

## DEFINING 'NATIONAL SECURITY': RESOLVING AMBIGUITY IN THE CFIUS REGULATIONS

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### 1. INTRODUCTION

The Committee on Foreign Investment in the United States ("CFIUS" or "the Committee") is responsible for reviewing all foreign direct investment ("FDI") in the United States for potential national security concerns raised by the transaction. However, the executive orders, legislation, and regulations concerning the Committee ("the regulations") have never defined "national security,"<sup>1</sup> nor have they provided clear guidance regarding the scope of the Committee's national security review.<sup>2</sup> This uncertainty did not initially pose many problems because of the toothless nature of the Committee throughout most of its existence.<sup>3</sup> However, with the increased focus on national security

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<sup>1</sup> See Regulations Pertaining to Mergers, Acquisitions, and Takeovers by Foreign Persons, 73 Fed. Reg. 70702, 70705 (Nov. 21, 2008) (describing CFIUS's rejection of comments that national security be defined in favor of a case-by-case review).

<sup>2</sup> Christopher M. Weimar, Note, *Foreign Direct Investment and National Security Post-FINSA 2007*, 87 TEX. L. REV. 663, 674 (2009) ("Like the term 'national security,' many of the above-mentioned factors are intentionally left open to interpretation by the Executive."). This lack of definition could potentially violate the Non-Delegation Doctrine or the Intelligible Principle Doctrine; however, such an analysis is beyond the scope of this Note.

<sup>3</sup> See Chip Yost, *Bush Approves Sale of US Military Parts Suppliers to UAE Government*, BALT. CHRON. (May 1, 2006), <http://baltimorechronicle.com/2006/050106Chip.shtml> ("The committee almost never met, and when it deliberated it was usually at a fairly low bureaucratic level," according to former Reagan administration defense official Richard Perle, who described the process as "a bit of a joke."). However, some did note concerns

issues after September 11th and the passage of the Foreign Investment and National Security Act of 2007 ("FINSA"), the lack of sufficient national security guidance in the CFIUS regulations has begun to impose significant costs on parties engaging in FDI.

There is no accurate measure of these costs, but an analysis of the CFIUS review process, available data, case studies of significant cross-border deals, and other available information demonstrates that these costs are substantial. From 2008–2012, a total of 538 transactions underwent CFIUS review, but this number is increasing annually.<sup>4</sup> The \$542 million publicly reported value of these deals in the 2013 Annual Report is a severe underestimate, because it includes only the publicly reported value of just eighteen of the filed transactions.<sup>5</sup> Furthermore, the true costs are not reflected in this data, as many other factors impose additional costs. First, the failure to define national security increases uncertainty and delays transactions, significantly reducing the deals' value.<sup>6</sup> Second, parties will often expend considerable time and capital agreeing to the structure of a deal, only to see it collapse when it becomes apparent that CFIUS will block the deal.<sup>7</sup> Third, the Committee's costs of monitoring and review are greater

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about the scope of the Committee's authority soon after its creation. See W. Robert Shearer, Comment, *The Exon-Florio Amendment: Protectionist Legislation Susceptible to Abuse*, 30 Hous. L. Rev. 1729, 1733 (1994) ("If Congress does not define and narrow Exon-Florio's scope, this attitude may soon find expression at the expense of foreigners seeking to invest in the United States, and ultimately, to the detriment of the U.S. economy.").

<sup>4</sup> Although the highest number of notices in one calendar year occurred in 2008 with 155, the number of notices dipped dramatically in 2009 due to the financial crisis, reaching a low of 65. For the complete lists of available statistics for 2008–2012, see COMM. ON FOREIGN INV. IN THE U.S., ANNUAL REPORT TO CONGRESS (2013) [hereinafter ANNUAL REPORT 2013]; COMM. ON FOREIGN INV. IN THE U.S., ANNUAL REPORT TO CONGRESS (2012) [hereinafter ANNUAL REPORT 2012]. See generally Aimen N. Mir, CFIUS Staff Chair, Comm. on Foreign Inv. in the U.S. (CFIUS) (2012) (unpublished presentation slides).

<sup>5</sup> ANNUAL REPORT 2013, *supra* note 4, at 30, 32. In 2011, the financial value of the twelve publicly reported M&A transactions filed with the Committee was \$682.25 million. ANNUAL REPORT 2012, *supra* note 4, at 28. In 2010, the financial value of the seven publicly reported M&A transactions filed with the Committee was \$1.4 billion. COMM. ON FOREIGN INV. IN THE U.S., ANNUAL REPORT TO CONGRESS 33 (2011) [hereinafter ANNUAL REPORT 2011]. In 2009, the financial value of the twelve publicly reported M&A transactions filed with the Committee was \$3.2 billion. COMM. ON FOREIGN INV. IN THE U.S., ANNUAL REPORT TO CONGRESS 26 (2010) [hereinafter ANNUAL REPORT 2010].

<sup>6</sup> See generally *infra* Section 4.3 (indicating that uncertainty regarding national security concerns can lead to additional costs).

<sup>7</sup> *Id.*

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due to the absence of clear direction regarding the national security review.<sup>8</sup> Finally, the lack of clarity regarding national security allows the Committee and the President to block transactions for seemingly political reasons, which can lead to retaliatory measures by the host countries of the companies whose investment is blocked.<sup>9</sup> Each of these costs will likely continue to rise if the regulations are not amended to more clearly explain the national security evaluation process.<sup>10</sup> Therefore, the regulations should be amended to provide additional clarity to investors, reducing these costs and promoting additional FDI, without diminishing the Committee's ability to block transactions threatening U.S. national security.

This paper will provide an overview of the history of the Committee, an analysis of the current regulations and the costs stemming from the failure to define national security, and a recommendation of how the regulations could be amended to reduce these costs. Section 2 will provide a brief history of CFIUS, focusing on how the scope and potency of the Committee's powers have gradually increased in response to certain proposed transactions. Section 3 will explain the filing and review process under FINSAs, with special attention paid to the limited guidance regarding the evaluation of national security threats. Section 4 will discuss the costs of the current regime using basic economic principles, the Committee's annual report to Congress, case studies of proposed transactions, and similar bodies in other countries. Finally, Section 5 will propose a potential solution that seeks to balance the Committee's desire to maintain flexibility and the financial benefits of providing international businesspersons with a clear understanding of which transactions may be delayed or blocked by CFIUS.

This paper proposes the creation of a regime that closely resembles prominent export laws in the United States.<sup>11</sup> Under this regime, CFIUS would publish lists of industries and technologies that are presumed to raise national security concerns. If the U.S. industry or technology sought by the foreign acquirer appeared on

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<sup>8</sup> See generally *infra* Section 4.4 (analyzing how the Committee's costs may decrease with greater clarity regarding the evaluation of national security).

<sup>9</sup> See generally *infra* Section 4.5 (exploring potential retaliatory measures).

<sup>10</sup> See generally *infra* Section 3.4 (describing how costs have increased with the Committee's scope).

<sup>11</sup> See generally *infra* Section 5 (discussing potential reforms).

the list, the foreign acquirer would cross-reference a country chart designating whether or not acquisitions of that specific industry or technology by an acquirer from that host country would be presumed to require a CFIUS national security investigation. In addition, CFIUS would be granted the authority to designate certain companies as presumed threats to U.S. national security. However, CFIUS and the President would maintain discretionary authority to either permit transactions presumed to threaten U.S. national security, or block transactions not presumed to be national security risks. By providing these clear criteria, the Committee could more effectively balance the encouragement of FDI in the United States with the protection of U.S. national security interests.

## 2. BRIEF HISTORY OF CFIUS

CFIUS was established by executive order in 1975. This order granted the Committee "primary continuing responsibility . . . for monitoring the impact of foreign investment in the United States . . . and for coordinating the implementation of United States policy on such investment."<sup>12</sup> Although the Committee had the authority to review transactions that "might have major implications for United States national interests,"<sup>13</sup> it did not have the authority to block transactions posing national security risks. This came into sharp focus due to the rise of FDI under President Reagan, culminating with Fujitsu Ltd.'s attempted acquisition of Fairchild Semiconductor Corp. in 1986.<sup>14</sup> Due to concerns of the deal's opponents, such as the Department of Defense ("DoD"), that this would give the Japanese access to sensitive technologies that Fairchild provided to U.S. defense contractors, CFIUS initiated a review.<sup>15</sup> Fujitsu withdrew its offer before the Committee completed its review, but this transaction served as a catalyst for granting CFIUS the power to block transactions affecting U.S. national security interests.

This power came by way of the 1988 Exon-Florio Amendment to Title VII of the Defense Production Act of 1950 ("Exon-Florio").<sup>16</sup>

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<sup>12</sup> Exec. Order No. 11858, 3 C.F.R. § 990(1)(b) (1975).

<sup>13</sup> *Id.* at § 990(1)(b)(3).

<sup>14</sup> See Stephen K. Pudner, *Moving Forward from Dubai Ports World—The Foreign Investment and National Security Act of 2007*, 59 ALA. L. REV. 1277, 1279 (2008) (analyzing FDI increases under President Reagan).

<sup>15</sup> See *id.* (delineating the concerns stemming from the Fujitsu deal).

<sup>16</sup> The Exon-Florio Amendment was passed as part of the Omnibus Trade

Exon-Florio granted the President the power to initiate an investigation by CFIUS<sup>17</sup> into the national security effects of transactions that may result in foreign control of a U.S. business or asset and to prohibit or suspend transactions that pose national security threats.<sup>18</sup> The President could exercise this power if there was “credible evidence” of a national security threat,<sup>19</sup> and no other provision of the law provided “adequate and appropriate remedy to protect the national security” interests of the United States.<sup>20</sup> If the President exercised this authority, he was required to submit a written report to Congress.<sup>21</sup> Finally, the President’s actions were not subject to judicial review,<sup>22</sup> reflecting the deference given to the President on national security issues.<sup>23</sup>

The next important expansion of the Committee’s powers came from the 1993 Byrd Amendment, which mandated that CFIUS

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and Competitiveness Act of 1988 § 5021, Pub. L. No. 100-418, 102 Stat. 1107 (1988). Executive Order 12661 implements the Omnibus Trade and Competitiveness Act of 1988. See Exec. Order No. 12661, 3 C.F.R. § 618 (1988) (stating a purpose of “ensur[ing] that the international trade policy of the United States shall be conducted and administered in a way that achieves the economic, foreign policy, and national security objectives of the United States . . . under the direction of the President . . .”); see also Mathew R. Byrne, Note, *Protecting National Security and Promoting Foreign Investment: Maintaining the Exon-Florio Balance*, 67 OHIO ST. L.J. 849, 857 (2006) (attributing Exon-Florio as “a response to the serious decline in United States competitiveness and the rapid growth of our trade deficit.”) (quoting H.R. REP. NO. 100-40, pt. 1, at 2-3 (1987)).

<sup>17</sup> Executive Order 12661 designated CFIUS as the agency to run the investigation. See Exec. Order No. 11858, 3 C.F.R. § 990(8) (1975) (“The Chairman of the Committee, in consultation with other members of the Committee, is hereby delegated the authority to issue regulations to implement Section 721 of the Defense Production Act”).

<sup>18</sup> See Omnibus Trade and Competitiveness Act of 1988 § 5021, 50 U.S.C. app. § 2170(a-d) (2000), amended by Pub L. 110-49, 121 Stat. 246, 259 (2007) (authorizing the President or his designee to “make an investigation to determine the effects on national security of mergers, acquisitions, and takeovers . . . by or with foreign persons which could result in foreign control of persons engaged in interstate commerce of the United States” and allowing “the President [to] take such action for such time as the President considers appropriate to suspend or prohibit any acquisition, merger, or takeover, of a person engaged in interstate commerce in the United States . . . by or for with foreign persons so the such control.”).

<sup>19</sup> *Id.* at § 2170(e)(1).

<sup>20</sup> *Id.* at § 2170(e)(2).

<sup>21</sup> *Id.* at § 2170(g) (mandating the President to file reports upon the completion of an investigation).

<sup>22</sup> *Id.* at § 2170(e) (stating that the President’s decisions are not subject to judicial review).

<sup>23</sup> See Byrne, *supra* note 16, at 861 (asserting that placing Exon-Florio in Defense Production Act on trade shows the primacy of national security).

review all transactions where a foreign government controls the acquirer or where the acquirer acts on behalf of a foreign government.<sup>24</sup> Following the attempted acquisition of LTV Steel's Missile Division, which held DoD contracts, by Thomson-CSF, a French government-owned corporation, Congress issued the Byrd Amendment "to ensure that such deals were properly vetted in the future."<sup>25</sup> Therefore, Congress replaced the optional nature of Exon-Florio with a mandatory regime requiring an investigation any time a transaction would result in foreign control of a U.S. business or asset and pose a potential threat to the national security of the United States.<sup>26</sup> Despite having little effect on the CFIUS process,<sup>27</sup> the regime put in place by the Byrd Amendment would remain for over a decade before another transaction would threaten U.S. national security and spur further change to the CFIUS regulations.

### 3. MODERN CFIUS REGULATIONS

Two general trends contributed significantly to the implementation of the modern CFIUS regulations: (1) the

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<sup>24</sup> National Defense Authorization Act of 1993 § 837(a), Pub. L. 102-484 (1993) (mandating CFIUS investigations "in any instance in which an entity controlled by or acting on behalf of a foreign government seeks to engage in any merger, acquisition, or takeover which could . . . affect the national security of the United States.").

<sup>25</sup> Pudner, *supra* note 14, at 1277.

<sup>26</sup> The act also changed the President's reporting requirements by mandating a report on whether or not the President took action instead of only when requiring an investigation, as under Exon-Florio. The Byrd provision required a report anytime an investigation is conducted and the parties do not withdraw the transaction. *See* 50 U.S.C. app. § 2170(b), *amended by* Pub. L. 110-49, 121 Stat. 246, 259 (2007) (describing the review procedures required by the act). In addition, the Defense Production Act Amendments of 1992 implemented reporting requirements. *See also* Defense Production Act Amendments of 1992, Pub. L. 102-558, 106 Stat. 4198 (1992) (requiring reporting every four years as to whether there is a targeted attempt by other countries to attain U.S. critical technologies and whether there is economic espionage against the interests of the United States). However, they did not require a report on national security matters. *See Foreign Direct Investment, the Exon-Florio Foreign Acquisition Review Process, and H.R. 2624, the Technology Preservation Act of 1991, to Amend the 1988 Exon-Florio Provision: Hearings Before the Subcomm. on Econ. Stabilization of the H. Comm. on Banking, Fin. and Urb. Aff., 102d Cong., 2d Sess. (1992)* [hereinafter *Foreign Direct Investment Hearings*] ("[W]e have not defined national security. I think the intent of Congress was very clear, that national security should be looked at in a broad sense" and defining it would let companies circumvent the definition).

<sup>27</sup> *See* Byrne, *supra* note 16, at 868 ("[T]he Byrd Amendment has had little actual effect on the Exon-Florio framework or process").

increased emphasis on national security issues in the wake of September 11<sup>th</sup> and (2) the global economic integration through globalization.<sup>28</sup> With these trends as the backdrop, the proposed investments by China National Offshore Oil Corp. (“CNOOC”) in Unocal Corp. and by Dubai Ports World (“DPW”) in Peninsular & Oriental Steam Navigation Company in 2005 and 2006, respectively, spurred action to bolster CFIUS’s powers. CNOOC, a Chinese government-owned oil company, sought to acquire the American oil company Unocal, which would have resulted in CNOOC controlling Unocal’s oil reserves.<sup>29</sup> Although CFIUS never approved or even reviewed the transaction, congressional fear that the Committee would not block the transaction led to calls to revise Exon-Florio.<sup>30</sup> Soon thereafter, DPW, a state-owned ports management company from the United Arab Emirates, attempted to acquire Peninsular & Oriental Stream Navigation Co., which would have given DPW operating rights in six American ports.<sup>31</sup> When news broke that CFIUS had approved the transaction, it became clear that the Committee’s national security review was ineffectual, and a congressional maelstrom followed.<sup>32</sup> In response, CFIUS and DPW agreed to a forty-five day investigation, but DPW ultimately arranged to sell its U.S. port leases to a U.S. company when Congress moved to force divestiture through legislation.<sup>33</sup>

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<sup>28</sup> James Mendenhall, Introductory Remarks at the Proceedings of the Annual Meeting of the American Society of International Law: Economic Politics and National Security: A CFIUS Case Study (Apr. 11, 2008), in 102 AM. SOC’Y INT’L L. PROC. 245, 245–46 (2008).

<sup>29</sup> For a detailed discussion of the CNOOC transaction, see generally Joshua W. Casselman, Note, *China’s Latest ‘Threat’ to the United States: The Failed CNOOC-Unocal Merger and its Implications for Exon-Florio and CFIUS*, 17 IND. INT’L & COMP. L. REV. 155 (2007) (discussing the CNOOC transaction).

<sup>30</sup> See Byrne, *supra* note 16, at 852 (citing Christopher Corr, *Pressures to Stiffen Exon-Florio: The Chinese Bid for Unocal Sparks a Firefight over Inbound Deals*, MERGERS AND ACQUISITIONS, DEALMAKER’S J. 36, (2006)) (explaining how calls to reform Exon-Florio arose).

<sup>31</sup> See *id.* at 851 (outlining the proposed deal structure) (citations omitted).

<sup>32</sup> See *id.* at 852 (“[M]any members of Congress had publicly and forcefully expressed grave reservations . . . .”); see also Ilene Knable Gotts et al., *Is Your Cross-Border Deal the Next National Security Lightning Rod?*, 16 BUS. L. TODAY 31 (2007) (“[B]ipartisan political concern over port security caused DP World voluntarily to request that CFIUS conduct a new review of the transaction . . . .”).

<sup>33</sup> See Gotts et al., *supra* note 32, at 32 (“Ultimately, facing the threat of congressional legislation to force divestiture, DP World agreed to sell the U.S. port leases to a U.S. company.”). For a discussion of congressional blocking of the DPW and CNOOC transactions, see David Zaring, *CFIUS as a Congressional Notification Service*, S. CAL. L. REV. 81, 83, 98–101 (2010) (describing the role of

The concerns surrounding these two proposed transactions led to the passage of the Foreign Investment in the United States Act of 2007 (FINSA), which was the first statutory codification of CFIUS. FINSA's preamble clearly states that the new rules are designed to "ensure national security while promoting foreign investment" and "to reform the process by which such investments are examined for any effect they may have on national security."<sup>34</sup> This reflects how CFIUS is designed to balance foreign investment and national security;<sup>35</sup> however, the regulations explicitly do not provide a definition for national security.<sup>36</sup> Instead, the regulations state that guidance as to how national security should be defined will be published in the Federal Register. Soon after FINSA's passage, President George W. Bush issued an executive order that expanded CFIUS membership to a potentially vast number of agencies, clarified the President's role in evaluating covered transactions, and explicitly authorized the use of mitigation agreements to resolve national security concerns.<sup>37</sup> Finally, Treasury published the aforementioned Guidance Concerning the National Security Review Conducted by the Committee on Foreign

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Congress in setting foreign investment policy as informed by CFIUS).

<sup>34</sup> Foreign Investment and National Security Act of 2007, Preamble, Pub. L. No. 110-49, 121 Stat. 246 (2007). Executive Order 13456 amended Executive Order 11858 to incorporate the changes made by FINSA, namely reviewing results in control by a foreign person. It similarly states intent to support "unequivocally such investment, consistent with the protection of national security." Exec. Order No. 13456, 73 Fed. Reg. 4677 (2008).

<sup>35</sup> Nova Daly, Remarks at the Proceedings of the Annual Meeting of the American Society of International Law: Economic Politics and National Security: A CFIUS Case Study (Apr. 11, 2008), *in* 102 AM. SOC'Y INT'L L. PROC. 245, 248 (2008) [hereinafter Daly Statement].

One of those lessons is that when people fear that the national security is jeopardized, they can take actions that also jeopardize an open investment environment. So ensuring that people know that you are doing the due diligence you need to do to ensure national security can also ensure that America can maintain its open investment policy. *Id.*

<sup>36</sup> Instead, the regulations state that guidance will be published in the Federal Register. For a more detailed discussion, see Section 3.3 (discussing the definition of national security).

<sup>37</sup> Exec. Order No. 13456, 73 Fed. Reg. 4677 (Jan. 23, 2008) (reiterating its objective of "support[ing] unequivocally such investment, consistent with the protection of the national security"). The President will be involved when the Committee recommends blocking the transaction, is unable to reach a decision of whether the transaction should be blocked, or when the Committee requests that the President make the determination. 31 C.F.R. § 800.506(b) (2008) (codifying the executive order through implementing regulations).

Investment in the United States (“the Guidance”),<sup>38</sup> which has a “narrow focus on national security alone” and disregards other national interests.<sup>39</sup> However, as will be discussed below,<sup>40</sup> the Guidance provides only vague direction on what constitutes a national security risk, resulting in a broad national security review.<sup>41</sup>

With this legal framework in mind,<sup>42</sup> the following subsections will address the current state of CFIUS. This includes a discussion of the current members and their respective roles within the Committee, filing requirements for voluntary notices, an overview of the CFIUS review process, and an analysis of the scope of the Committee’s powers under the regulations.

### 3.1. CFIUS Membership

CFIUS is an interagency committee composed of fifteen agency heads with Treasury as the Chair.<sup>43</sup> Of these members, Treasury

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<sup>38</sup> See generally Guidance Concerning the National Security Review Conducted by the Committee on Foreign Investment in the United States, 73 Fed. Reg. 74567 (Dec. 8, 2008) [hereinafter Guidance] (describing the regulatory guidance on national security review).

<sup>39</sup> See *id.* at 74568 (asserting that CFIUS focuses solely on real national security issues).

<sup>40</sup> See Section 3.3.2.

<sup>41</sup> See Jonathon G. Cedarbaum & Stephen W. Preston, *CFIUS and Foreign Investment*, in *HOMELAND SECURITY: LEGAL AND POLICY ISSUES* 235, 241 (Joe D. Whitley & Lynne K. Zusman eds., 2009) (“FINSA leaves CFIUS with broad discretion to determine if a transaction threatens national security.”).

<sup>42</sup> In summary, the key legal bases of CFIUS are as follows: (1) § 721 of the Defense Production Act of 1950, as amended, 50 U.S.C. app. § 2170; (2) Exon-Florio (part of Omnibus Trade and Competitiveness Act of 1988), Pub. L. 100-418, § 5021, 102 Stat. 1107, 1425-26 (1988); (3) Executive Order 11858, which established CFIUS as Executive Branch interagency committee; (4) Executive Order 12661, 54 Fed. Reg. 779 (Dec. 27, 1988), which delegated authority under Exon-Florio to CFIUS; (5) Executive Order 13456, 73 Fed. Reg. 4677 (Jan. 23, 2008), which amended Executive Order 11858 to incorporate FINSA changes; and (6) Regulations pertaining to Mergers, Acquisitions, and Takeovers by Foreign Persons, 31 C.F.R. Part 800. The Guidance, *supra* note 38, supplements these regulations. More information is available at [www.treasury.gov/cfius](http://www.treasury.gov/cfius).

<sup>43</sup> Under FINSA, the Attorney General’s office, the Departments of Homeland Security, Defense, Commerce, State, and Energy serve as full voting members, and the heads of the Department of Labor and the Department of National Intelligence (“DNI”) will serve as non-voting *ex officio* members. See 50 U.S.C. app. 2170(k) (listing Committee members under FINSA). Executive Order 13456 added the United States Trade Representative and the Director of the Office of Science and Technology to the Committee. See Exec. Order No. 13456, 73 Fed. Reg. 4677 § 3 (Jan. 23, 2008) (supplementing the list of original Committee

and Department of National Intelligence (“DNI”) have particularly notable roles. First, at the beginning of the review period, Treasury is responsible for designating a lead agency or agencies to serve as its co-lead throughout the review process.<sup>44</sup> This designation normally goes to the agency with the most interest in or questions about the transaction. If CFIUS determines that the transaction raises national security concerns, the co-lead agency’s role becomes increasingly important, because it will be responsible for negotiating, imposing, and monitoring mitigation agreements designed to address the national security threats posed by the transaction.<sup>45</sup> Second, DNI<sup>46</sup> shall “expeditiously carry out a thorough analysis of any threat to the national security of the United States posed by any covered transaction.”<sup>47</sup> This analysis must be independent but must also incorporate the opinions of each reviewing intelligence agency.<sup>48</sup> Therefore, DNI serves as the de facto agency responsible for making final determinations on the national security implications of a transaction.

CFIUS’s structure reflects the Committee’s stated objective of

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members and stating that the Office of Management and Budget, the Chairman of the Counsel of Economic Advisors, the Assistant to the President for National Security Affairs, the Assistant to the President for Economic Policy, the Assistant to the President for Homeland Security and Counterterrorism are all to “observe and, as appropriate, participate in” CFIUS reviews).

Finally, other agencies, such as the Central Intelligence Agency, National Security Agency, Department of Agriculture, and Department of Transportation, may participate on a case-by-case basis as needed. *Id.* at § 10 (observing that other agencies may assist as needed on the Committee’s request).

<sup>44</sup> See 50 U.S.C. app. 2170(k)(5) (“The Secretary of the Treasury shall designate, as appropriate, a member or members of the Committee to be the lead agency or agencies on behalf of the Committee . . .”).

<sup>45</sup> See *id.* (outlining the steps the co-lead agency are required to take).

<sup>46</sup> DNI is an *ex officio*, non-voting member but receives all votes from other Committee members. For a full description of DNI’s role, see 50 U.S.C. app. 2170(b)(4).

The Director of National Intelligence shall expeditiously carry out a thorough analysis of any threat to the national security of the United States posed by any covered transaction. The Director of National Intelligence shall also seek and incorporate the views of all affected or appropriate intelligence agencies with respect to the transaction. *Id.*

<sup>47</sup> 50 U.S.C. app. 2170(b)(4)(A). DNI can start its review before receiving a formal filing, so DNI prefers to receive notifications in advance.

<sup>48</sup> *Id.* DNI must provide its opinion within 20 days but can be granted an extension. 50 U.S.C. app. 2170(b)(4)(B) (noting that the report must be filed “not later than 20 days” after the notice).

balancing national security and open investment policy.<sup>49</sup> In addition, DoD seems to receive greater deference than other Committee members due to its omniscient presence in the national security space.<sup>50</sup> Treasury's position as Chair reflects concerns early in the Committee's development that the national security review's potential breadth could become a significant barrier to FDI.<sup>51</sup> Moreover, Treasury's authority is meant to "serve as a reminder to the outside world—and presumably to CFIUS members—that open investment is an important goal that should be sustained unless there are serious national security problems with a transaction."<sup>52</sup> However, since Treasury does not make any final determinations regarding whether to permit the transaction, other motivations supersede the encouragement of FDI.<sup>53</sup>

### 3.2. Filing Requirements & Timeline of CFIUS Process

According to the regulations, the entire CFIUS process can take up to ninety days and involve up to three primary stages. First, CFIUS will conduct a thirty-day review, which is initiated by a voluntary submission by the parties or a request for a filing from the Committee, to determine if the transaction is "covered." Second, the Committee may conduct a forty-five day investigation if it determines that the transaction may raise national security concerns. Finally, the Committee may submit its recommendation to the President, who is given fifteen days to determine whether or not to block the proposed transaction.

#### 3.2.1. Filing & Initial Thirty Day Review

CFIUS review can be initiated either by a voluntary notice by the parties to the transaction to CFIUS or a request for submission by the Committee.<sup>54</sup> Although filing is technically voluntary,

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<sup>49</sup> See Byrne, *supra* note 16, at 893 ("Finally, the current membership structure of CFIUS and its preference to operate by consensus ensure that both national security and an open investment policy are protected, while not short-changing either goal.").

<sup>50</sup> See *id.* ("Because of its unique role in the national security arena, the Department of Defense seems to be given a great degree of deference by other members of CFIUS.").

<sup>51</sup> See Section 4.1 (describing the breadth of national security review).

<sup>52</sup> Byrne, *supra* note 16, at 893-94.

<sup>53</sup> This will be discussed in greater detail in Section 4.

<sup>54</sup> For a notice to be considered complete, it must include the following: (1) terms of the transaction, including the parties, nature, and scope of agreement; (2)

CFIUS can request that parties submit the necessary materials if it determines that the transaction “may” be a “covered transaction,” which is defined broadly.<sup>55</sup> In reality, the Committee’s request for a filing is actually a mandate, and it can be made up to three years after the completion of the transaction.<sup>56</sup> As a result, it is in the parties’ interest to be proactive and voluntarily file with the Committee. Voluntarily filing a complete notice not only improves the efficiency of the review process,<sup>57</sup> but it also increases the certainty surrounding their transaction. In addition, parties who voluntarily file receive regulatory safe harbor, immunizing them against subsequent CFIUS reviews and investigations once their transaction is approved absent misrepresentations during the CFIUS process.<sup>58</sup> Therefore, it is in both the companies’ and the

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description of assets; (3) description of U.S. company’s business activities, including classified contracts over the last five years and government contracts over prior three years if dealing with national security, defense, or homeland security; (4) details about products, technical data, technology, or services sold to U.S. government; (5) products, technical data, technology, or services for which the target is a “sole source” or a single “qualified source”; (6) products or services sold by third party and rebranded; (7) services target provided on behalf of or under the name of another entity; (8) DPAS-rated contract information; (9) products subject to EAR and/or ITAR listed and with details provided, including licenses and authorizations that will transfer; (10) documentation “relevant to” the target’s export classifications including any commodity jurisdiction determinations, completed or pending, or any Commerce classifications; (11) Department of Energy-related export activity; (12) toxins or special agents activity; and (13) any history of prior CFIUS activity. 31 C.F.R. § 800.402(c).

<sup>55</sup> See *id.* (explaining that if the Committee then determines that the transaction is covered, it will request a complete filing from the parties to the transaction).

<sup>56</sup> 31 C.F.R. § 800.402 (observing reporting requirements for voluntary notices).

<sup>57</sup> See Guidance, *supra* note 38, at 74572 (“In CFIUS’s experience, the efficiency of reviews is also enhanced when parties to transactions voluntarily provide in their notice additional information that may be relevant to the notified transaction but which is not listed in § 800.402 of the Regulations.”); George Stephanov Georgiev, Comment, *The Reformed CFIUS Regulatory Framework: Mediating Between Continued Openness to Foreign Investment and National Security*, 25 YALE J. ON REG. 125, 131 (2008) (pointing to the efficiencies generated by filing voluntarily).

<sup>58</sup> See Cedarbaum & Preston, *supra* note 41, at 239 (listing the three thresholds to be met for safe harbor). For a criticism of the safe harbor provisions, see Weimar, *supra* note 2, at 676 (“The single greatest shortcoming of CFIUS review in the protection of national security is that it focuses almost singularly on threats perceived in transactions *ex ante*, yet it lacks any review of relevant activities once covered transactions have been completed”, which is compounded by the safe harbor provision); Georgiev, *supra* note 57, at 128 (describing the safe harbor provisions in the regulations).

Committee's interests if the parties can clearly identify which transactions may raise national security concerns and voluntarily file to initiate the CFIUS process.

If the Committee determines that a transaction is a "covered transaction," it will commence an initial thirty-day review. During this process, the Committee evaluates the transaction to determine if it threatens U.S. national security, results in foreign control of a U.S. business or asset, or results in foreign control of critical infrastructure that may impair U.S. national security.<sup>59</sup> The regulations define "covered" as "any merger, acquisition, or takeover . . . by or with any foreign person which could result in foreign control" of any U.S. business, part of a U.S. business, or U.S. asset by a foreign person.<sup>60</sup> The key element of this definition is "control," which FINSA failed to define,<sup>61</sup> requiring instead that CFIUS prescribe a definition.<sup>62</sup> The final rule defines control in "functional terms as the ability to exercise certain powers over important matters affecting an entity."<sup>63</sup> This vague definition "eschews bright lines" and considers all relevant factors together

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<sup>59</sup> See Guidance, *supra* note 38, at 74568 (describing the national security review process).

<sup>60</sup> 50 U.S.C. app. 2170(a)(3). See also 31 CFR §§ 800.207, 800.301 (restating the definition of covered transactions). This includes but is not limited to investments, joint ventures, and asset purchases, and includes transactions when foreign persons convey U.S. businesses or assets to another foreign person. A covered transaction does NOT include: (1) stock splits, pro rata stock dividends, transactions resulting in a foreign person controlling less than 10% of U.S. business that are only for investment purposes (narrowly construed objective test looking for any rights to directorship, voting rights, etc.)—considering the timeline of when they will get ownership (if it will increase above 10% later), and noting that 10% is not a safe harbor—based on facts/circumstances and may not be recognized on discretion; (2) acquisition of an entity that does not constitute a U.S. business; (3) acquisition of securities or securities underwriter in the "ordinary course" of business; and (4) acquisition pursuant to insurance contract if made in the "ordinary course" of business.

<sup>61</sup> For definitions of the other terms used in the definition, see 50 U.S.C. app. 2170(a) (defining a list of terms); Fed. Reg., *supra* note 1, at 70703-05.

<sup>62</sup> See Fed. Reg., *supra* note 1, at 70704 ("FINSA does not define 'control,' but rather requires that CFIUS prescribe a definition by regulation.").

<sup>63</sup> *Id.* (providing the complete definition as "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 § 800.204(a)], or any other similarly important matters affecting an entity.").

when determining if a transaction is covered;<sup>64</sup> however, the definition becomes clearer by examining what is *not* considered control. Most importantly, “a foreign person does not control an entity if it holds ten percent or less of the voting interest in the entity and it holds that interest ‘solely for the purpose of passive investment.’”<sup>65</sup> Although this does not provide an exemption solely because the foreign person has less than a ten percent interest in the U.S. business or asset, it provides clear guidance to foreign direct investors. Therefore, the definitions of “covered transaction” and each of their elements,<sup>66</sup> in conjunction with the discussions and examples contained in the regulations,<sup>67</sup> allow companies to assess if their proposed transaction is “covered” and potentially subject to CFIUS review.

### 3.2.2. *Forty-Five Day Investigation*

CFIUS concludes the vast majority of its reviews within this initial thirty-day review period.<sup>68</sup> However, the Committee may commence a forty-five day investigation if the initial review reveals any of the following four situations: (1) the transaction threatens to impair U.S. national security; (2) the lead agency recommends, and CFIUS concurs, that an investigation be undertaken; (3) the transaction will result in “foreign government-control” of a U.S. business or asset; or (4) the transaction would result in foreign control of U.S. critical infrastructure that could

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<sup>64</sup> *Id.*

<sup>65</sup> *Id.* (citing § 800.302(b)). The ten percent threshold is not, however, arbitrary or useless. See ANNUAL REPORT 2013, *supra* note 4, at 31 (considering (1) transactions notified under § 721; (2) non-notified transactions from which CFIUS required submissions; and (3) transactions resulting in a ten percent ownership stake of a U.S. company).

<sup>66</sup> The Federal Register includes discussions of “covered transaction,” “transaction,” “control,” “U.S. business,” “Foreign Person,” and “Transactions That Are and Are Not Covered Transactions.” See Fed. Reg., *supra* note 1, at 70704 (elaborating on the meaning of each of the terms).

<sup>67</sup> 31 C.F.R. § 800.204 (providing nine examples of covered transactions).

<sup>68</sup> Guidance, *supra* note 38, at 74568 (“CFIUS concludes action on the vast majority of transactions within this initial 30-day period”); Cedarbaum & Preston, *supra* note 41, at 238 (“CFIUS had traditionally approved the vast majority of notified transactions during the initial 30-day period, but a growing number of transactions are now being subjected to a second-phase 45-day investigation.”). The Committee may also recommend withdrawal, but that is rare at this stage. The clock will only stop ticking at this stage if the parties pull their filing, at which point they must notify CFIUS if they are going to resubmit or cancel the transaction. *Id.*

impair U.S. national security.<sup>69</sup> If any of these conditions exist, then CFIUS may instigate the forty-five day investigation.<sup>70</sup> After an investigation, CFIUS only allows the transaction to proceed “if it has determined that there are no unresolved national security concerns,” which must be certified to Congress.<sup>71</sup>

### 3.2.3. Mitigation Agreements

CFIUS also has authority to “impose, and enforce, agreements or conditions to mitigate any national security risks posed by covered transaction[s].”<sup>72</sup> From 2008 to 2010, sixteen transactions implemented legally binding mitigation agreements, ten of which occurred in 2010.<sup>73</sup> Most agreements are reached during forty-five day investigations due to the difficulties in assessing national security risk, reaching an agreement, and implementing the agreement during the initial thirty-day review period. CFIUS’s authority to enter into these agreements is limited in two significant ways. First, CFIUS can only opt for mitigation after providing a written analysis that both assesses the national security risks proposed by the transaction and proposes measures to address those risks.<sup>74</sup> Second, mitigation measures shall be imposed “only if” the risks are not adequately addressed by other

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<sup>69</sup> Cedarbaum & Preston, *supra* note 41, at 238 (listing the four situations where an investigation is undertaken).

<sup>70</sup> Review is initiated if the lead agency recommends review and the Committee concurs, or if a member agency requests review and Treasury concurs. This investigation is not to be used as an extension and is limited to evaluations of the national security implications of a transaction. The scope of the national security analysis will be discussed in Section 3.3. The national security review is intended to be narrowly tailored. *See* Daly Statement, *supra* note 35, at 249 (“So CFIUS is remaining a targeted, narrowly focused process that ensures national security. It is not an economic means test, or an economic benefits test. CFIUS remains focused on those important issues central to our open investment policy and important to ensuring that the world and America stays open to investment.”).

<sup>71</sup> Guidance, *supra* note 38, at 74568.

<sup>72</sup> *Id.* This is authorized by Executive Order 11858. *See* Exec. Order No. 11858, *supra* note 12 (delineating the authority of CFIUS). The lead agency for the transaction is responsible for carrying out and monitoring compliance with mitigation agreements. *See* ANNUAL REPORT 2013, *supra* note 4, at 20–21 (describing means of monitoring and internal procedures).

<sup>73</sup> *See* ANNUAL REPORT 2013, *supra* note 4, at 20 (noting mitigation agreements in the computer software, telecommunications, and energy sectors).

<sup>74</sup> *See* Guidance, *supra* note 38, at 74568 (“[B]efore CFIUS may pursue a risk mitigation agreement or condition, the agreement or condition must be justified by a written analysis . . .”).

laws or regulations, such as the International Traffic in Arms Regulations (“ITAR”), the Export Administration Regulations (“EAR”), or the National Industrial Security Program Operating Manual (“NISPOM”).<sup>75</sup> Mitigation agreements are a viable solution and include a variety of options.<sup>76</sup> However, the discretionary authority CFIUS currently exercises may not be as narrowly tailored to case-by-case reviews as the regulations would suggest,<sup>77</sup> weakening the claim that national security should not be more clearly defined in order to protect the individualized process.

#### 3.2.4. Presidential Power

At the conclusion of the investigation period, CFIUS will either notify the President if it cannot determine if the transaction raises national security concerns or will make a recommendation to the President as to whether the transaction should be allowed to proceed or should be blocked due to unresolved national security issues.<sup>78</sup> Using the Committee’s findings, the President will then exercise his sole authority to suspend or prohibit the transaction.<sup>79</sup> In order to do so, the President must find both that “[t]here is credible evidence . . . that the foreign interest exercising control might take action that threatens to impair the national security” and that other provisions of law do not “provide adequate and appropriate authority for the President to protect the national security.”<sup>80</sup> However, the large majority of transactions are either

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<sup>75</sup> See *id.* at 74568–69 (listing other laws that potentially preclude mitigation agreements).

<sup>76</sup> Examples include limitations on foreign ownership through special security agreements, proxy agreements or proxy boards, limitations on voting rights, and divestitures of parts of the business assets through asset sales, limits on re-sales, and march-in rights, among other options. See ANNUAL REPORT 2013, *supra* note 4, at 20–21 (giving examples of measures required of businesses).

<sup>77</sup> See generally Zaring, *supra* note 33; see also *id.* at 117 (“These differences should not obscure the fact that the CFIUS agreements contain a lot of boilerplate, even though the Committee tailors its agreements, to a significant degree, based on the nature of the acquirer.”); *id.* at 117 (bringing into question if national security and mitigation is really case-by-case due to the presence of standard terms).

<sup>78</sup> Mir, *supra* note 4, at 6, 8 (describing the President’s authority to block transactions).

<sup>79</sup> *Id.* at 6; see also Guidance, *supra* note 38, at 74567 (describing how final interpretation of the national security threat is made by the President if CFIUS is unable to reach a decision).

<sup>80</sup> Guidance, *supra* note 38, at 74569.

approved by the Committee without investigation, withdrawn by the parties, or mitigated. Therefore, only a small number of transactions have been referred to the President,<sup>81</sup> and the President has only blocked two transactions using the authority granted under the CFIUS regulations.<sup>82</sup> However, the President could play an increasingly important role in blocking future transactions.<sup>83</sup>

### 3.3. National Security

CFIUS review is limited to national security concerns, making the Committee's national security evaluation the key determinant at each stage of the process. Yet, despite the regulation's clear definition of "control," the regulations do not define national security and provide only limited guidance as to how it is interpreted.<sup>84</sup> An examination of FINSA's history suggests that the vagueness surrounding the Committee's national security evaluation is indeed deliberate and is designed to give CFIUS broad authority to block FDI.<sup>85</sup> This likely stems from concerns, particularly in the wake of 9/11 and the proposed CNOOC and DPW transactions, that the concept of national security evolves so quickly in response to new threats that it cannot be effectively defined.<sup>86</sup> Therefore, instead of relying on a clear definition or

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<sup>81</sup> Precise figures cannot be obtained. For estimations prior to the passage of FINSA, see generally Zaring, *supra* note 33.

<sup>82</sup> See Section 4.6.

<sup>83</sup> See Zaring, *supra* note 33, at 124 (footnote omitted) ("Other scholars have concluded that presidential power inevitably expands, both generally and more specifically in the arena of foreign affairs. Further, critics of executive power in national security matters tend to assume that, as a descriptive matter, the executive calls the shots. Derek Jinks and Neal Katyal, for example, have warned that Congress's role in constraining the executive might 'wither' in foreign relations law unless the courts act to protect it.").

<sup>84</sup> FINSA requires CFIUS to review covered transactions "to determine the effects of the transaction[s] on the national security of the United States," but it does not define "national security," other than to note that the term includes issues relating to homeland security. See 50 U.S.C. app. 2170 (2007).

<sup>85</sup> See *Foreign Direct Investment Hearings*, *supra* note 26 (statement of William Barreda, Deputy Assistant Secretary of the Treasury) ("[W]e have not defined national security. I think the intent of Congress was very clear, that national security should be looked at in a broad sense" and that defining national security would allow parties to structure transactions around the definition. Acting General Counsel of the Department of Defense, Chester Paul Beach, Jr., expressed similar sentiments).

<sup>86</sup> See Daly Statement, *supra* note 35, at 249 (explaining that "[t]hey will not necessarily define 'national security' in and of itself: it is a hard concept to put

guidance, companies are forced to piece together a collection of sources that provide limited, vague direction regarding the national security evaluation. These include FINSA and CFIUS's other legal frameworks, the Guidance, and the annual reports. However, since these "are neither mandatory nor dispositive,"<sup>87</sup> they do not provide an ascertainable conceptualization of national security as applied to transactions.

### 3.3.1. FINSA §721(f) Factors

The CFIUS regulations do not define national security, but instead provide only a list of factors for the Committee and the President to consider when assessing the national security implications of a transaction.<sup>88</sup> The regulations do not list industries or technologies generally subject to review,<sup>89</sup> but the Committee considers whether the transaction will result in foreign control of government contractors and entities with access to classified information.<sup>90</sup> Section 721(f) of the Defense Production

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expressly on paper, but FINSA already provides good direction."); *see also* Byrne, *supra* note 16, at 887, 888 ("[A]s presently constituted, the Exon-Florio system strikes a proper balance between national security and open foreign investment" due partially to lack of national security definition, which allows CFIUS to "respond to novel or emerging threats to national security."); Zaring, *supra* note 33, at 129, 130 (stating that "[n]ational security . . . is a term that few international lawyers have dared to define, although it is the excuse commonly used to avoid a variety of legal obligations. Although, since the onset of the war on terror, national security law has assumed prominence, it is still the subject of little international law scholarship" and that "other international institutions have produced their own cautious judgments on what might constitute national security."). *See* Georgiev, *supra* note 57, at 133 (stating that "[b]ecause consideration of these factors is neither mandatory nor dispositive, their addition does not place rigid constraints on the CFIUS process, but it does suggest that the process would be more probing. At the same time, the adopted version of the Act avoids earlier proposals to rank countries based on their counter-proliferation and counter-terrorism policies. Such a review process would have rendered the review process more formulaic and less effectual").

<sup>87</sup> Georgiev, *supra* note 57, at 133.

<sup>88</sup> *See generally* Guidance, *supra* note 38, at 74569-570 (listing the national security factors considered on a case-by-case basis).

<sup>89</sup> *See generally* Section 4.1 (citing the early concerns regarding national security).

<sup>90</sup> *See generally* Regulations Pertaining to Mergers, Acquisitions and Takeovers by Foreign Persons; Final Rule, 31 C.F.R. Part 800 (2008) (stating that the transaction will result in foreign control of a U.S. business that provides products, technical data, technology or services—either as a prime contractor, a subcontractor, or a supplier to prime contractors—to U.S. government agencies, state and/or local governments. This includes sole source arrangements,

Act of 1950<sup>91</sup> lists and the Guidance restates<sup>92</sup> the factors considered by the Committee. However, the categories are very broad and subject to interpretation by CFIUS and the President, leaving little certainty as to what transactions raise national security concerns.<sup>93</sup>

Notably, CFIUS considers the *potential* effects instead of the realized effects of these factors, which gives the Committee significantly broader authority. The factors include the transaction's effects on: (1) "domestic production needed for national defense requirements;" (2) "the capability and capacity of domestic industries to meet national defense requirements," such as human resources, technology, and other supplies; (3) "a foreign person's control of domestic industries and commercial activity on the capability and capacity of the United States to meet the requirements of national security;" (4) "U.S. international technological leadership in areas affecting U.S. national security;" (5) "the long-term projection of U.S. requirements for sources of energy and other critical resources and material;" (6) "U.S. critical infrastructure, including [physical infrastructure such as] major energy assets;" (7) "sales of military goods, equipment, or technology to countries that present concerns related to terrorism; missile proliferation; chemical, biological, or nuclear weapons proliferation; or regional military threats;" and (8) "transshipment or diversion of technologies with military applications, including the relevant country's export control system."<sup>94</sup> In addition, the Committee and the President may also consider "whether the transaction could result in control of a U.S. business by a foreign government or by an entity controlled by or acting on behalf of a foreign government" and "the relevant country's record of adherence to nonproliferation control regimes and record of

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companies with access to classified information, companies with defense businesses, and national security-related law enforcement).

<sup>91</sup> See 50 U.S.C. app. 2170(f) (listing factors added under FINSAs).

<sup>92</sup> See Guidance, *supra* note 38, at 74569-70 (listing national security factors considered on a case-by-case basis by CFIUS and the President in determining whether a covered transaction poses a threat to national security).

<sup>93</sup> See Weimar, *supra* note 2, at 674 (explaining that "[l]ike the term 'national security,' many of the above-mentioned factors are intentionally left open to interpretation by the Executive").

<sup>94</sup> Giovanna M. Cinelli & Kenneth J. Nunnenkamp, Jones Day, Presentation at the 2012 Export Briefing Series, CFIUS: A Primer for Foreign Companies Acquiring U.S. Assets or Businesses, Part I, 46-50 (June 15, 2012) (paraphrasing the national security factors listed in FINSAs § 721(f)).

cooperating with U.S. counterterrorism efforts.”<sup>95</sup>

These factors leave open a potentially unbounded range of interpretations, and it is becoming increasingly evident that CFIUS will not hesitate to exercise this discretion.<sup>96</sup> Moreover, CFIUS is free to consider other factors as needed, which expands their interpretive authority even further. This has led scholars and practitioners to speculate on more specific risks the Committee considers national security threats.<sup>97</sup> However, these speculations do not provide much more specificity and have limited predictive value since the Committee does not provide them. As a result, the vagueness of the factors and the Committee’s broad authority to interpret the potential effects a transaction has virtually eviscerated any predictive capabilities from FINSA §721(f).

### 3.3.2. Guidance

Recognizing the regulations’ failure to define national security, FINSA mandated that CFIUS publish guidance in the Federal Register “on the types of transactions that the Committee has reviewed and that have presented national security considerations.”<sup>98</sup> However, the Guidance notes that it is

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<sup>95</sup> *Id.* at 51.

<sup>96</sup> *See* Section 5.

<sup>97</sup> For an example, see Weimar, *supra* note 2, at 667–68 (listing risks CFIUS has considered: (1) “Shutting down or sabotaging a critical facility in the United States;” (2) “Impeding a U.S. law-enforcement or national security investigation;” (3) “Accessing sensitive data, or becoming aware of a federal investigation or methods used by U.S. intelligence and law-enforcement agencies, including moving transaction data and records offshore;” (4) “Limiting U.S. government access to information for surveillance or law-enforcement purposes;” (5) “Denying critical technology or key products offshore that are important to national defense, intelligence operations, or homeland security;” (6) “Moving critical technology or key products offshore that are important for national defense, intelligence operations, or homeland security;” (7) “Unlawfully transferring technology abroad that is subject to U.S. export laws;” (8) “Undermining U.S. technological leadership in a sector with important defense, intelligence, or homeland-security applications;” (9) “Compromising the security of government and private sector information-technology networks in the United States;” (10) “Facilitating state or economic espionage through acquisition of a U.S. company;” (11) “Aiding the military or intelligence capabilities of a foreign country with interests adverse to those of the United States.”) (citing EDWARD M. GRAHAM & DAVID M. MARCHICK, U.S. NATIONAL SECURITY AND FOREIGN DIRECT INVESTMENT 77 (2006)).

<sup>98</sup> *See* 50 U.S.C. app. 2170, at 261 (including “transactions that may constitute covered transactions that would result in control of critical infrastructure relating to United States national security by a foreign government or any entity controlled by or acting on behalf of a foreign government”).

“necessarily illustrative” and “does not provide comprehensive guidance on all types of covered transactions that have presented national security considerations.”<sup>99</sup> In addition, the Guidance “does not identify the types of transactions that pose national security risk, and it should not be used for that purpose.”<sup>100</sup> As a result, parties to transactions cannot use the Guidance to either determine that their proposed deal is or is not considered a potential national security threat. This means that all illustrations contained in the Guidance have little predictive value, leading to high levels of uncertainty with significant financial implications.

The Guidance breaks the types of transactions that have presented national security concerns down into two extremely broad categories: (1) those raising concerns due to “the nature of the U.S. business over which foreign control is being acquired” and (2) those raising concerns due to “the nature of the foreign person who acquires control over the U.S. business.”<sup>101</sup> However, the broad nature of the categories and examples contained therein makes them both too general to be of use to parties to a cross-border transaction. Regarding the first category, the Guidance does not provide examples of industries, products, or other information to help identify which companies would raise national security concerns if subject to foreign control. In fact, the Guidance explicitly avoids listing any industries that are commonly subject to CFIUS review.<sup>102</sup> Instead, four general subcategories of companies are provided: (a) government contractors,<sup>103</sup> (b) companies producing products with national security implications,<sup>104</sup> (c) companies operating U.S. critical

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<sup>99</sup> See Guidance, *supra* note 38, at 74570 (stating that although CFIUS has had “extensive experience” in reviewing transactions, it does not provide a comprehensive list of which such transactions constitute a threat to national security”).

<sup>100</sup> *Id.*

<sup>101</sup> *Id.*

<sup>102</sup> *Id.* (“CFIUS is focused on identifying and addressing national security risks posed by transactions, *regardless of industry*. Accordingly, CFIUS does not focus on any one U.S. business sector or group of sectors”) (emphasis added). The following industries are those that have been included: defense, smart grid, munitions manufacturing, aerospace, software, radar, information technology, telecommunications, energy, natural resources, industrial products, and structural engineering. See also Jones Day, *supra* note 94, at 46–47 (listing industries of interest).

<sup>103</sup> Guidance, *supra* note 38, at 74570.

<sup>104</sup> *Id.*

infrastructure,<sup>105</sup> and (d) companies producing certain advanced technologies.<sup>106</sup> Finally, the Guidance notes, “a significant portion” of reviewed transactions presenting national security concerns “have involved U.S. businesses” dealing in “technology, goods, software, or services that are subject to U.S. export controls.”<sup>107</sup> These broad subcategories do not provide sufficient guidance to companies involved in transactions and could be construed to encompass virtually any U.S. business. Moreover, these categories are not exclusive. As a result, both CFIUS and the President have almost limitless discretion by either applying these general categories broadly or by identifying another category of U.S. businesses causing national security considerations when acquired.

Regarding the second category, the Guidance provides even less information. Besides repeating that CFIUS will consider “all relevant facts and circumstances relevant to national security,” the Guidance simply notes that transactions resulting in foreign government control of U.S. businesses or assets will more often raise national security issues than corporate reorganizations.<sup>108</sup> In foreign government-controlled deals, CFIUS seeks to determine the purchaser’s capability to impair U.S. national security interests via its control of the U.S. business and the likelihood that it will do so. The Guidance lists certain factors relevant to this analysis<sup>109</sup> but does not give an indication of how these factors are addressed, examples of their application, or quantifiable explanations. Therefore, parties seeking to invest in the United States cannot readily understand how these factors will be applied prior to filing.

The directions regarding transactions when the acquirer is not a foreign government-controlled entity are similarly vague. The

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<sup>105</sup> *Id.* at 74569.

<sup>106</sup> *Id.* at 74570–71.

<sup>107</sup> *Id.* at 74571 (the Guidance does not provide any examples of industries or products falling under this category, nor does it give any examples of export laws to which the products have been subject).

<sup>108</sup> *Id.* at 74571.

However, as emphasized previously, the fact that a transaction presents a national security consideration does not necessarily mean that it poses a national security risk. First, risk requires not only threat, but also a vulnerability in U.S. national security. Second, the applicability of laws other than section 721 has often resolved any national security considerations identified by CFIUS when considering relevant national security factors. *Id.*

<sup>109</sup> *Id.* (stating that CFIUS takes into consideration all the circumstances such as the policies of the foreign person, etc.).

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Guidance first notes that these corporate reorganizations present national security concerns “only in exceptional cases,”<sup>110</sup> and it states once again that the Committee “considers all relevant national security factors.”<sup>111</sup> However, it does not provide any further explanation beyond one brief example.<sup>112</sup> Therefore, international businesspersons are once again left without meaningful direction from either §721(f) or the Guidance as to which transactions will be subject to the Committee’s national security review.

### 3.3.3. Annual Report

FINSA also requires CFIUS to submit an annual report on the covered transactions reviewed over the previous year. The Committee is directed to include information regarding what CFIUS considered to pose a national security threat, such as the industries and countries involved in the investments.<sup>113</sup> Most importantly, the regulations require CFIUS to include a detailed discussion of all perceived adverse effects of covered transactions on the national security or critical infrastructure of the United States that the Committee will take into account in its deliberations during the period before delivery of the next report, to the extent possible.<sup>114</sup>

Therefore, the annual report is designed to provide companies with a greater understanding of which transactions may be considered national security risks in future years based on data collected over previous years.<sup>115</sup> However, even though risk from

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<sup>110</sup> *Id.*

<sup>111</sup> *Id.*

<sup>112</sup> *Id.* (explaining one example of a corporate reorganization that would raise national security considerations).

<sup>113</sup> See 50 U.S.C. app. 2170(m)(2) (requiring “[c]umulative and, as appropriate, trend information on the business sectors involved in the filings which have been made, and the countries from which the investments have originated”).

<sup>114</sup> See *id.* at 265 (requiring the Committee to report “[t]he types of security arrangements and conditions” that it “has used to mitigate national security concerns about a transaction”).

<sup>115</sup> See Scott Morris, Remarks at Economic Politics and National Security: A CFIUS Case Study, 102 AM. SOC’Y INT’L L. PROC. 245, 253 (2008) (mentioning that “[o]ur hope is that it will provide a great deal of information to the public, including to the companies who are users of CFIUS, about what is expected of them, about how CFIUS is looking at these issues, and about how it is thinking about national security”).

FDI is closely linked to certain technologies and industries,<sup>116</sup> the publicly available version of the annual reports have only included vague information that is inadequate for parties seeking to invest in the United States.<sup>117</sup>

The annual report's discussion of sectors considered to be national security threats does not provide much clarity for foreign direct investors. Instead of providing a list of industries or technologies that are *prima facie* national security threats, the annual report simply breaks down the covered transactions filed from 2008 to 2012 into four broad categories and certain select subcategories. These categories are as follows: (1) Manufacturing; (2) Finance, Information, and Services; (3) Mining, Utilities, and Construction; and (4) Wholesale, Retail, and Transportation.<sup>118</sup> First, the plurality of covered transactions has been in the manufacturing category with 41% of all CFIUS filings from 2008–2012, and 48% of these transactions involved Computer and Electronic Products in 2012.<sup>119</sup> Second, the Finance, Information, and Services sector accounted for 33% of covered transactions, and the Professional, Scientific, and Technical Services subsector made up approximately half of the transactions in this sector in 2012.<sup>120</sup>

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<sup>116</sup> See Weimar, *supra* note 2, at 667 (“Rather, the risks posed by FDI tend to be less systematic and more related to individual assets, sensitive defense technologies, and critical domestic infrastructure.”).

<sup>117</sup> Although the Committee prepares a confidential version of the annual report that includes “information on the acquirer and the U.S. business acquired, including the nature of their business activities or products, and details on any withdrawal,” for each individual transaction CFIUS reviews, this information is not available publicly. See ANNUAL REPORT 2013, *supra* note 4, at 2.

<sup>118</sup> See ANNUAL REPORT 2013, *supra* note 4, at 4 (showing table breaking down the categories by sectors); see also ANNUAL REPORT 2010, *supra* note 5, at 3 (“Broad sectors are defined using North American Industry Classification System (NAICS) or Standard Industrial Classification (SIC) codes of the target company.”).

<sup>119</sup> See ANNUAL REPORT 2013, *supra* note 4, at 5 (showing percentages by category). The primary Manufacturing sectors include: (1) Computer and Electronic Products; (2) Machinery; (3) Transportation Equipment; (4) Electronic Equipment, Appliances, and Components; (5) Chemical; (6) Fabricated Metal Product; (7) Textile Product Mills; and (8) Leather and Allied Product. *Id.* at 5 (listing sub-sectors). For a breakdown of each sector into subcategories, see *id.* at 6–15; however, this information lacks specificity.

<sup>120</sup> See *id.* at 8–12 (breaking down Finance, Information, and Services into the follow subcategories: (1) Professional, Scientific, and Technical Services; (2) Telecommunications; (3) Real Estate; (4) Publishing Industries (except Internet); (5) Administrative and Support Staff; (6) Credit Intermediation and Related Activities; (7) Motion Picture and Sound Recording Industries; (8) Other Information Services; (9) Rental and Leasing Services; (10) Repair and Maintenance).

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Third, Mining, Utilities, and Construction has accounted for 18% of covered transactions, and the Utilities subsector accounted for approximately half of the covered transactions in 2012.<sup>121</sup> Finally, Wholesale and Retail Trade has accounted for 8% of covered transactions, and Support Activities for Transportation made up the largest subsector at 50% in 2012.<sup>122</sup> These statistics, however, provide little value to companies determining if their transaction is covered, because they provide the proportions of *covered* transactions by industry and do not indicate whether national security concerns were raised.

The annual report also provides a breakdown of covered transactions by the acquirer's home country,<sup>123</sup> including the sectors of the target's business, for the 2010–2012 period.<sup>124</sup> The most notable aspect of these tables is that the majority of the covered transactions involved an acquirer based in a country typically considered close allies of the United States. For example, investors from the United Kingdom accounted for 21%, the overwhelming plurality of covered transactions, and Canada and France accounted for another 10% and 9%, respectively, of covered transactions.<sup>125</sup> It is also important to note that the Committee did not note any clear investor tendencies based on the industry sector of the target company,<sup>126</sup> and the Committee did not believe there was a coordinated strategy by any country to obtain U.S. critical technologies.<sup>127</sup> Although these statistics illustrate that no acquirer host country is immune to review, companies will not be able to

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<sup>121</sup> See *id.* at 12–14 (providing a more detailed synopsis of covered transactions).

<sup>122</sup> See *id.* at 14–15 (giving a more elaborate summary of transactions that are covered).

<sup>123</sup> See *id.* at 17 (providing a synopsis of transactions by host country but noting that statistics do not account for the fact that some transactions involve multiple notices). But see Georgiev, *supra* note 57, at 133 (“At the same time, the adopted version of the Act avoids earlier proposals to rank countries based on their counter-proliferation and counter-terrorism policies. Such an approach would have rendered the review process more formulaic and less effectual.”).

<sup>124</sup> See ANNUAL REPORT 2013, *supra* note 4, at 18 (providing a breakdown of transactions by both sector and host country).

<sup>125</sup> See *id.* at 16–17 (noting the countries filing the most covered transactions).

<sup>126</sup> See *id.* at 17–18 (observing only a few examples of industry concentrations of investments by county).

<sup>127</sup> See *id.* at 25 (stating that there was no identifiable foreign government strategy to acquire critical U.S. technologies). For a breakdown of this analysis, see *id.* at 25–29.

discern anything *ex ante* about the national security implications of their transaction due to the lack of correlation between the countries and national security implications in the annual report.

The annual report's discussion of the perceived adverse effects of covered transactions on national security is even more limited and does not allow companies to make any reasonable predictions about the national security considerations raised.<sup>128</sup> The details provided basically amount to a restatement of the factors listed in §721(f) with slightly different wordings and with certain factors named explicitly.<sup>129</sup> The only technologies and industries mentioned explicitly are semiconductors, weapons and munitions manufacturing, aerospace, satellite, and radar systems, cyber security, and critical infrastructure.<sup>130</sup> However, the listing of these factors does not provide any greater clarity, because these factors are clearly encompassed within the broad spectrum of §721(f) and are seemingly obvious industries to be subject to some form of CFIUS review.<sup>131</sup> Finally, the report's future projections of considerations likely to arise merely states, "CFIUS will consider whether the transactions may have the above-listed or any other adverse effects in determining whether the transactions pose national security risk."<sup>132</sup> Thus, companies achieve no greater understanding of the scope of the national security review.

Therefore, the information considered in the annual report provides only a high-level analysis of covered transactions and does not provide companies with insight into whether CFIUS will consider their transaction covered. Moreover, the factors are not mandatory or dispositive, which leaves unbridled authority in CFIUS's hands when making national security determinations. Although some may argue that it will become easier for the Committee to identify trends and make predictions regarding their national security review as CFIUS matures in the post-FINSA

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<sup>128</sup> These reports are mandated under §721(m). See ANNUAL REPORT 2013, *supra* note 4, at 22 (considering "a broad range of national security considerations" and stating that the list is not exhaustive).

<sup>129</sup> See *id.* at 22-24 (stating the national security factors considered in 2012).

<sup>130</sup> See *id.* at 21-22 (listing the national security factors considered in 2012).

<sup>131</sup> See Zaring, *supra* note 33, at 131 (stating that "[d]efense contractors, raw materials providers, and high-technology industries are all particularly likely to be included in this encompassing view of what national security means in economic terms").

<sup>132</sup> See ANNUAL REPORT 2010, *supra* note 5, at 22-23.

era,<sup>133</sup> there is no evidence that CFIUS will provide more concrete guidance regarding its national security review. In fact, the Committee's reach seems to be expanding, adding further murkiness to the national security standard.

### 3.4. Future of CFIUS

An analysis of CFIUS's history shows that the scope of its powers has been gradually increasing since the Committee's creation in 1975. Most notably, the political reaction stemming from the Dubai Ports World controversy led to the passage of FINSA, which greatly increased the Committee's power and left the definition of national security open-ended. As a result, CFIUS can reach a seemingly limitless array of transactions, and its powers are likely to continue to expand as more transactions are considered covered and subject to CFIUS review. There is evidence that the Committee's review has already extended into other arenas and may be reaching beyond the "national security rubric" when evaluating transactions involving energy and critical infrastructure.<sup>134</sup> In addition, a recent congressional report recommended further extension of the Committee's powers,<sup>135</sup> and the President's powers under CFIUS are likely to continue to expand.<sup>136</sup> As a result, the costs explained in the following section are likely to grow until the CFIUS regulations are amended to include clear guidance on how it evaluates national security.<sup>137</sup>

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<sup>133</sup> See *id.* at 3 (noting the difficulty of identifying trends).

<sup>134</sup> See Morris, *supra* note 115, at 256 (discussing extending CFIUS's reach to other, non-national security arenas and noting it will look at how new factors are applied to energy and critical infrastructure to see if national security focus is maintained). For an example of how these interpretations have been extended, see discussion of Ralls Corp. in Section 4.6.1.

<sup>135</sup> See generally CHAIRMAN MIKE ROGERS & RANKING MEMBER C.A. DUTCH RUPPERSBERGER OF THE PERMANENT SELECT COMM. ON INTELLIGENCE, 112<sup>TH</sup> CONG., INVESTIGATIVE REP. ON THE U.S. NAT'L SEC. ISSUES POSED BY CHINESE TELECOMMS. COS. HUAWEI AND ZTE (Oct. 8, 2012), available at [http://intelligence.house.gov/sites/intelligence.house.gov/files/documents/Huawei-ZTE%20Investigative%20Report%20\(FINAL\).pdf](http://intelligence.house.gov/sites/intelligence.house.gov/files/documents/Huawei-ZTE%20Investigative%20Report%20(FINAL).pdf) (discussing how the Committee's powers should be expanded).

<sup>136</sup> See generally Section 4.6 (describing case studies where the expansion of authority may continue).

<sup>137</sup> See Cedarbaum & Preston, *supra* note 41, at 242-43 ("[C]ompanies can expect that more transactions will be reviewed and that more reviews will be exacting, resulting in full, formal investigations" and "they should expect longer-term interaction with, and oversight by, the relevant CFIUS agencies in the wake of any deal that raises national security concerns.").

#### 4. COSTS OF CURRENT REGIME

The lack of clarity regarding “national security” in the CFIUS regulations imposes significant costs on parties engaging in cross-border transactions due to the uncertainty regarding which transactions may be subject to review and the delays caused by the CFIUS review and investigation process. This also increases the Committee’s review costs, because many companies do not suspect that their deal will be subject to CFIUS review and do not file a voluntary notice or do not provide adequate filings. Thus, although the Committee provides annual reports on the deals subjected to CFIUS review, the figures provided do not accurately reflect the effects that failing to provide sufficient direction on the national security review inflicts on parties engaging in cross-border deals. In addition, many transactions are withdrawn while undergoing CFIUS review or break down due to the restrictions imposed by the regulations.<sup>138</sup> Finally, many countries have created similar government bodies, exposing U.S. businesses seeking to invest abroad to retaliatory measures. As a result, the lack of clarity surrounding the national security provision in the CFIUS regulations imposes costs that far exceed any reportable statistics.

##### 4.1. *Early Concerns*

Concerns regarding the lack of a national security definition predate the enactment of FINSA, as many commenters on the regulations noted the potential costs that failing to provide a definition would have for foreign direct investors.<sup>139</sup> Chief among

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<sup>138</sup> See ANNUAL REPORT 2013, *supra* note 4, at 19 (“In 2012, CFIUS approved withdrawal of 22 notices. The parties withdrew two notices during the 30-day review period and twenty notices after the commencement of the 45-day investigation period. In ten cases, parties re-filed in 2012, and CFIUS concluded action in those cases. In two cases, the parties re-filed in 2013. In the remaining cases, the parties abandoned the transaction for commercial reasons or in light of CFIUS’s national security concerns, as described above. As noted previously, the number of withdrawals in 2012 is a function of the specific facts and circumstances of the particular transactions reviewed by the committee.”). Parties may be withdrawing because these delays make the transaction no longer feasible.

<sup>139</sup> See Fed. Reg., *supra* note 1, at 70705 (discussing commenters’ statements regarding the scope of 31 C.F.R. § 800.101 and the implications of failing to define national security); Shearer, *supra* note 3, at 1768 (“One of the most consistent complaints directed at the statute concerns its failure to articulate clear guidelines for determining what type of transaction may impair national security.”) (citations

these concerns was that the ambiguity of the national security factors could be used for protectionist purposes,<sup>140</sup> which would negatively impact the U.S. economy.<sup>141</sup> Therefore, prior to the broadening of CFIUS's power under FINSA, commentators had already recommended that the Committee truly define national security by providing a list of technologies, industries, or countries raising national security concerns, or by creating a multi-factor test to make national security determinations.<sup>142</sup> Despite these comments, the final regulations note that national security reviews must maintain flexibility and be conducted on a case-by-case basis.<sup>143</sup> While this greatly increases the Committee's authority, these early concerns regarding the costs of this uncertainty have proven correct.

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omitted).

<sup>140</sup> See Shearer, *supra* note 3, at 1735 ("While Exon-Florio ostensibly serves the legitimate purpose of helping to protect U.S. national security, its vague parameters and elastic provisions create a potent protectionist weapon that virtually invites abuse.") (citations omitted).

<sup>141</sup> See *id.* at 1733 ("If Congress does not define and narrow Exon-Florio's scope, this attitude may soon find expression at the expense of foreigners seeking to invest in the United States, and ultimately, to the detriment of the U.S. economy.").

<sup>142</sup> See Byrne, *supra* note 16, at 869-70 ("Various requests were made to Treasury to define national security in the mergers and acquisitions context by positive or negative lists, or by creating a multi-factor test. However, Treasury rejected these suggestions because they were too limiting on the President's ability to affirmatively act to protect national security, and provided insufficient guidance to corporations; rather Treasury stated that 'national security' should be 'interpreted broadly and without limitation to particular industries.' The Committee also refused to issue guidelines outside of the Code of Federal Regulations to generally describe national security, or to issue summaries of its decisions.").

<sup>143</sup> See Fed. Reg., *supra* note 1, at 70705 (discussing case-by-case approach adopted in § 800.101). Also note that some people thought the regulations were not strong enough for national security purposes, but they still thought the national security factors were too vague. See Georgiev, *supra* note 57, at 129 ("Prominent among the criticisms was the view that because CFIUS is chaired by the Department of the Treasury, economic concerns would prevail over national security concerns. Furthermore, the definition of 'national security' was sometimes interpreted too narrowly and the list of factors used to evaluate national security threats was viewed as too vague."); *id.* at 133 ("Because consideration of these factors is neither mandatory nor dispositive, their addition does not place rigid constraints on the CFIUS process, but it does suggest that the process would be more probing. At the same time, the adopted version of the Act avoids earlier proposals to rank countries based on their counter-proliferation and counter-terrorism policies. Such an approach would have rendered the review process more formulaic and less effectual.").

#### 4.2. Available Data

The annual reports filed by CFIUS provide statistics regarding the number of CFIUS reviews and the measurable financial impact of these reviews.<sup>144</sup> When taken at face value, these statistics should not “strike terror into the hearts of foreign direct investors.”<sup>145</sup> Indeed, as of 2010, CFIUS had only recommended that the President block a transaction on five occasions,<sup>146</sup> and the President recently blocked a transaction following CFIUS review for only the second time in history.<sup>147</sup> According to some, the first instance, President Bush’s MAMCO order,<sup>148</sup> “begged presidential action” due to the unique nature of the transaction.<sup>149</sup> However, the impact of the Committee’s actions extends “far beyond sample statistics,” because “[b]locking a transaction is a crude tool and serves no purpose when more subtle remedies are available.”<sup>150</sup> Thus, CFIUS review often causes parties to withdraw from close-to-complete transactions without taking any formal action to block

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<sup>144</sup> The public version of the report contains only vague information, whereas the classified version contains significantly more detail. See ANNUAL REPORT 2013, *supra* note 4, at 2 (stating that tables containing information about the acquirer and the U.S. business acquired is contained in the classified report but that the public report contains only aggregate data). This is partially due to companies’ concerns about disclosure of their confidential information. See Weimar, *supra* note 2, at 235 (noting companies’ concerns about the disclosure of their information in reports to Congress).

<sup>145</sup> See Zaring, *supra* note 33, at 106 (indicating that CFIUS actions have remained relatively stable).

<sup>146</sup> *Id.* at 105 (“Over the life of CFIUS, the Committee has recommended to the president that an acquisition be prohibited in only five cases; in all but one of those cases, the president allowed the acquisition to proceed.”).

<sup>147</sup> See Section 1. See also ANNUAL REPORT 2013, *supra* note 4, at 2 (noting that the President blocked Ralls Corporation’s wind farm project as a result of the company’s Chinese ownership).

<sup>148</sup> See Order on the China National Aero-Technology Import and Export Corporation Divestiture of MAMCO Manufacturing, Inc., in PUBLIC PAPERS OF THE PRESIDENTS OF THE UNITED STATES BOOK I, 143 (1990) [hereinafter Order] (prohibiting acquisition by MAMCO due to national security concerns).

<sup>149</sup> See Zaring, *supra* note 33, at 104–05 (“That case . . . involv[ed] . . . an American airplane parts manufacturer and a Chinese company that was [sic] both owned by China’s Ministry of Aerospace Technology and affiliated with the People’s Liberation Army.”).

<sup>150</sup> See *id.* at 106 (“When the subtlety of the remedy is taken into account, the Treasury says, ‘CFIUS has been very successful.’”) (quoting U.S. TREASURY DEP’T, STAFF ANALYSIS OF THE ECONOMIC STRATEGY INSTITUTE’S REPORT: FOREIGN INVESTMENT IN THE UNITED STATES, UNENCUMBERED ACCESS 2 (1991)).

the transaction.<sup>151</sup> Although the number of transactions withdrawn in such a manner was initially not very large,<sup>152</sup> it has likely increased dramatically since FINSA. As a result, a greater number of transactions are being prevented “with a wink and a nudge,” but statistics of these instances are unobtainable.<sup>153</sup> Therefore, when evaluating these statistics, it is important to remember that the impact is much greater than the statistics provided.<sup>154</sup>

Given the significant strengthening of the Committee’s powers under FINSA and the scarcity of available data, only the statistics compiled since 2008 are relevant to this analysis.<sup>155</sup> In addition, it is also important to note that the revision of the regulations coincides with the 2008 financial crisis, which has significantly

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<sup>151</sup> See *id.* at 107 (“[O]bservers like Eliot Kang have been persuaded that ‘CFIUS’s investigatory scrutiny has led a number of foreign buyers to withdraw from ‘done-deals’ or modify the terms of purchase.’ For example, informal consultations may have deterred Dubai’s sovereign wealth fund from following through on two recent proposed acquisitions of American assets. The managing director of the fund noted that the deals ‘might meet political opposition in the U.S.’ though it is hard to know whether this opposition came from Congress or reflected pressures from CFIUS itself.”) (quoting C.S. Eliot Kang, *U.S. Politics and Greater Regulation of Inward Foreign Direct Investment*, 51 INT’L ORG. 301, 334 (1997)).

<sup>152</sup> See *id.* at 108 (“[T]here is reason for some skepticism about the possibility that the Committee is a blocking machine. The news stories that do report that mergers have failed on word from CFIUS are few, despite the fact that failed mergers are actively covered in the business press. The Treasury Department has said that the Committee approves most deals without a peep, and it downplays the threat posed by the Committee when it meets with foreign officials. Accordingly, the isolated cases of blockage that we do know about look more like rare exceptions rather than exemplars of the rule.”).

<sup>153</sup> See *id.* (“Accordingly, it is possible that CFIUS frequently blocks foreign acquisitions with a wink and a nudge—we simply do not, and probably cannot, collect the data on the subject, with only news stories and fleeting allusions in reorganization opinions to guide us.”). There is also no guidance as the number of mitigation agreements entered into. See *id.* (“It is hard to say how frequently CFIUS imposes these agreements, as it does not report on the number of mitigation agreements that it has concluded (or, for that matter, on anything other than to Congress, and even then reports are often confidential . . . . [M]embers of the Committee themselves have often said that conditions are rarely imposed on foreign acquisitions . . . .”).

<sup>154</sup> See Georgiev, *supra* note 57, at 129 (“When evaluating these criticisms, it is important to remember that the number of foreign acquisitions that require CFIUS review is very small and that the potential for harm in the form of negative business attitudes towards U.S. firms abroad is disproportionately large”).

<sup>155</sup> For statistics from the years prior to the passage of FINSA, see generally Weimar, *supra* note 2; see also Zaring, *supra* note 33, at 104–06 (providing table of the aggregate CFIUS data from September 1998 until December 2007 and a chart on changes in CFIUS notifications over time).

reduced the amount of FDI in recent years.<sup>156</sup> From 2008 to 2012, a total of 538 notices were filed with the Committee, resulting in 168 investigations, 32 withdrawals during review, 38 withdrawals during investigation, and one presidential decision.<sup>157</sup> These statistics indicate that the number of transactions being reviewed, as well as the number undergoing CFIUS investigation, is much higher than prior to the passage of FINSA.<sup>158</sup> Although the number of notices dropped significantly due to the financial crisis, the number of notices and investigations has since increased annually.<sup>159</sup> In 2012, the number of notices withdrawn after commencement of an investigation increased from five in 2011 to 20 in 2012, and the President blocked a transaction for the first time since 1990.<sup>160</sup> These transactions represent a small percentage of the total of such FDI flows into the United States, and the Committee is not notified of many of the covered transactions reviewed each year. This suggests that many companies are unaware of CFIUS's reach, or do not believe their transactions are potentially subject to the CFIUS process. Therefore, providing greater certainty through revisions to the CFIUS regulations could affect significantly more transactions than the numbers reported here.

Information about the financial value of the deals subjected to the CFIUS process is even sparser. The only monetary value provided in the annual report is the estimated \$542 million value of seven transactions with identifiable values involving investors from countries complying with the boycott of Israel in 2012;<sup>161</sup>

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<sup>156</sup> See generally Eric Lipton, *Questions on Security Mar Foreign Investments*, N.Y. TIMES (Dec. 17, 2009), <http://www.nytimes.com/2009/12/18/business/18invest.html>. See also ANNUAL REPORT 2010, *supra* note 5, at 2 ("There was a significant decline in the number of notices from 2008 to 2009, coinciding with the global financial crisis, followed by an appreciable increase in 2010").

<sup>157</sup> See ANNUAL REPORT 2013, *supra* note 4, at 3 (providing table breaking down deals).

<sup>158</sup> See Georgiev, *supra* note 57, at 129 ("The transactions which CFIUS needed to investigate comprise only two percent of the total number of notified transactions.").

<sup>159</sup> *Id.*

<sup>160</sup> See *id.*; see also *infra* Section 4.6.1.

<sup>161</sup> There were 18 transactions involving countries that boycott Israel; however, only seven had identifiable values. The transactions included: nine from the United Arab Emirates, five from Qatar, two from Kuwait, one from Lebanon, and one from Venezuela. See ANNUAL REPORT 2013, *supra* note 4, at 30. In 2010, five of the deals were from the United Arab Emirates and totaled a value

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however, the annual report itself acknowledges that this figure has no representative value relative to the entirety of the CFIUS process.<sup>162</sup> First, this represents only seven of the 93 transactions filed with CFIUS. Second, this only includes the publicly reported values of those seven transactions, and most transactions do not make this information public.<sup>163</sup> Therefore, this financial data is of virtually no predictive value but can be assumed to be significantly larger than reported based on the following direct and indirect effects.

#### 4.3. Uncertainty & Delay

The most apparent of the additional costs that can be attributed to failing to adequately inform parties about the national security evaluation are the financial costs of uncertainty and delay. First, it is both a commonly understood economic principle and a foundational principle of contract law that uncertainty is extremely detrimental in the business context. By reducing uncertainty, parties are better able to make informed business decisions in the present and plan for future business arrangements. Therefore, the uncertainty surrounding how "national security" will be interpreted can impose severe costs onto the parties to the transaction.<sup>164</sup> Second, the entirety of the CFIUS review process can take ninety days for one transaction.<sup>165</sup> This can decrease the

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of \$1.353 billion. One transaction was from Kuwait and was valued at \$40 million. One transaction was from Lebanon and had no reported value. *Id.* at 32. Four of the transactions involved information services valued at \$1.113 billion. One transaction involved commercial space travel and was valued at \$280 million. One transaction each involved semiconductors and telecommunications services, but neither had a reported value. See ANNUAL REPORT 2010, *supra* note 5, at 34.

<sup>162</sup> See ANNUAL REPORT 2010, *supra* note 5, at 33–34.

<sup>163</sup> *Id.* at 33.

<sup>164</sup> See Shearer, *supra* note 3, at 1768 (“[B]ecause the ‘national security’ standard is susceptible to various interpretations, foreign investors face many uncertainties when structuring acquisitions involving a company engaged in U.S. interstate commerce.”) (citations omitted). One benefit of voluntarily filing is reducing this uncertainty. See Byrne, *supra* note 16, at 888 n.221 (noting that “[s]ome in the business world argue that the lack of a definition creates uncertainty, and criticize the fact that the approach to national security depends on the particular views of the presidential administration in place at any particular time.”) (citations omitted); Georgiev, *supra* note 57, at 128 (discussing the potentially “waste[d] resources” involved in transactions that are unlikely to receive CFIUS approval).

<sup>165</sup> If the Committee conducts the 30-day review, 45-day investigation, and 15-day presidential decision process, then Committee approval will take 90 days.

value of the deal and expose it to many risks, particularly in the volatile international business context,<sup>166</sup> and has the potential to make the deal no longer profitable or desirable. Taken together, this uncertainty can lead to a chilling effect that discourages foreign businesses from investing in the United States. However, if parties were able to determine whether their transaction raises national security concerns and is subject to this delay, they could contract in a manner that reduced the financial impact of the delay. Therefore, by reducing the uncertainty and unexpected delays stemming from CFIUS's national security review, FDI would be more profitable.<sup>167</sup>

#### 4.4. Increase in Review Costs

Businesses are not the only parties that would benefit from greater clarity regarding how national security is evaluated—CFIUS's operating costs would also be reduced dramatically without sacrificing the effectiveness of its review. Although the regulations and the Guidance were intended to prevent companies from pursuing transactions destined to be blocked and to encourage interaction between businesses and the Committee, interaction between CFIUS and the private sector is extremely limited.<sup>168</sup> Since CFIUS does not provide adequate direction on its national security evaluations, many companies falsely assume that their transaction will not require review.<sup>169</sup> This stems from either a general lack of awareness of the Committee or certain incorrect, yet reasonable, assumptions businesses make about CFIUS's national security review.<sup>170</sup> Therefore, instead of anticipating the Committee's review and filing a sufficient notice, businesses are caught off guard when CFIUS requests a filing. This often leads to hastily prepared filings or contentious interactions between CFIUS

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<sup>166</sup> For example, currency values may change during this period of delay.

<sup>167</sup> See Cedarbaum & Preston, *supra* note 41, at 252 (stating that an effective regime would identify and resolve national security concerns "before the transaction is formally submitted for review") (emphasis added).

<sup>168</sup> See Georgiev, *supra* note 57, at 128 (acknowledging the benefits of filing voluntary notice but stating that "the dialogue between the regulator and companies has halted in the aftermath of the DP World controversy").

<sup>169</sup> See Section 4.6.1 (detailing a circumstance which required review).

<sup>170</sup> For a discussion of common misperceptions about the CFIUS process, see *Common Misconceptions Regarding CFIUS and the CFIUS Process*, JONES DAY COMMENTARY (June 2012), [http://www.jonesday.com/common\\_misconceptions\\_regarding\\_cfius/](http://www.jonesday.com/common_misconceptions_regarding_cfius/).

and the businesses,<sup>171</sup> which unnecessarily wastes CFIUS resources that could be saved if the businesses provided sufficient, timely filings that allowed for a more efficient review. This could help counteract concerns that providing clear guidance regarding national security would expose the United States to increased risk. The Committee has historically struggled to identify all transactions subject to review, meaning that the Committee never reviews certain threatening transactions, or it reviews them after closing.<sup>172</sup> This is likely to continue as FDI increases following the recession and as the scope of the Committee's review grows, which could make the process "unwieldy."<sup>173</sup>

Therefore, by providing businesses with a clear understanding of which transactions may raise national security concerns, CFIUS could reduce its costs in two significant ways. First, CFIUS could reduce its costs of monitoring all FDI to identify potentially threatening transactions that have not been filed with the Committee. This would also have the added benefit of reducing the likelihood that a threatening transaction goes unnoticed. Second, the Committee could reduce its costs during the review and investigation stages, because businesses would be more likely to file voluntary notices containing all the necessary information for the Committee to make a national security determination. In an era of tightening government budgets, these savings would undoubtedly be welcome.

#### 4.5. Retaliatory Measures

Retaliatory measures by foreign direct investors and their host countries pose another immeasurable, though possibly the largest, cost of failing to offer clear guidance on which transactions will be subject to national security review.<sup>174</sup>

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<sup>171</sup> Examples include Ralls Corp. and Firstgold. See generally Section 4.6.1; see also Matthew C. Sullivan, *Mining for Meaning: Assessing CFIUS's Rejection of the Firstgold Acquisition*, 4 BERKELEY J. INT'L L. PUBLICIST 12, 15 (2010) (citing Firstgold as "a reminder to all foreign investors of the perils they may face if ill-prepared for the CFIUS review process").

<sup>172</sup> See Shearer, *supra* note 3, at 1769 (stating that "many potentially threatening foreign acquisitions escape CFIUS's attention" because of the lack of guidance).

<sup>173</sup> See Weimar, *supra* note 2, at 676 ("As greater swaths of FDI become subject to CFIUS review, the process threatens to become unwieldy.").

<sup>174</sup> International law permits exceptions for national security reasons. See RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 407 (1987) (permitting exceptions to the presumption of extraterritoriality based on the

In response to actions by the Committee that are seen as protectionist,<sup>175</sup> foreign businesses and governments often respond by taking measures that decrease international business opportunities for the United States and its companies. The potential damages to the U.S. economy are severe since the U.S. trade deficit is already over \$34 billion.<sup>176</sup> These measures take two separate forms: (1) avoiding future investment opportunities in the United States and (2) preventing FDI by the United States.<sup>177</sup> This is particularly likely to occur with China, which has already implemented a similar regulatory body that could block U.S. investment in China.<sup>178</sup> Although it is difficult to establish a direct link between CFIUS's actions and these retaliatory measures or to quantify the costs of these retaliatory measures, there is sufficient evidence to show that these costs are significant and likely to increase.

#### 4.5.1. Avoiding Future Investments

Businesses value certainty<sup>179</sup> and freedom from intervention by regulatory bodies. Therefore, as foreign direct investors become

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"effects" and "protective" principles).

<sup>175</sup> See Sullivan, *supra* note 171, at 16, 17 (citing the Firstgold case which indicates that CFIUS actions occasionally result in retaliatory action).

<sup>176</sup> See Lucia Mutikani, *Weak Imports Drive U.S. Trade Deficit to Four-Year Lows*, REUTERS (Jan. 7, 2014, 1:02 PM), available at <http://www.reuters.com/article/2014/01/07/us-usa-economy-idUSBREA060HJ20140107> (stating that "[t]he trade gap [has fallen] 12.9 percent to \$34.3 billion," according to the U.S. Commerce Department).

<sup>177</sup> See Sullivan, *supra* note 171, at 17 (summarizing that "the critical *Global Times* editorial argued that CFIUS's reaction 'would hold back many thriving Chinese companies from investing in the attractive but politically dangerous American market,' and warned of a belief 'in some quarters that striking down Firstgold investment proposal, although it is small, may deal a blow to U.S.-China relations. It probably will.'") (citing Editorial, *Toxic Mood over China's Investment in the US*, GLOBAL TIMES (Dec. 23, 2009), [http://opinion.globaltimes.cn/editorial/2009-12/453755\\_2.html](http://opinion.globaltimes.cn/editorial/2009-12/453755_2.html)); see also Shearer, *supra* note 3, at 1769 ("[F]oreign direct investment into the United States will decrease and foreign countries are likely to retaliate by increasing the barriers to U.S. companies seeking to invest abroad.").

<sup>178</sup> See generally *China Publishes Final Rules on the National Security Review of Foreign Investment in Chinese Companies*, JONES DAY COMMENTARY (Sept. 2011), [http://www.jonesday.com/china\\_publishes\\_final\\_rules/](http://www.jonesday.com/china_publishes_final_rules/) (remarking that China has implemented new rules that provide for review and potential rejection of acquisitions of Chinese companies by foreign investors where such acquisitions could affect national security).

<sup>179</sup> See Section 4.3 (delving into how uncertainty affects business).

more aware of transactions subjected to CFIUS review, they will become increasingly wary of investing in the United States.<sup>180</sup> Although these decisions cannot be directly linked to Committee actions, decreases from particular regions or countries seem to coincide with high profile actions taken by the Committee. For example, analysts estimate that “foreign investment in the United States originating from the United Arab Emirates alone fell by over \$1 billion in 2006” as a result of the Dubai Ports World controversy.<sup>181</sup> Similar statistics likely stem from other high-profile actions by the Committee, such as the Firstgold,<sup>182</sup> CNOOC,<sup>183</sup> and Ralls Corporation (“Ralls Corp.”)<sup>184</sup> incidents, each of which involved attempted investments by Chinese corporations. These responses will be exacerbated by the expansion of national security into other non-traditional defense industries like wind energy, because foreign businesses will be uncertain whether their technology fits into the virtually limitless application of national security.<sup>185</sup>

#### 4.5.2. Preventing FDI from the United States

Foreign governments are also likely to take retaliatory measures to prevent FDI by U.S. businesses within their borders if they perceive actions by the Committee as protectionist. By adding the critical infrastructure and critical technology, the factors used when making national security determinations have been criticized as “broadly over-inclusive,” which “threatens to send the message that the United States is taking an increasingly protective stance toward FDI.”<sup>186</sup> Indeed, many perceive CFIUS as a tool for

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<sup>180</sup> See Sullivan, *supra* note 171 (observing that Chinese investors continue to fear U.S. resistance to acquisitions, which would result in the likelihood of decreased investments due to uncertainty).

<sup>181</sup> See Georgiev, *supra* note 57, at 131 (indicating that investment in the United States decreased as a result of the Dubai Ports World controversy) (citing *DP World's Long Shadow*, THE ECONOMIST (June 14, 2007), at 74-75).

<sup>182</sup> See Sullivan, *supra* note 171 (recognizing the impact of the Firstgold case on foreign businesses).

<sup>183</sup> See generally Section 3 (discussing the CNOOC investment).

<sup>184</sup> See Section 4.6.1 (describing the investment by Ralls Corp.).

<sup>185</sup> See Cedarbaum & Preston, *supra* note 41 (analyzing the national security provisions as a “wide-open” standard and remarking that “[v]irtually any deal involving foreign interests on the acquiring side and U.S. assets on the acquired side is a possible candidate for CFIUS review”).

<sup>186</sup> See Weimar, *supra* note 2, at 677 (criticizing the FINSA as being “overinclusive”); Georgiev, *supra* note 57, at 125 (“The frequent political

protectionist measures,<sup>187</sup> and the broad nature of the national security definition could allow for more protectionist actions in the future.<sup>188</sup> Whether or not these claims are valid, the perception of protectionism by the United States is likely to strain international relations<sup>189</sup> and can lead to retaliatory measures that block U.S. foreign investment within that country.<sup>190</sup>

Many countries have begun implementing CFIUS-style bodies

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opposition to foreign acquisitions can be driven not only by genuine national security concerns, but also by protectionist impulses.”); *see also* Sullivan, *supra* note 171 (noting the political opposition to acquisitions by foreign investors).

<sup>187</sup> *See* Pudner, *supra* note 14, at 1292 (“While CFIUS serves a vital role in protecting the national security of the United States, it can, and has been, abused as a tool for economic protectionism by U.S. companies and their Congressional cohorts.”); *see id.* at 1292 (stating the adoption of certain measures such as the “Exon-Pill in order to avoid an unwanted takeover attempt”) (citing Paul I. Djuricic, Comment, *The Exon-Florio Amendment: Protectionist National Security Legislation Susceptible to Abuse*; 30 HOUS. L. REV. 179, 193 (1991)); Matthew C. Sullivan, *CFIUS and Congress Reconsidered: Fire Alarms, Police Patrols and a New Oversight Regime*, 17 WILLIAMETTE J. INT’L L. & DISP. RESOL. 199, 206 (2009) (providing evidence of examples where “members of Congress opposing on national security grounds proposed transactions that would reduce jobs or otherwise inflict economic harm on their constituents”). However, these concerns may not be relevant with all transactions. *See also* Sullivan, *supra* note 187, at 238 (stating that “despite some concern that the Firstgold rejection represents a continuation of perceived U.S. hostility to Chinese investment, there is no evidence that CFIUS’s actual determination was based on considerations other than the unusual circumstances that this transaction presented.”).

<sup>188</sup> *See* Byrne, *supra* note 16, at 890 (“The risk of this lack of a definition of national security, of course, is that this gap could be exploited by a future protectionist-minded presidential administration to block transactions which properly should not be deemed to be national security threats.”) (citing Editorial, *Ports of Gall*, WALL ST. J. (Feb. 25, 2006), at A10); *see* Casselman, *supra* note 29 (“[I]t is in our interest and that of the global economy that China continue to progress toward becoming a more market-based, productive and dynamic economy . . . . For our part, it is essential that we do not put that outcome, or our future, at risk with a step back into protectionism.”) (quoting former Federal Reserve Chairman Alan Greenspan).

<sup>189</sup> *See* Georgiev, *supra* note 57, at 130 (noting that “the increased interplay between the regulatory framework of countries seeking to attract foreign investment suggests that the CFIUS regime can have unintended international effects”).

<sup>190</sup> *See id.* at 126 (“If the United States is seen as using national security review to engage in protectionism, this could provoke a protectionist backlash in other parts of the world and hurt U.S. companies.”); *see also* Sullivan, *supra* note 171, at 15 (explaining that “CFIUS’s substantive determination may also prove to be significant; although no evidence exists suggesting that the rejection [of Firstgold’s proposed transaction] should be interpreted as part of a broader protectionist shift in U.S. investment policy, the decision—barring further clarification from CFIUS agencies—could further escalate trade tensions.”).

that the governments could use for protectionist purposes under the guise of national security review. Some prominent examples include major U.S. trade partners like Canada, Germany, China, and the European Union.<sup>191</sup> Most notably, Article 12 of China's 2006 Provisions on Acquisition of Domestic Enterprises by Foreign Investors installs a similar body to conduct national security reviews, leading to concerns that China will use this body for protectionist purposes.<sup>192</sup> However, the scope of its national security review is "even murkier and less efficient"<sup>193</sup> due to its "vague and as-yet-undefined process and lack of investor protections."<sup>194</sup> As a result, China could respond to CFIUS's actions blocking Chinese investment in the United States, such as the recent prohibition of the Ralls Corp. investment,<sup>195</sup> and prevent an even wider array of U.S. FDI in China. Therefore, by providing clear guidelines regarding what transactions raise national security concerns, the United States could potentially increase FDI, calm political tensions, and create more opportunities for U.S. businesses to invest abroad.

#### 4.6. Case Studies

Four recent case studies demonstrate the increasing recognition

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<sup>191</sup> See Georgiev, *supra* note 57, at 130-31 (stating that "[i]n recent years, a number of jurisdictions have begun establishing CFIUS-style bodies or procedures, including major U.S. trade partners, such as China, Canada, Germany, and the European Union."); see also Pudner, *supra* note 14, at 1297 ("In July 2007, German Chancellor Angela Merkel called for a European Union-wide national security review mechanism based on the CFIUS model. In so recommending, Merkel was careful to advise against the French model in which 'a law defines strategic industries in a very broad way.'") (citing Greg Hitt, *U.S. Foreign-Investment Debate Goes Global: If Congress Sets Tighter Restrictions, Other Countries Could Enact Their Own Limits*, WALL ST. J. (May 30, 2006), at A4 and quoting Hugh Williamson, *Merkel Seeks European-Wide Vetting of Foreign Acquisitions*, FIN. TIMES (July 19, 2007), at 6).

<sup>192</sup> See Eric Jensen, Comment, *Balancing Security and Growth: Defining National Security Review and Foreign Investment in China*, 19 PAC. RIM. L. & POL'Y J. 161, 162 (2010) (stating that "[i]nvestors fear that developing economies, including China, are becoming increasingly protectionist under the guise of national security review. Article 12 of China's 2006 Provisions on Acquisition of Domestic Enterprises by Foreign Investors (2006 M&A Provisions) allows such review.") (citing Provisions on Mergers and Acquisitions of Domestic Enterprises by Foreign Investors, art. 12 (2006) (China)). See generally *id.* (discussing in detail China's national security review process).

<sup>193</sup> *Id.* at 161.

<sup>194</sup> *Id.* at 162.

<sup>195</sup> See Section 4.6.1 (detailing the Ralls Corp. case).

of CFIUS as a barrier to FDI, the breadth of CFIUS's national security review, and the costs this imposes on foreign direct investors, U.S. businesses, and the federal government. These cases are Ralls Corp.'s attempted purchase of U.S. wind farms, the failed merger between BAE Systems Plc ("BAE") and European Aeronautic, Defence & Space Co. ("EADS"), the congressional report recommending that CFIUS block all U.S. investments by Huawei Technologies Co. Ltd. ("Huawei") and ZTE Corporation ("ZTE"), and the approved acquisition of pork producer Smithfield Foods Inc. by China's Shuanghui International Holdings Ltd.<sup>196</sup> By discussing these examples, this paper is not stating an opinion as to whether the transactions should be permitted either under the current regulations or under the proposed revisions. However, these cases highlight the costs of the current vagueness of the national security prong in the CFIUS regulations and how providing greater clarity could reduce costs for both businesses operating internationally and the Committee.

#### 4.6.1. Ralls Corp.

President Obama's order that Ralls Corporation divest its interest in four wind farm projects in Oregon in 2012 represents

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<sup>196</sup> While these proposed transactions represent the most significant examples of the Committee's growing powers, many other notable transactions have recently undergone CFIUS review. For example, the Committee forced the Indian company Polaris Financial Technology Ltd. to divest its 85.3% interest in IndenTrust Inc., a US company specializing in digital authentication services for secure cloud computing. See GOODWIN PROCTER, Publication, *CFIUS Invokes National Security in Ordering Indian Company to Divest Equity in U.S. Company* (Sept. 27, 2013), available at [http://www.goodwinprocter.com/Publications/Newsletters/Client-Alert/2013/0927\\_CFIUS-Invokes-National-Security-in-Ordering-Indian-Company-to-Divest-Equity-in-US-Company.aspx?article=1](http://www.goodwinprocter.com/Publications/Newsletters/Client-Alert/2013/0927_CFIUS-Invokes-National-Security-in-Ordering-Indian-Company-to-Divest-Equity-in-US-Company.aspx?article=1) (mentioning that Polaris Financial Technology Ltd. were ordered to divest 85.3% by CFIUS). While Polaris was forced to divest, the nature of the services provided and the company's provision of services to government agencies make the Committee's action less surprising. Another example is the approved acquisition of the Canadian company Nexen by CNOOC. Michael J. De La Merced, *Nexen Secures Approval of its Sale to Cnooc of China*, N.Y. TIMES (Feb. 12, 2013, 9:10 AM), available at <http://dealbook.nytimes.com/2013/02/12/nexen-secures-u-s-approval-of-its-sale-to-cnooc-of-china/>. An additional example is the sale of A123 Systems, a car battery manufacturer, to the Wanxiang Group. See *id.* Finally after the parties agreed to mitigation measures, CFIUS approved the acquisition of Sprint, the United States' third largest mobile carrier, by the Japanese company Softbank. See Ziad Haider, *China Inc. and the CFIUS National Security Review*, THE DIPLOMAT (Dec. 5, 2013), available at <http://thediplomat.com/2013/12/china-inc-and-the-cfius-national-security-review/1/>.

perhaps the most striking example of the potential costs imposed by the array of transactions that CFIUS may deem national security threats.<sup>197</sup> The order came after the Committee initiated a review, entered an interim order banning all further work on the project while the review was conducted, and even negotiated a mitigation agreement with Ralls Corp.<sup>198</sup> After CFIUS determined that it was unable to reach a national security determination during the investigation, it referred the transaction to the President to either block or approve. For the first time in twenty-two years,<sup>199</sup> and just the second time ever,<sup>200</sup> the President exercised his authority under the CFIUS regulations to block a transaction due to national security concerns.<sup>201</sup>

Two executives of Sany Group Company, China's largest machinery manufacturer,<sup>202</sup> own Ralls Corp., thereby satisfying the

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<sup>197</sup> See ANNUAL REPORT 2013, *supra* note 4, at 2 (noting that the President issued an order to prevent the acquisition and ownership of four projects owned by Ralls Corp). Ralls Corp. was required to remove all property within two weeks and to divest all interests within 90 days. The order replaced an interim order banning further construction. See Sara Forden, *Chinese-Owned Company Sues Obama over Wind Farm Project*, BUS. WK. (Oct. 12, 2012), <http://www.businessweek.com/news/2012-10-02/obama-bars-chinese-owned-company-from-building-wind-farm>. The Ralls Corp. case is strikingly similar to the Firstgold transaction in which a Chinese company attempted to take over a mining facility located near Fallon Naval Air Station. The proposed deal was withdrawn after CFIUS recommended that President Obama block the transaction but prior to an order from the President. For a discussion of the Firstgold rejection, see generally Sullivan, *supra* note 171.

<sup>198</sup> See Forden, *supra* note 197 (explaining the timeline of the Ralls Corp. rejection). For a discussion of the mitigation agreement, see Stan Abrams, *Beating a Dead Horse: Chinese Investment and the U.S. National Excuse*, BUS. INSIDER (Oct. 19, 2012, 2:15 AM), <http://www.businessinsider.com/ beating-a-dead-horse-chinese-investment-and-the-us-national-security-excuse-2012-10> (discussing the mitigation agreement).

<sup>199</sup> See Order, *supra* note 148 (blocking MAMCO's proposed acquisition); see also Forden, *supra* note 197 (stating that the Ralls Corp. order was the first time the President has blocked a transaction in 22 years).

<sup>200</sup> Forden, *supra* note 197; see also Siobhan Gorman & Juro Osawa, *Huawei Fires Back at the U.S.*, WALL ST. J. (Oct. 8, 2012), [http://online.wsj.com/article/SB10000872396390443982904578044190738613734.html?mod=WSJ\\_hpp\\_LEFTTopStories](http://online.wsj.com/article/SB10000872396390443982904578044190738613734.html?mod=WSJ_hpp_LEFTTopStories) (stating that the Commerce Department had previously blocked Huawei from competing for a national wireless emergency network, citing national security concerns).

<sup>201</sup> See ANNUAL REPORT 2013, *supra* note 4, at 3 (showing chart demonstrating the percentages of transactions withdrawn, investigated, and decided by presidential decision).

<sup>202</sup> See Forden, *supra* note 197 (describing Ralls Corp.'s management structure).

foreign control prong of the CFIUS regulations. However, it is unclear why the President decided that the project, which sought to place five Chinese-made wind turbines in each of the four locations,<sup>203</sup> was a threat to national security. Although the Obama Administration did not immediately provide an explanation of its decision to block the investment,<sup>204</sup> the media coverage of the President's order has offered two potential explanations. First, the project's locations were near the Naval Weapons Systems Training Facility, which is used for bombing, electronic combat, and drone training,<sup>205</sup> and the wind farm's proximity to this facility poses national security concerns. Others claim that this cannot serve as a justification since there are other wind farms in the area.<sup>206</sup> Second, others believe that President Obama blocked the transaction in an attempt to appear tough on China prior to the election.<sup>207</sup> Such a motivation would reinforce the view that the breadth of the Committee's national security determination could be used for politicized and protectionist reasons.<sup>208</sup> Following the decision, many international businesspersons expressed concern over the

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<sup>203</sup> See *China Syndrome: Obama Blocks Purchase of U.S. Wind Farms by Chinese Company*, HOMELAND SECURITY NEWSWIRE (Oct. 3, 2012), <http://www.homelandsecuritynewswire.com/dr20121002-obama-blocks-purchase-of-u-s-wind-farms-by-chinese-company> (noting that no reason was given as to what risk the farms posed).

<sup>204</sup> See ANNUAL REPORT, *supra* note 4, at 2 (pointing to the Ralls' Chinese ownership and the sites' vicinity to restricted US airspace). The Treasury stated that this is not a sign of future policy vis-à-vis China. See *China Syndrome*, *supra* note 203 (citing a statement denying that this was part of a coordinated strategy against China and that this was an isolated transaction). This case is very similar to Firstgold, which was considered an exceptional case at the time. See Sullivan, *supra* note 171, at 17-18 (stating that "[u]ltimately, fears that CFIUS officials' emphasis on military installations disguised the committee's true purposes remain wholly speculative" and that "Chairman Jaskowiak unequivocally characterized the transaction as 'a very rare and unusual case,' presenting its rejection as 'a clear decision that had to be made.'").

<sup>205</sup> For discussions of the sites location, see Naval Weapons Systems Training Facility Boardman, available at <http://nwstfboardmaneis.com>; see also Forden, *supra* note 197; see generally *China Syndrome*, *supra* note 203 (noting that planes fly as low as 200 feet and as fast as 300 miles per hour at the site).

<sup>206</sup> Tim Kia, a lawyer representing Ralls Corp., stated, "the President's order is without justification, as scores of other wind turbines already operate in the area." *China Syndrome*, *supra* note 203.

<sup>207</sup> See *id.* (discussing accusations by Mitt Romney that President Obama is not being tough enough on China).

<sup>208</sup> See Section 4.1 (stating that adopting such measures could lead to a protectionist attitude).

implications of the decision,<sup>209</sup> and Ralls Corp. filed suit alleging that they were denied property without due process of law.<sup>210</sup> However, this legal challenge is destined to fail, because the Executive receives an extremely high level of deference in matters of national security.<sup>211</sup> In fact, the district court judge presiding over the case and many leading attorneys in the field have noted the dim prospects for Ralls Corp.'s legal challenge.<sup>212</sup>

Regardless of the merits of Ralls Corp.'s legal claim or the reasoning behind the President's decision, providing greater clarity concerning CFIUS's national security review could have reduced the costs of this failed transaction. First, whether the transaction would have been permitted under the modified regulations, Ralls Corp. could have used these regulations to evaluate the likelihood that the projects would be struck down during CFIUS review and decided whether to proceed by weighing the risk of CFIUS action against the potential value of the deal. As a result, there would have been less uncertainty surrounding Ralls Corp.'s transaction, which could lead to increased profitability.<sup>213</sup> Second, if Ralls Corp. determined that CFIUS was likely to initiate a review, they would be more likely to preemptively file a timely and complete notice instead of waiting for CFIUS to request a filing. This would reduce the resources expended by both Ralls Corp. and CFIUS

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<sup>209</sup> Gorman & Osawa, *supra* note 200; Xinhua, *US "National Security" Excuse Backfires*, GLOBAL TIMES (Oct. 19, 2012, 2:15 AM), <http://www.globaltimes.cn/content/739386.shtml> (stating that "[i]nvestors may rethink their decisions if their assets are handled without legal basis or business logic."); *see also* Abrams, *supra* note 198 (noting that "[i]f Sany loses, many Chinese entrepreneurs may be more wary about future investment in the US.").

<sup>210</sup> *See* Forden, *supra* note 197 (explaining Ralls Corp.'s complaint against President Obama and CFIUS).

<sup>211</sup> *See* U.S. CONST. art. II (listing Executive Powers, including foreign policy and national defense); *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (installing the famous and highly deferential two-step process for overturning executive agency decisions); *see also* Zaring, *supra* note 33, at 124–25 (noting that "critics of executive power in national security matters tend to assume that, as a descriptive matter, the executive calls the shots" and "[j]udges have opined that 'determinations regarding national security are matters that courts acknowledge are generally beyond their ken' and that foreign affairs emergencies may require judicial deference even on matters of constitutional protection.").

<sup>212</sup> *Ralls Corp. v. Committee on Foreign Investment in the US*, No. 1:12CV01513 (D.D.C. filed on Sept. 12, 2012); *see* Forden, *supra* note 197 (describing the likely failure of the case and the judge's initial order); *see also* *China Syndrome*, *supra* note 203 (stating that a suit was filed).

<sup>213</sup> *See generally supra* Section 4.3.

during review. Finally, had Ralls Corp. determined that CFIUS would block their investment, they would have called off the transaction, preventing the further waste of resources on a frivolous deal. Consequently, clearer guidance on CFIUS's national security review could have reduced the costs imposed upon both Ralls Corp. and CFIUS in pursuit of an unsuccessful transaction.

#### 4.6.2. BAE/EADS Merger

The failed merger between BAE and EADS demonstrates the Committee's increased power, how the number of transactions affected by CFIUS review exceeds the number reported annually, and how clear regulations can reduce costs for both the public and private sector. Although BAE and EADS withdrew the proposed deal to create the world's largest aero defense contractor without ever filing with CFIUS,<sup>214</sup> both the structure of the deal and the parties' actions in preparation for a filing signify their awareness that CFIUS approval would be required. Moreover, the parties withdrew the proposed deal once it became apparent that the demands of the foreign governments involved in the deal could not be reconciled with the foreign control requirements of the CFIUS regulations. The costs saved from this early withdrawal due to concerns regarding the "foreign control" prong demonstrate how similar clarity in the "national security" prong could reduce costs for foreign businesses and the Committee.

The structure of the proposed deal deliberately limited foreign government-control in order to comply with the ten percent threshold in the foreign control prong of the CFIUS regulations.<sup>215</sup> From the beginning, the success of the deal was dependent on a determination by CFIUS that the transaction did not result in

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<sup>214</sup> See Gopal Ratnam & Sara Forden, *BAE Said to Brief Pentagon on EADS Merger to Save Status*, BUS. WK. (Sept. 28, 2012), <http://www.businessweek.com/news/2012-09-28/bae-said-to-brief-pentagon-on-eads-merger-to-save-status> (noting that the estimated revenue of the merged company of \$94 billion would exceed the \$76 billion revenue of Boeing Co.).

<sup>215</sup> See Andrea Rothman et al., *EADS Said to Mull Deadline Move as BAE Talks Go into Weekend*, BLOOMBERG (Oct. 6, 2012, 8:03 AM), <http://www.bloomberg.com/news/2012-10-05/eads-struggles-to-meet-bae-merger-deadline-amid-government-talks.html> (discussing how French control of EADS would be reduced from 22.5% to 9% and would prevent Germany from purchasing another 7.5% of Dalminer).

significantly greater foreign control of the merged company.<sup>216</sup> Therefore, the parties took measures to ease U.S. government concerns of foreign control by issuing special shares,<sup>217</sup> ring-fencing certain defense activities,<sup>218</sup> and operating under special security arrangements.<sup>219</sup> In addition, both parties retained U.S. counsel and lobbyists to seek CFIUS approval, and BAE arranged a meeting with the Pentagon in an attempt to ease national security concerns stemming from the transaction.<sup>220</sup> However, it soon became apparent that the French and German governments would not approve the structure of the deal because of the limits placed on their stakes in the merged company, and the parties withdrew the deal.<sup>221</sup>

Although the parties never submitted the deal to the Committee or reviewed for national security concerns, the parties'

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<sup>216</sup> See Ratnam & Forden, *supra* note 214 (discussing the parties' efforts to comply with the regulations due to their awareness of the necessity of CFIUS approval).

<sup>217</sup> See Steven M. Davidoff, *The Many Complexities of an EADS-BAE Merger*, N.Y. TIMES (Sept. 12, 2012, 2:47 PM), <http://dealbook.nytimes.com/2012/09/12/the-many-complexities-of-any-eads-bae-merger/> (discussing the issuance of "golden" or "special" shares to avoid foreign control while still retaining some authority over the merged company); see Ratnam & Forden, *supra* note 214 (discussing the use of "golden" or "special" shares).

<sup>218</sup> The deal structure was flipped as to investment within the United States. Thus, instead of a 60-40% ownership arrangement between EADS and BAE, the parties agreed to give BAE 60% interest in US assets, because the US government is more trusting of BAE. See Ratnam & Forden, *supra* note 214 (explaining that the structure of the deals flips for U.S. interests in order to placate the Pentagon's national security concerns); see also Davidoff, *supra* note 217 (noting the standard structure of the deal).

<sup>219</sup> See Ratnam & Forden, *supra* note 214 (discussing attempts to arrange special security arrangements in order to avoid proxy agreements, placing US individuals on the board, and other similar arrangements).

<sup>220</sup> See *id.* (identifying the law firms and lobbyists named to counteract political pressures against the deal and to navigate the CFIUS review process).

<sup>221</sup> See, e.g., Marjorie Censer, *BAE-EADS Merger Talks Collapse*, WASH. POST (Oct. 10, 2012), [http://www.washingtonpost.com/business/capitalbusiness/bae-eads-merger-talks-collapse/2012/10/10/e8a5f7aa-12dd-11e2-be82-c3411b7680a9\\_story.html?hpid=z3](http://www.washingtonpost.com/business/capitalbusiness/bae-eads-merger-talks-collapse/2012/10/10/e8a5f7aa-12dd-11e2-be82-c3411b7680a9_story.html?hpid=z3) (explaining the collapse and withdrawal of the proposed deal); Véronique Guillermand & Yann Le Galès, *Berlin Accusé D'Avoir Torpillé la Fusion EADS-BAE*, LE FIGARO (Oct. 10, 2012), <http://bourse.lefigaro.fr/indices-actions/actu-conseils/berlin-accuse-d-avoir-torpille-la-fusion-eads-bae-292670> (discussing the French concerns of losing their stake in the merged company); see also Ratnam & Forden, *supra* note 214 (discussing the companies' desire to avoid proxy agreements, placing U.S. individuals on the board, and other similar arrangements).

actions demonstrate how clarity in the CFIUS regulations can reduce costs. Since the “foreign control” prong of the regulations is clear, BAE and EADS were able to structure the proposed deal around the regulations and withdraw the deal once it became clear that the foreign governments’ demands could not be reconciled with the CFIUS regulations. This prevented the use of resources both the companies and the Committee would have spent once the transaction was under CFIUS review. Therefore, providing greater clarity as to the “national security” prong could similarly reduce costs. Critics may respond that BAE and EADS deliberately contracted around the regulations and that international businesses would contract around the national security specifications, which would threaten U.S. interests. However, by providing greater guidance while also retaining the President’s authority to block a transaction, parties would have greater clarity while retaining the government’s ability to protect U.S. national interests.<sup>222</sup> Therefore, as clear standards regarding CFIUS’s definition of foreign control reduced costs in the failed merger between BAE and EADS, providing greater clarity as to the scope of the Committee’s national security review could reduce costs in future transactions without sacrificing U.S. national security.

#### 4.6.3. *Huawei & ZTE*

Another recent demonstration of the Committee’s increasing powers and expanding influence is the recent congressional report labeling Huawei and ZTE as national security threats that CFIUS should prevent from investing in the United States.<sup>223</sup> The report recommends labeling both companies, which sell telecommunications equipment used for the operation of wireless networks, as arms of the Chinese government seeking to steal U.S. intellectual property and to spy on the United States.<sup>224</sup>

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<sup>222</sup> See generally *infra* Section 5.

<sup>223</sup> See generally CHAIRMAN MIKE ROGERS & RANKING MEMBER C.A. DUTCH RUPPERSBERGER OF THE PERMANENT SELECT COMMITTEE ON INTELLIGENCE, 112<sup>TH</sup> CONG., INVESTIGATIVE REP. ON THE U.S. NAT’L SECURITY ISSUES POSED BY CHINESE TELECOMMS. COS. HUAWAI AND ZTE (Oct. 8, 2012), available at [http://intelligence.house.gov/sites/intelligence.house.gov/files/documents/Huawei-ZTE%20Investigative%20Report%20\(FINAL\).pdf](http://intelligence.house.gov/sites/intelligence.house.gov/files/documents/Huawei-ZTE%20Investigative%20Report%20(FINAL).pdf) (noting the threat to national security and stating “Huawei and ZTE cannot be trusted to be free of foreign state influence and thus pose a security threat to the United States and to our systems.”).

<sup>224</sup> See *id.* at 12, 2 (asserting that the companies’ evasive actions “only

Specifically, there is concern that these technologies could be used to intercept communications or launch a cyberattack,<sup>225</sup> and the report notes China's history of economic espionage.<sup>226</sup> As a result, the report states that CFIUS "must block acquisitions, takeovers, or mergers involving Huawei and ZTE given the threat to U.S. national security interests," and "[l]egislative proposals seeking to expand CFIUS to include purchasing agreements should receive thorough consideration by relevant Congressional committees."<sup>227</sup>

Although the Committee has never officially blocked a transaction involving either company, CFIUS has previously issued an advisory opinion denying FDI by Huawei.<sup>228</sup> Huawei, in particular, has a checkered history with the Committee stemming from its attempted acquisition of the U.S.-based firm 3Com in 2007-2008.<sup>229</sup> Due to these concerns, the Committee should likely block FDI by Huawei in the United States; however, these objectives could be accomplished more effectively by providing more clarity regarding the Committee's national security evaluation. The highly public nature of this report led to immediate criticisms that the action was political and

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heighten[ed] concerns about Chinese government control over these firms and their operations" and noting that the companies seek "to control the market for sensitive equipment and infrastructure that could be used for spying and other malicious purposes").

<sup>225</sup> See *id.* at iv (Executive Summary) (stating that "the opportunity exists for further economic and foreign espionage by a foreign nation-state already known to be a major perpetrator of cyber espionage").

<sup>226</sup> See *id.* (remarking that "the opportunity exists for further economic and foreign espionage by a foreign nation-state already known to be a major perpetrator of cyber espionage").

<sup>227</sup> *Id.*

<sup>228</sup> *Id.* at 12-43; Michael S. Schmidt, *U.S. Panel Cites Risks in Chinese Equipment*, N.Y. TIMES (Oct. 12, 2012), <http://www.nytimes.com/2012/10/09/us/us-panel-calls-huawei-and-zte-national-security-threat.html?pagewanted=1&r=3&hp> (detailing the report's findings and noting responses).

<sup>229</sup> See Sullivan, *supra* note 187, at 228-29 ("The actions of the Chinese corporation Huawei during 2007 and 2008 provide a stark counterexample for other firms of how not to approach the CFIUS process. Their attempt to acquire the U.S.-based firm 3Com came one year after a cyber attack on the Pentagon, believed to have originated in China. Still, Huawei executives struck an uncooperative tone, maintaining that the size of their investment meant it did not warrant governmental scrutiny. Despite the existence of congressional resistance to the deal, which was ultimately abandoned, several aspects of the 3Com-Huawei transaction indicate that the deal would have failed to win CFIUS approval without a dramatic restructuring."). Of particular concern was the founder's history as a People's Liberation Army officer and the company's close ties with Chinese military.

protectionist.<sup>230</sup> Indeed, scholars have warned that greater congressional involvement in the CFIUS review process will lead to protectionism, foreign policy dilemmas, and even Constitutional issues.<sup>231</sup> Others, however, think the Committee is sufficiently insulated from congressional pressure.<sup>232</sup> Although there is truth to both of these positions, providing clearer guidance regarding the national security prong in the CFIUS regulations would eliminate some of the concerns of polarization and protectionism while maintaining a limited oversight role for Congress, thereby reducing the costs the regulations impose on international businesses.

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<sup>230</sup> See, e.g., Gorman & Osawa, *supra* note 200 (noting the negative responses following the report's publication); see also Press Release from Ken Hu, Deputy Chairman of Huawei Technologies, Chairman of Huawei USA, Huawei Open Letter (Feb. 25, 2011, 00:00 AM), available at <http://www.huawei.com/en/about-huawei/newsroom/press-release/hw-092875-huaweioopenletter.htm> (responding to the company being labeled as a threat to U.S. national security); see also Xinhua, *supra* note 209 (criticizing U.S. claims of security threats as baseless); Abrams, *supra* note 198 (criticizing U.S. claims of national security concerns as an excuse for other motivations).

<sup>231</sup> See Byrne, *supra* note 16, at 849 ("Greater Congressional involvement in the CFIUS review process would politicize the process in a manner that would change Exon-Florio from a national security tool to a protectionist tool and would raise serious constitutional and policy concerns."); see also Zaring, *supra* note 33, at 103 ("The actual practice of the Committee shows that, although apparently a hurdle that foreign acquirers rather fear, it rarely interferes with foreign acquisitions—and when it does interfere, it does so in a pro forma manner. CFIUS's minute blockage record and its relatively modest imposition of conditions on acquirers, when considered alongside Congress's increasingly important role in vetting CFIUS acquisitions, bolster the Congress-not-the-president account of CFIUS that is proffered here.").

<sup>232</sup> See Zaring, *supra* note 33, at 101 ("In this way, Congress has turned CFIUS, an agency at the heart of implementing the president's policies on national security, into an outfit that in many ways serves and is closely supervised by the legislature. In a world where scholars bemoan the lack of oversight of the executive's national security determinations by the coordinate branches, CFIUS may offer a way forward."); *id.* at 120 ("Accordingly, while CFIUS is not a nonexistent obstacle for foreign acquisition, it is Congress, sitting in review of the Committee that really drives American policy in this area."); see also Byrne, *supra* note 16, at 891 ("CFIUS at present operates in an environment that is usually isolated from political concerns, thus preserving the balance between national security and an open investment policy."); see also Pudner, *supra* note 14, at 1290 ("These reporting requirements add an appropriate level of Congressional scrutiny by requiring notice and explanations of cleared transactions, but importantly, and appropriately, only so require after the CFIUS process has run its course, therefore insulating the CFIUS procedure from excessive Congressional pressures.").

#### 4.6.4. *Smithfield Foods, Inc.*

Although CFIUS ultimately approved the transaction, the Committee's review of Shuanghui International Holdings Limited's (Shuanghui") acquisition of Smithfield Foods, Inc. ("Smithfield") represents the final notable example of the Committee's expanding national security review. Shuanghui, a Hong-Kong based company focusing on the food and logistics sectors, including China's largest meat processor, agreed to acquire Smithfield, a Virginia-based company and the largest pork producer in the world in May 2013 for \$4.72 billion.<sup>233</sup> Aware of the Committee's increasing authority, the parties conditioned closing on CFIUS approval and submitted a voluntary notice to the Committee in June 2013.<sup>234</sup> After conducting a 75-day review, CFIUS approved the transaction without requiring any material mitigation measures.<sup>235</sup>

The Committee's scrutiny of the transaction marked a new addition to the national security review: threats to the U.S. food supply.<sup>236</sup> Both Congress and investors warned of the national security risks of allowing Chinese control of a major U.S. food processor, and other concerns centered around U.S. jobs, food prices, retaliatory restrictions by the Chinese government, and possibly whether Smithfield facilities were near military bases or other sensitive locations.<sup>237</sup> Senate Finance Committee Chairman

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<sup>233</sup> SULLIVAN & CROMWELL LLP, Publication, *Shuanghui International Receives CFIUS Clearance for its Purchase of Smithfield Foods* (Sept. 10, 2013), available at [http://www.sullcrom.com/files/Publication/e2199a8c-3d7a-4c17-aad5-553b0b0cc15d/Presentation/PublicationAttachment/d600e67e-ff8b-4e0d-9049-55f01abbb31c/SC\\_Publication\\_Shuanghui\\_International\\_Receives\\_CFIUS\\_Clearance\\_for\\_its\\_Purchase\\_of\\_Smithfield\\_Foods.pdf](http://www.sullcrom.com/files/Publication/e2199a8c-3d7a-4c17-aad5-553b0b0cc15d/Presentation/PublicationAttachment/d600e67e-ff8b-4e0d-9049-55f01abbb31c/SC_Publication_Shuanghui_International_Receives_CFIUS_Clearance_for_its_Purchase_of_Smithfield_Foods.pdf); Shruit Date Singh & Bradley Olson, *Smithfield Receives U.S. Approval for Biggest Chinese Takeover*, BLOOMBERG (Sept. 6, 2013), available at <http://www.bloomberg.com/news/print/2013-09-06/smithfield-receives-u-s-regulator-approval-for-shuanghui-deal.html>.

<sup>234</sup> SULLIVAN & CROMWELL LLP, *supra* note 233, at 2.

<sup>235</sup> *Id.* (noting that "notice of the clearance was filed in Smithfield's Securities and Exchange Commission proxy statement in connection with the upcoming shareholder vote to approve the transaction").

<sup>236</sup> See generally Doug Guthrie, *CFIUS: Often Misunderstood and Maligned*, FORBES (Dec. 20, 2013), available at <http://www.forbes.com/sites/douguthrie/2013/12/20/cfius-often-misunderstood-and-maligned/print> (noting CFIUS's review of the Smithfield merger was the first involving concerns over the national food supply).

<sup>237</sup> See SULLIVAN & CROMWELL LLP, *supra* note 233 (highlighting the various US concerns arising from the acquisition of Smithfield by Shuanghui); Singh & Olson, *supra* note 233 (noting that CFIUS might have considered the proximity of

Max Baucus, Senator Orrin Hatch, and Senator Debbie Stabenow all spoke out publicly against the deal.<sup>238</sup> In addition, at least two shareholders advocated for the breakup of Smithfield.<sup>239</sup>

Despite the deal's ultimate approval, the Smithfield acquisition demonstrates how far the Committee's national security review has expanded beyond what investors view as traditional national security domains. The deal's approval can likely be largely attributed to the parties' proactive filing and cooperative efforts. However, most investors would not anticipate such transactions requiring CFIUS approval, increasing uncertainty and leading to prolonged reviews, and this broadening of national security review further increases the likelihood of retaliatory measures.

These case studies illustrate some of the immeasurable costs associated with the current form of the national security review process and offer insights into how providing greater clarity regarding CFIUS's national security review could encourage FDI while still protecting U.S. national security. These immeasurable costs come in the form of delay and uncertainty, increased Committee review costs, and retaliatory measures, which collectively demonstrate the potential economic benefits of providing greater clarity regarding CFIUS's review.

## 5. POSSIBLE SOLUTIONS

Due to the significant costs imposed on both private businesses and the Committee by the failure to provide clear guidance regarding the Committee's national security review, the CFIUS regulations should be revised to provide greater clarity to those seeking to invest in the United States.<sup>240</sup> This does not necessarily mean that the Committee's power to review national security threats raised by transactions must be weakened.<sup>241</sup> In fact,

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Smithfield's facilities to the military bases and the impact of the acquisition on the US food-supply chain).

<sup>238</sup> See Guthrie, *supra* note 236 (noting that Senator Debbie Stabenow questioned the economic motivation of the acquisition); Singh & Olson, *supra* note 233 (highlighting that Senator Orrin Hatch urged scrutiny of the acquisition).

<sup>239</sup> Singh & Olson, *supra* note 233.

<sup>240</sup> Authority to define national security or adjust the national security factors exists. See Shearer, *supra* note 3, at 1733 ("Given this discretion, future administrations have the ability, without rewriting the statute or the regulations, to define the 'national security' standard to encompass economic and industrial policy concerns.").

<sup>241</sup> See Weimar, *supra* note 2, at 663 ("[W]hile practitioners have sought to

revising the national security definition could make the Committee's national security review even stronger,<sup>242</sup> while also stimulating FDI in the United States through increased clarity. This has led scholars to propose a variety of modifications to the CFIUS regulations.<sup>243</sup> While the proposals have merit, they are either too limited in application, or fail to strike the proper balance between encouraging FDI and maintaining the Committee's discretion in protecting U.S. national security interests.

This paper proposes modifying the CFIUS regulations pertaining to national security in three significant ways: (1) the Committee should publish a list of specific industries and technologies, the acquisition of which is presumed to raise national security concerns; (2) the Committee should publish charts of acquiring countries and companies presumed to be a national security risk; and (3) the Committee should clarify the application of these regulations by providing more examples to which companies can compare their proposed transactions. Although this may seem like a daunting task, similar publications are

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explain what types of transactions trigger CFIUS review, few have stepped back to ask what types of transactions should lead to such scrutiny and what form such scrutiny should take.”).

<sup>242</sup> See Georgiev, *supra* note 57, at 129 (“[T]he definition of ‘national security’ was sometimes interpreted too narrowly and the list of factors used to evaluate national security threats was viewed as too vague.”).

<sup>243</sup> Some scholars have provided definitions for national security. See Byrne, *supra* note 16, at 894–910 (outlining proposal that will: “(1) give Congress the ability to pass a joint resolution reversing the president’s decisions under the statute; (2) add economic security as a touchstone for CFIUS review; (3) enhance CFIUS’s reporting requirements to Congress; and (4) shift the chairmanship of CFIUS from the Secretary of the Treasury to the Secretary of Defense or Homeland Security”); Jason Cox, *Regulation of Foreign Direct Investment After the Dubai Ports Controversy: Has the U.S. Government Finally Figured Out How to Balance Foreign Threats to National Security Without Alienating Foreign Companies?*, 34 J. CORP. L. 293, 311–14 (2009) (making the following recommendations: (1) removal of the mandatory investigation of foreign government-controlled transactions; (2) creation of a separate committee to review all FDI transactions and initiate CFIUS reviews; (3) rework the evergreen provision to only include intentional fraud by the parties to the covered transaction; and (4) more secrecy in the CFIUS process); Yiheng Feng, Note, “We Wouldn’t Transfer Title to the Devil”: *Consequences of the Congressional Politicization of Foreign Direct Investment on National Security Grounds*, 42 N.Y.U. J. INT’L L. & POL. 253, 300–09 (2010) (recommending implementation of a more robust mitigation system and regulatory parity with the investing nation when conducting national security reviews); Zaring, *supra* note 33, at 130 (stating that some “have produced their own cautious judgments on what might constitute national security”). For a discussion of the potential application of golden shares to resolve matters of foreign government control, see generally Byrne, *supra* note 16.

available for export control regimes and could be used as guidelines for CFIUS. In making these recommendations, this paper draws considerably from these export regulations, which have successfully balanced the encouragement of FDI and the protection of national security interests.<sup>244</sup>

One may note that these recommendations are similar to those rejected at the passage of FINSA when the Committee denied requests to include lists of sectors, technologies, and countries deemed to be national security risks.<sup>245</sup> However, there are certain key considerations and differences that make these changes a suitable remedy. First, when rejecting these recommendations, CFIUS had not yet published the Guidance or the annual report. This is significant, because the Guidance and the annual report have not provided the anticipated or necessary clarity regarding the Committee's national security evaluation. Second, the scope and financial implications of CFIUS's national security review under FINSA were not yet understood. In the years since FINSA's passage, CFIUS's powers have grown, and parties have become increasingly concerned about the broad powers of this once-toothless regulatory committee.<sup>246</sup>

Most importantly, the lists, charts, and examples proposed in this paper will only create the presumption that the transaction will be considered a national security threat. Therefore, discretion over national security determinations would remain with CFIUS and the President, allowing the flexibility to respond to the continuously evolving nature of national security, while still permitting foreign direct investors to make more accurate *ex ante* determinations of whether their transactions will be subject to a national security evaluation. Some may argue that leaving final discretion with the Committee and the President would permit the continued blocking of transactions for political and other reasons. However, rooting these decisions by the Committee and the President in concrete lists and charts would decrease the likelihood of this occurring. Parties would gain a better understanding of why transactions were denied, because CFIUS or the President

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<sup>244</sup> Although there have been criticisms of the export regulations, they are primarily based on the extraterritorial application of the laws.

<sup>245</sup> See Georgiev, *supra* note 57, at 133 (describing the Committee's decision not to list countries).

<sup>246</sup> See generally *supra* Section 3.4 (discussing the expansion of CFIUS's powers).

would be required to either link the decision to noncompliance with the lists and charts provided or make a discretionary determination. In addition, they would then be required to publish redacted reports on these discretionary determinations to eliminate unilateral decisions not rooted in genuine national security threats. This would increase the accountability of CFIUS and the President, because they would no longer be able to rely on vague factors and would be forced to point to clear justifications for blocking transactions. Therefore, parties would be able to make more accurate business decisions based on their ability to determine whether their transaction is subject to review, but the Committee would maintain its ultimate authority to block transactions for legitimate national security reasons.

### 5.1. *Export Controls*

The United States already has abundant experience in labeling certain industries and technologies as national security threats, as well as labeling trading with certain countries and companies as a national security risk. Most notably, the Export Administration Act of 1979 (EAA)<sup>247</sup> and the Arms Export Control Act of 1976 (AECA)<sup>248</sup> both regulate U.S. exports involving certain industries and technologies for national security reasons. In addition, both the EAA and AECA provide a chart or list of countries to which certain exports are prohibited and where certain countries are presumed to be national security threats. The international community has also implemented similarly specific regimes,<sup>249</sup>

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<sup>247</sup> See Export Administration Act of 1979, Pub. L. No. 96-72 (1979) (describing the normalized extension of the EAA by Presidents). The EAA was implemented by Export Control Regulations, 15 C.F.R. §§ 730-74 (1979). When the EAA expired in 1994, the President exercised his powers under the International Emergency Economic Powers Act, 91 Stat. 1626 (1977) and extended the EAA by passing Exec. Order No. 12924, 59 Fed. Reg. 206 (1994). Every president since has continued to extend the EAA in this manner.

<sup>248</sup> See Arms Export Control, 22 U.S.C. §§ 2751-2765 (1976) (listing the relevant industries for which there are national security threats); The United States Munitions List, 22 C.F.R. 121 (listing technologies with defense applications). The AECA was implemented by the International Traffic in Arms Regulations (ITAR) and is further governed by TAAs and MLAs.

<sup>249</sup> The Wassenaar Arrangement to which 42 countries, including the United States, promotes "transparency and greater responsibility in transfers of conventional arms and dual-use goods." It includes extremely detailed lists of nine categories of dual-use goods, a sensitive list, a very sensitive list, and a munitions list. See Wassenaar Arrangement Secretariat, *The Wassenaar Arrangement on Export Controls for Conventional Arms and Dual-Use Goods and*

demonstrating both the feasibility and international acceptance of such restrictions. Using the effective balance accomplished by these regulations as a guide, CFIUS could publish a list of industries and technologies for which acquisition would be presumed to be a threat to national security, which could then be cross-referenced with a chart of countries and companies presumed to threaten national security when investing in the United States. Publishing these lists and charts would improve the transparency of CFIUS review while preserving CFIUS's robust authority to block transactions threatening national security.

The EAA grants the President authority to regulate the export and re-export of "dual-use" items, meaning items that have both commercial and military applications, for reasons of national security, foreign policy, and short supply.<sup>250</sup> Parties seeking to export items covered by the Export Administration Regulations (EAR), which implement the EAA regulations, must obtain a license from the Bureau of Industry and Security (BIS).<sup>251</sup> BIS publishes the Commerce Control List (CCL), which includes ten categories of items, each containing particular items and specifications that are subject to regulation under the EAA.<sup>252</sup>

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*Technologies* (Jan. 2012), available at <http://www.wassenaar.org/publicdocuments/2012/Basic%20Documents%202012.pdf> (showing the origins of the Arrangement and providing information for where to find the various lists mentioned above).

<sup>250</sup> See Export Administration Act, *supra* note 247, at pmbl. (discussing the president's power under the Export Administration Act). The President names the items to the list and has authority to establish President's Technology Export Council and Export Control Advisory Committees. Some claim the President's powers over export control extend too far. See Zaring, *supra* note 33, at 131 ("Under the Export Administration Act of 1979 ("EAA"), the President has the 'ability to block most exports to certain nations or to control the shipment of specific technologies and goods to any country. This power provides the President with an effective weapon for economic warfare, one he can use unhindered.' The justification for the President's responsibility here also lies in his control over national security."). However, this is still preferable, because the lists are published in advance so parties are not caught off guard.

<sup>251</sup> See Export Administration Act, *supra* note 247 (explaining that licenses must be obtained from BIS for items covered under EAR).

<sup>252</sup> See Commerce Control List, 15 C.F.R. § 738.2 (2013) (listing the following ten categories: (0) Nuclear Materials, Facilities and Equipment; (1) Special Materials and Related Equipment; Chemicals, 'Microorganisms' and Toxins; (2) Materials Processing; (3) Electronics; (4) Computers; (5) Telecommunications and Information Security; (6) Lasers and Sensors; (7) Navigation and Avionics; (8) Marine; and (9) Aerospace and Propulsion). These categories contain extremely specific subcategories listing items based on sizes, temperatures, and other details.

Moreover, every Export Control Classification Number (ECCN) explains why the EAA limits the export of that item.<sup>253</sup> After determining if their export appears on the CCL, parties look to the country chart, which clearly illustrates what countries may not receive the export based on the reasons for which the item's export is restricted. Therefore, exporters can clearly determine whether they are required to acquire a license in order to export specific items to specific countries, eliminating uncertainty and promoting cross-border transactions.

The AECA similarly limits the export and re-export of certain items, but the AECA only restricts items with defense applications. The Department of State administers the AECA under the International Traffic in Arms Regulations (ITAR),<sup>254</sup> which contains the highly detailed United States Munitions List (USML).<sup>255</sup> Items appearing on the USML are subject to the prohibition of export, and the President is required to report to Congress if he becomes aware of a potential violation.<sup>256</sup> Similarly to the CCL, this list is updated over time in a variety of sources to keep pace with changes in available technologies and national security threats.<sup>257</sup> In addition, exports of defense items to certain countries, namely Burma, Cuba, Iran, North Korea, and Sudan, are subject to sanctions.<sup>258</sup> The AECA provides another example to emulate, because the listing of industries, technologies, and countries can effectively be presumed to raise national security concerns.

Despite the presence of these export examples for similar listing mechanisms pertaining to FDI, CFIUS elected to eschew

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<sup>253</sup> See Commerce Control List, 31 C.F.R. § 738.2 (1996) and § 742 (1996) (listing the following ECCN classification: Anti-Terrorism (AT), Chemical and Biological Weapons (CB), Crime Control (CC), Chemical Weapons Convention (CW), Encryption Items (EI), Firearms Convention (FC), Missile Technology (MT), National Security (NS), Nuclear Nonproliferation (NP), Regional Stability (RS), Short Supply (SS), United Nations Embargo (UN), Significant Items (SI), and Surreptitious Listening (SL)).

<sup>254</sup> See The United States Munitions List, 22 C.F.R. § 121 (1976) Subchapter M (containing ITAR regulations).

<sup>255</sup> See 22 C.F.R. § 121 (1976) (containing USML).

<sup>256</sup> See *id.* at Subchapter M (describing the nature of the USML restrictions and the obligations of the President).

<sup>257</sup> The BIS is responsible for updating the list, which is amended in the Federal Register. The Defense Trade News published by the Department of State's Bureau of Political-Military Affairs further clarifies the list.

<sup>258</sup> See Foreign Asset Control Regulations, 31 C.F.R. § 800 (2008) (listing the various countries for which defense items are subject to sanctions).

these successful models in favor of the vague and discretionary system currently in place. Instead, parties simply report if the U.S. business being acquired produces or trades in items subject to these or other similar regulations.<sup>259</sup> However, since there is no indication as to the weight this factor will carry relative to other vague factors in the CFIUS regulations, the regulations' discussion of these export regimes provides only extremely limited guidance instead of the concrete determinations provided to exporters applying those regimes.

### *5.2. Presumed Threats: Industries and Technologies*

Using these export control regimes and the resources CFIUS already allocates to its annual evaluations of whether there is a coordinated foreign strategy to acquire U.S. critical technologies, CFIUS should implement a list of industries and technologies presumed to threaten national security. As noted above, the EAA already breaks down items into categories and lists of specific items subject to export restrictions based on the country to which the item is destined. Certain categories<sup>260</sup> receive near-blanket restrictions. Therefore, should the Committee so choose, it could label FDI in U.S. businesses operating in certain high-threat industries, such as nuclear energy, as always presumed to threaten national security. As a result, parties seeking to invest in U.S. businesses operating in these industries would know that their transaction would be subject to CFIUS review and potential delay or cancellation. This would both benefit the investors through greater clarity and expedite the review process by increasing early filings.

Since only select high-threat industries would be subject to the presumption of a national security threat, the list of technologies of the U.S. business being acquired would be of greater importance. As noted above, FINSA added the potential national security-related effects on critical infrastructure and critical technologies to CFIUS's national security review. However, CFIUS evaluates effects on critical infrastructure on a case-by-case basis, noting only that its definition "turns on the national security effects of any

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<sup>259</sup> See Fed Reg., *supra* note 1, at 70725 (noting reporting requirements for items subject to export control).

<sup>260</sup> For example, CB 1 (Chemical and biological weapons), NS 1 (National Security), and MT 1 (missile technology) may not be exported to most countries without a license.

incapacity or destruction . . . over which a foreign person would have control as a result of a covered transaction.”<sup>261</sup> The regulations define critical technologies as defense articles and services contained in the USML, certain categories of items from the CCL, specific nuclear equipment, and select agents and toxins.<sup>262</sup> CFIUS also assesses critical technologies in conjunction with its evaluation of whether there is a targeted effort to acquire U.S. critical technologies. In its annual report, the Committee notes that, “[t]here is no single source that lists all U.S. critical technology companies acquired by foreign persons,” requiring the contributing export control agencies to use “a combination of publicly available information, non-public data on M&A transactions that CFIUS reviewed, and their own internal records to identify the U.S. critical technology companies . . . .”<sup>263</sup> Therefore, CFIUS already evaluates critical technologies but does not publish which of these technologies are considered national security risks in any publicly available source. As a result, the Committee would only need to expend a marginal amount of resources in order to produce such a list.

If the Committee published this information in public lists, it would increase the transparency of the Committee’s national security evaluation for foreign direct investors, rather than perpetuating the ambiguity of the current reliance on the vague FINSA §721(f) factors. Since CFIUS elected not to rely on these export lists under FINSA, it may not wish to subject all covered transactions involving these technologies to Committee review. If this is the case, CFIUS could trim the list down to a more select number of technologies and limit restrictions of less threatening dual-use technologies to countries viewed as the greatest threats to the United States.<sup>264</sup> The important feature is creating a database

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<sup>261</sup> Fed. Reg, *supra* note 1, at 70708.

<sup>262</sup> See 31 C.F.R. § 209 (1976) (listing the sources from which the Committee draws lists of critical technologies); Cedarbaum & Preston, *supra* note 41, at 246 (“The statutory definition of *critical technologies*, however, is expanded upon to incorporate by reference the definitions from various existing regulatory regimes that deal with export, trade, or handling of sensitive goods, technologies, and services.”).

<sup>263</sup> This included evaluations by the Department of State under ITAR, Commerce under EAR and toxin restrictions, and Energy. See ANNUAL REPORT 2010, *supra* note 5, at 36. In total, 32 agencies and entities contributed to the critical technologies section. For a complete list of the agencies and entities, see *id.* at 39 (listing the entities).

<sup>264</sup> Admittedly, this will likely open the process to intense lobbying as

that allows parties to determine whether their transaction is subject to a national security evaluation prior to completing that transaction. Similarly to the CCL and USML, the President and his designated agencies could continuously update this list; however, it needs to be made available for consultation prior to completing the transaction in order to reduce unexpected delays and uncertainty. This will also reduce other indirect costs, such as retaliatory measures and review costs for the Committee, by increasing the transparency of the national security evaluation.

### *5.3. Presumed Threats: Countries and Companies*

Similarly to export control regimes, for those industries and technologies not subject to the blanket presumption of threatening national security, CFIUS should publish a chart of countries and companies to be consulted in conjunction with the industries and technologies list. This chart could also include blanket presumptions of national security risks for select countries, such as state sponsors of terrorism, and certain companies deemed to be puppets of foreign governments threatening U.S. national security interests. Moreover, this chart could also be constructed fairly easily based on the export models and the Committee's annual evaluation of investors by countries complying with the boycott of Israel, or by countries that do not ban foreign terrorist organizations.<sup>265</sup>

Since these charts include valuable trade partners, such as Saudi Arabia and the United Arab Emirates, CFIUS may wish to limit the countries subject to this presumption to certain high-threat industries and technologies. In addition, China is both commonly viewed as a threat to U.S. national security and as a valuable trade partner. For such situations, this chart of countries should be consulted in conjunction with the list of industries and technologies. The key distinction is that instead of publishing a vague evaluation of investments from these countries at the conclusion of each year, CFIUS should make a consultable chart

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certain industries seek to avoid being included in the list. However, the fact that similar lists have been implemented in the realm of exports demonstrates the feasibility of such a process.

<sup>265</sup> See ANNUAL REPORT 2010, *supra* note 5, at 30, 31 (listing Algeria, Iraq, Iran, Kuwait, Lebanon, Libya, Qatar, Saudi Arabia, Syria, Sudan, the United Arab Emirates, and Yemen as countries that comply with the boycott of Israel and Cuba, Eritrea, Iran, North Korea, Syria, and Venezuela as countries that do not ban terrorist organizations).

available to parties in real time.

Some may note the potential for diplomatic conflicts stemming from countries being placed on this chart, and the potential for retaliatory measures; however, these risks would be overstated for a variety of reasons. First, the chart would only signify the presumption that FDI from that country posed a national security risk. Parties believing that their transaction did not in fact pose these risks would be aware of this presumption and could file a notice with the Committee seeking to prove their transaction was harmless. Second, the chart would include every country in the world, like the country chart published under the EAR, and would draw distinctions based primarily on the industries and technologies. Thus, instead of banning all investment from that country, bans would be limited to certain defense articles and dual-use items, and be further restricted based on the specific national security risks these items pose if acquired by that particular country, which would limit the potential "shunning" effect and resulting likelihood of retaliatory measures. Third, similar designations exist in even stricter form through both sanction regimes and export control regimes, reducing the potential backlash likely to result when countries are first determined to threaten U.S. national security interests. Finally, countries largely reliant on revenues generated via FDI in the United States may seek to increase their conformity with the regulations and to pursue diplomatic solutions. Therefore, the benefits of transparency outweigh the costs of publishing a chart of threatening countries.

In addition, the Committee should consider publishing a chart of companies whose investment is presumed to threaten U.S. national security. These designations are likely to be based on the belief that the company operates as a puppet of a foreign government deemed to be a national security risk. The most notable examples of companies that may receive such a designation are Huawei and ZTE, which have essentially already been so designated.<sup>266</sup> By labeling a company, as opposed to a country, as a presumed threat, CFIUS could narrowly tailor its restrictions in instances where it does not wish to restrict all investment from a particular country in that industry or technology but has determined that a particular company is an arm

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<sup>266</sup> See *supra* Section 4.6.3 (discussing further the process by which Huawei and ZTE were labeled as national security threats).

of a foreign government.

Publishing sources for industries, technologies, countries, and companies presumed to raise national security concerns could reduce the costs of delay and uncertainty to foreign direct investors, the Committee's own review costs, and limit indirect costs like retaliatory measures, because it would be clear which transactions may raise national security concerns in the vast majority of situations. However, in order to maintain robust national security protections, the CFIUS regulations should preserve the President's ultimate authority to block transactions but limit it to discretionary circumstances not covered by the sources of presumed national security threats.

#### *5.4. Examples for Discretionary Decisions*

The CFIUS regulations provide only limited examples of how they are to be applied, particularly for national security evaluations.<sup>267</sup> For instance, there are nine examples under the "control" heading, and twenty-seven under the "covered transaction" heading but none related specifically to the application of the national security factors.<sup>268</sup> In addition, CFIUS has been reluctant to comply with requests to publish redacted versions of covered transactions in the annual reports and even reports to Congress,<sup>269</sup> which may be an effort to avoid the cost and burden of publishing such reports. However, by publishing these lists and charts, CFIUS could limit the number of reports required to situations where CFIUS exercises its discretionary authority to allow a transaction that was presumed to threaten national security or to situations where the President exercises his discretionary

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<sup>267</sup> Should this proposal be rejected, the Committee should consider publishing examples of national security concerns for consultation by foreign direct investors. This would increase the certainty surrounding FDI, though not to the same extent as publishing lists of presumed national security threats.

<sup>268</sup> See 31 C.F.R. § 800.204 (2008); 31 C.F.R. § 800.301 (2008) (showing how the few examples given do not include an application of the national security factors). This stems from CFIUS's desire to maintain a case-by-case evaluation of national security concerns.

<sup>269</sup> See Fed. Reg., *supra* note 1, at 70714 (rejecting a commenter's request that reports on cases be made public, because "the national security effects of covered transactions is based on, among other things, sensitive business information submitted by the parties and classified U.S. Government information"); Sullivan, *supra* note 187, at 235 (noting companies are concerned about their ability to maintain the confidentiality of their information and "some observers maintaining that Congress should receive only aggregate data").

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authority to block a transaction not presumed to threaten national security.

Allowing the Committee and the President to maintain this discretionary authority would admittedly decrease the overall certainty these proposed revisions seek to create; however, this uncertainty will be extremely limited and balance the Committee's authority to protect national security interests. First, should the Committee decide to allow a transaction presumed to threaten national security based on the lists and charts, this will actually benefit the parties by allowing the transaction to proceed without delay. Second, the President's powers to block a transaction have not been a major problem. As noted, the President has only exercised this power twice in the history of the Committee. Although this could increase should the regulations be revised, it is unlikely to be exercised too frequently because of the improved accountability generated by the lists and charts of presumed threats. Therefore, this discretionary authority can be maintained without overly diminishing the certainty surrounding FDI.

Moreover, the regulations should require CFIUS to publish redacted reports on the transactions where the Committee or the President exercised their discretionary authority, which would further reduce the uncertainty generated by preserving this discretionary authority. Foreign direct investors' concerns over confidentiality would also be minimal, both because the reports would be redacted and because they would only be published in the rare event that this discretionary authority was exercised. Therefore, CFIUS can maintain robust authority to protect national security interests, while significantly reducing the net uncertainty surrounding their national security evaluations and without raising significant confidentiality concerns.

## 6. CONCLUSION

With the passage of FINSA, CFIUS has transitioned from a once-toothless entity to a powerful body with immense authority to prevent FDI for national security reasons. Due to the vagueness of the national security factors and the lack of transparency as to how they are applied, investors are left with little clarity as to whether their transaction may raise national security concerns. This uncertainty imposes significant costs on foreign direct investors, U.S. businesses, and the Committee itself. Although these costs have not been effectively measured, they are

undoubtedly substantial due to delays and uncertainty for businesses, retaliatory measures, and increased review costs for the Committee. Moreover, these costs are likely to increase as the global economy recovers, leading to increased cross-border investments, and as both CFIUS and the President continue to expand the application of their respective powers under the CFIUS regulations. Commenters and scholars noted these potential costs early on, but in the heightened national security environment following September 11th, as well as the CNOOC and DPW controversies, CFIUS disregarded these concerns. However, CFIUS's growing prominence, as highlighted in the rejection of Ralls Corp.'s wind farm investment, has demonstrated the need for revisions to the CFIUS regulations.

This paper proposes revisions that closely emulate the licensing process in U.S. export law, namely the EAA and AECA. This process involves the listing of industries and technologies whose acquisition by a foreign entity CFIUS will presume to raise national security concerns. This list should be considered in conjunction with a similar chart of countries and companies presumed to raise national security threats when investing in the United States. However, instead of prohibiting transactions appearing on these lists outright, CFIUS and the President should maintain discretionary authority to allow a listed transaction or block a non-listed transaction, respectively. The requirement that redacted reports be published on every discretionary decision would limit the uncertainty generated by preserving CFIUS's discretionary authority over national security concerns without raising significant confidentiality concerns for investors. Therefore, by implementing these revisions, CFIUS could better achieve its objective of encouraging FDI in the United States while diligently protecting the United States from national security risks stemming from select foreign investments.