on the bill stated that it realistically would not be enacted due to its late introduction into Congress and controversial scope, but the bill intended to, “revive debate over the scope of CFIUS review, including whether, when and how to expand review to factors other than national security.”<sup>176</sup>

The proposed “net benefit” review of a transaction sweeps in a multitude of elements for CFIUS’s consideration. These elements include, first, “the effect on the level of economic activi-

171. *Id.* at 11–12.

172. Parija Kavilanz, *Is Pork a National Security Asset?*, CNN MONEY (May 31, 2013, 9:51 AM), <http://money.cnn.com/2013/05/31/news/companies/smithfield-foods/index.html>.

173. H.R. 5581, 113th Cong. §1 (2014). On September 18, 2014, the legislation was introduced in the House and referred to the House Committee on Financial Services. *H.R. 5581 – Foreign Investment and Economic Security Act of 2014*, CONGRESS.GOV, <https://www.congress.gov/bill/113th-congress/house-bill/5581/actions> (last visited Sept. 28, 2015).

174. *DeLauro Introduces Foreign Investment and Economic Security Act of 2014*, CONGRESSWOMAN ROSA DELAURO, [http://delauro.house.gov/index.php?option=com\\_content&view=article&id=1703:delauro-introduces-foreign-investment-and-economic-security-act-of-2014&catid=2:press-releases&Itemid=21](http://delauro.house.gov/index.php?option=com_content&view=article&id=1703:delauro-introduces-foreign-investment-and-economic-security-act-of-2014&catid=2:press-releases&Itemid=21) (last visited May 15, 2015).

175. H.R. 5581 § 3(o)(1)(A)–(B).

176. Christopher Brewster, *DeLauro Legislation Would Broaden Reach of CFIUS Reviews*, LAW360 (Sept. 25, 2014, 10:28 AM), <http://www.law360.com/articles/580422/delauro-legislation-would-broaden-reach-of-cfius-reviews>.

ty<sup>177</sup> in the United States.”<sup>178</sup> Second, if a transaction is influenced by a foreign government, the Committee must consider the “governance and commercial orientation of the foreign person,” how and to what extent the foreign person involved in a transaction is owned, controlled or influenced by a foreign government, and the applicable state government’s policies regarding support and the economic sector.<sup>179</sup> The legislation also compels CFIUS to consider whether the foreign person “adheres to United States standards of corporate governance,” and whether the home country is “adequately engaged with the Securities and Exchange Commission and Public Company Accounting Oversight Board.”<sup>180</sup>

Finally, the legislation proposes that CFIUS review transactions of any “construction of a new facility in the United States by any foreign person,” regardless of whether the underlying investment entailed a merger, acquisition or takeover.<sup>181</sup> In addition to these substantive changes, the legislation also provides for new procedural protections for parties to a transaction. Unlike Section 721, FIESA includes a right to appeal a final determination.<sup>182</sup> If parties wish to appeal, they may submit additional information in the thirty days after a determination is rendered to prove their transaction will provide a “net benefit” to the United States.<sup>183</sup>

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177. Analysis on “economic activity” includes “the level and the quality of employment; resource processing; the utilization of parts and services produced in the United States; the utilization of products, parts, and services imported into the United States; and exports from the United States.” H.R. 5581 § 3(o)(1)(A)(i)–(v) (2014). Additionally, the review will consider the

effect of the proposed or pending transaction on productivity, industrial efficiency, technological development, technology transfers, and production innovation in the United States; the effect of the proposed or pending transaction on competition within any industry in the United States or between the United States and other countries; the compatibility of the proposed or pending transaction with national industrial, economic, and cultural policies; the effect on the public health, safety, well-being of United States consumers.

H.R. 5581 § 3 (o)(B)–(F) (2014).

178. H.R. 5581 § 3(o)(1)(A)(i)–(v).

179. H.R. 5581 § 3(o)(1)(F)(i)–(ii).

180. H.R. 5581 § 3(o)(1)(F)(iii)(I)–(III).

181. Brewster, *supra* note 176.

182. H.R. 5581 § 3(o)(3)(A).

183. *Id.*

Additional legislation concerning CFIUS has also been announced by another vocal opponent of the Shuanghui transaction,<sup>184</sup> the Chairwoman of the U.S. Senate Committee on Agriculture, Nutrition, and Forestry, Debbie Stabenow, Democrat from Michigan. Senator Stabenow announced that legislation is being drafted to “overhaul the American government’s review process for foreign acquisitions.”<sup>185</sup> Like Congresswoman DeLauro, Senator Stabenow emphasizes that “the government’s review process for foreign acquisitions of American companies” must account for “the impact that the purchase could have on a broad array of national priorities and interests.”<sup>186</sup> Senator Stabenow also implies that the Committee should move beyond CFIUS’s original, narrowly-focused purpose of preserving national security, to evaluating other interests such as the economic and cultural ramifications on the nation.<sup>187</sup>

#### PART IV: CHINA AND ITS REGULATORY REGIME FOR INBOUND FDI

In recent years, there has been a global “proliferation of merger control regimes.”<sup>188</sup> The enforcement of such regimes has been deeply problematic.<sup>189</sup> Although these regimes are governed by organizations or agreements such as the World Trade Organization (“WTO”),<sup>190</sup> the North America Free Trade

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184. *See supra* Part II.A.

185. Brewster, *supra* note 176.

186. *Id.*

187. *Id.*

188. Denise Wee, *Regulatory Hurdles a Rising Concern for Asia M&A*, FIN. ASIA (Dec. 3, 2014), <http://www.financeasia.com/News/392557,regulatory-hurdles-a-rising-concern-for-asia-ma.aspx>.

189. *Id.* In July 2015, lawmakers in South Korea proposed a bill “to revise the Foreign Investment Promotion Act” to prohibit the sale of Korean companies if such sale would be “detrimental to the overall Korean economy.” Jeong Hunny, *NPAD Seeks Tighter Rules on Speculative Foreign Investors*, KOREA HERALD (July 7, 2015), <http://www.koreaherald.com/view.php?ud=20150706000767>.

190. Although the WTO and its provisions are at issue, it is often noted that foreign investors lack effective recourse in organizations like the WTO due to the fear of economic and political blowback for speaking out against Chinese regulatory authorities and policies. UNITED STATES CHAMBER OF COMMERCE, CHINA’S APPROVAL PROCESS FOR INBOUND FOREIGN DIRECT INVESTMENT: IMPACT ON MARKET ACCESS, NATIONAL TREATMENT AND TRANSPARENCY, 2 (2012) [hereinafter CHINA’S APPROVAL PROCESS FOR INBOUND FDI], <http://www.cov.com/files/Publication/4b417f2b-ca02-4c23-b5a0->

Agreement (“NAFTA”),<sup>191</sup> or bilateral and multilateral investment treaties, these governing bodies typically allow departures from obligations for national security risks.<sup>192</sup> As a result, international merger control regimes remain ambiguous, vague, and difficult to navigate. Countries such as India, Germany, and, most significantly, China, have created or threatened to create regulatory regimes in response to the CFIUS reviews.<sup>193</sup> Retaliatory legislation in response to a disapproved transaction by the United States was instituted by China in 2011,<sup>194</sup> wherein China codified its own national security review framework, mirroring that of CFIUS.<sup>195</sup>

Contemporary transactions involving foreign persons domiciled in China appear to be the epicenter of disputes surrounding CFIUS reviews.<sup>196</sup> China remains in the spotlight due to its

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c9882f8f02ac/Presentation/PublicationAttachment/74c43d19-71c2-47c5-b6ce-c56c56d91b/China\_InboundInvestment.pdf.

191. Article 2102 of NAFTA provides the following exception for national security concerns:

Subject to Articles 607 and 1018, nothing in this agreement shall be construed (a) to require any Party to furnish or allow access to any information the disclosure of which it determines to be contrary to its essential security interests; (b) to prevent any Party from taking any actions that it considers necessary for the protection of its essential security interests.

North American Free Trade Agreement, art. 2102, Dec. 17, 1992, 107 Stat. 2057.

192. Zaring, *supra* note 60, at 127.

193. *Id.* at 86.

194. *See supra* Part II.C. *See also* Saha, *supra* note 18, at 217 (“[T]he temporal proximity of the Security Review Notice to the adverse CFIUS review of the Huawei-3Leaf transaction suggests protectionist backlash.”).

195. *Id.*

196. *See generally* David McLaughlin & Sangwon Yoon, *Waldorf Sale to Chinese Risks Review Over Spying Concerns*, BLOOMBERG (Nov. 7, 2014, 11:36 AM), <http://www.bloomberg.com/news/2014-11-07/waldorf-sale-to-chinese-risks-review-over-spying-concerns.html>. Recently, the purchase of New York’s Waldorf Astoria hotel by Anbang Insurance Company of China has once again prompted the discussion of CFIUS’s focus on Chinese investments. The Waldorf Astoria serves as the “home away from home” for U.S. presidents visiting New York City and is the residence of the U.S. Ambassador to the United Nations. Mark Katz, *Sale of Landmark NYC Hotel an Example of What Triggers Canadian, U.S. National Security Protocols*, LAWS. WKLY., Apr. 3, 2015, <http://www.lawyersweekly.ca/articles/2354>. State Department officials have stated that President Obama cancelled the “longstanding White House reservation at the Waldorf-Astoria Hotel” and that the White House

position as one of the world's leading economies.<sup>197</sup> Additionally, these blockbuster reviews involve high-dollar transactions, are often prolonged, and face aggressive political pressure.<sup>198</sup> Although fears of Chinese-cultivated espionage materialized with the Justice Department's indictment of five officers in China's People's Liberation Army for attempts to steal U.S. commercial trade secrets, the integrity of the CFIUS review process continues to be debated.<sup>199</sup>

Further, the Office of the National Counterintelligence Executive has previously stated that China, through its use of corporate insiders and sophisticated hacking, has been at the forefront of "foreign economic collection and industrial espionage activities against major [U.S.] corporations."<sup>200</sup> Although political commentators, economists, foreign investors, and scholars critique CFIUS for administering politicized and thus ineffective reviews, recent empirical and statistical data suggest that such commentary is unfounded.<sup>201</sup> A majority of the Chinese investments in the United States are approved without issue;

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instead booked rooms at the New York Palace Hotel. The New York Palace Hotel was recently purchased by a consortium in South Korea. Pamela Falk, *Obama Nixing 8 Decades of Tradition to Spite China?*, CBS NEWS (July 23, 2015) <http://www.cbsnews.com/news/obama-white-house-out-of-waldorf-astoria-hotel-chinese-anbang-purchase/>.

197. *China Surpasses U.S. to Become Largest World Economy*, FOX NEWS (Dec. 6, 2014), <http://www.foxnews.com/world/2014/12/06/china-surpasses-us-to-become-largest-world-economy/>.

198. *See supra* Part II.

199. Charles Cooper, *Behind US-China Cyberspy Tensions: The View from Beijing (Q&A)*, CNET (June 5, 2014, 4:00 AM), <http://www.cnet.com/news/behind-us-china-cyberspy-tensions-the-view-from-beijing/>.

200. Saha, *supra* note 18, at 207 (citing OFFICE OF THE NAT'L COUNTERINTELLIGENCE EXEC., FOREIGN SPIES STEALING US ECONOMIC SECRETS IN CYBERSPACE (Comm. Print 2011), [http://www.ncsc.gov/publications/reports/fecie\\_all/Foreign\\_Economic\\_Collection\\_2011.pdf](http://www.ncsc.gov/publications/reports/fecie_all/Foreign_Economic_Collection_2011.pdf)).

201. A recent empirical study stated that the regression analysis "indicates that CFIUS decisions appear to be non-discriminatory. National security factors such as risk of espionage explain the review outcomes better than favoritism towards certain countries of origin alone." It is important to note that the regression analysis focused on discrimination in CFIUS review outcomes rather than preliminary application of CFIUS review. Connell & Huang, *supra* note 40, at 135, 160.

there is no indication that Chinese companies are “formally discriminated against.”<sup>202</sup>

In 2014, Chinese direct investment into the United States surpassed U.S. direct investment into China.<sup>203</sup> China, nevertheless, is not the predominant source of FDI in the United States.<sup>204</sup> Rather, the top nine sources that account for 80 percent of FDI in the United States include the United Kingdom, Japan, the Netherlands, Canada, France, Switzerland, Luxembourg, Germany, and Belgium.<sup>205</sup> While China accounts for less than 1 percent of FDI in the United States,<sup>206</sup> it is the fastest growing source for FDI in both the United States and the rest of the international community.<sup>207</sup> With this economic back-

202. Barfield, *supra* note 19, at 15.

203. John Kehoe, *Chinese Investment in US Surpasses American Investment in China*, FIN. REV., Apr. 30, 2014, [http://www.afr.com/p/world/chinese\\_investment\\_in\\_us\\_surpasses\\_kJuD3wyytWpR6Fb7QuxuYJ](http://www.afr.com/p/world/chinese_investment_in_us_surpasses_kJuD3wyytWpR6Fb7QuxuYJ); Daniel H. Rosen & Thilo Hanemann, *New Realities in the US-China Investment Relationship*, RHODIUM GROUP (Apr. 19, 2014), <http://rhg.com/notes/new-realities-in-the-us-china-investment-relationship>; U.S. CHINA ECONOMIC AND SECURITY REVIEW COMMISSION, 113TH CONG., 2D SESS., 2014 REPORT TO CONGRESS 34 (2014).

204. *Id.* at 90.

205. *Id.*

206. Jason Lange, *China Investors Top U.S. List of 2013 National Security Reviews*, REUTERS (Feb. 26, 2015, 5:50 PM), <http://www.reuters.com/article/2015/02/26/us-usa-china-idUSKBN0LU2HZ20150226>. According to Rhodium Group, in the last quarter of 2014,

Chinese firms spent \$3.7 billion on 30 FDI transactions in the US, bringing total Chinese investment for last year to nearly \$12 billion. . . . A strong base for 2015 is expected with more than \$3 billion in deals currently up in the air and several large, multiyear greenfield projects in real estate and other sectors started last year.

Hua Shengdun, *China Top Attendee at Investment Summit*, CHINA DAILY USA (Mar. 13, 2015, 1:00 PM), [http://usa.chinadaily.com/cn/us/2015-03/13/content\\_19807665.htm](http://usa.chinadaily.com/cn/us/2015-03/13/content_19807665.htm).

207. Toh Han Shih, *Slow Going Seen for China-US Investment Treaty due to Political Delays*, SOUTH CHINA MORNING POST, Dec. 15, 2014, <http://www.scmp.com/business/economy/article/1662812/slow-going-seen-china-us-investment-treaty-due-political-delays>. Data released by the U.S. Department of Commerce indicated that “China’s direct investment in the US grew by a compound annual rate of 41.51 percent between 2009 and 2013.” *Foreign Investment Growth in US Led by China*, WANT CHINA TIMES (Mar. 25, 2015, 10:42 AM), <http://www.wantchinatimes.com/news-print-cnt.aspx?id=20150325000046&cid=1202&MainCatID=12>. China invested

ground in mind, generally the amount of FDI is directly proportional to the frequency of CFIUS reviews. However, these statistics are subject to the rising and diminishing prominence of certain markets.<sup>208</sup> Between 2011 and 2013, the countries enduring the most reviews were China (54 reviews), the United Kingdom (49 reviews), Canada (34 reviews), Japan (34 reviews), and France (29 reviews).<sup>209</sup> However, in looking at 2013 alone, transactions involving China received the most attention, with 21 reviews, followed by Japan, with 18 reviews.<sup>210</sup>

#### A. Development of China's National Security Review Regulatory Regime

China, in liberalizing its economy, has gradually opened its borders to foreign parties.<sup>211</sup> Since this economic expansion only began in 1983, China's regulatory regime, in both its formation and practice, remains in its infancy.<sup>212</sup> However, like

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more than \$12.6 billion in Europe in 2012, making Europe the principle recipient of foreign investment by Chinese firms. This is reportedly due to the fact that Europe has welcomed Chinese investments because of the continent's recession, while the United States resists Chinese investments as a result of suspicions of threats. Claus Hecking, *Capital Study: Chinese Investment in Europe Hits Record High*, SPIEGEL ONLINE (Apr. 16, 2013, 12:16 PM), <http://www.spiegel.de/international/business/study-finds-massive-investment-in-europe-by-chinese-state-companies-a-894570.html>.

208. See *supra* Part I.C.

209. ANNUAL REPORT TO CONGRESS CY 2013, *supra* note 72, at 17.

210. *Id.*

211. *Foreign Direct Investment—the China Story*, THE WORLD BANK, (July 16, 2010), <http://www.worldbank.org/en/news/feature/2010/07/16/foreign-direct-investment-china-story.print>.

212. Saha, *supra* note 18, at 215. On January 19, 2015, MOFCOM published the draft of its new Foreign Investment Law for public comment. The draft, when finalized, “unifies and repeals three current foreign-invested enterprise (FIE) laws: the PRC Wholly Foreign-owned Enterprise Law (Revised), the PRC Sino-foreign Equity Joint Venture Law (2nd Revision) and the PRC Sino-foreign Cooperative Joint Venture Law (Revised), which govern the corporate structures of foreign entities in China.” Katherine Jo, *China Revamps Foreign Investment Rules, Tackles VIEs*, CHINA L. & PRACTICE (Jan. 30, 2015), <http://www.chinalawandpractice.com/Article/3433178/Channel/9933/China-revamps-foreign-investment-rules-tackles-VIEs.html>. The draft's main purpose is to “grant ‘national treatment’ to all foreign investment, except that which falls under the ‘Special Administrative Measure List’ (‘Negative List’).” The draft includes a national security review process that employs similar elements to the CFIUS review process. However, all administrative decisions

CFIUS, China's legislation pertaining to national security reviews ("NSRs") for FDI has promulgated over time. In 2008,

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will be "exempt from any judicial review." Norman B. Page, Ron Cai & Chao Tong, *Draft of China's New Foreign Investment Law*, LEXOLOGY (Jan. 29, 2015), <http://www.lexology.com/library/detail.aspx?g=ddb5907e-b45c-4f4c-b8b1-f4cedf78a711>. This proposed legislation will simply "formalize the national security review principles that were already in place and in practice." *China's New Foreign Investment Law: Implications for Restricted Industry Investments in China*, CADWALADER, WICKERSHAM & TAFT (Mar. 13, 2015), <http://www.cadwalader.com/resources/clients-friends-memos/chinas-new-foreign-investment-law-implications-for-restricted-industry-investments-in-china>. Additionally, the draft law "intends to consolidate the existing laws regulating foreign investments into one uniform statutory regime and unify the corporate legal requirements for both foreign and domestic investments in China." CHRISTOPHER W. BETTS ET AL., SKADDEN, ARPS, SLATE, MEAGER & FLOM, CHINA'S MOFCOM AIMS TO FUNDAMENTALLY CHANGE THE LEGAL LANDSCAPE ON FOREIGN INVESTMENTS 1 (2015), <https://www.skadden.com/sites/default/files/publications/China's%20MOFCOM%20Aims%20to%20Fundamentally%20Change%20the%20Legal%20Landscape%20on%20Foreign%20Investments.pdf>. While this will potentially alter the framework of foreign investment law and the national security review framework, this draft law does not affect this Note's analysis. This Note analyzes the national security review scheme specific to mergers and acquisitions, rather than foreign investment generally. These specific national security review schemes include: Shāngwù bù duì ānquán shēnchá zhìdù de bìnggòu jìngnèi qǐyè de wàiguó tóuzī zhě shíshī guīdìng (商务部实施外国投资者并购境内企业安全审查制度的规定) [Provisions of the Ministry of Commerce on the Implementation of the Security Review System for Mergers and Acquisitions of Domestic Enterprises by Foreign Investors] (promulgated by the Ministry of Commerce, Aug. 25, 2011, effective Sept. 1, 2011) 53 MINISTRY OF COMMERCE ANNOUNCEMENT (China) [hereinafter Provisions on Implementation of Security Review System]; Shāngwù bù yǒuguān wèntí de zhàn háng guīdìng xiāngguān de ānquán shēnchá zhìdù bìnggòu jìngnèi qǐyè de wàiguó tóuzī zhě bìnggòu shíshī (商务部有关问题的暂行规定相关的安全审查制度并购境内企业的外国投资者并购实施) [Interim Provisions of the Ministry of Commerce on Issues Related to the Implementation of the Security Review System for Mergers and Acquisitions of Domestic Enterprises by Foreign Investors], No.8 (promulgated by the Ministry of Commerce, Mar. 4, 2011, effective Mar. 5, 2011, Repealed) 8 MINISTRY OF COMMERCE ANNOUNCEMENT (China) [hereinafter Interim Provisions on Issues Related to Implementation]; Guówùyuàn bàngōng tīng guānyú kāizhǎn ānquán shēnchá zhìdù de bìnggòu jìngnèi qǐyè de bìnggòu wàiguó tóuzī zhě de tōngzhī (国务院办公厅关于建立外国投资者并购境内企业安全审查制度的通知) [Notice of the General Office of the State Council on Launching the Security Review System for Mergers and Acquisitions of Domestic Enterprises by Foreign Investors] (promulgated by the General Office of the State Council, Feb. 3, 2011, effective March 5, 2011) 6 GUO BAN FA (China) [hereinafter Notice on Launching Security Review System].

China first attempted to adopt a NSR for foreign mergers and acquisitions with the creation of China's anti-monopoly law.<sup>213</sup> Article 31 of the primarily antitrust review legislation provided for a concurrent NSR,<sup>214</sup> similar to other national security provisions found in free market economies.<sup>215</sup> Later in 2011, the NSR process was formalized when MOFCOM issued new "Provisions of the Ministry of Commerce on the Implementation of the Security Review System for the Merger and Acquisition of Domestic Enterprises by Foreign Investors" ("Chinese Model"), CFIUS's Chinese counterpart.<sup>216</sup>

### *B. Comparison of Chinese and U.S. National Security Reviews*

China's and the United States' NSR schemes illustrate the difficulties nations face in striking a balance between policies that encourage FDI while also protecting national security. Comparing China's and the United States'<sup>217</sup> NSR schemes further demonstrates the two nations' complex political relationships. Procedurally, the Chinese Model for NSR directly mirrors CFIUS review in several aspects. First, China has an interagency panel<sup>218</sup> known as the "ministerial panel" that con-

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213. Zhōngguó rénmin gònghéguó fǎn lǒngduàn fǎ (中华人民共和国反垄断法) [Anti-monopoly Law of the People's Republic of China] (promulgated by the Standing Comm. Nat'l People's Cong., Aug. 30, 2007, effective Aug. 1, 2008) 2011 STANDING COMM. NAT'L PEOPLE'S CONG. GAZ. (China).

214. *Id.* art. 31 ("Where a foreign investor merges and acquires a domestic enterprise or participates in concentration by other means, if state security is involved, besides the examination of the concentration in accordance with this Law, the examination of national security shall also be conducted in accordance with the relevant State provisions.").

215. Kenneth Y. Hui, *National Security Review of Foreign Mergers and Acquisitions of Domestic Companies in China and the United States* 1–2 (Cornell Law Sch. Inter-University Graduate Student Conf., Paper No. 34, Apr. 14, 2009).

216. Provisions on Implementation of Security Review System, *supra* note 212.

217. Foreign investments in the United States are subject to fewer pre-establishment approvals. Foreign investments in the United States are, at most, subject to "anti-monopoly review, national security review, enterprise registration, site-related and environmental approvals, industry regulatory approvals, and approvals related to strategic investments in publicly traded companies." CHINA'S APPROVAL PROCESS FOR INBOUND FDI, *supra* note 190, at 42.

218. Leadership of the national security review includes the National Development and Reform Commission and MOFCOM. Christine Kahler, *For-*

ducts the reviews.<sup>219</sup> As in the United States and other jurisdictions that employ similar rules, the Chinese Model gives the Chinese government great discretion on NSR.<sup>220</sup> Second, foreign investors may voluntarily file with MOFCOM or the local commerce authorities and other government agencies may request a filing.<sup>221</sup> Third, the Chinese Model proceeds with an articulated, multi-stage timeline, which provides for mitigation measures and allows parties to a transaction to withdraw their application for review.<sup>222</sup>

### *C. NSR in the United States and China: Scope and Procedure*

Even though the Chinese Model and CFIUS are similar in their procedures, the two regimes are incredibly different substantively. It is first important to note that China's overall approval process for inbound FDI, aside from the NSR, is much more comprehensive than the process in the United States. The Chinese Model provides for "far greater avenues and opportunities to scrutinize foreign mergers and acquisitions through the national security review process."<sup>223</sup> Specifically, the Chinese Model's scope of review, in respect to sectors and types of transactions, is much broader. Many components overlap, including the review of mergers and transaction by foreign investors if an investor would "obtain actual control" or de facto control<sup>224</sup> of a domestic enterprise involving the military, military

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*eign M&A in China Face Security Review*, CHINA BUS. REV., Apr. 1, 2011, <http://www.chinabusinessreview.com/foreign-ma-in-china-face-security-review/>.

219. CHINA'S APPROVAL PROCESS FOR INBOUND FDI, *supra* note 190, at 12.

220. *China's New National Security Review Will Examine Foreign Investment in Chinese Companies*, JONES DAY (Feb. 2011), [http://www.jonesday.com/china\\_new\\_national\\_security\\_review/](http://www.jonesday.com/china_new_national_security_review/).

221. CHINA'S APPROVAL PROCESS FOR INBOUND FDI, *supra* note 190, at 12.

222. Provisions on Implementation of Security Review System, *supra* note 212; Notice on Launching Security Review System, *supra* note 212.

223. Saha, *supra* note 18, at 218.

224. In the Chinese Model, de facto control is established when a

foreign investor becom[es] a controlling shareholder or *de facto* controller of the Chinese enterprise in a M&A action that includes: controlling parent company or controlled subsidiary taking more than 50% of equity interests of merged or acquired enterprise, several foreign investors cumulatively taking more than 50% of equity interests of the merged or acquired enterprise, a foreign investor has a major influence over decisions of SH meetings or board of directors of

support or association with national defense and security, infrastructure, energy, equipment manufacturing, technology, or transportation.<sup>225</sup> Additionally, transactions are reviewed if they are specifically in the vicinity of sensitive military facilities.<sup>226</sup> Novel additions to the inquiry provide for the consideration of more economic and cultural considerations. Specifically, unique considerations include “the effect on the stability of the national economy, on basic social order, and on research and development capabilities for key national technologies.”<sup>227</sup>

The most striking difference between the two regimes, which highlights precarious loopholes in the U.S. legislation, is the Chinese Model’s authority to review additional transactions outside the specified mergers, acquisitions, and takeovers. The Chinese Model stipulates an additional approval process for post-establishment expansion or modifications of the enterprise.<sup>228</sup> Expansions or modifications can include a change of registered capital or shareholders, amendments of a business’s operational scope, acquisition of a “company in a restricted in-

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merged or acquired enterprise even if they acquire less than 50% of the merged or acquired enterprise, or a foreign investor taking *de facto* control over business decision-making, finance, human resource or technology of the merged or acquired Chinese enterprise.

*China Formalizes National Security Review System for M&A Transactions by Foreign Investors*, MWE CHINA L. OFFICES, <http://www.mwechinalaw.com/news/2011/chinalawalert0911c.htm> (last visited Sept. 15, 2015).

225. Notice on Launching the Security Review System, *supra* note 212, para. 1. This list includes the previously established nine “pillar industries” announced in 2006, in which “state-owned enterprises should play a leading role: auto, chemical, construction, electronic information, heavy equipment manufacturing, nonferrous metal, research and development (R&D), steel, and technology.” Kahler, *supra* note 218.

226. Notice on Launching the Security Review, *supra* note 212, para. 1; Kahler, *supra* note 218.

227. *China’s New National Security Review Will Examine Foreign Investment in Chinese Companies*, *supra* note 220. Such areas of inquiry have been categorized as either “economic security” or “cultural security.” Kevin B. Goldstein, *Reviewing Cross-Border Mergers and Acquisitions for Competition and National Security: A Comparative Look at How the United States, Europe, and China Separate Security Concerns from Competition Concerns in Reviewing Acquisitions by Foreign Entities*, 3 TSINGHUA CHINA L. REV. 215, 238 (2011) (citing Tarrant M. Mahony, *Thirty Years of Reform and Opening: A Brief History of Foreign Investment in China*, 1 DONG-A J. INT’L BUS. TRANSACTIONS L. 1, 36–37 (2009).

228. CHINA’S APPROVAL PROCESS FOR INBOUND FDI, *supra* note 190, at 20.

dustry,” and an expansion of business presence by “adding new products or opening new branches.”<sup>229</sup> Furthermore, the final NSR Rules, in contrast to the Interim Rules,<sup>230</sup> exhibit a critical change in China’s approach to NSR. Specifically, as articulated in Article 9:

Whether a foreign investor’s M&A of a domestic enterprise falls within the scope of M&A security review or not shall be determined based on the substance and actual influence of the M&A transaction. No foreign investor is allowed to substantially avoid the M&A security review in any way, including but not limited to, holding shares on behalf of others, trust, multi-level reinvestment, leasing, loans, variable interest entities, or overseas transactions.<sup>231</sup>

As a result, the Chinese Model substantially eliminates the ability of foreign entities to circumvent a NSR due to the emphasis on the “the substance and the actual impact” of a transaction and the explicit acknowledgment that alternative structures to a transaction cannot be used to thwart reviews.<sup>232</sup>

#### D. Critiques of the NSR Models

As CFIUS and the Chinese Model are similar in structure, so are the criticisms leveled at them. First, both regulatory schemes are critiqued for the vague definition of “national security,” which allows for a potentially arbitrary review process.<sup>233</sup> Second, investors have voiced concerns that both NSRs are generally vague.<sup>234</sup> Ambiguities in the NSR process, partic-

229. *Id.*

230. Interim Provisions on Issues Related to Implementation, *supra* note 212.

231. Provisions on Implementation Security Review System, *supra* note 212.

232. *Alert Memo: MOFCOM Issues Final National Security Review Rules*, CLEARY GOTTlieb (Sept. 19, 2011), <http://www.cgsh.com/files/News/31760287-9ae4-4499-9f9f-20e84ba6d576/Presentation/NewsAttachment/5d0747e0-df96-46b9-9a9d-21da85fc0871/CGSH%20Alert%20%20MOFCOM%20Issues%20Final%20National%20Security%20Review%20Rules.pdf> [hereinafter *Alert Memo*].

233. See generally Amy S. Josselyn, *National Security at All Costs: Why the CFIUS Review Process May Have Overreached its Purpose*, 21 GEO. MASON L. REV. 1347, 1374, 1379 (2014); Goldstein, *supra* note 227, at 227.

234. See generally Cooper, *supra* note 199; Susan Ning, Huang Jing & Yin Ranran, *Updated National Security Review Rules: A Justifiable Cause of Anxiety*, CHINA L. INSIGHT (Sept. 5, 2011),

ularly in the Chinese Model, highlight the possibility that China is violating WTO commitments, and the resulting lack of disclosure and paper trail have impaired enforcement of both nations' WTO commitments.<sup>235</sup> Such difficulties enable both China and the United States to favor domestic enterprises over foreign competitors. However, as of 2012, foreign investors' experience with China's NSR has been minimal. Therefore, critiques of the Chinese Model have focused not on implementation but instead ambiguities in the law itself.

#### PART V: SUGGESTIONS FOR REVIEW

Revisions to the CFIUS process must be considered in the context of the current economic and political climate, as well as the existing regulatory framework for FDI into the United States.<sup>236</sup> Amendments must consider existing bilateral investment treaties with other countries, including China,<sup>237</sup> the

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<http://www.chinalawinsight.com/2011/09/articles/corporate/updated-national-security-review-rules-a-justifiable-cause-of-anxiety/>.

235. CHINA'S APPROVAL PROCESS FOR INBOUND FDI, *supra* note 190, at 35.

236. On November 24, 2014, the Department of Commerce's Bureau of Economic Analysis reinstated previously discontinued mandatory reporting requirements of the BE-13 Survey of New FDI in the United States. The survey collects statistical data concerning the "acquisition or establishment of U.S. business enterprises by foreign investors" and "information on expansions by existing U.S. affiliates of foreign companies." Neil Ray & Curtis M. Dombek, *Mandatory Reporting of Foreign Direct Investments in the U.S.*, NAT'L L. REV. (Dec. 21, 2014), <http://www.natlawreview.com/article/mandatory-reporting-foreign-direct-investments-us>; Jeanne S. Archibald, Anthony V. Capobianco, Aleksandar Dukic, Ajay Kuntamukkala, Robert D. Kyle & Beth Peters, *Commerce Department Reinstates Mandatory Reporting Requirements for Certain Foreign Direct Investments in U.S. Companies and Real Estate*, LEXOLOGY (Dec. 29, 2014), <http://www.lexology.com/library/detail.aspx?g=07a4904d-df1b-415a-90e5-060288a00aa8>.

237. In July 2013, at the close of the fifth United States-China Strategic and Economic Dialogue, China and the United States announced their intention to negotiate a bilateral investment treaty (a "BIT") covering "all stages of investment and sectors." These negotiations made significant inroads into opening up China's previously secluded economy to U.S. investment. Most importantly, these negotiations mark the first time that "China has agreed to negotiate a BIT that includes all stages of investment and sectors." Betsy Bourassa, *Treasury Notes, U.S. and China Breakthrough Announcement on the Bilateral Investment Treaty Negotiations*, U.S. DEP'T. TREASURY (July 15, 2013), <http://www.treasury.gov/connect/blog/Pages/U.S.-and-China-Breakthrough-Announcement.aspx>. Additionally, during BIT negotiations,

intentions of U.S. foreign trade policies like those articulated in the Asia-Pacific Economic Cooperation summit,<sup>238</sup> and the rise of China as the fastest growing source of FDI in both the United States and the world.<sup>239</sup> In addition to addressing domestic concerns, amendments must also assure foreign investors that a revised FDI regulatory framework is impartial and unbiased. Thus, a balance between maintaining national security, while not discouraging FDI with a nebulous body of law, must be struck.

#### *A. Maintaining a Permissive Definition of "National Security"*

Contrary to the suggestions of recent scholarship and proposed legislation, the term "national security" must not be explicitly defined. Even though commentators suggest a need for a definition that expands CFIUS's scope of power or increases the Committee's transparency to foreign investors,<sup>240</sup> providing a concrete definition inhibits CFIUS's ability to adapt to new forms of industrial espionage. Such fixed definitions would likely overlook nuanced threats in the current era of globalization and compromise the nation's security. In order to properly maintain national security within the United States, the definition of "national security" should not be concretely defined. Instead, "national security" should remain a broad term, in order to best grapple with unexpected issues. As seen in

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Chinese negotiators explicitly asked for clarification and transparency in the review process. Sean Miner, *China-U.S. Investment Treaty Would Strengthen Economic Relations*, CAIXIN ONLINE (Nov. 11, 2014, 3:56 PM), <http://english.caixin.com/2014-11-21/100754012.html>.

238. During the Asia-Pacific Economic Cooperation summit in Beijing in November 2014, the United States and China discussed a treaty that would boost investment between the two nations. China also indicated that it was allowing "foreign investment in all sectors of its economy, except those on the 'negative list.'" The basic text of the treaty is purported to be completed by the end of 2014 while negotiations on specific sectors for investment will continue to be deliberated in 2015. Shih, *supra* note 207. Additionally, in June 2015, China and the United States reached an "important milestone" in the exchange of the countries initial offers of their "negative lists." Xinhua Zhu Junqing, *Spotlight: China, U.S. pin high hopes on Xi's visit for Breakthrough in BIT Talks*, INT'L INST. FOR STRATEGIC STUDIES-CHINA (Sept. 19, 2015, 2:00 PM), <http://www.iiss.com/html/article/20159/20/a313b.html>.

239. Shih, *supra* note 207.

240. See Amy S. Josselyn, *supra* note 233, at 1374 & 1379; H.R. 5581, 113th Cong. (2014).

§ 2170(f), ten of the eleven factors the Committee considers are explicitly focused on inquiries concerning national security.<sup>241</sup>

Additionally, the definition of “national security” must not be specifically defined to include “economic security” or a “net benefit” review.<sup>242</sup> Including “economic security” as part of the national security inquiry would insert a political factor into CFIUS’s jurisdiction and thus politicize the review process. Although CFIUS, in both its structure and history, often appears to conflate national security with economic security, it is important to note that national and economic security are often tightly intertwined. This close relationship is proven by CFIUS’s intimate relationship with the Department of the Treasury and due to CFIUS’s jurisdiction hinging on the type of economic transaction.<sup>243</sup> Although the economic security of the nation is critical, economic security should not eclipse the foundational concern of CFIUS—national security.<sup>244</sup>

If the substance of CFIUS national security inquiries were amended to include a “net benefit” review, as proposed in Congresswoman DeLauro’s legislation, the analysis would become even more politicized because subsequent evaluations would range into more politically-debated national issues.<sup>245</sup> Topics such as “economic activity,” “quality of employment,” the effect on productivity, “industrial efficiency,” and compatibility with “U.S. cultural policies”<sup>246</sup> would lead to drastic politicization of the review process. These issues would also divert CFIUS’s focus from its already burdensome task of protecting national security. Furthermore, a substantive expansion of the national security inquiry would not only discourage FDI, but would

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241. 50 U.S.C. app § 2170(f) (2007).

242. H.R. 5581.

243. *Composition of CFIUS*, DEP’T TREASURY, <http://www.treasury.gov/resource-center/international/foreign-investment/Pages/cfius-members.aspx> (last updated Dec. 1, 2010); Foreign Investment and National Security Act, sec. 2, Pub. L. 110-49, 121 Stat. 246, 246 (2007).

244. During the Hearing on CFIUS and the Role of Foreign Direct Investment in the United States, Daniel K. Tarullo stated, “There is widespread agreement, verging on consensus, that two important interests are implicated by Section 721. One, of course, is protection of the national security. The other is the nation’s economic interest in receiving foreign direct investment.” *Hearing, supra* note 31, at 60.

245. *See supra* Part III.

246. Brewster, *supra* note 176.

make the CFIUS judgments more arbitrary and politicized due to the critical lack of a framework for determining what constitutes a “net benefit.” Finally, as seen in the Chinese Model, which arguably violates China’s WTO commitments, adding such stipulations could possibly violate the United States’ commitments<sup>247</sup> to the WTO.<sup>248</sup>

*B. Defining “Covered Transactions” to Include Alternative Types of “Control”*

Rather than explicitly defining “national security” or broadening the substance of CFIUS reviews, the definition of “covered transaction[s]” must be broadened to include transactions in which a foreign person could gain “de facto”<sup>249</sup> control of a U.S. business. Presently, section 800.224 defines and therefore establishes the statutory requirement that a “transaction” must be a “proposed or completed merger, acquisition, or take-over.”<sup>250</sup> Additionally, section 800.207 defines a “covered trans-

247. See *United States of America and the WTO*, WORLD TRADE ORG., [http://www.wto.org/english/thewto\\_e/countries\\_e/usa\\_e.htm](http://www.wto.org/english/thewto_e/countries_e/usa_e.htm) (last visited May 17, 2015).

248. See *supra* Part IV.

249. De facto is defined as “actual,” “existing in fact,” or “having effect even though not formally or legally recognized.” *De facto*, BLACK’S LAW DICTIONARY (10th ed. 2014).

250. 31 C.F.R. § 800.224 (2004). The regulation specifically includes the following transactions:

- (a) The acquisition of an ownership interest in an entity.
- (b) The acquisition or conversion of convertible voting instruments of an entity.
- (c) The acquisition of proxies from holders of a voting interest in an entity.
- (d) A merger or consolidation.
- (e) The Formation of a joint venture.
- (f) a long-term lease under which a lessee makes substantially all business decisions concerning the operation of a leased entity, as if it were the owner.

*Id.* Additionally, noncovered transactions include:

- (a) A stock split or pro rata stock dividend that does not involve a change in control.
- (b) A transaction that results in a foreign person holding ten percent or less of the outstanding voting interest in a U.S. business . . . but only if the transaction is solely for the purpose of passive investment.
- (c) An acquisition of any part of an entity or assets, if such part of an entity or assets do not constitute a U.S. business.

31 C.F.R. § 800.302 (2010).

action”<sup>251</sup> as “any transaction . . . by or with any foreign person, which could result in *control*<sup>252</sup> of a U.S. business by a foreign person.”<sup>253</sup> Furthermore, section 800.302 outlines transactions that are exempt from the “covered transactions” definition, including transactions or events that affect ownership, but do not constitute a change of control in an entity.<sup>254</sup> Thus, establishing a transfer in control is a key threshold issue, because CFIUS’s jurisdiction is predicated on control.

On their face, sections 800.204, 800.207, 800.302, and 800.224 appear extremely detailed in defining terms and providing examples. They address very nuanced components regarding what is considered to be a transaction in addition to the subelements of transactions that create control. Namely, the definitions identify elements of corporate structure that include corporate governance, securities, and shareholders’ voting rights. However, basing CFIUS jurisdiction on the very narrowly defined terms of a “covered transaction” and “control” establishes a *de jure*<sup>255</sup> standard for control akin to *de jure* con-

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251. 31 C.F.R. § 800.301 (2011) also expands this definition and covers transactions to specifically include:

A transaction in which a foreign person conveys its control of a U.S. business to another person . . . that results or could result in control by a foreign person of any part of an entity or of assets . . . a joint venture in which the parties enter into a contractual or other similar arrangement, including an agreement on the establishment of a new entity, but only if one or more of the parties contributes a U.S. business and a foreign person could control that U.S. business by means of the joint venture.

252. Control, in this context, is

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 . . . or any other similarly important matters affecting an entity.

31 C.F.R. § 800.204 (2010).

253. 31 C.F.R. § 800.207 (2011)(emphasis added).

254. *Id.*

255. *De jure* means “existing by right or according to law”. *De jure*, BLACK’S LAW DICTIONARY (10th ed. 2014).

trol seen in corporate law. Establishing such a standard provides a savvy investor with a map filled with loopholes by which they may thwart the regulatory scheme and strategically circumvent CFIUS review.

CFIUS jurisdiction should not be centered on corporate law distinctions. Instead, jurisdiction should be channeled through a more logical and equitable approach in which any transaction that could pose a security threat is covered. As seen in and addressed by the Chinese Model, foreign investors can establish or gain control of a business through transactions outside the realm of mergers, acquisitions, and takeovers, which are the three primary targets of CFIUS review. Instead of only covering mergers, acquisitions, and takeovers, a covered transaction must include leases and other similar transactions, such as construction and additional investments. Although these transactions normally bear neither the same economic significance nor the same degree of control as mergers or acquisitions, they nevertheless establish the presence and control of a foreign entity in the United States.<sup>256</sup>

A foreign entity's mere presence could have severe implications for national security. Thus, these additional transactions should be reviewed under the same standards as the more traditional covered transactions. Furthermore, these additional transactions allow canny investors to evade CFIUS review by restructuring transactions that would be covered under the current legislation into leases, construction, and additional investments, or into other nontraditional investments such as

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256. Leases, along with construction and additional investments, have importance not only in national security, but in economic security as well. Even though a lease in the traditional sense is not considered an "asset" under Generally Accepted Accounting Principles, leases are still valuable assets in transactions that greatly affect the immediate geographic area and, therefore, may implicate the nation's economic security. Although economic ramifications of a lease may be less significant than a merger or acquisition, leases can still have significant economic impact, making CFIUS review more than justified. *Operating versus Capital Leases*, N.Y.U. STERN SCH. OF BUS. [http://pages.stern.nyu.edu/~adamodar/New\\_Home\\_Page/AccPrimer/lease.htm](http://pages.stern.nyu.edu/~adamodar/New_Home_Page/AccPrimer/lease.htm) (last visited Sept. 29, 2015); see *supra* Part II.B. As seen in the debate over the Gultainer lease, the lease is going to greatly benefit the State of Florida. See *supra* Part II.B.

greenfield investments.<sup>257</sup> Since the legislation does not have an “anti-circumvention clause”<sup>258</sup> or a focus on the substance of the transaction, as seen in the Chinese Model, foreign investors are able to use alternative investment structures to sidestep CFIUS reviews.<sup>259</sup> Not requiring approvals of such alternative transactions sets a dangerous precedent for national security. As a result, the CFIUS review process must look beyond the *form* of a transaction and review both the *substance* of a transaction and its *effects*.

Although a lease may not constitute a change of control, as defined in section 800.204, or qualify as a transfer of an ownership interest, it nevertheless is the transfer of a legally-substantiated right.<sup>260</sup> This right provides a foreign entity with a port of entry into the United States and a venue to establish a presence that can pose serious risks to national security. Even though section 800.224(f) addresses leases, it only addresses very limited, long-term leases “under which a lessee makes substantially all business decisions concerning the operation of a leased entity, as if it were the owner.”<sup>261</sup> This provision and its example<sup>262</sup> provides a nebulous gap for interpretation with regard to the control of a leased property. Predicating CFIUS’s jurisdiction over leases on a temporal factor, ra-

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257. A greenfield investment is an investment in which an entity or person “us[es] capital to begin a new company or create new subsidiaries within the U.S.” Zucker & Hari, *supra* note 133, at 188.

258. *Alert Memo*, *supra* note 232.

259. *See supra* Part IV.C.

260. Although this Note focuses on leases, the issues raised and analysis also applies to construction of facilities, additional or incremental investments, and the opening of new branches.

261. 31 C.F.R. § 800.224(f) (2011).

262. 31 C.F.R. § 800.224 (2011). The example in § 800.224, illustrating when a lease is not considered a transaction, is as follows:

Corporation A, a foreign person, signs a concession agreement to operate the toll road business of Corporation B, a U.S. business, for 99 years. Corporation B, however, is required under the agreement to perform safety and security functions with respect to the business and to monitor compliance by Corporation A with the operating requirements of the agreement on an ongoing basis. Corporation B may terminate the agreement or impose other penalties for breach of these operating requirements. Assuming no other relevant facts, this is not a transaction.

ther than the substance or location of a business, does not take into account issues such as short-term leases in close proximity to sensitive U.S. government installations or the leasing of different forms of critical infrastructure.<sup>263</sup> Concerns stemming from a business's proximity to a sensitive U.S. government facility was seen in the previous controversial CFIUS reviews of both Ralls<sup>264</sup> and the DPW controversy.<sup>265</sup> This exact issue is also raised in the disputed Gulftainer lease.<sup>266</sup> In Gulftainer, however, the transaction was not reviewed because it was a "simple lease" and therefore not a covered transaction.<sup>267</sup> Thus, CFIUS declined to review the transaction due to its structure, not a lack of substantive concerns. The Committee failed to invoke its jurisdiction, irrespective of the fact that a lease could pose the same security threat as a transfer of ownership transaction. Regardless of whether property is obtained through a lease, merger, acquisition, or takeover, the threat of close proximity to sensitive U.S. government facilities still occurs due to the substance of the transaction, not its form. Even though a foreign person may not have control under the traditional meaning of the statute or have ownership of the property itself as a tenant—irrespective of whether a tenant is long-term or temporary—the presence of foreign leaseholders in certain locations could lead to national security threats. Hence, leases and other similar transactions must fall within CFIUS jurisdiction.

## CONCLUSION

*Ralls*, its predecessors, and the current economic climate raise the desperate call for reform of the CFIUS process. Alt-

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263. Jeremy Zucker & Hrishikesh Hari, *Gone with the Wind II: The Ralls Decision and Lesson for Foreign Investors*, 9 GLOBAL TRADE & CUSTOMS J. 44, 46 (2014).

264. See *supra* Part II.C. Previously, Chinese nationals did not encounter issues acquiring windfarms located further from sensitive locations. Goldwind's Shady Oaks Project located in Illinois and the Sany windfarm in Texas were not subject to CFIUS review. Zucker & Hari, *supra* note 133, at 187 (citing Edward Alden, *Guest Post: Ralls v. CFIUS: What are the Implications for Chinese Investment?*, RENEWING AM. (Oct. 5, 2012), <http://blogs.cfr.org/renewing-america/2012/10/05/ralls-vs-cfius-what-are-the-implications-for-chinese-investment/>.)

265. See *supra* Part II.A.

266. See *supra* Part II.B.

267. Bonney, *supra* note 120.

hough Congresswoman DeLauro's proposed legislation attempted to answer this demand, the amendments miss the mark, failing to solve the recurring problems with the CFIUS review process.<sup>268</sup> CFIUS legislation must not be expanded to include a "net benefit" review or to explicitly define "national security."<sup>269</sup> Rather, CFIUS jurisdiction must be expanded to include additional types of transactions that include leases, construction, and additional investments. By appropriating concepts from China's national security review that focus on the *substance* and *effect* of a transaction, rather than its *form*,<sup>270</sup> CFIUS reviews will better fulfill the agency's original purpose of protecting national security by impartial regulation of FDI. Additionally, CFIUS's implementing legislation will no longer provide a blueprint for corrupt foreign investors who attempt to establish a presence within the United States under the guise of a corporation. By shedding its focus on traditional corporate law distinctions and adopting a more equitable approach to establishing CFIUS's jurisdiction, the legislation will both alter and deter foreign investors from thwarting CFIUS review. With these proposed amendments, the United States will not only be a more secure nation, but will remain a prominent power in the global marketplace.

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268. See *supra* Part III.

269. H.R. 5581, 113th Cong. (2014).

270. See *supra* Part IV.

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