SAFEGUARDING SHAREHOLDER DEMOCRACY AGAINST FOREIGN INTERFERENCE: CHANGING SHAREHOLDER VOTING TO PROTECT U.S. NATIONAL SECURITY INTERESTS

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ABSTRACT

Recently, foreign policy in the United States has shifted its focus to a return to "great power competition," reflecting the rising challenges posed by potential competitor nations such as China and Russia. The combination of economic integration with and actions by these countries, especially China, has exposed weaknesses in U.S. corporate law that, if unaddressed, threaten to undermine the security and foreign policy of the U.S. Foreign shareholders own an increasing share of U.S. companies' equity, which opens the possibility of shareholder votes being used to advance strategic interests of foreign governments. Current legal safeguards against potentially threatening foreign investment, such as the Committee on Foreign Investment in the United States (CFIUS), currently lack both the legal authority and practical ability to safeguard U.S. companies from potentially malicious interference in shareholder voting. Expanding CFIUS authority to temporarily restrict voting rights from certain shareholders in sensitive industries and countries would safeguard the interests of U.S. shareholders and U.S. foreign policy.

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INTRODUCTION

From 1947 to 1991, the United States and its allies engaged in geopolitical conflict with the Soviet Union and its satellite states, a conflict known as the Cold War. Many observers believed the end of the Cold War and collapse of the Soviet Union would usher in a new period of international cooperation and peace.[1] While the years immediately after the fall of the Soviet Union may have satisfied some of these predictions, recent history has demonstrated that international competition continues to be a defining force of today's geopolitics.

Russia, under Vladimir Putin, has begun asserting its military strength

1. *See* Thomas Wright, *The Return to Great-Power Rivalry was Inevitable*, THE BROOKINGS INSTITUTION (Sep. 12, 2018), https://www.brookings.edu/opinions/the-return-to-great-power-rivalry-was-inevitable/ [https://perma.cc/MTW3-RLEE] (arguing that "[i]n the 1990s and 2000s, American leaders believed that Russia and China were converging with the West on basic questions of world order. Countries would work together on common challenges while old geopolitical rivalries would matter much less."). *See also* Hal Brands, *Six Propositions about Great-Power Competition and Revisionism in the 21st Century*, THE FUTURE OF THE GLOBAL ORDER COLLOQUIUM (2017), https://global.upenn.edu/sites/default/files/go-six-propositions-brands.original.pdf [https://perma.cc/Z4H6-GD3Y] (suggesting that "the great hope of the post-Cold War era was that ideological convergence would lead to great power peace").

in Ukraine[2] and the Middle East.[3] China has asserted itself militarily in the South China Sea[4] and economically across the globe.[5] Some rogue governments have continued to sponsor terrorism[6] and hack into U.S. government and commercial databases.[7] International competition is very much alive.

U.S. companies are not immune from this competition. China, in its pursuit of global leadership, has engaged in behavior that threatens both U.S. interests and the success of U.S. companies. U.S. corporations have long complained about poor intellectual property protection in China and being forced to transfer their technology to Chinese state-owned companies in exchange for access to the Chinese market.[8] While China denies this,[9] this

2. *See, e.g.,* Steven Lee Meyers and Ellen Barry, *Putin Reclaims Crimea for Russia and Bitterly Denounces the West*, N.Y. TIMES (Mar. 18, 2014), https://www.nytimes.com/2014/03/19/world/europe/ukraine.html [https://perma.cc/9CW7-U337] (reporting Putin's announcement of Russia's annexation of Crimea in 2014); Patrick Reevell, *Russia extends detention of captured Ukrainian sailors*, ABC NEWS (Jan. 15, 2019), https://abcnews.go.com/beta-story-container/International/russia-brings-captured-ukrainian-sailors-court/story?id=60398214 [https://perma.cc/7NJU-CTKP] (reporting that Russia continues to detain captured Ukrainian sailors despite protests from Ukraine and the West); Tom Embury-Dennis, *Ukraine could soon cease to be a country, Russia's top security official says*, THE INDEPENDENT (Jan. 16. 2019), https://www.independent.co.uk/news/world/europe/ukraine-russia-country-conflict-war-crimea-nikolai-patrushev-a8730476.html [https://perma.cc/TF26-ZPKE] (reporting that Russia's top security official has warned that Ukraine could soon lose statehood).

3. *See, e.g.,* Liz Sly, *In the Middle East, Russia is Back*, THE WASHINGTON POST (Dec. 5, 2018), https://www.washingtonpost.com/world/in-the-middle-east-russia-is-back/2018/12/04/e899df30-aaf1-11e8-9a7d-cd30504ff902_story.html?noredirect=on&utm_term=.9a1f6bf35fe2 [https://perma.cc/9UUX-6J3H] (recounting recent expansion of Russian military, political, and economic action in the Middle East).

4. *See* Travis Fedchun, *China builds new platform on reef in South China Sea, satellite photos show*, FOX NEWS (Nov. 22, 2018), https://www.foxnews.com/world/china-building-on-new-reef-in-south-china-sea-satellite-photos-show [https://perma.cc/4KN2-YWAN] (describing China's effort to build artificial islands for military use in the South China Sea).

5. *See* Lily Kuo and Niko Kommenda, *What is China's Belt and Road Initiative?*, THE GUARDIAN (July 30, 2018), https://www.theguardian.com/cities/ng-interactive/2018/jul/30/what-china-belt-road-initiative-silk-road-explainer [https://perma.cc/WUB9-RZ9D] (describing China's multibillion-dollar Belt and Road initiative and plans to expand its global economic influence).

6. BUREAU OF COUNTERTERRORISM, STATE SPONSORS OF TERRORISM (2019).

7. NAT'L COUNTERINTELLIGENCE & SEC. CTR., FOREIGN ECONOMIC ESPIONAGE IN CYBERSPACE 5-11 (2018), https://www.dni.gov/files/NCSC/documents/news/20180724-economic-espionage-pub.pdf [https://perma.cc/697F-38TA].

8. OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE: EXECUTIVE OFFICE OF THE PRESIDENT, UPDATE CONCERNING CHINA'S ACTS, POLICIES, AND PRACTICES RELATED TO TECHNOLOGY TRANSFER, INTELLECTUAL PROPERTY, AND INNOVATION (2018), https://ustr.gov/sites/default/files/enforcement/301Investigations/301%20Report%20Update.pdf [https://perma.cc/BPJ5-4VPL].

9. Tom Miles, *U.S. and China Clash over 'Technology Transfer' at WTO*, REUTERS

interference is especially problematic in light of China's Made in China 2025 initiative[10] and ongoing trade dispute with the U.S.[11] Additionally, evidence has recently surfaced of the Chinese government conducting corporate espionage on U.S. companies and government organizations through supplier relationships with large U.S. companies,[12] and the U.S. continues to accuse the Chinese telecommunications giant Huawei of having the capability to use, if not using, its communications equipment to spy on other nations, companies, or individuals.[13]

China has also sought to use corporate law as one of its weapons. Throughout 2015 and 2016, the Chinese financial services conglomerate Anbang Insurance Group, which has close ties to the Chinese government,[14] sought to take control of the U.S. hotel chain Starwood Hotels, International.[15] Anbang retreated from the deal after concerns emerged that U.S. national security regulators may not approve the deal, or may require certain divestments before approval.[16] But in 2018, Starwood, then part of

(May 28, 2018), https://www.reuters.com/article/us-usa-trade-china/u-s-and-china-clash-over-technology-transfer-at-wto-idUSKCN1IT11G [https://perma.cc/3X2P-WDCY].

10. For a summary of the economic implications of China 2025 Initiative for the U.S., see WAYNE M. MORRISON, CONG. RESEARCH SERV., THE MADE IN CHINA 2025 INITIATIVE: ECONOMIC IMPLICATIONS FOR THE UNITED STATES (2018).

11. *US-China Officials Begin Trade War Talks in Beijing*, BBC NEWS (Jan. 7, 2019), https://www.bbc.com/news/business-46778189 [https://perma.cc/YQC8-VYJM]; *See also* William Mauldin, Lingling Wei, and Alex Leary, *U.S., China Agree to Limited Deal to Halt Trade War*, WALL ST. J. (Dec. 14, 2019), https://www.wsj.com/articles/us-china-confirm-reaching-phase-one-trade-deal-11576234325 [https://perma.cc/F26P-LTZL].

12. Jordan Robertson and Michael Riley, *The Big Hack: How China Used a Tiny Chip to Infiltrate U.S. Companies*, BLOOMBERG BUSINESSWEEK (Oct. 4, 2018), https://www.bloomberg.com/news/features/2018-10-04/the-big-hack-how-china-used-a-tiny-chip-to-infiltrate-america-s-top-companies [https://perma.cc/422U-W3QS].

13. Julian E. Barnes, *White House Official Says Huawei Has Secret Back Door to Extract Data*, N.Y. TIMES (Feb. 11, 2020), https://www.nytimes.com/2020/02/11/us/politics/white-house-huawei-back-door.html [https://perma.cc/J9B5-9DT8].

14. Chao Deng and James T. Areddy, *China Confirms It Transferred Ownership of Anbang Insurance to Government*, WALL ST. J. (June 22, 2018), https://www.wsj.com/articles/china-confirms-it-transferred-ownership-of-anbang-insurance-to-government-1529674446 [https://perma.cc/K77S-LKED].

15. Craig Karmin and Joshua Jamerson, *Starwood Gets Higher Offer from Anbang-led Group, Threatening Marriott Deal*, WALL ST. J. (Mar. 28, 2016), https://www.wsj.com/articles/starwood-gets-higher-offer-from-anbang-threatening-marriott-deal-1459173151 [https://perma.cc/E572-LMNF].

16. Michael J. de la Merced and Leslie Picker, *Starwood Bidding War Ends Abruptly, Yielding a Merger and a Puzzle*, N.Y. TIMES (Mar. 31, 2016), https://www.nytimes.com/2016/04/01/business/dealbook/starwood-hotels-chinese-suitor-backs-out-of-bidding.html [https://perma.cc/4RBJ-KJHU]. *See also* Steven Davidoff Solomon, *If Starwood Makes a Deal with Anbang, Can It Be Done?*, N.Y. TIMES (Mar. 30, 2016), https://www.nytimes.com/2016/03/31/business/dealbook/if-starwood-makes-a-deal-with-anbang-can-it-be-done.html [https://per

Marriott International, was discovered to have been the victim of a hacking attempt, which cybersecurity experts have identified as being perpetrated by the Chinese government.[17] While no definitive evidence has been publicly revealed, it is possible that when the attempt to gain control over Starwood's data via corporate law mechanisms (in this case, an acquisition) failed, the Chinese government resorted to hacking Starwood in order to obtain the data they desired. If so, this would be one potential example of a competitive foreign power seeking to use U.S. corporate law to pursue its own interests.[18]

A new weakness in U.S. corporate law is emerging. Left unaddressed, it could become detrimental to the U.S. national security apparatus. Foreign holdings of U.S. equities have risen from $2.4 trillion in 2006 to a record $7.2 trillion in 2017.[19] The share of U.S. equities owned by foreign investors has increased from less than 9% in 2006 to nearly 15% in 2018.[20] Research has found that by 2050, many U.S. companies will be majority-owned by

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ma.cc/96BM-NHSG] (arguing that CFIUS may require divestiture of certain hotels to approve the transaction), *and* David Eisen, *Opaque Anbang draws more questions over U.S. buying spree*, HOTEL MGMT. (Apr. 22, 2016), https://www.hotelmanagement.net/own/opaque-anbang-draws-more-questions-over-u-s-buying-spree [https://perma.cc/6BXR-RUNV] (citing a series of calls to use CFIUS to investigate Anbang acquisitions of U.S. hotels) *and* Letter from Senator Claire McCaskill, Ranking Member of the Comm. on Homeland Security and Governmental Affairs, to Adam J. Szubin, Acting Sec'y, Treasury (Feb. 8, 2017), https://www.hsgac.senate.gov/imo/media/doc/2017-02-08%20Letter%20to%20Treasury%20requesting%20CIFUS%20plans%20re%20Trump%20financial%20interests.pdf [https://perma.cc/B4G5-7YK8] (noting the belief among certain senators that CFIUS approval contributed to Anbang's retreat from the Marriott deal).

17. Ellen Nakashima and Craig Timberg, *U.S. investigators point to China in Marriott hack affecting 500 million guests*, THE WASHINGTON POST (Dec. 11, 2018), https://www.washingtonpost.com/technology/2018/12/12/us-investigators-point-china-marriott-hack-affecting-million-travelers/?utm_term=.accda2dff76b [https://perma.cc/RC78-S5VQ].

18. China's use of corporate law to advance its strategic interests has also attracted the attention of U.S. policymakers. *See, e.g.,* Mitt Romney, *Mitt Romney: America is Awakening to China. This is a Clarion Call to Seize the Moment.*, THE WASHINGTON POST (Apr. 23, 2020 3:25 PM), https://www.washingtonpost.com/opinions/global-opinions/mitt-romney-covid-19-has-exposed-chinas-utter-dishonesty/2020/04/23/30859476-8569-11ea-ae26-989cfce1c7c7_story.html [https://perma.cc/5UCJ-MZ2Z]. *See also* Alfred Cang and Mark Burton, *China's Tsingshan Helped Drive Record Drop in Nickel Inventories*, BLOOMBERG NEWS (Oct. 8, 2019 12:19 AM), https://www.bloomberg.com/news/articles/2019-10-08/china-s-tsingshan-helped-drive-record-drop-in-nickel-inventories [https://perma.cc/K6EY-VPSB], *and* Bernadette Christina and Wilda Asmarini, *Indonesian nickel miners to stop ore exports immediately*, REUTERS (Oct. 28, 2019 6:47 AM), https://www.reuters.com/article/us-indonesia-nickel/indonesian-nickel-miners-agree-to-stop-ore-exports-immediately-investment-chief-idUSKBN1X7106 [https://perma.cc/2W9R-3R49].

19. DEPARTMENT OF THE TREASURY: FEDERAL RESERVE BANK OF NEW YORK, FOREIGN PORTFOLIO HOLDINGS OF U.S. SECURITIES 6 (2018), http://ticdata.treasury.gov/Publish/shla2018r.pdf [https://perma.cc/4364-5JNU].

20. *Id.*

foreign investors.[21] The Committee on Foreign Investment in the United States, or CFIUS, can review and block major transactions such as mergers or asset sales to foreign owners,[22] but is ill-suited to address the gradual shift in ownership that is occurring as Americans sell shares of stock to fund their retirement and foreign investors buy those shares. This slow, gradual shift in ownership raises the question: how should we ensure the decisionmakers at U.S. companies act with U.S. interests in mind, while supporting the free market system that led to these companies'—and America's—success?

The remainder of this Comment discusses the severity of the threat facing U.S. corporations, the insufficiency of current legal responses to this threat, and a proposal to guard against this threat while preserving opportunities for investment.

I. FOREIGN INFLUENCE IN U.S. CORPORATIONS IS DANGEROUS

Importantly, while the Starwood/Marriott example demonstrates potential interest in interference by foreign governments, foreign actors do not require malign motives in order to subvert U.S. interests. Even with no malign motives, foreign shareholders may simply have different interests than domestic shareholders or other domestic bodies, such as policymakers or the broader public.[23] The threat to U.S. companies' governance rests on a spectrum; at one end, foreign governments could maliciously and intentionally abuse weaknesses in U.S. corporate law to gain influence over U.S. companies, and at the other, individual foreign investors could simply have interests that do not align with U.S. national security concerns.

Either of these ends of the spectrum is problematic. The threat of malicious action by hostile foreign governments is obvious. The threat from individual foreign investors is less clear, but significant. As mentioned above, U.S. companies have long complained of the Chinese government forcing them to turn over proprietary technology in exchange for access to

21. Daniel J. Rosenthal and Joshua A. Geltzer, *American Retirees Are a National Security Threat*, FOREIGN POL'Y (Aug. 2, 2018), https://foreignpolicy.com/2018/08/02/american-retirees-are-a-national-security-threat/ [https://perma.cc/U8XV-UYVG] ("Siegel and others predict that, as a result, by the middle of this century many U.S. companies will be majority-owned by non-American investors.").

22. *See generally,* 50 U.S.C.A. § 4565 (West, Westlaw through P.L. 116–30) (establishing authority for CFIUS to review such transactions).

23. *See, e.g.*, *Global Investor Study 2017: Investor behaviour: from priorities to expectations*, SCHRODERS (2017), https://www.schroders.com/en/sysglobalassets/digital/insights/2017/pdf/global-investor-study-2017/theme2/schroders_report-2__eng_master.pdf [https://perma.cc/6ATE-Z9DE] (finding varying investment priorities among citizens of different countries).

the Chinese market.[24] From a U.S. national security perspective, transferring sensitive technology such as semiconductors or artificial intelligence may speed the technological advancement of a rival government. However, from the perspective of a foreign shareholder in, say, South Africa, such a transfer facilitates rapid growth for the corporation at minimal, or irrelevant, cost (although, it is possible that the firm and its shareholders could still bear long-run costs by sharing technology with potential long-run competitors). Under either end of the spectrum, the slow accumulation of foreign ownership of U.S. firms can threaten U.S. security interests, and there is no provision of U.S. law to protect against it.

II. CURRENT LEGAL RESPONSES ARE INSUFFICIENT TO PROTECT NATIONAL SECURITY INTERESTS

A. CFIUS is Ill-Equipped to Deal with this Threat

The Committee on Foreign Investment in the United States, or CFIUS, is the main legal mechanism to guard against potentially dangerous foreign investment in the U.S. CFIUS was created in 1975 by executive order of President Gerald Ford[25] and given further power by the International Investment Survey Act of 1976.[26] CFIUS in its current form was created in 1988 by the Exon-Florio Amendment,[27] after U.S. government officials became concerned by U.S. companies being acquired by Japanese companies.[28] This new legislation gave the President the power to block transactions involving foreign entities for national security purposes and increased the reporting requirements for such foreign transactions.[29]

Statutes limit CFIUS review to single-transaction events such as mergers, acquisitions, and takeovers.[30] CFIUS has no direct enforcement power; it can only recommend that the President block transactions deemed to threaten national security.[31] While CFIUS reviews "covered

24. OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE, *supra* note 8.

25. Exec. Order No. 11,858, 40 Fed. Reg. § 20263 (May 7, 1975).

26. 22 U.S.C.A. § 3101 (West, Westlaw through P.L. 116–30).

27. 50 U.S.C.A. § 4565 (West, Westlaw through P.L. 116–30), *supra* note 22.

28. JAMES K. JACKSON, CONG. RESEARCH SERV., RL33388, THE COMMITTEE ON FOREIGN INVESTMENT IN THE UNITED STATES 7 (2018).

29. 50 U.S.C.A. § 4565 (West, Westlaw through P.L. 116–30), *supra* note 22.

30. 50 U.S.C.A. § 4565 (West, Westlaw through P.L. 116–30), *supra* note 22 (granting authority for CFIUS to review large transactions such as mergers, acquisitions, and takeovers).

31. 50 U.S.C.A. § 4565 (West, Westlaw through P.L. 116–30), *supra* note 22.

transaction[s]" (i.e. major foreign transactions)[32], it is required by statute to consider whether a given transaction is a foreign government-controlled transaction.[33] Such transactions are subject to greater scrutiny, including longer time periods for review,[34] mandatory congressional reporting requirements,[35] and public announcements of decisions by the President.[36] The Foreign Investment Risk Review Modernization Act of 2018 expanded these powers, but still focuses CFIUS review on single-transaction investments, as opposed to the current trend of gradually accumulating shares based on thousands of small transactions.[37]

These powers are well-suited to closely scrutinize major transactions mentioned in statute, such as mergers, acquisitions, and takeovers.[38] For example, had Anbang not withdrawn its offer to acquire Starwood, the deal would have fallen within CFIUS's purview.[39] However, these CFIUS powers are not appropriate to review gradual shifts in foreign ownership of U.S. companies caused by slow accumulation of openly-traded shares. CFIUS's legal authority is limited to these major, singular-event transactions and does not extend to reviewing shares of ownership by disparate individuals of foreign nations, accumulated over time in an open market. So, if a number of Chinese individuals bought shares of Starwood stock on the exchanges, the purchases would not be subject to CFIUS review. Further, individual review of each transaction is infeasible, given the rapid pace of trading on today's exchanges.[40] CFIUS is simply ill-equipped to evaluate the threat posed by gradually increasing foreign ownership shares of U.S. companies.

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32. 50 USC § 4565(a)(4)(A) (West, Westlaw through P.L. 116–30).

33. *Id*. at § 4565(b)(1)(B).

34. *Id.* at § 4565(b)(2)(C).

35. 50 U.S.C. § 4565(b)(3)(B).

36. 50 U.S.C. § 4565(d)(2).

37. Foreign Investment Risk Review Modernization Act of 2018, Pub. L. No. 115–32, tit. XVII, Subtitle A, 132 Stat. 2289.

38. 50 U.S.C.A. § 4565, *supra* note 22.

39. *See* note 16 and accompanying text.

40. *Compare* Maxime Rieman, *Analysis: Investors Can Receive Quality Brokerage Execution For a Fraction of the Cost*, NERDWALLET (Nov. 15, 2012), https://www.nerdwallet.com/blog/investing/investing-data/brokerage-execution-quality/ [https://perma.cc/46JN-DTSW] (reporting results of an analysis suggesting that many large brokers execute typical clients' orders during trading hours in less than one second), *with* Michael Reilly, *High-Frequency Trading Is Nearing the Ultimate Speed Limit*, MIT TECH. REV. (Aug. 9, 2016), https://www.technologyreview.com/s/602135/high-frequency-trading-is-nearing-the-ultimate-speed-limit/ [https://perma.cc/U5DR-V78H] (reporting a technological development that allows high-frequency traders to execute trades in just 85 nanoseconds).

B. Prior Corporate Law Reform Proposals for Foreign Investors

Concerns over the right level and type of foreign investment are not new. However, most prior literature about foreign influence in U.S. companies has focused on the influence of sovereign wealth funds. Sovereign wealth funds are government-owned investment vehicles, which often invest in foreign assets.[41] As these funds have become more popular, concerns about their political influence and level of autonomy from their sponsoring governments have prompted calls for transparency and reform.[42]

Ronald J. Gilson & Curtis J. Milhaupt have proposed temporarily removing voting rights from shares owned by sovereign wealth funds, and restoring voting rights to those shares when the shares are transferred to a non-sovereign wealth fund owner.[43] They argue this would limit voting influence of foreign-government-controlled investment bodies, while maintaining economic incentive to invest, since the value of the underlying shares is unchanged for the next owner of the shares.[44]

Other scholars have proposed increasing taxes on sovereign wealth funds to discourage high ownership stakes by them,[45] relying on existing securities or regulatory law,[46] or relying on a voluntary code of best practices.[47] While these proposals have their merit, all are geared towards investments by single, foreign-government-associated bodies; none address the problem of slowly-accumulating foreign ownership amongst diffuse foreign owners. This Comment is the first to address the lack of legal response in light of slowly accumulating foreign ownership shares of U.S. companies.

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41. *Sovereign Wealth Funds—A Work Agenda*, INT'L MONETARY FUND (2008), https://www.imf.org/external/np/pp/eng/2008/022908.pdf [https://perma.cc/6YLA-EDJH].

42. *Id*.

43. Ronald J. Gilson & Curtis J. Milhaupt, *Sovereign Wealth Funds and Corporate Governance: A Minimalist Solution to the New Mercantilism*. 60 STAN. L. REV. 1345 (2010).

44. *Id.* at 1352.

45. Victor Fleischer, *A Theory of Taxing Sovereign Wealth*, 84 N.Y.U. L. REV. 440 (2009) (noting that current law exempts sovereign wealth funds from taxation, placing these funds at an economic advantage compared to other investors).

46. Steven M. Davidoff, *Telling Friend from Foe in Foreign Investments*, N.Y. TIMES (Apr. 2, 2008), https://dealbook.nytimes.com/2008/04/02/telling-friend-from-foe-in-foreign-investments/ [https://perma.cc/7X84-VRMC] (suggesting that modifications to existing securities law, in combination with CFIUS review, would guard against undue influence of sovereign wealth funds).

47. Paul Rose, *Sovereigns as Shareholders*, 87 N.C. L. REV. 83, 115 (2008) (arguing for the universal adoption of a code of best practices to guard against misfeasance in sovereign wealth funds).

III. THE PROPOSAL: TEMPORARILY REMOVE VOTING RIGHTS FROM CERTAIN FOREIGN SHAREHOLDERS WHEN THEY COULD, IF ACTING IN CONCERT, ACT AS THE CONTROLLING SHAREHOLDER

Any solution to this threat must balance three critical factors.

First, economic progress and capital mobility. High levels of capital mobility have been shown to improve economic growth,[48] and the legal system countries use significantly impacts a country's capital mobility.[49] Li Sheng notes that capital mobility is associated with benefits including economic "growth[50] and competition,[51] the transfer of technology and management skill,[52] the enhancement of transparency and market discipline,[53] the strengthening of efficiency at financial institutions,[54] and the

48. Sebastian Edwards, *Capital Mobility and Economic Performance: Are Emerging Economies Different?*, (Nat'l Bureau of Econ. Research, Working Paper No. 8076, 2001), https://www.nber.org/papers/w8076.pdf [https://perma.cc/WJZ4-5QY9] (finding that countries with high levels of capital mobility outperform others in economic terms).

49. Laura Alfaro, Sebnem Kalemli-Ozcan, & Vadym Volosovych, *Capital Flows in a Globalized World: The Role of Policies and Institutions*, (Nat'l Bureau of Econ. Research, Working Paper No. 11696, 2005), https://www.nber.org/papers/w11696.pdf [https://perma.cc/3XNQ-V9WK] (finding a link between a country's legal system and its level of capital mobility).

50. Miranda Xafa, *Monetary Stability, Exchange Rate Regimes, and Capital Controls: What have we learned?*, 28 CATO JOURNAL 237 (2008); Li Sheng and Yanming Tsui, *Casino Booms and Local Politics: The City of Macao*, 26 CITIES 67 (2009).

51. Li Sheng, *Competing or Cooperating to Host Mega Events: A Simple Model*, 27 ECONOMIC MODELLING 375 (2009); Chigon Kim, *Place Promotion and Symbolic Characterization of New Songdo City, South Korea*, 27 CITIES 13 (2010).

52. Adam C. Baines, *Capital Mobility, Perspectives and Central Bank Independence: Exchange Rate Policy since 1945*, 34 POLICY SCIENCES 171 (2001); Robert Musil, *Global Capital Control and City Hierarchies: An Attempt to Reposition Vienna in a World City Network*, 26 CITIES 255 (2009).

53. Juan Luo and Wenjin Tang, *Capital Openness and Financial Crises: A Financial Contagion Model with Multiple Equilibria*, 10 J. OF ECON. POL'Y REFORM 283 (2007); Tim Campbell, *Learning Cities: Knowledge, Capacity and Competitiveness*, 33 HABITAT INT'L 195 (2009).

54. Le Thi Thu Huong and Edsel E. Sajor, *Privatization, Democratic Reforms, and Micro-governance Change in a Transition Economy: Condominium Homeowner Associations in Ho Chi Minh City, Vietnam*, 27 CITIES 20 (2010); Kee-Lee Chou and Nelson W. S. Chow, *The Roles of Human Capital and Social Capital in the Economic Integration of New Arrivals from Mainland China to Hong Kong*, 33 HABITAT INT'L 340 (2009).

smoothing of consumption.[55]"[56] Additionally, reduced capital mobility may cause "financial instability and . . . currency crises[57]" (citations in original).[58] Given the numerous benefits to maintaining a system of free capital mobility and the importance of the legal regime underpinning this, any policy solutions to protect national security must be narrowly tailored to avoid unnecessarily increasing the difficulty of investing in the U.S.

Second, shareholder rights. A longstanding feature of U.S. corporate law is that shareholders in a given class should be treated equally,[59] though some scholarship questions whether this is true in practice, or even whether it should be given force at all.[60] As this Comment argues, there may be certain situations in which this baseline assumption is improper. Even so, solutions should be narrowly tailored as to avoid unnecessary interference with shareholder rights.

Third, national security. Protecting American security interests has long been seen as a primary purpose of the federal government.[61] In light of rising threats around the world, these interests must be weighed against other considerations.

These principles rule out two sweeping changes to corporate law. The first extreme proposal would be to remove all voting rights from all foreign shareholders in all circumstances. The second would be to expand regulation limiting the ownership of U.S. companies by foreign shareholders, perhaps by further restricting the limits on sensitive industries such as telecommunications, aviation, energy, and banking.[62] The economic harm

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55. Graham Bird and Dane Rowlands, *Catalysing Private Capital Flows and IMF Programs: Some Remaining Questions*, 11 J. OF ECON. POL'Y REFORM 37 (2008); Dilek Özdemir, *Strategic Choice for Istanbul: A Domestic or International Orientation for Logistics?*, 27 CITIES 154 (2010).

56. Li Sheng, *Theorising Free Capital Mobility: The Perspective of Developing Countries*, 37 REV. OF INT'L STUD. 2519 (2011).

57. Leonardo Bartolini and Allan Drazen, *When Liberal Policies Reflect External Shocks, What do We Learn?*, 42 J. OF INT'L ECON. 249 (1997); Shigeto Kitano, *Capital Controls, Public Debt and Currency Crises*, 90 J. OF ECON. 117 (2007).

58. *See* Sheng, *supra* note 56.

59. Victor Brudney, *Equal Treatment of Shareholders in Corporate Distributions and Reorganizations*, 71 CALIF. L. REV. 1072 (1983) (noting the proposition that "all shares of a particular class (e.g., common stock) are to be treated as homogeneous claims on enterprise wealth").

60. James D. Cox, *Equal Treatment of Shareholders: An Essay*, 19 CARDOZO L. REV. 615 (1997) (citing various examples of corporate law moving away from equality of shareholders).

61. *See* U.S. CONST. pmbl. (defining a central purpose of the U.S. Constitution as to "provide for the common defense"), *see also* THE FEDERALIST No. 23 (Alexander Hamilton) (arguing that a federal government is necessary for "the common defense of its members; the preservation of the public peace as well against internal convulsions as external attacks").

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caused by strict foreign ownership limit is highlighted by Vietnam's recent decision to remove its 49% foreign ownership cap on its companies (though caps remain for industries deemed critical to national security, like aviation), which analysts described as handicapping foreign investment, distorting economic incentives, and restricting economic growth.[63] Removing shareholders' voting rights would necessarily reduce the value of those shares, because presumably, some investors by the stock with the intent to vote on the affairs of the company. Without the ability to do so, the incentive to own the stock will be decreased. This is likely to suppress the value of other shares as well, as it limits the buyer pool for a given company's shares. Further, it is possible that removing voting rights of shares someone already owns is illegal and violates their due process rights. Any change to shareholder voting rights must be tailored as narrowly as possible, while still achieving its national security aims, in order to avoid unnecessary economic harm to shareholders and resulting economic harms to society.

For similar reasons, capping foreign investment in certain industries, such as those to which CFIUS already applies a more intensive standard of review, is undesirable. This would similarly depress the value of all shares of stock by curtailing the pool of available buyers and hindering capital mobility. It also interferes with shareholder rights by increasing the difficulty of selling shares. Rather than these sweeping measures, this Comment proposes a more targeted intervention that still meets U.S. national security needs.

This proposed solution contains three key elements:

1. Companies should be required to disclose their ownership by shareholders' countries of domicile.

2. CFIUS should be granted authority to designate companies and countries subject to higher scrutiny.

3. If shareholders of any one company, from one country, could become the company's controlling shareholder by acting in concert, those shareholders should temporarily be restricted from voting until that bloc would no longer be the controlling shareholder.

These provisions, together, expand the powers of CFIUS to ensure that foreign investment in the U.S. continues, but in a manner that safeguards U.S. national security. It is tailored to be as limited in scope as possible, while still achieving its national security aims.

IN THE UNITED STATES: MAJOR FEDERAL STATUTORY RESTRICTIONS (2013).

63. *Vietnam to remove 49% foreign ownership cap on listed companies*, NIKKEI ASIAN REV. (Oct. 10, 2018), https://asia.nikkei.com/Economy/Vietnam-to-remove-49-foreign-ownership-cap-on-listed-companies [https://perma.cc/AEE5-WR3F].

A. Mandatory disclosure of ownership by country

While aggregate data about how much U.S. stock is held by foreign shareholders exists, little is known about specific companies. This is troubling, considering that the CFIUS review process suggests that foreign ownership of certain companies or industries may be more problematic than others.[64] As a first step, the U.S. should mandate that all publicly traded companies disclose how many of their shares are owned by U.S. versus foreign shareholders.

Current disclosure laws require the disclosure of many important pieces of information: registration statements containing information about new security issuances,[65] annual[66] and quarterly[67] financial reporting, major developments,[68] proxy statements,[69] and stock ownership by officers and directors,[70] among others. They also must disclose major individual shareholders,[71] which could provide information about major foreign shareholders above the required threshold. This requires disclosure of major shareholders' identity, background, purpose of transaction, and citizenship.[72] This requirement should be extended to provide a complete view of foreign ownership, including ownership by smaller shareholders. While the individual holdings of each shareholder are not important, the aggregate breakdown of U.S. versus foreign ownership is critical. Importantly, since many shareholders' shares are held by custodian banks or brokers,[73] this requirement would have to apply to the shares' beneficial owner, not the record owner.

Notably, the U.S. Congress is already considering enacting such a

64. *See* 31 C.F.R. § Pt. 800, Annex B (listing a number of industries now subject to higher scrutiny under CFIUS because of their importance to national security, such as aircraft, semiconductor, and weapons manufacturing, energy production and storage, telecommunications, and nanotechnology, among others).

65. 17 C.F.R. § 229.10 (2010).

66. 17 C.F.R. § 249.310 (2010).

67. 17 C.F.R. § 249.308a (2010).

68. 17 C.F.R. § 249.308 (2010).

69. 17 C.F.R. § 240.14a-3(a) (2010).

70. 17 C.F.R. § 249.103, §§ 249.104, 249.105 (2010).

71. 17 C.F.R. § 240.13d-1(a) (2010) (requiring companies to disclose any shareholder holding 5% or more of the company).

72. 17 C.F.R. § 240.13d-101 (2010) (requiring disclosure of key information, including, among others, the shareholder's name, source of funds, and citizenship or place of organization).

73. The Depository Trust and Clearing Corporation is one of the largest such clearinghouses. THE DEPOSITORY TRUST AND CLEARING CORPORATION, http://www.dtcc.com / [https://perma.cc/85TG-KER2] (last visited Jan. 25, 2019).

beneficial-owner-disclosure requirement. The House of Representatives passed a bill requiring corporations, LLCs, and other entities to register their beneficial owners each year with the Financial Crimes Enforcement Network.[74] Similar requirements are being debated in a Senate bill.[75] This disclosure requirement may soon become law in the United States.

The beneficial-owner requirement is especially important in light of the number of entities which own U.S. equities through offshore investment vehicles (through the Cayman Islands, for example). However, reporting the nationality of those shareholders is already required under the laws of many other nations and associated treaties with the United States. For example, consider the Cayman Islands' laws requiring disclosure of financial vehicles' beneficial owners. In 2005, the Cayman Islands passed the Tax Information Authority Law to implement the Tax Information Exchange Agreement treaty with the United States and United Kingdom.[76] This law requires the Cayman Islands to share information about beneficial owners of Cayman Islands financial vehicles with the United States and United Kingdom for tax purposes, including the beneficial owner's country of domicile.[77] The Proceeds of Crime Law[78] and Terrorism Law[79] require the disclosure of beneficial owners of these financial vehicles for anti-money-laundering and anti-terrorism-financing purposes, and require a "know-your-customer" requirement similar to what the U.S. has required of its financial institutions.[80] Accordingly, the Beneficial Ownership Regulations require disclosure of the beneficial owners of major Cayman Islands entities, again including the owners' domiciles.[81] Information about offshore financing

74. Corporate Transparency Act of 2019, H.R. 2513, 116th Cong. (2019).

75. ILLICIT CASH Act, S. 2563, 116th Cong. (2019).

76. U.S. GOV'T ACCOUNTABILITY OFF., GAO-08-1028SP, CAYMAN ISLANDS: REVIEW OF CAYMAN ISLANDS AND U.S. LAWS APPLICABLE TO U.S. PERSONS' FINANCIAL ACTIVITY IN THE CAYMAN ISLANDS (2008).

77. *Tax Information Authority (International Tax Compliance) (Country-By-Country Reporting) Regulations,* CAYMAN ISLANDS, (2017), http://www.gov.ky/portal/pls/portal/docs/1/12554414.PDF [https://perma.cc/CR93-4K47].

78. *Proceeds of Crime Law*, CAYMAN ISLANDS, (2017), https://www.cima.ky/upimages/commonfiles/1499349646ProceedsofCrimeLaw2017Revision.PDF [https://perma.cc/4WMW-9S8F].

79. *Terrorism Law*, CAYMAN ISLANDS, (2018), https://www.cima.ky/upimages/commonfiles/TerrorismLaw2018Revision_1524077980.PDF [https://perma.cc/EU2E-8U6V].

80. These requirements were put in place by the 2001 USA PATRIOT Act and have been updated and amended several times since then. Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT ACT) Act of 2001, 107 Pub. L. No. 56, 115 Stat 272 (2001).

81. *Beneficial Ownership (Companies) (Amendment) Regulations*, CAYMAN ISLANDS, (2018), http://www.gov.ky/portal/pls/portal/docs/1/12600381.PDF [https://perma.cc/J8AZ-ENM7].

vehicles' beneficial owners is currently available for a variety of purposes, and access to this information should be expanded to facilitate individual companies' disclosure of foreign versus domestic ownership.

Requiring reporting is unlikely to affect the actual economic value of each share or substantively alter the stock price. It alone does not change shareholder rights and would enable further study of national security threats posed by foreign ownership of U.S. companies. The U.S. Congress should swiftly enact the legislation currently in progress to require this reporting.

Critics of this proposal may argue that it would raise privacy concerns, encourage shareholders to shroud true ownership through a complex web of trusts or corporations, or be costly to implement given the large number of shareholders that already use trusts or other mechanisms to cloud the true owners of the shares. However, some disclosure of major shareholders' domicile, as well as those investing through many offshore entities, is already required today, and more disclosure may be required in the future regardless of this proposal.[82] Expanding this disclosure to facilitate an aggregate ownership percentage by country for each publicly-traded company would not meaningfully increase the disclosure required or available in today's financial ecosystem. On the contrary, it would aid officials as they make determinations about which companies and sectors of the economy posed potential risks of foreign interference.

B. Expanded CFIUS authority

Because CFIUS review is currently limited to large-scale transactions,[83] it is not equipped to review large numbers of individual stock purchases and sales. Further, such review would be logistically infeasible given the rapid pace of many stock trades in today's markets.[84] Rather than solely having the ability to scrutinize individual trades after the fact, CFIUS should be given the authority to preemptively declare certain companies or industries that are critical for national security and are subject to more intensive review. This list could be similar to the list CFIUS already uses to review large-scale transactions, which includes industries such as aerospace, semiconductor, and weapons manufacturing; energy production and storage; telecommunications; and nanotechnology; among others.[85]

82. *See supra* notes 74, 76–81,.

83. 50 U.S.C.A. § 4565, *supra* note 22 (establishing authority for CFIUS to review large transactions such as mergers, acquisitions, and takeovers).

84. *See* Reilly, *supra* note 40.

85. 31 C.F.R. § Pt. 800, Annex B, *supra* note 64. *See also* 50 U.S.C.A. § 4565, *supra* note 22 (establishing CFIUS power to review transactions that place critical infrastructure or

CFIUS should also be able to designate those countries whose ownership of U.S. firms will be subject to scrutiny. Expanding review to all countries would be unnecessary, considering that certain countries, such as China, have already exhibited a willingness to interfere in the affairs of U.S. corporations, while other nations, such as close American allies have not exhibited such a threat.[86] Considering the economic harms of a too-broad proposal, it is important that CFIUS has the authority to limit this scrutiny to the smallest number of countries necessary.

C. Restrictions on voting rights of a potentially controlling bloc of shareholders

A bloc of shareholders from a country deemed by CFIUS to deserve a higher level of scrutiny becomes problematic if the bloc, acting in concert, would be the company's controlling shareholder. This would allow the bloc to control major company decisions, such as mergers with foreign competitors (which would be subject to CFIUS review)[87], joint ventures (which would not, unless it were a joint venture designed to result in control of the target company)[88], entry into foreign markets and attendant technology transfers, investment decisions, product launches or cancellations, and so forth. If it is possible for these shareholders, acting in concert, to influence the company's decision, it is possible for one of two things to happen. One, their government could coerce them into voting a certain way or could manipulate a proxy contest. Two, the shareholders themselves could make these decisions without considering the same set of factors a U.S. investor would. As noted above, both ends of this spectrum are problematic.[89]

For this reason, voting rights of these shareholders should be temporarily suspended, until they would no longer be the controlling shareholder if acting in concert. This proposal would only apply to shareholders in countries highlighted by CFIUS as deserving additional scrutiny, when holding shares of companies in industries similarly highlighted by CFIUS. As with Gilson and Milhaupt's proposed reform in the sovereign wealth fund context, these voting rights would be restored when the shares are sold to a shareholder in a non-sensitive industry-country

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technology at risk, or allow foreign persons to conduct surveillance on U.S. government property or activities).

86. *See supra* notes 8, 12–17 and accompanying text.

87. 50 U.S.C.A. § 4565, *supra* note 22.

88. 50 U.S.C.A. § 4565(a)(4)(B)(i) (limiting scrutiny of joint ventures to a "takeover carried out through a joint venture").

89. *See supra* notes 23–24 and accompanying text.

combination, which would preserve the economic value of the shares.[90]

Importantly, current CFIUS regulations already emphasize the importance of determining what constitutes "control." These regulations define "control" as:

> [The] power, direct or indirect, whether or not exercised, through the ownership of a majority or a dominant minority of the total outstanding voting interest in an entity, board representation, proxy voting, a special share, contractual arrangements, formal or informal arrangements to act in concert, or other means, to determine, direct, or decide important matters affecting an entity; in particular, but without limitation, to determine, direct, take, reach, or cause decisions regarding the [matters listed in § 800.208(a)], or any other similarly important matters affecting an entity.[91]

When this definition was originally promulgated, the Treasury Department noted that these regulations "eschew bright lines" and do not rely on "a specified percentage of shares or number of board seats," but rather consider "all relevant factors."[92] "Control" is a nebulous concept that depends on the circumstances of each case. This proposal does not change how CFIUS defines "control," but simply extends the concept of "control" to a group of shareholders potentially acting in concert.

This test would be similar to current SEC regulations defining beneficial ownership in cases of shareholders acting together. Current regulations mandate that "[w]hen two or more persons agree to act together for the purpose of acquiring, holding, voting or disposing of equity securities" the shareholders are deemed to have acquired beneficial ownership of the other shares, which then triggers additional reporting requirements.[93] The American Law Institute defines a "controlling shareholder" as a person who "either alone or pursuant to an arrangement or understanding with one or more other persons" owns 50% of voting shares or "otherwise exercises a controlling influence" over the corporation.[94] The ALI also notes that once a shareholder or group of shareholders achieves a 25% voting stake, it is presumed to "exercise a controlling influence,"

90. *See supra* notes 43–44 and accompanying text.

91. 31 C.F.R. § 800.208.

92. Regulations Pertaining to Mergers, Acquisitions, and Takeovers by Foreign Persons; Final Rule, 73 Fed. Reg. 70704 (Nov. 21, 2008), https://www.treasury.gov/resource-center/international/foreign-investment/Documents/CFIUS-Final-Regulations-new.pdf [https://perma.cc/5TB5-GETM].

93. 17 C.F.R. § 240.13d-5.

94. PRINCIPLES OF CORPORATE GOVERNANCE: ANALYSIS AND RECOMMENDATIONS § 1.10(a) (Am. Law Inst. 1994).

though this presumption can be rebutted.[95] Additionally, several leading treatises note that groups of shareholders, when combining to control the corporation or when acting in concert, may be considered the controlling shareholder of the corporation and thus trigger fiduciary duties.[96] This principle has been recognized in federal,[97] Delaware,[98] and several other state courts.[99]

Such a proposal requires a body charged with enforcement and a forum for adjudicating disputes to protect shareholders' due process rights. An expanded CFIUS would be the logical choice as an enforcement body, given its experience and expertise evaluating "control," and proceedings could continue in specially designed CFIUS administrative proceedings, in another body's administrative proceedings (such as the SEC), or through the federal court system. It is critical that there is some mechanism for shareholders to appeal any decision to minimize the risk of an over-aggressive designation by CFIUS. Because there is no singular cutoff for what constitutes a "controlling shareholder," but rather, control depends on the circumstances of each case,[100] such disputes are highly likely and even beneficial, as the process would both safeguard shareholder rights and in time, provide precedent for defining "control" in this context. To further safeguard against overzealous designations by CFIUS, CFIUS or whatever body brings the action to remove shareholders' voting rights should bear the burden of proof that the bloc of shareholders would, in fact, be the controlling shareholder if acting in concert.

Taken together, such policy adjustments serve to strengthen the U.S.'s ability to confront potentially nefarious actions by foreign governments, which may seek to exercise control or influence over critical U.S. companies and sensitive technology. But even in the absence of nefarious intent, these

95. PRINCIPLES OF CORPORATE GOVERNANCE: ANALYSIS AND RECOMMENDATIONS § 1.10(b) (Am. Law Inst. 1994).

96. *See, e.g.* § 5765.Forms of majority holdings—Control by combination of shareholders, 12B Fletcher Cyc. Corp. § 5765 ("Ordinarily, some of the shareholders may combine to control the corporation. If they do combine for such purpose and actually control the acts of the corporation, they are generally considered fiduciaries . . . .").

97. Seagrave Corp. v. Mount, 212 F.2d 389, 396 (6th Cir. 1954) (noting that a "group of stockholders" may qualify as the controlling shareholder and owe fiduciary duties to other shareholders).

98. Kennedy v. Venrock Associates, 348 F.3d 584, 590–91 (7th Cir. 2003) (applying Delaware law).

99. *See, e.g.*, Wilkes v. Springside Nursing Home, Inc., 353 N.E.2d 657, 661–65 (Mass. 1976) (applying the principle in Massachusetts), Frank v. Getty, 29 Misc. 2d 115, 116 (N.Y. Sup. Ct. 1961) (applying the principle in New York), Locati v. Johnson, 160 Or. App. 63, 69 (O.R. Ct. App. 1999) (applying the principle in Oregon).

100. *See supra* note 92 and accompanying text.

adjustments ensure that foreign investors with less-direct interest in U.S. national security do not control a U.S. company's decisions.

This proposal accomplishes this goal with minimal impact on shareholder rights and capital mobility. In the vast majority of situations, this proposal would leave shareholder rights and the value of their shares, untouched. Only in specific situations where CFIUS identifies a threat from a specific country-company combination would any voting rights be adjusted. Further, the economic value tied to those shares would not change. The shares would retain rights to dividends, and this proposal would not change the value of the shares to another buyer, whose voting rights would be restored upon transfer of the sale. This solution achieves its aim of protecting U.S. national security with minimum interference in the capital markets.

IV. POTENTIAL OBJECTIONS: INCREASING PROTECTIONISM, RAISING THE RISK OF RETALIATION BY OTHER NATIONS, AND INTERFERING WITH SHAREHOLDER EQUALITY

Some readers may be alarmed by proposals to interfere with the rights of shareholders absent compelling evidence of its necessity. Others may be disturbed by the potential repercussions of the proposal, such as increasing protectionism or daring other nations to retaliate. Each of these objections is addressed below.

A. Shareholder equality

Typically, U.S. corporate law seeks to ensure that all shareholders in a given class are treated equally.[101] However, there are already exceptions to this principle, where corporate law acknowledges that the benefits of discrimination against some shareholders outweigh the cost. For example, poison pill defenses to takeovers are recognized as acceptable in many situations,[102] even though poison pills afford extra rights to the target company's shareholders at the expense of the acquirer's shares.[103] The general theory is that discrimination against the acquirer's shares is justified by the need to protect the target company.[104]

101. *See* Brudney, *supra* note 59.

102. *See, e.g.,* Moran v. Household International, Inc., 500 A.2d 1357 (Del. 1985) (upholding the legality of poison pill defenses).

103. JAMES D. COX AND THOMAS LEE HAZEN, 4 TREATISE ON THE LAW OF CORPORATIONS § 23:7 (3D ED. 2018) (defining poison pills).

104. *Id. See also Moran*, 500 A.2d at 102.

Other exceptions to the principle of shareholder equality exist as well. Delaware imposes additional duties on controlling shareholders, which are generally viewed as fiduciaries and owe additional duties to other shareholders.[105] Corporations may grant additional liquidity provisions to shares held by an employee stock ownership plan that shares of the same class held by non-employees do not receive.[106] They may also enact "tenure voting" schemes, whereby longer-tenured shareholders receive additional voting power than shorter-tenured shareholders within the same class.[107]

Thus, U.S. corporate law already recognizes exceptions to the general principle of equality of shareholders within a given class, each of which is thought to be justified by a compelling rationale for departing from the equal treatment norm. This proposal simply adds another exception to this list, with an important reason – the security of the nation. Simply put, "[i]t is well established in our jurisprudence that stockholders need not always be treated equally for all purposes."[108]

B. Protectionism

Restricting voting rights of foreign shareholders may be viewed as protectionist, as it discriminates against the voting power of some shareholders based on national affiliation. Similar proposals to limit voting rights of sovereign wealth funds have been criticized as such, and Gilson and Milhaupt's response is apt in this new context as well:

> Some may perceive our proposal as protectionist. But to do so is to misconstrue the impact of vote suspension. . . . [U]nlike a truly protectionist measure designed to protect domestic companies' commercial interests rather than the integrity of the structure of a form of capitalism, our proposal would not lower investment values for foreign investors on account of their nationality or sovereign affiliation per se.[109]

This measure would only be "protectionist" if it reduced the value of the foreign shareholders' shares. But since the suspension of their voting rights is only temporary – voting rights would be restored when sold to a shareholder from a country not identified as problematic by CFIUS – the value of their shares would remain, and they would retain their economic

105. Ivanhoe Partners v. Newmont Mining Corp., 535 A.2d 1334, 1344 (Del. 1987) (noting that controlling shareholders are fiduciaries).

106. Nixon v. Blackwell, 626 A.2d 1366, 1376–77 (Del. 1993).

107. Williams v. Geier, 671 A.2d 1368, 1370–71 (Del. 1996).

108. *Nixon*, 626 A.2d at 1376.

109. *See* Gilson & Milhaupt, *supra* note 43, at 1353.

incentive to invest in the U.S. Temporary vote suspension is actually the least-protectionist method of reducing foreign influence on U.S. companies.

C. Potential retaliation by other nations

Lastly, some readers may be concerned that U.S. action to limit the power of foreign investors may spark retaliation from other countries. First, as discussed below, this concern overestimates the probability of retaliation. Second, retaliation is less likely to cause severe economic harm for the U.S. than many assume.

The current global policy landscape includes increased scrutiny of foreign investments, which may prompt some fear of retaliation if the U.S. strengthens its review of foreign investments beyond its 2018 revision to CFIUS powers.[110] The European Union recently passed legislation enacting their own review of foreign direct investment.[111] Australia,[112] Canada,[113] Japan,[114] and China[115] have similar regulations in place.

Note, however, that many of these countries have instituted their regimes to restrict investment from China in order to protect their national security,[116] while China recently enacted a new law that would make it more

110. *See* Foreign Investment Risk Review Modernization Act of 2018, *supra* note 37.

111. Council Directive No. 72/18 of 20 February 2019, Regulation of the European Parliament and of The Council establishing a framework for the screening of foreign direct investments into the Union.

112. *See* Foreign Acquisitions and Takeovers Act 1975, 1975 (Austl.); *see also* Foreign Acquisitions and Takeovers Fees Imposition Act 2015, 2015, (Austl.).

113. *See* Investment Canada Act, R.S.C., 1985, c. 28 (1st Supp.) (Can.).

114. *See* Foreign Exchange and Foreign Trade Act, Act No. 228 of (December 1, 1949) (Japan).

115. *See* Zhonghua Renmin Gongheguo Waizi Qiye Fa (中华人民共和国外资企业法) [the Wholly Foreign-owned Enterprise Law of the People's Republic of China] (promulgated by the Congress of the People's Republic of China, effective Apr. 12, 1968) THE NAT'L PEOPLE'S CONGR. OF CHINA; *see also* Zhonghua Renmin Gongheguo Zhongwai Hezi Jingying Qiye Fa (中华人民共和国中外合资经营企业法) [the Sino-Foreign Equity Joint Venture Enterprise Law of the People's Republic of China] (promulgated by the 5th Nat'l People's Cong., effective July 1, 1979, amended Mar. 15, 2001) MINISTRY OF COMMERCE; Zhonghua Renmin Gongheguo Zhongwai Hezuo Jingying Qiye Fa (中华人民共和国中外合作经营企业法), Congress of the People's Republic of China (全国人民代表大会) [the Sino-Foreign Cooperative Joint Venture Enterprise Law of the People's Republic of China] (promulgated by the 7th Nat'l People's Cong., effective Apr. 13, 1988, am'd Oct. 31, 2000) THE NAT'L PEOPLE'S CONGR. OF CHINA.

116. *See, e.g.* Thilo Hanemann, Mikko Huotari, and Agatha Kratz, *Chinese FDI in Europe: 2018 Trends and Impact of New Screening Policies*, RHODIUM GROUP (Mar. 6, 2019), https://rhg.com/research/chinese-fdi-in-europe-2018-trends-and-impact-of-new-screening-policies/ [https://perma.cc/F8RY-AHRE] (noting that the recent EU investment screening framework is in part intended to apply greater scrutiny to Chinese investment); Alexandra

open to foreign investment, though its trade dispute with the U.S. remains ongoing.[117] Under this comment's proposal, no voting rights would be changed absent designation from CFIUS; presumably, the current trend of higher wariness towards Chinese investments than towards investment from Western nations will continue. If so, retaliation would be less likely from other Western nations and more likely from China. Prior to the recent trade dispute with the U.S., however, China began taking some steps to open its economy.[118] And while the ongoing trade dispute demonstrated China's willingness to retaliate against U.S. economic or trade policy, the "Phase One" trade deal also demonstrates that détente is possible despite broad issues in the dispute being unresolved as of this writing.[119]

If retaliation does occur after the U.S. implements this proposal, the effects will likely be less harmful than many assume. Consider a world in which every nation implements the proposal described here. Restrictions on voting rights would only occur when a specific country designates specific country-company combinations to receive greater scrutiny and demonstrates that shareholders of that country could actually act as the controlling shareholder, if acting in concert. Very few companies would be affected by this. Shareholders of the small number of affected companies would not be significantly affected either, as only their voting rights change, but the underlying value of the stock does not change, since voting rights would be restored once the shares are sold to a shareholder of another country. The risks of retaliation, while important to consider, are likely to be less harmful than some might assume, if retaliation does occur. Of course, policymakers should regularly reevaluate changing circumstances to make informed judgments about retaliation risk.

V. CONCLUSION

Foreign ownership of U.S. companies is increasing. In general, this

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Yoon-Hendricks, Congress Strengthens Reviews of Chinese and Other Foreign Investments, N.Y. TIMES (Aug. 1, 2018) (noting that many U.S. government officials supported the Foreign Investment Risk Review Modernization Act in order to limit problematic investment from China).

117. Foreign Investment Law of the People's Republic of China (2019), THE NAT'L PEOPLE'S CONGR. OF CHINA, http://www.gov.cn/zhengce/content/2019-12/31/content_5465449.htm [https://perma.cc/QP8C-9ZLW].

118. *Id.*

119. Shawn Donnan, Josh Wingrove, and Saleha Mohsin, *U.S. and China Sign Phase One of Trade Deal*, BLOOMBERG NEWS (Jan. 15, 2020), https://www.bloomberg.com/news/articles/2020-01-15/u-s-china-sign-phase-one-of-trade-deal-trump-calls-remarkable [https://perma.cc/ZQK6-ERW7].

increased foreign investment is a positive trend for U.S. companies and workers, but left unchecked, it presents dangerous national security threats. As nefarious actors on the world stage seek to use U.S. corporate law to their advantage, the U.S. must ensure that corporate law serves the broader national interest. To protect against this influence, the U.S. should strengthen the CFIUS review process to consider the changing nature of foreign investment in the U.S. and the slow accumulation of foreign ownership of U.S. companies.