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The Committee on Foreign Investment in the United States (CFIUS)

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Summary

The Committee on Foreign Investment in the United States (CFIUS) is an interagency body comprised of nine Cabinet members, two ex officio members, and other members as appointed by the President, that assists the President in overseeing the national security aspects of foreign direct investment in the U.S. economy. While the group often operated in relative obscurity, the perceived change in the nation's national security and economic concerns following the September 11, 2001, terrorist attacks and the proposed acquisition of commercial operations at six U.S. ports by Dubai Ports World in 2006 placed CFIUS's review procedures under intense scrutiny by Members of Congress and the public. Prompted by this case, some Members of Congress questioned the ability of Congress to exercise its oversight responsibilities given the general view that CFIUS's operations lacked transparency. The current CFIUS process reflects changes Congress initiated in the first session of the 110th Congress, when the House and Senate adopted S. 1610, the Foreign Investment and National Security Act of 2007 (FINSA). In the 115th Congress, the House and Senate adopted measures that would mark the most comprehensive reform of CFIUS since FINSA in 2007 (S. 2987/H.R. 5515), the Foreign Investment Risk Review Modernization Act of 2017).

Generally, efforts to amend CFIUS have been spurred by a specific foreign investment transaction that raised national security concerns. Despite various changes to the CFIUS statute, some Members and others are questioning the nature and scope of CFIUS's reviews. The CFIUS process is governed by statute that sets a legal standard for the President to suspend or block a transaction if no other laws apply and if there is "credible evidence" that the transaction threatens to impair the national security, which is interpreted as transactions that pose a national security risk.

The U.S. policy approach to international investment traditionally has been to establish and support an open and rules-based system that is in line with U.S. economic and national security interests. The current debate over CFIUS reflects long-standing concerns about the impact of foreign investment on the economy and the role of economics as a component of national security. Some Members question CFIUS's performance and the way the Committee reviews cases involving foreign governments, particularly with the emergence of state-owned enterprises. Some policymakers have suggested expanding CFIUS's purview to include a broader focus on the economic implications of individual foreign investment transactions and the cumulative effect of foreign investment on certain sectors of the economy or by investors from individual countries. Changes in U.S. foreign investment policy have potentially large economy-wide implications, since the United States is the largest recipient and the largest overseas investor of foreign direct investment. To date, five investments have been blocked, although proposed transactions may have been terminated by the firms involved in lieu of having a transaction blocked. President Obama used the FINSA authority in 2012 to block an American firm, Ralls Corporation, owned by Chinese nationals, from acquiring a U.S. wind farm energy firm located near a DOD facility and to block a Chinese investment firm in 2016 from acquiring Aixtron, a Germany-based firm with assets in the United States. In 2017, President Trump blocked the acquisition of Lattice Semiconductor Corp. by the Chinese investment firm Canyon Bridge Capital Partners; in 2018, he blocked the acquisition of Qualcomm by Broadcom.

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Background

The Committee on Foreign Investment in the United States (CFIUS) is an interagency committee that serves the President in overseeing the national security implications of foreign direct investment (FDI) in the economy. Since its inception, CFIUS has operated at the nexus of shifting concepts of national security, especially relative to various notions of national economic security, and a changing global economic order that is marked in part by emerging economies such as China that are playing a more active role in the global economy. As a basic premise, the U.S. historical approach to international investment has aimed to establish an open and rules-based system that is consistent across countries and in line with U.S. economic and national security interests. This policy also has fundamentally maintained that FDI has positive net benefits for the economy, except in certain cases in which national security concerns outweigh other considerations. More recently, some policymakers have argued that certain foreign investment transactions, particularly by entities owned or controlled by a foreign government, are compromising U.S. national economic security and argue for greater CFIUS scrutiny of foreign investment transactions, including a mandatory approval process. Some policymakers also argue that the CFIUS review process should have a more robust economic component, possibly even to the extent of an industrial policy-type approach that uses the CFIUS national security review process to protect and promote certain industrial sectors in the economy. Others argue, however, that this review process should maintain its current focus on national security issues.

Originally established by an Executive Order of President Ford in 1975, the Committee generally operated in relative obscurity.[1] According to a Treasury Department memorandum, the Committee originally was established in order to "dissuade Congress from enacting new restrictions" on foreign investment, as a result of growing concerns over the rapid increase in investments by Organization of the Petroleum Exporting Countries (OPEC) countries in American portfolio assets (Treasury securities, corporate stocks and bonds), and to respond to concerns of some that much of the OPEC investments were being driven by political, rather than by economic, motives.[2]

Thirty years later, public and congressional concerns about the proposed purchase of commercial port operations of the British-owned Peninsular and Oriental Steam Navigation Company (P&O)[3] in six U.S. ports by Dubai Ports World (DP World)[4] sparked a firestorm of criticism and congressional activity during the 109th Congress concerning CFIUS and the manner in which it operated. As a result of the attention by the public and Congress, DP World officials decided to sell off the U.S. port operations to an American owner.[5] On December 11, 2006, DP World officials announced that a unit of AIG Global Investment Group, a New York-based asset

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[1] Executive Order 11858 (b), May 7, 1975, 40 F.R. 20263.

[2] U.S. Congress. House. Committee on Government Operations. Subcommittee on Commerce, Consumer, and Monetary Affairs. *The Operations of Federal Agencies in Monitoring, Reporting on, and Analyzing Foreign Investments in the United States*. Hearings. 96th Cong., 1st sess., Part 3, July 30, 1979. Washington: GPO, 1979. pp. 334-335. (Hereinafter cited as, *The Operations of Federal Agencies*, part 3.)

[3] Peninsular and Oriental Steam Company is a leading ports operator and transport company with operations in ports, ferries, and property development. It operates container terminals and logistics operations in over 100 ports and has a presence in 18 countries.

[4] Dubai Ports World was created in November 2005 by integrating Dubai Ports Authority and Dubai Ports International. It is one of the largest commercial port operators in the world with operations in the Middle East, India, Europe, Asia, Latin America, the Caribbean, and North America.

[5] Weisman, Jonathan, and Bradley Graham, "Dubai Firm to Sell U.S. Port Operations," *The Washington Post*, March 10, 2006. p. A1.

management company with large assets, but no experience in port operations, had acquired the U.S. port operations for an undisclosed amount.[6]

The DP World transaction revealed that the September 11, 2001, terrorist attacks fundamentally altered the viewpoint of some Members of Congress regarding the role of foreign investment in the economy and the impact of such investment on the national security framework. Some Members argued that this change in perspective required a reassessment of the role of foreign investment in the economy and of the implications of corporate ownership on activities that fall under the rubric of critical infrastructure. The emergence of state-owned enterprises as commercial economic actors has raised additional concerns about whose interests and whose objectives such firms are pursuing in their foreign investment activities.

Members of Congress introduced more than 25 bills in the second session of the 109th Congress that addressed various aspects of foreign investment following the proposed DP World transaction. In the first session of the 110th Congress, Members approved, and President Bush signed, the Foreign Investment and National Security Act of 2007 (FINSA), (P.L. 110-49), which altered the CFIUS process in order to enable greater oversight by Congress and increased transparency and reporting by the Committee on its decisions. In addition, the act broadened the definition of national security and required greater scrutiny by CFIUS of certain types of foreign direct investments. Not all Members were satisfied with the law: some Members argued that the law remained deficient in reviewing investment by foreign governments through sovereign wealth funds (SWFs), an issue that was attracting attention when the law was adopted. Also left unresolved were issues concerning the role of foreign investment in the nation's overall security framework and the methods that are used to assess the impact of foreign investment on the nation's defense industrial base, critical infrastructure, and homeland security.

Information on international investment and production collected and published by the United Nations indicates that FDI peaked in 2007 prior to the global financial crisis and has not fully recovered. Similarly, from 2012 through 2014, international flows of FDI fell below the levels reached prior to the 2008-2009 financial crisis. Cross-border merger and acquisition activity (M&As) picked up in 2014, after lagging behind the pace set in 2008, although global nominal gross domestic product (GDP) generally has risen since 2009. Globally, at 79 million, employment in 2015 by the foreign affiliates of international firms, as indicted in **Table 1**, has surpassed the 77 million recorded in 2007. Globally, foreign direct investment in 2015 totaled about $25 trillion. Other measures of international production, sales, assets, value-added production, and exports all indicate higher nominal values in 2015 than in previous years, which provides further indication that global economic growth was recovering, although at a slow pace.

According to the United Nations,[7] the global FDI position in the United States, or the cumulative amount, was recorded at around $5.6 trillion in 2015, with the U.S. outward FDI position of about $6.0 trillion. The next closest country in investment position to the United States was Germany with inward and outward investment positions of about one-fifth that of the United States.

[6] King, Neil Jr., and Greg Hitt, "Dubai Ports World Sells U.S. Assets—AIG Buys Operations that Ignited Controversy As Democrats Plan Changes," *The Wall Street Journal*, December 12, 2006. p. A1.

[7] *World Investment Report 2016*, United Nations, 2016.

Table 1. Selected Indicators of International Investment and Production, 2008-2015
(Billions of dollars)

	2008	2009	2010	2011	2012	2013	2014	2015
FDI inflows	$1,744.0	$1,198.0	$1,409.0	$1,700.0	$1,403.0	$1,427.0	$1,277.0	$1,762.0
FDI outflows	1,911.0	1,175.0	1,505.0	1,712.0	1,284.0	1,311.0	1,318.0	$1,474.0
FDI inward stock	15,295.0	18,041.0	20,380.0	21,117.0	22,073.0	24,533.0	25,113.0	24,983.0
FDI outward stock	15,988.0	19,326.0	21,130.0	21,913.0	22,527.0	24,665.0	24,810.0	25,045.0
Cross-border M&As (number)	707	250	344	556	328	263	432	721
Sales of foreign affiliates	33,300.0	23,866.0	22,574.0	28,516.0	31,687.0	31,865.0	34,149.0	36,668.0
Value-added (product) of foreign affiliates	6,216.0	6,392.0	5,735.0	6,262.0	7,105.0	7,030.0	7,419.0	7,903.0
Total assets of foreign affiliates	64,423.0	74,910.0	78,631.0	83,754.0	88,536.0	95,671.0	101,254.0	105,778.0
Exports of foreign affiliates	6,599.0	5,060.0	6,320.0	7,463.0	7,469.0	7,469.0	7,688.0	7,803.0
GDP	61,147.0	57,920.0	63,468.0	71,314.0	73,457.0	75,887.0	77,807.0	73,152.0
Employment by foreign affiliates (thousands)	64,484.0	59,877.0	63,043.0	63,416.0	69,359.0	72,239.0	76,821.0	79,505.0

Source: *World Investment Report*, United Nations Conference on Trade and Development, June 2016.

Establishment of CFIUS

President Ford's 1975 Executive Order established the basic structure of CFIUS, and directed that the "representative"[8] of the Secretary of the Treasury be the chairman of the Committee. The Executive Order also stipulated that the Committee would have "the primary continuing responsibility within the executive branch for monitoring the impact of foreign investment in the United States, both direct and portfolio, and for coordinating the implementation of United States policy on such investment." In particular, CFIUS was directed to (1) arrange for the preparation of analyses of trends and significant developments in foreign investment in the United States; (2) provide guidance on arrangements with foreign governments for advance consultations on prospective major foreign governmental investment in the United States; (3) review investment in the United States which, in the judgment of the Committee, might have major implications for United States national interests; and (4) consider proposals for new legislation or regulations relating to foreign investment as may appear necessary.[9]

President Ford's Executive Order also stipulated that information submitted "in confidence shall not be publicly disclosed" and that information submitted to CFIUS be used "only for the purpose

[8] The term "representative" was dropped by Executive Order 12661, December 27, 1988, 54 FR 780.

[9] Executive Order 11858 (b), May 7, 1975, 40 F.R. 20263.

of carrying out the functions and activities" of the order. In addition, the Secretary of Commerce was directed to perform a number of activities, including

> (1) obtaining, consolidating, and analyzing information on foreign investment in the United States;
>
> (2) improving the procedures for the collection and dissemination of information on such foreign investment;
>
> (3) the close observing of foreign investment in the United States;
>
> (4) preparing reports and analyses of trends and of significant developments in appropriate categories of such investment;
>
> (5) compiling data and preparing evaluation of significant transactions; and
>
> (6) submitting to the Committee on Foreign Investment in the United States appropriate reports, analyses, data, and recommendations as to how information on foreign investment can be kept current.

The Executive Order, however, raised questions among various observers and government officials who doubted that federal agencies had the legal authority to collect the types of data that were required by the order. As a result, Congress and the President sought to clarify this issue, and in the following year President Ford signed the International Investment Survey Act of 1976.[10] The act gave the President "clear and unambiguous authority" to collect information on "international investment." In addition, the act authorized "the collection and use of information on direct investments owned or controlled directly or indirectly by foreign governments or persons, and to provide analyses of such information to the Congress, the executive agencies, and the general public."[11]

CFIUS Legislative History

1975 CFIUS established by Executive Order.

1988 "Exon-Florio" amendment to Defense Production Act. Codified the process CFIUS used to review foreign investment transactions.

1992 "Byrd Amendment" to Defense Production Act. Required reviews in cases where foreign acquirer was acting on or behalf of a foreign government.

2007 Foreign Investment and National Security Act of 2007. Replaced Executive Order and codified CFIUS.

By 1980, some Members of Congress had come to believe that CFIUS was not fulfilling its mandate. Between 1975 and 1980, for instance, the Committee had met only 10 times and seemed unable to decide whether it should respond to the political or the economic aspects of foreign direct investment in the United States.[12] One critic of the Committee argued in a congressional hearing in 1979 that, "the Committee has been reduced over the last four years to a body that only responds to the political aspects or the political questions that foreign investment in the United States poses and not with what we really want to know about foreign investments in the United States, that is: Is it good for the economy?"[13]

From 1980 to 1987, CFIUS investigated a number of foreign investments, mostly at the request of the Department of Defense. In 1983, for instance, a Japanese firm sought to acquire a U.S. specialty steel producer. The Department of Defense subsequently classified the metals produced

[10] P.L. 94-472, October 11, 1976; 22 U.S.C. 3101.

[11] P.L. 94-472, October 11, 1976; 22 U.S.C. Section 3101(b).

[12] U.S. Congress. House. Committee on Government Operations. *The Adequacy of the Federal Response to Foreign Investment in the United States*. Report by the Committee on Government Operations. H.Rept. 96-1216, 96th Cong., 2nd sess., Washington: GPO, 1980. 166-184.

[13] *The Operations of Federal Agencies*, part 3, p. 5.

by the firm because they were used in the production of military aircraft, which caused the Japanese firm to withdraw its offer. Another Japanese company attempted to acquire a U.S. firm in 1985 that manufactured specialized ball bearings for the military. The acquisition was completed after the Japanese firm agreed that production would be maintained in the United States. In a similar case in 1987, the Defense Department objected to a proposed acquisition of the computer division of a U.S. multinational company by a French firm because of classified work engaged in by the computer division. The acquisition proceeded after the classified contracts were reassigned to the U.S. parent company.[14]

The "Exon-Florio" Provision

In 1988, amid concerns over foreign acquisition of certain types of U.S. firms, particularly by Japanese firms, Congress approved the Exon-Florio amendment to the Defense Production Act, which specifies the process by which foreign investments are reviewed.[15] This statute grants the President the authority to block proposed or pending foreign "mergers, acquisitions, or takeovers" of "persons engaged in interstate commerce in the United States" that threaten to impair the national security. Congress directed, however, that before this authority can be invoked the President must conclude that (1) other U.S. laws are inadequate or inappropriate to protect the national security; and (2) he must have "credible evidence" that the foreign investment will impair the national security. This same standard was maintained in an update to the Exon-Florio provision in 2007, the Foreign Investment and National Security Act of 2007.

By the late 1980s, Congress and the public had grown increasingly concerned about the sharp increase in foreign investment in the United States and the potential impact such investment might have on the U.S. economy. In particular, the proposed sale in 1987 of Fairchild Semiconductor Co. by Schlumberger Ltd. of France to Fujitsu Ltd. of Japan touched off strong opposition in Congress and provided much of the impetus behind the passage of the Exon-Florio provision. The proposed Fairchild acquisition generated intense concern in Congress in part because of general difficulties in trade relations with Japan at that time and because some Americans felt that the United States was declining as an international economic and world power. The Defense Department opposed the acquisition because some officials believed that the deal would have given Japan control over a major supplier of computer chips for the military and would have made U.S. defense industries more dependent on foreign suppliers for sophisticated high-technology products.[16]

Although Commerce Secretary Malcolm Baldridge and Defense Secretary Caspar Weinberger failed in their attempt to have President Reagan block the Fujitsu acquisition, Fujitsu and Schlumberger called off the proposed sale of Fairchild.[17] While Fairchild was acquired some months later by National Semiconductor Corp. for a discount,[18] the Fujitsu-Fairchild incident marked an important shift in the Reagan Administration's support for unlimited foreign direct

[14] U.S. Congress. House. Committee on Energy and Commerce. Subcommittee on Commerce, Consumer Protection, and Competitiveness. *Foreign Takeovers and National Security*. Hearings on Section 905 of H.R. 3. 100th Cong., 1st sess., October 20, 1987. Testimony of David C. Mulford. Washington: GPO, 1988. pp. 21-22.

[15] P.L. 100-418, Title V, Section 5021, August 23, 1988; 50 U.S.C. Appendix §2170.

[16] Auerbach, Stuart. "Cabinet to Weigh Sale of Chip Firm," *The Washington Post*, March 12, 1987. p. E1.

[17] Sanger, David E. "Japanese Purchase of Chip Maker Canceled After Objections in U.S.," *The New York Times*, March 17, 1987. p. 1.

[18] Pollack, Andrew. "Schlumberger Accepts Offer," *The New York Times*, September 1, 1987. p. D1.

investment in U.S. businesses and boosted support within the Administration for fixed guidelines for blocking foreign takeovers of companies in national security-sensitive industries.[19]

In 1988, after three years of often contentious negotiations between Congress and the Reagan Administration, Congress passed and President Reagan signed the Omnibus Trade and Competitiveness Act of 1988.[20] During consideration of the Exon-Florio proposal as an amendment to the 1988 Omnibus Trade bill, debate focused on three issues that generated a clash of views: (1) what constitutes foreign control of a U.S. firm?; (2) how should national security be defined?; and (3) which types of economic activities should be targeted for a CFIUS review? Of these issues, the most controversial and the most far-reaching was the lack of a definition of national security. As originally drafted, the provision would have considered investments which affected the "national security and essential commerce" of the United States. The term "essential commerce" was the focus of intense debate between Congress and the Reagan Administration.

The Treasury Department, headed by Secretary James Baker, objected to the Exon-Florio amendment, and the Administration vetoed the first version of the omnibus trade legislation, in part due to its objections to the language in the measure regarding "national security and essential commerce." The Reagan Administration argued that the language would broaden the definition of national security beyond the traditional concept of military/defense to one which included a strong economic component. Administration witnesses argued against this aspect of the proposal and eventually succeeded in prodding Congress to remove the term "essential commerce" from the measure and in narrowing substantially the factors the President must consider in his determination.

The final Exon-Florio provision was included as Section 5021 of the Omnibus Trade and Competitiveness Act of 1988. The provision originated in bills reported by the Commerce Committee in the Senate and the Energy and Commerce Committee in the House, but the measure was transferred to the Senate Banking Committee as a result of a dispute over jurisdictional responsibilities.[21] Through Executive Order 12661, President Reagan implemented provisions of the Omnibus Trade Act. In the Executive Order, President Reagan delegated his authority to administer the Exon-Florio provision to CFIUS,[22] particularly to conduct reviews, undertake investigations, and make recommendations, although the statute itself does not specifically mention CFIUS. As a result of President Reagan's action, CFIUS was transformed from an administrative body with limited authority to review and analyze data on foreign investment to an important component of U.S. foreign investment policy with a broad mandate and significant authority to advise the President on foreign investment transactions and to recommend that some transactions be suspended or blocked.

In 1990, President Bush directed the China National Aero-Technology Import and Export Corporation (CATIC) to divest its acquisition of MAMCO Manufacturing, a Seattle-based firm producing metal parts and assemblies for aircraft, because of concerns that CATIC might gain access to technology through MAMCO that it would otherwise have to obtain under an export license.[23]

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[19] Kilborn, Peter T. "Curb Asked On Foreign Takeovers," *The New York Times*, March 18, 1987. p. D1.

[20] P.L. 100-418.

[21] Testimony of Patrick A. Mulloy before the Committee on Banking, Housing, & Urban Affairs, October 20, 2005.

[22] Executive Order 12661 of December 27, 1988, 54 F.R. 779.

[23] Auerbach, Stuart. "President Tells China to Sell Seattle Firm," *The Washington Post*, February 8, 1990, p. A1; and Benham, Barbara. "Blocked Takeover Fuels Foreign Policy Flap," *Investor's Daily*, February 8, 1990. p. 1.

Part of Congress's motivation in adopting the Exon-Florio provision apparently arose from concerns that foreign takeovers of U.S. firms could not be stopped unless the President declared a national emergency or regulators invoked federal antitrust, environmental, or securities laws. Through the Exon-Florio provision, Congress attempted to strengthen the President's hand in conducting foreign investment policy, while limiting its own role as a means of emphasizing that, as much as possible, the commercial nature of investment transactions should be free from political considerations. Congress also attempted to balance public concerns about the economic impact of certain types of foreign investment with the nation's long-standing international commitment to maintaining an open and receptive environment for foreign investment.

Furthermore, Congress did not intend to have the Exon-Florio provision alter the generally open foreign investment climate of the country or to have it inhibit foreign direct investment in industries that could not be considered to be of national security interest. At the time, some analysts believed the provision could potentially widen the scope of industries that fell under the national security rubric. CFIUS, however, is not free to establish an independent approach to reviewing foreign investment transactions, but operates under the authority of the President and reflects his attitudes and policies. As a result, the discretion CFIUS uses to review and to investigate foreign investment cases reflects policy guidance from the President. Foreign investors also are constrained by legislation that bars foreign direct investment in such industries as maritime, aircraft, banking, resources, and power. Generally, these sectors were closed to foreign investors prior to passage of the Exon-Florio provision in order to prevent public services and public interest activities from falling under foreign control, primarily for national defense purposes.

Transactions Blocked by Presidents

Since the creation of CFIUS, the President has blocked five transactions based on a recommendation from the Committee:

1. In 1990, President Bush directed the China National Aero-Technology Import and Export Corporation (CATIC) to divest its acquisition of MAMCO Manufacturing.

2. In 2012, President Obama directed the Ralls Corporation to divest itself of an Oregon wind farm project.

3. In 2016, President Obama blocked the Chinese firm Fujian Grand Chip Investment Fund from acquiring Aixtron, a German-based semiconductor firm with U.S. assets.

4. In 2017, President Trump blocked the acquisition of Lattice Semiconductor Corp. of Portland, OR, for $1.3 billion by Canyon Bridge Capital Partners, a Chinese investment firm.

5. In 2018, President Trump blocked the acquisition of semiconductor chip maker Qualcomm by Singapore-based Broadcom for $117 billion.

Treasury Department Regulations

After extensive public comment, the Treasury Department issued its final regulations in November 1991 implementing the Exon-Florio provision.[24] Although these procedures were amended through FINSA, they continued to serve as the basis for the Exon-Florio review and investigation until new regulations were released on November 21, 2008.[25] These regulations created an essentially voluntary system of notification by the parties to an acquisition, and they allowed for notices of acquisitions by agencies that are members of CFIUS. Despite the voluntary nature of the notification, firms largely comply with the provision, because the regulations stipulate that foreign acquisitions that are governed by the Exon-Florio review process that do not notify the Committee remain subject indefinitely to possible divestment or other appropriate actions by the President. Under most circumstances, notice of a proposed acquisition that is given to the Committee by a third party, including

[24] Regulations Pertaining to Mergers, Acquisitions, and Takeovers by Foreign Persons. 31 C.F.R. Part 800.

[25] 31 C.F.R. Part 800, November 21, 2008.

shareholders, is not considered by the Committee to constitute an official notification. The regulations also indicated that notifications provided to the Committee would be considered confidential and the information would not be released by the Committee to the press or commented on publicly.

The "Byrd Amendment"

In 1992, Congress amended the Exon-Florio statute through Section 837(a) of the National Defense Authorization Act for Fiscal Year 1993 (P.L. 102-484). Known as the "Byrd" amendment after the amendment's sponsor, the provision requires CFIUS to investigate proposed mergers, acquisitions, or takeovers in cases where two criteria are met:

> (1) the acquirer is controlled by or acting on behalf of a foreign government; and
>
> (2) the acquisition results in control of a person engaged in interstate commerce in the United States that could affect the national security of the United States.[26]

This amendment came under scrutiny by the 109th Congress as a result of the DP World transaction. Many Members of Congress and others believed that this amendment required CFIUS to undertake a full 45-day investigation of the transaction because DP World was "controlled by or acting on behalf of a foreign government." The DP World acquisition, however, exposed a sharp rift between what some Members apparently believed the amendment directed CFIUS to do and how the members of CFIUS were interpreting the amendment. In particular, some Members of Congress apparently interpreted the amendment to direct CFIUS to conduct a mandatory 45-day investigation if the foreign firm involved in a transaction is owned or controlled by a foreign government. Representatives of CFIUS argued that they interpreted the amendment to mean that a 45-day investigation was discretionary and not mandatory. In the case of the DP World acquisition, CFIUS representatives argued that they had concluded as a result of an extensive review of the proposed acquisition prior to the case being formally filed with CFIUS and during the 30-day review that the DP World case did not warrant a full 45-day investigation. They conceded that the case met the first criterion under the Byrd amendment, because DP World was controlled by a foreign government, but that it did not meet the second part of the requirement, because CFIUS had concluded during the 30-day review that the transaction "could not affect the national security."[27]

The intense public and congressional reaction that arose from the proposed Dubai Ports World acquisition spurred the Bush Administration in late 2006 to make an important administrative change in the way CFIUS reviewed foreign investment transactions. CFIUS and President Bush approved the acquisition of Lucent Technologies, Inc. by the French-based Alcatel SA, which was completed on December 1, 2006. Before the transaction was approved by CFIUS, however, Alcatel-Lucent was required to agree to a national security arrangement, known as a Special Security Arrangement, or SSA, that restricts Alcatel's access to sensitive work done by Lucent's research arm, Bell Labs, and the communications infrastructure in the United States.

The most controversial feature of this arrangement is that it allows CFIUS to reopen a review of the deal and to overturn its approval at any time if CFIUS believed the companies "materially fail to comply" with the terms of the arrangement. This marked a significant change in the CFIUS process. Prior to this transaction, CFIUS reviews and investigations were portrayed and considered to be final. As a result, firms were willing to subject themselves voluntarily to a

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[26] P.L. 102-484, October 23, 1992.

[27] Briefing on the Dubai Ports World Deal before the Senate Armed Services Committee, February 23, 2006.

CFIUS review, because they believed that once an investment transaction was scrutinized and approved by the members of CFIUS the firms could be assured that the investment transaction would be exempt from any future reviews or actions. This administrative change, however, meant that a CFIUS determination may no longer be a final decision, and it added a new level of uncertainty to foreign investors seeking to acquire U.S. firms. A broad range of U.S. and international business groups objected to this change in the Bush Administration's policy.[28]

The Amended CFIUS Process

In the first session of the 110th Congress, Representative Maloney introduced H.R. 556, the National Security Foreign Investment Reform and Strengthened Transparency Act of 2007, on January 18, 2007. The House Financial Services Committee approved it on February 13, 2007, with amendments, and the full House amended and approved it on February 28, 2007, by a vote of 423 to 0. On June 13, 2007, Senator Dodd introduced S. 1610, the Foreign Investment and National Security Act of 2007 (FINSA). On June 29, 2007, the Senate adopted S. 1610 in lieu of H.R. 556 by unanimous consent. On July 11, 2007, the House accepted the Senate's version of H.R. 556 by a vote of 370-45 and sent the measure to President Bush, who signed it on July 26, 2007.[29] On January 23, 2008, President Bush issued Executive Order 13456 implementing the law.

CFIUS Risk Assessment

In assessing the risk posed to national security by a foreign investment transaction, CFIUS considers three issues:

1. What is the threat posed by the foreign investment in terms of intent and capabilities?

2. What aspects of the business activity pose vulnerabilities to national security?

3. What are the national security consequences if the vulnerabilities are exploited?

Similar to the Exon-Florio Amendment, FINSA grants the President the authority to block or suspend proposed or pending foreign "mergers, acquisitions, or takeovers" of "persons engaged in interstate commerce in the United States" that threaten to impair the national security. Congress directed, however, that before this authority can be invoked the President must conclude that (1) other U.S. laws are inadequate or inappropriate to protect the national security; and (2) he/she must have "credible evidence" that the foreign interest exercising control might take action that threatens to impair the national security. According to CFIUS, it has interpreted this last provision to mean an investment that poses a risk to the national security. In assessing the national security risk, CFIUS looks at (1) the threat, which involves an assessment of the intent and capabilities of the acquirer; (2) the vulnerability, which involves an assessment of the aspects of the U.S. business that could impact national security; and (3) the potential national security consequences if the vulnerabilities were to be exploited.[30]

Major changes made by FINSA included the following:

- Codified the Committee on Foreign Investment in the United States (CFIUS), giving it statutory authority.

[28] Kirchgaessner, Stephanie, "US Threat to Reopen Terms of Lucent and Alcatel Deal Mergers," *Financial Times*, December 1, 2006. P. 19; Pelofsky, Jeremy, "Businesses Object to US move on foreign Investment," *Reuters News*, December 5, 2006.

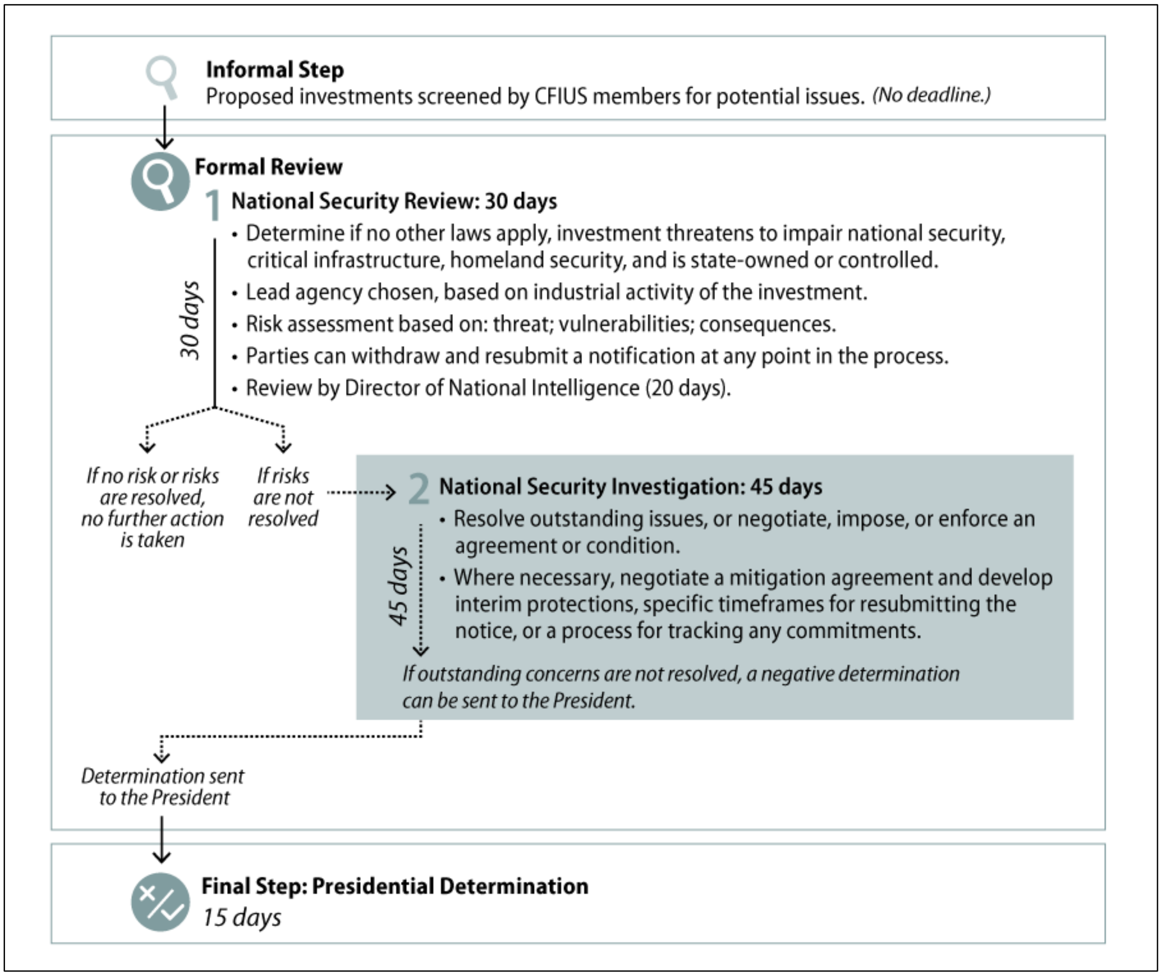
[29] The law is designated as P.L. 110-49.

[30] See the CFIIUS website at https://www.treasury.gov/press-center/press-releases/Pages/jl0401.aspx.

- Made CFIUS membership permanent and added the Secretary of Energy; added the Director of National Intelligence (DNI) and Secretary of Labor as ex officio members with the DNI providing intelligence analysis; also granted authority to the President to add members on a case-by-case basis.
- Required the Secretary of the Treasury to designate an agency with lead responsibility for reviewing a covered transaction.
- Increased the number of factors the President could consider in making his determination.
- Required that an individual no lower than an Assistant Secretary level for each CFIUS member must certify to Congress that a reviewed transaction has no unresolved national security issues; for investigated transactions, the certification must be at the Secretary or Deputy Secretary level.
- Provided Congress with confidential briefings upon request on cleared transactions and annual classified and unclassified reports.

As indicated in **Figure 1** below, the CFIUS foreign investment review process is comprised of an informal step and three formal steps: a National Security Review; a National Security Investigation; and a Presidential Determination.

Figure 1. Steps of a CFIUS Foreign Investment National Security Review



Source: Chart developed by CRS.

Informal Actions

Over time, the three-step CFIUS process has evolved to include an informal stage of unspecified length of time that consists of an unofficial CFIUS determination prior to the formal filing with CFIUS. This type of informal review likely developed because it serves the interests of both CFIUS and the firms that are involved in an investment transaction. According to Treasury Department officials, this informal contact enabled "CFIUS staff to identify potential issues before the review process formally begins."[31]

Firms that are party to an investment transaction apparently benefit from this informal review in a number of ways. For one, it allows firms additional time to work out any national security concerns privately with individual CFIUS members. Secondly, and perhaps more importantly, it provides a process for firms to avoid risking potential negative publicity that could arise if a transaction were blocked or otherwise labeled as impairing U.S. national security interests. For

[31] Testimony of Robert Kimmett, Briefing on the Dubai Ports World Deal Before the Senate Armed Services Committee, February 23, 2006.

some firms, public knowledge of a CFIUS investigation has had a negative effect on the value of the firm's stock price.

For CFIUS members, the informal process is beneficial because it gives them as much time as they consider necessary to review a transaction without facing the time constraints that arise under the formal CFIUS review process. This informal review likely also gives the CFIUS members added time to negotiate with firms involved in a transaction to restructure the transaction in ways that can address any potential security concerns or to develop other types of conditions that members feel are appropriate in order to remove security concerns.

According to the amended CFIUS provision, the President or any member of CFIUS can initiate a review of an investment transaction, in addition to a review that is initiated by the parties to a transaction providing a formal notification. CFIUS has 30 days after it receives the initial formal notification by the parties to a merger, acquisition, or takeover to review the transaction to decide whether to investigate a case as a result of its determination that the investment "threatens to impair the national security of the United States." National security also includes "those issues relating to 'homeland security,' including its application to critical infrastructure," and "critical technologies." In addition, CFIUS is required to conduct an investigation of a transaction if the Committee determines that the transaction would result in foreign control of any person engaged in interstate commerce in the United States. During such a review, CFIUS members are required to consider the 12 factors mandated by Congress in assessing the impact of the investment. If during this 30-day period all members conclude that the investment does not threaten to impair the national security, the review is terminated. If, however, at least one member of the Committee determines that the investment threatens to impair the national security, CFIUS proceeds to a 45-day investigation.

According to anecdotal evidence, some firms believe the CFIUS process is not market neutral, but adds to market uncertainty that can negatively affect a firm's stock price and lead to economic behavior by some firms that is not optimal for the economy as a whole. Such behavior might involve firms expending resources to avoid a CFIUS investigation, or terminating a transaction that potentially could improve the optimal performance of the economy to avoid a CFIUS investigation. While such anecdotal accounts generally are not a basis for developing public policy, they raise concerns about the possible impact a CFIUS review may have on financial markets and the potential costs of redefining the concept of national security relative to foreign investment.

Formal Actions

FINSA codified CFIUS, gave it statutory authority, and designated the Secretary of the Treasury to serve as the chairman. The measure followed the same pattern that had been set by Executive Order 11858. The formal process has clear deadlines for action

- 30 days to conduct a review;
- 45 days to conduct an investigation; and
- 15 days for a presidential determination.

At any point during the CFIUS process, parties can withdraw and refile their notice, for instance, to allow additional time to discuss CFIUS's proposed resolution of outstanding issues. Under FINSA, the President retained his authority as the only officer capable of suspending or prohibiting mergers, acquisitions, and takeovers, and the measure placed additional requirements on firms that resubmitted a filing after previously withdrawing a filing before a full review was completed.

National Security Review

During the 30-day review stage, the Director of National Intelligence (DNI), an ex officio member of CFIUS, is required to carry out a thorough analysis of "any threat to the national security of the United States" of any merger, acquisition, or takeover. This analysis is required to be completed "within 20 days" of the receipt of a notification by CFIUS, but the statute directs that the DNI must be given "adequate time," presumably if this national security review cannot be completed within the 20-day requirement. This analysis would include a request for information from the Department of the Treasury's Director of the Office of Foreign Assets Control and the Director of the Financial Crimes Enforcement Network. In addition, the Director of National Intelligence is required to seek and to incorporate the views of "all affected or appropriate" intelligence agencies. CFIUS also is required to review "covered" investment transactions in which the foreign entity is owned or controlled by a foreign government, but the law provides an exception to this requirement. A review is exempted if the Secretary of the Treasury and certain other specified officials determine that the transaction in question will not impair the national security.

National Security Investigation

The President, acting through CFIUS, is required to conduct a National Security investigation and to take any "necessary" actions as part of the 45-day investigation if the review indicates that at least one of three conditions exists: (1) CFIUS determines that the transaction threatens to impair the national security of the United States and that the threat has not been mitigated during or prior to a review of the transaction; (2) the foreign person is controlled by a foreign government; or (3) the transaction would result in the control of any critical infrastructure by a foreign person, the transaction could impair the national security, and such impairment has not been mitigated. At the conclusion of the investigation or the 45-day review period, whichever comes first, the Committee can decide to offer no recommendation or it can recommend that the President suspend or prohibit the investment.

During a review or an investigation, CFIUS and a designated lead agency have the authority to negotiate, impose, or enforce any agreement or condition with the parties to a transaction in order to mitigate any threat to U.S. national security. Such agreements are based on a "risk-based analysis" of the threat posed by the transaction. Also, if a notification of a transaction is withdrawn before any review or investigation by CFIUS is completed, the amended law grants the Committee the authority to take a number of actions. In particular, the Committee could develop (1) interim protections to address specific concerns about the transaction pending a resubmission of a notice by the parties; (2) specific time frames for resubmitting the notice; and (3) a process for tracking any actions taken by any parties to the transaction.

Presidential Determination

FINSA grants the President the authority to block proposed or pending foreign "mergers, acquisitions, or takeovers" of "persons engaged in interstate commerce in the United States" that threaten to impair the national security. The President, however, is under no obligation to follow the recommendation of the Committee to suspend or prohibit an investment. Congress directed that before this authority can be invoked (1) the President must conclude that other U.S. laws are inadequate or inappropriate to protect the national security; and (2) the President must have "credible evidence" that the foreign investment will impair the national security. As a result, if CFIUS determines, as was the case in the Dubai Ports transaction, that it does not have credible evidence that an investment will impair the national security, then it may argue that it is not required to undertake a full 45-day investigation, even if the foreign entity is owned or controlled by a foreign government. After considering the two conditions listed above (other laws are inadequate or inappropriate, and he has credible evidence that a foreign transaction will impair national security), the President is granted almost unlimited authority to take "*such action for such time as the President considers appropriate to suspend or prohibit any covered transaction that threatens to impair the national security of the United States*." In addition, such determinations by the President are not subject to judicial review, although the process by which the disposition of a transaction is determined may be subject to judicial review, as was emphasized in the ruling by the U.S. District Court for the District of Columbia in the case of *Ralls vs. the Committee on Foreign Investment in the United States*.

Committee Membership

President Bush's January 23, 2008, Executive Order 13456 implementing FINSA made various changes to the law. The Committee consists of nine Cabinet members, including the Secretaries of State, the Treasury, Defense, Homeland Security, Commerce, and Energy; the Attorney General; the United States Trade Representative; and the Director of the Office of Science and Technology Policy.[32] The Secretary of Labor and the Director of National Intelligence serve as ex officio members of the Committee.[33] The Executive Order added five executive office members to CFIUS in order to "observe and, as appropriate, participate in and report to the President": the Director of the Office of Management and Budget; the Chairman of the Council of Economic Advisors; the Assistant to the President for National Security Affairs; the Assistant to the President for Economic Policy; and the Assistant to the President for Homeland Security and Counterterrorism. The President can also appoint members on a temporary basis to the Committee as he determines.

Covered Transactions

The law requires CFIUS to review all "covered" foreign investment transactions to determine whether a transaction threatens to impair the national security, or the foreign entity is controlled by a foreign government, or it would result in control of any "critical infrastructure that could impair the national security." A covered foreign investment transaction is defined as any merger, acquisition, or takeover which results in "foreign control of any person engaged in interstate commerce in the United States." According to CFIUS, the FINSA law increased accountability in the way CFIUS conducts its reviews. Since the review process involves numerous federal government agencies with varying missions, CFIUS seeks consensus among the member agencies on every transaction. Any agency that has a different assessment of the national security risks

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[32] The United States Trade Representative and the Director of the Office of Science and Technology Policy were added through E.O. 13456, issued January 23, 2008.

[33] Executive Order 11858 of May 7, 1975, 40 F.R. 20263 established the Committee with six members: the Secretaries of State, the Treasury, Defense, Commerce, and the Assistant to the President for Economic Affairs, and the Executive Director of the Council on International Economic Policy. Executive Order 12188, January 2, 1980, 45 F.R. 969, added the United States Trade Representative and substituted the Chairman of the Council of Economic Advisors for the Executive Director of the Council on International Economic Policy. Executive Order 12661, December 27, 1988, 54 F.R. 779, added the Attorney General and the Director of the Office of Management and Budget. Executive Order 12860, September 3, 1993, 58 F.R. 47201, added the Director of the Office of Science and Technology Policy, the Assistant to the President for National Security Affairs, and the Assistant to the President for Economic Policy. Executive Order 13286, Section 57, February 28, 2003, added the Secretary of Homeland Security. P.L. 110-49 reduced the membership of CFIUS to six Cabinet members and the Attorney General, it added the Secretary of Labor and the Director of National Security as ex officio members, and removed seven White House appointees.

posed by a transaction has the ability to push that assessment to a higher level within CFIUS and, ultimately, to the President. As a matter of practice, before CFIUS clears a transaction to proceed, each member agency confirms to Treasury, at politically accountable levels, that it has no unresolved national security concerns with the transaction. CFIUS is represented through the review process by Treasury and by one or more other agencies that Treasury designates as a lead agency based on the subject matter of the transaction. At the end of a review or investigation, CFIUS provides a written certification to Congress that it has no unresolved national security concerns. This certification is executed by Senate-confirmed officials at these agencies at either the Assistant Secretary or Deputy Secretary level, depending on the stage of the process at which the transaction is cleared.[34]

According to Treasury Department regulations, investment transactions that are *not* considered to be covered transactions under FINSA and, therefore, not subject to a CFIUS review are those that are undertaken "solely for the purpose of investment," or an investment in which the foreign investor has "no intention of determining or directing the basic business decisions of the issuer." In addition, investments that are solely for investment purposes are defined as those (1) in which the transaction does not involve owning more than 10% of the voting securities of the firm; or (2) those investments that are undertaken directly by a bank, trust company, insurance company, investment company, pension fund, employee benefit plan, mutual fund, finance company, or brokerage company "in the ordinary course of business for its own account."[35]

Other transactions that are not covered include (1) stock splits or a pro rata stock dividend that does not involve a change in control; (2) an acquisition of any part of an entity or of assets that do not constitute a U.S. business; (3) an acquisition of securities by a person acting as a securities underwriter, in the ordinary course of business and in the process of underwriting; and (4) an acquisition pursuant to a condition in a contract of insurance relating to fidelity, surety, or casualty obligations if the contract was made by an insurer in the ordinary course of business. In addition, the Treasury regulations also stipulate that the extension of a loan or a similar financing arrangement by a foreign person to a U.S. business will not be considered a covered transaction and will not be investigated, unless the loan conveys a right to the profits of the U.S. business or involves a transfer of management decisions.

Critical Infrastructure

A new element to the CFIUS process added by FINSA was the addition of "critical industries" and "homeland security" as broad categories of economic activity that could be subject to a CFIUS national security review, ostensibly broadening CFIUS's mandate. The precedent for this action was set in the Patriot Act of 2001 and the Homeland Security Act of 2002, which define critical industries and homeland security and assign responsibilities for those industries to various federal government agencies. FINSA references those two acts and borrows language from them on critical industries and homeland security. After the September 11th terrorist attacks Congress passed and President Bush signed the USA PATRIOT Act of 2001 (Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism).[36] In this act, Congress provided for special support for "critical industries," which it defined as

> systems and assets, whether physical or virtual, so vital to the United States that the incapacity or destruction of such systems and assets would have a debilitating impact on

[34] https://www.treasury.gov/press-center/press-releases/Pages/jl0401.aspx.

[35] 31 C.F.R. 800.302.

[36] P.L. 107-56, Title X, §1014, October 26, 2001; 42 U.S.C. §5195c(e).

> security, national economic security, national public health or safety, or any combination of those matters.[37]

This broad definition is enhanced to some degree by other provisions of the act, which identify certain sectors of the economy that are likely candidates for consideration as components of the national critical infrastructure. These sectors include telecommunications, energy, financial services, water, transportation sectors,[38] and the "cyber and physical infrastructure services critical to maintaining the national defense, continuity of government, economic prosperity, and quality of life in the United States."[39] The following year, Congress adopted the language in the Patriot Act on critical infrastructure into The Homeland Security Act of 2002.[40]

In addition, the Homeland Security Act added key resources to the list of critical infrastructure (CI/KR) and defined those resources as "publicly or privately controlled resources essential to the minimal operations of the economy and government."[41] Through a series of directives, the Department of Homeland Security identified 17 sectors[42] of the economy as falling within the definition of critical infrastructure/key resources and assigned primary responsibility for those sectors to various federal departments and agencies, which are designated as Sector-Specific Agencies (SSAs).[43] On March 3, 2008, Homeland Security Secretary Chertoff signed an internal DHS memo designating Critical Manufacturing as the 18th sector on the CI/KR list.

In 2013, the list of critical industries was altered through a Presidential Policy Directive (PPD-21).[44] The directive listed three "strategic imperatives" as drivers of the Federal approach to strengthening "critical infrastructure security and resilience":

1. Refine and clarify functional relationships across the Federal Government to advance the national unity of effort to strengthen critical infrastructure security and resilience;
2. Enable effective information exchange by identifying baseline data and systems requirements for the Federal Government; and
3. Implement an integration and analysis function to inform planning and operations decisions regarding critical infrastructure.

The directive assigns the main responsibility to the Department of Homeland Security for identifying critical industries and coordinating efforts among the various government agencies, among a number of responsibilities. The directive also assigns roles to other agencies and designated 16 sectors as critical to the U.S. infrastructure. The sectors are (1) chemical; (2) commercial facilities; (3) communications; (4) critical manufacturing; (5) dams; (6) defense industrial base; (7) emergency services; (8) energy; (9) financial services; (10) food and

[37] Ibid.

[38] 42 U.S.C. §5195c(b)(2).

[39] 42 U.S.C. §5195c(b)(3).

[40] 6 U.S.C. §101(4).

[41] 6 U.S.C. §101(9).

[42] The sectors include (1) Agriculture and Food; (2) Defense Industrial Base; (3) Energy; (4) Public Health and Healthcare; (5) National Monuments and Icons; (6) Banking and Finance; (7) Drinking Water and Water Treatment Systems; (8) Chemical; (9) Commercial Facilities; (10) Dams; (11) Emergency Services; (12) Commercial Nuclear Reactors, Materials, and Waste; (13) Information Technology; (14) Telecommunications; (15) Postal and Shipping; (16) Transportation Systems; and (17) Government Facilities.

[43] Sector-Specific Agencies include the Departments of: Agriculture, Defense, Energy, Health and Human Services, Homeland Security, Interior, Treasury, and the Environmental Protection Agency.

[44] Presidential Policy Directive—Critical Infrastructure Security and Resilience, The While House, February 12, 2013.

agriculture; (11) government facilities; (12) health care and public health; (13) information technology; (14) nuclear reactors, materials, and waste; (15) transportation systems; and (16) water and wastewater systems.[45]

Foreign Ownership Control

The CFIUS statute itself does not provide a definition of the term "control," but such a definition is included in the Treasury Department's regulations. According to those regulations, control is not defined as a numerical benchmark,[46] but instead focuses on a functional definition of control, or a definition that is governed by the influence the level of ownership permits the foreign entity to affect certain decisions by the firm. According to the Treasury Department's regulations:

> The term control means the power, direct or indirect, whether or not exercised, and whether or not exercised or exercisable through the ownership of a majority or a dominant minority of the total outstanding voting securities of an issuer, or by proxy voting, contractual arrangements or other means, to determine, direct or decide matters affecting an entity; in particular, but without limitation, to determine, direct, take, reach or cause decisions regarding:
>
> (1) The sale, lease, mortgage, pledge or other transfer of any or all of the principal assets of the entity, whether or not in the ordinary course of business;
>
> (2) The reorganization, merger, or dissolution of the entity;
>
> (3) The closing, relocation, or substantial alternation of the production operational, or research and development facilities of the entity;
>
> (4) Major expenditures or investments, issuances of equity or debt, or dividend payments by this entity, or approval of the operating budget of the entity;
>
> (5) The selection of new business lines or ventures that the entity will pursue;
>
> (6) The entry into termination or nonfulfillment by the entity of significant contracts;
>
> (7) The policies or procedures of the entity governing the treatment of nonpublic technical, financial, or other proprietary information of the entity;
>
> (8) The appointment or dismissal of officers or senior managers;
>
> (9) The appointment or dismissal of employees with access to sensitive technology or classified U.S. Government information; or
>
> (10) The amendment of the Articles of Incorporation, constituent agreement, or other organizational documents of the entity with respect to the matters described at paragraph (a) (1) through (9) of this section.

The Treasury Department's regulations also provide some guidance to firms that are deciding whether they should notify CFIUS of a proposed or pending merger, acquisition, or takeover. The

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[45] See http://www.dhs.gov/critical-infrastructure-sectors.

[46] There are other statutes that do use numerical benchmarks. According to Section 13(d) of the Securities Exchange Act of 1934 (15 U.S.C. Section 78m(d) any person who acquires 5% or more of the publicly traded securities of a U.S. firm must report the acquisition of the shares to the Securities and Exchange Commission. For statistical purposes, the United States defines foreign direct investment as the ownership or control, directly or indirectly, by one foreign person (individual, branch, partnership, association, government, etc.) of 10% or more of the voting securities of an incorporated U.S. business enterprise or an equivalent interest in an unincorporated U.S. business enterprise 15 C.F.R. §806.15 (a)(1). This level of ownership requires foreign owners to file quarterly and longer annual reports with the Department of Commerce as part of the quarterly and annual reports on the balance of payments and gross domestic product (GDP).

guidance states that proposed acquisitions that need to notify CFIUS are those that involve "products or key technologies essential to the U.S. defense industrial base." This notice is not intended for firms that produce goods or services with no special relation to national security, especially toys and games, food products (separate from food production), hotels and restaurants, or legal services. CFIUS has indicated that in order to ensure an unimpeded inflow of foreign investment it would implement the statute "only insofar as necessary to protect the national security," and "in a manner fully consistent with the international obligations of the United States."[47]

Neither Congress nor the Administration has attempted to define the term "national security." Treasury Department officials have indicated, however, that during a review or investigation each CFIUS member is expected to apply that definition of national security that is consistent with the representative agency's specific legislative mandate.[48] The concept of national security was broadened by P.L. 110-49 to include, "those issues relating to 'homeland security,' including its application to critical infrastructure."

Factors for Consideration

The CFIUS statute includes a list of 12 factors the President must consider in deciding to block a foreign acquisition, although the President is not required to block a transaction based on these factors. Additionally, the CFIUS members consider the factors as part of their own review process to determine if a particular transaction threatens to impair the national security. This list includes the following elements:

> (1) domestic production needed for projected national defense requirements;
>
> (2) capability and capacity of domestic industries to meet national defense requirements, including the availability of human resources, products, technology, materials, and other supplies and services;
>
> (3) control of domestic industries and commercial activity by foreign citizens as it affects the capability and capacity of the U.S. to meet the requirements of national security;
>
> (4) potential effects of the transactions on the sales of military goods, equipment, or technology to a country that supports terrorism or proliferates missile technology or chemical and biological weapons; and transactions identified by the Secretary of Defense as "posing a regional military threat" to the interests of the United States;
>
> (5) potential effects of the transaction on U.S. technological leadership in areas affecting U.S. national security;
>
> (6) whether the transaction has a security-related impact on critical infrastructure in the United States;
>
> (7) potential effects on United States critical infrastructure, including major energy assets;
>
> (8) potential effects on United States critical technologies;
>
> (9) whether the transaction is a foreign government-controlled transaction;
>
> (10) in cases involving a government-controlled transaction, a review of (A) the adherence of the foreign country to nonproliferation control regimes, (B) the foreign country's record

[47] Ibid.

[48] Senate Armed Services Committee, Briefing on the Dubai Ports World Ports Deal, February 23, 2006.

> on cooperating in counter-terrorism efforts, (C) the potential for transshipment or diversion of technologies with military applications;
>
> (11) long-term projection of the United States requirements for sources of energy and other critical resources and materials; and
>
> (12) such other factors as the President or the Committee determine to be appropriate.[49]

Factors 6-12 were added through the FINSA Act potentially broadening the scope of CFIUS's reviews and investigations. Previously, CFIUS had been directed by Treasury Department regulations to focus its activities primarily on investments that had an impact on U.S. national defense security. The additional factors, however, incorporate economic considerations into the CFIUS review process in a way that was specifically rejected when the original Exon-Florio amendment was adopted and refocuses CFIUS's reviews and investigations on considering the broader rubric of economic security. In particular, CFIUS is now required to consider the impact of an investment on critical infrastructure as a factor for considering recommending that the President block or postpone a transaction. As previously indicated, critical infrastructure is defined in broad terms within FINSA as "any systems and assets, whether physical or cyber-based, so vital to the United States that the degradation or destruction of such systems or assets would have a debilitating impact on national security, including national economic security and national public health or safety."

As originally drafted, the Exon-Florio provision also would have applied to joint ventures and licensing agreements in addition to mergers, acquisitions, and takeovers. Joint ventures and licensing agreements subsequently were dropped from the proposal because the Reagan Administration and various industry groups argued at the time that such business practices were deemed to be beneficial arrangements for U.S. companies. In addition, they argued that any potential threat to national security could be addressed by the Export Administration Act[50] and the Arms Control Export Act.[51]

Confidentiality Requirements

The FINSA Act codified confidentiality requirements that are similar to those that appeared in the Exon-Florio amendment and Executive Order 11858 by stating that any information or documentary material filed under the provision may not be made public "except as may be relevant to any administrative or judicial action or proceeding."[52] The FINSA provision does state, however, that this confidentiality provision "shall not be construed to prevent disclosure to either House of Congress or to any duly authorized committee or subcommittee of the Congress." The provision provides for the release of proprietary information "which can be associated with a particular party" to committees only with assurances that the information will remain confidential. Members of Congress and their staff members are accountable under current provisions of law governing the release of certain types of information. FINSA requires the President to provide a written report to the Secretary of the Senate and the Clerk of the House detailing his decision and his actions relevant to any transaction that was subject to a 45-day investigation.[53]

[49] The last requirement under factor 4 and factors 6-12 were added by P.L. 110-49.

[50] 50 U.S.C. App. Section 2401, as amended.

[51] 22 U.S.C. App. 2778 et seq.

[52] 50 U.S.C. Appendix Section 2170(c).

[53] 50 U.S.C. Appendix Section 2170(g).

Mitigation and Tracking

Since the implementation of the Exon-Florio provision in the 1980s, CFIUS had developed several informal practices that likely were not envisioned when the statute was drafted. In particular, members of CFIUS on occasion negotiated conditions with firms to mitigate or to remove business arrangements that raised national security concerns among the CFIUS members. Such agreements often were informal arrangements that had an uncertain basis in statute and had not been tested in court. These arrangements often were negotiated during the formal 30-day review period, or even during an informal process prior to the formal filing of a notice of an investment transaction.

Under FINSA, CFIUS must designate a lead agency to negotiate, modify, monitor, and enforce agreements in order to mitigate any threat to national security. Such agreements are required to be based on a "risk-based analysis" of the threat posed by the transaction. CFIUS is also required to develop a method for evaluating the compliance of firms that have entered into a mitigation agreement or condition that was imposed as a requirement for approval of the investment transaction. Such measures, however, are required to be developed in such a way that they allow CFIUS to determine that compliance is taking place without also (1) "unnecessarily diverting" CFIUS resources from assessing any new covered transaction for which a written notice had been filed; and (2) placing "unnecessary" burdens on a party to an investment transaction.

If a notification of a transaction is withdrawn before any review or investigation by CFIUS is completed, CFIUS can take a number of actions, including (1) interim protections to address specific concerns about the transaction pending a resubmission of a notice by the parties; (2) specific time frames for resubmitting the notice; and (3) a process for tracking any actions taken by any party to the transaction. Also, any federal entity or entities that are involved in any mitigation agreement are to report to CFIUS if there is any modification that is made to any agreement or condition that had been imposed and to ensure that "any significant" modification is reported to the Director of National Intelligence and to any other federal department or agency that "may have a material interest in such modification." Such reports are required to be filed with the Attorney General.

Congressional Oversight

The FINSA Act significantly increased the types and number of reports that CFIUS is required to send to certain specified Members of Congress. In particular, CFIUS is required to brief certain congressional leaders if they request such a briefing and to report annually to Congress on any reviews or investigations it has conducted during the prior year. CFIUS provides a classified report to Congress each year and a less extensive report for public release. Each report is required to include a list of all concluded reviews and investigations, information on the nature of the business activities of the parties involved in an investment transaction, information about the status of the review or investigation, and information on any transactions that were withdrawn from the process, any roll call votes by the Committee, any extension of time for any investigation, and any presidential decision or action taken under FINSA. In addition, CFIUS is required to report on trend information on the numbers of filings, investigations, withdrawals, and presidential decisions or actions that were taken. The report must include cumulative information on the business sectors involved in filings and the countries from which the investments originated; information on the status of the investments of companies that withdrew notices and the types of security arrangements and conditions CFIUS used to mitigate national security concerns; the methods the Committee used to determine that firms were complying with mitigation agreements or conditions; and a detailed discussion of all perceived adverse effects of investment transactions on the national security or critical infrastructure of the United States.

The Secretary of the Treasury, in consultation with the Secretaries of State and Commerce, was directed to conduct a study on investment in the United States, particularly in critical infrastructure and industries affecting national security, by (1) foreign governments, entities controlled by or acting on behalf of a foreign government, or persons of foreign countries which comply with any boycott of Israel; or (2) foreign governments, entities controlled by or acting on behalf of a foreign government, or persons of foreign countries which do not ban organizations designated by the Secretary of State as foreign terrorist organizations. In addition, CFIUS is required to provide an annual evaluation of any credible evidence of a coordinated strategy by one or more countries or companies to acquire U.S. companies involved in research, development, or production of critical technologies in which the United States is a leading producer. The report must include an evaluation of possible industrial espionage activities directed or directly assisted by foreign governments against private U.S. companies aimed at obtaining commercial secrets related to critical technologies.

The Inspector General of the Department of the Treasury must investigate any failure of CFIUS to comply with requirements for reporting that were imposed prior to the passage of FINSA and to report the findings of this report to Congress. In particular, the report must be sent to the chairman and ranking member of each committee of the House and the Senate with jurisdiction over any aspect of the report, including the Senate Committee on Foreign Relations, and the House Committees on Foreign Affairs, Financial Services, and Energy and Commerce.

The chief executive officer of any party to a merger, acquisition, or takeover must certify in writing that the information contained in a written notification to CFIUS fully complies with the CFIUS requirements and that the information is accurate and complete. This written notification would also include any mitigation agreement or condition that was part of a CFIUS approval.

Recent CFIUS Reviews

According to the annual report filed by CFIUS,[54] CFIUS activity dropped sharply in 2009 as a result of tight credit markets and hesitation by banks to fund acquisitions and takeovers during the global financial crisis, but rebounded in 2010, as indicated in **Table 2**. During the eight-year period 2008-2015 (the latest years for which such data are available), foreign investors sent 925 notices to CFIUS of plans to acquire, take over, or merge with a U.S. firm. In comparison, the Commerce Department reports there were over 1,800 foreign investment transactions in 2015, slightly less than half of which were acquisitions of existing U.S. firms. Acquisitions, however, accounted for 96% of the total annual value of foreign direct investments.[55] Of the investment transactions that were notified during the 2008-2015 period, about 4% were withdrawn during the initial 30-day review; about 36% of the total notified transactions required a 45-day investigation. Also, of the transactions that were investigated, about 6% were withdrawn before a final determination was reached. As a result, of the 925 proposed investment transactions notified to CFIUS during this period, 822 transactions, or 89% of the transactions, were completed. The CFIUS report also indicates that a presidential decision was made in one of the transactions, the Ralls Corp. acquisition of wind farm assets from Terna Energy SA (discussed in a later section of this report). President Obama blocked a Chinese investment firm in 2016 from acquiring Aixtron,

[54] *Annual Report to Congress*, Committee on Foreign Investment in the United States, September 2017.

[55] Anderson, Thomas, New Foreign Direct Investment in the United States in 2015, *Survey of Current Business*, August 2016, p. 2.

a Germany-based firm with assets in the United States. In 2017, President Trump blocked the acquisition of Lattice Semiconductor Corp. by the Chinese investment firm Canyon Bridge Capital Partners.

Table 2. Foreign Investment Transactions Reviewed by CFIUS, 2008-2015

Year	Number of Notices	Notices Withdrawn During Review	Number of Investigations	Notices Withdrawn During Investigation	Presidential Decisions
2008	155	18	23	5	0
2009	65	5	25	2	0
2010	93	6	35	6	0
2011	111	1	40	5	0
2012	114	2	45	20	1
2013	97	3	48	5	0
2014	147	3	51	9	0
2015	143	3	66	10	0
Total	**925**	**41**	**333**	**62**	**1**

Source: *Annual Report to Congress*, Committee on Foreign Investment in the United States, September 2017.

Note: Three additional foreign investment transactions have been blocked by presidential order.

The CFIUS report also indicates that 43% of the foreign investment transactions that were notified to CFIUS from 2008 to 2015 were in the manufacturing sector. Investments in the finance, information, and services sectors accounted for another 31% of the total notified transactions, as indicated in **Table 3**. Within the manufacturing sector, 43% of all the investment transactions notified to CFIUS between 2013 and 2015 were in the computer and electronic products sectors, a share that rose to 49% in 2015. The next three sectors with the highest number of transactions were the transportation equipment sector, which was recorded at 12% in the 2013-2015 period and in 2015, the machinery sector, which fell from 13% in the 2013-2015 period to 12% in 2015, and the electrical equipment and computer sector, which fell from 11% of manufacturing transactions in 2013-2015 to 3% in 2015. Within the finance, information, and services sector, professional services accounted for 20% of transactions 2015, down from 37% recorded in the 2013-2015 period. Notified transactions in publishing (21%), telecommunications (17%), and real estate (10%) comprised the next most active sectors.

Table 4 shows foreign investment transactions by the home country of the foreign investor and the industry composition of the investment transactions. According to data based on notices provided to CFIUS by foreign investors, Chinese investors were the most active in acquisitions, takeovers, or mergers during the 2013-2015 period, accounting for 19% of the total number of transactions. The United Kingdom and Canada join China as the top three countries of origin for investors providing notifications to CFIUS. For China and the UK, investment notifications were concentrated in the manufacturing and finance, information, and services sectors, although nearly one-fifth of Chinese transactions were in the mining, construction, and utilities sectors. The ranking of countries in **Table 4** differs in a number of important ways from data published by the Bureau of Economic Analysis on the cumulative amount, or the total book value, of foreign direct investment in the United States, which places the United Kingdom, Japan, the Netherlands, Germany, Canada, and Switzerland as the most active countries of origin for foreign investment in the United States.

Table 3. Industry Composition of Foreign Investment Transactions Reviewed by CFIUS, 2008-2015

Year	Manufacturing	Finance, Information, and Services	Mining, Utilities, and Construction	Wholesale and Retail Trade	Total
2008	72	42	25	16	155
2009	21	22	19	3	65
2010	36	35	13	9	93
2011	49	38	16	8	111
2012	47	36	23	8	114
2013	35	32	20	10	97
2014	69	38	25	15	147
2015	68	42	21	12	143
Total	**397**	**285**	**162**	**81**	**925**

Source: *Annual Report to Congress*, Committee on Foreign Investment in the United States, September 2017.

Table 4. Country of Foreign Investor and Industry Reviewed by CFIUS, 2013-2015

Country	Manufacturing	Finance, Information, and Services	Mining, Utilities, and Construction	Wholesale Trade and Retail Trade	Total
China	39	15	13	7	74
Canada	9	9	19	12	49
United Kingdom	25	15	3	4	47
Japan	20	12	5	4	41
France	8	9	1	3	21
Germany	9	5	0	0	14
Netherlands	4	8	2	0	14
Switzerland	10	2	0	0	12
Singapore	3	5	3	1	12
Hong Kong	6	3	0	0	9
Israel	7	2	0	0	9
Australia	1	2	4	1	8
South Korea	2	3	2	1	8
Total	**172**	**112**	**66**	**37**	**387**

Source: *Annual Report to Congress*, Committee on Foreign Investment in the United States, September 2017.

Table 5 provides information on notified foreign investment transactions by in critical technology classified by types of foreign investment. According to CFIUS, the Committee reviewed 130 transactions in 2015 (126 transactions were reported by CFIUS for the data in **Table 5**) involving acquirers from 32 countries to determine if it could detect a coordinated strategy. Solo acquisitions accounted for 86% of the total number of transactions. According to CFIUS, the largest number of transactions in critical technology occurred in the Information Technology and the Aerospace & Defense sectors.

Table 5. Home Country of Foreign Acquirer of U.S. Critical Technology, 2013-2015

Country	Solo Deals	Joint Deals	Total
United Kingdom	19	2	21
Canada	20	0	20
Japan	8	0	8
France	5	1	6
Germany	6	1	7
Netherlands	5	2	7
China	5	0	5
Italy	2	2	4
Switzerland	2	2	4
Singapore	3	1	4
Israel	3	0	3
United Arab Emirates	2	1	3
Total	**108**	**18**	**126**

Source: *Annual Report to Congress*, Committee on Foreign Investment in the United States, September 2017.

The CFIUS annual report also provides some general information on the total number of cases in which it applied legally binding mitigation measures. The report did not list any specific cases or measures, but it did indicate that CFIUS applied mitigation measures to 40 cases in the 2013-2015 period. According to the CFIUS report, in 2015 CFIUS agencies negotiated, and parties adopted, mitigation measures for 11 covered transactions.[56] These mitigation measures have included a number of different approaches, including

- Ensuring that only authorized persons have access to certain technologies and information.
- Establishing a Corporate Security Committee and other mechanisms to ensure compliance with all required actions, including the appointment of a U.S. government-approved security officer or member of the board of directors and requirements for security policies, annual reports, and independent audits.
- Establishing guidelines and terms for handling existing or future U.S. government contracts, U.S. government customer information, and other sensitive information.
- Ensuring only U.S. citizens handle certain products and services, and ensuring that certain activities and products are located only in the United States.
- Notifying security officers or relevant U.S. government parties in advance of foreign national visits to the U.S. business for approval.
- Security protocols to ensure the integrity of goods or software sold to the U.S. Government.
- Notifying customers regarding the change of ownership.
- Assurances of continuity of supply for defined periods, and notification and consultation prior to taking certain business decisions, with certain rights in the

[56] *Annual Report to Congress*, September 2017.

event that the company decides to exit a business line. Established meetings to discuss business plans that might affect U.S. Government or national security considerations.

- Exclusion of certain sensitive assets from the transaction.
- Providing the U.S. Government with the right to review certain business decisions and object if they raise national security concerns.

CFIUS also implemented procedures to evaluate and ensure that parties to an investment transaction remain in compliance with any risk mitigation measures that were adopted to gain approval of the investment. These procedures include the following:

- Periodic reporting to U.S. Government agencies by the companies.
- On-site compliance reviews by U.S. Government agencies.
- Third party audits when provided for by the terms of the mitigation measures.
- Investigations and remedial actions if anomalies or breaches are discovered or suspected.
- Assigning staff responsibilities to monitor compliance.
- Designating tracking systems to monitor required reports.
- Instituting internal instructions and procedures to ensure that in-house expertise is drawn upon to analyze compliance with measures.[57]

Foreign Investment National Security Policies of Foreign Jurisdictions

According to the United Nations and other groups, over the past decade national security-related concerns have become more prominent in the investment policies of numerous countries. As a result, countries have adopted new measures to restrict foreign investment or have amended existing laws concerning investment-related national security reviews.[58] International organizations have long recognized the legitimate concerns of nations in restricting foreign investment in certain sectors of their economies, but the recent increase in such restrictions has raised a number of policy issues. Countries have different approaches for reviewing and restricting foreign investment on national security-related grounds. These approaches range from formal investment restrictions to complex review mechanisms with broad definitions and broad scope of application to provide host country authorities with wide discretion in the review process. As a result of these differences, foreign investors can face different entry conditions in different countries in similar economic activities.[59]

The U.N. analysis also concluded that national security provisions differ by the following:

- The concepts of "national security": domestic policy approaches range from relatively narrow definitions of national security and security-related industries to broader interpretations that extend investment review procedures to critical infrastructure and strategic industries.

[57] Ibid., pp. 21-22.

[58] *World Investment Report 2016*, United Nations Conference on Trade and Development, 2016, p. 95.

[59] Ibid., p. 94.

- The content and depth of investment screening processes and the degree and amount of information they require.
- The possible consequences of investments deemed to be sensitive from a national security perspective. Policy approaches include outright or partial investment prohibitions and investment approvals under certain conditions.

No country surveyed by the U.N. had a precise definition of "national security" relative to foreign investment. Most countries identify a number of sectors or industries, which, by their nature, may pose national security-related concerns relative to foreign investment. The U.N. concluded that certain types of economic activities and/or sectors are most likely to be subject to national security-related FDI limitations and/or review procedures. These activities include defense- and security-related activities, investment in critical infrastructure, and foreign investments in strategic economic sectors. The broad concept of "national security" also translates into a variety of criteria that national authorities consider in their investment screening procedures.[60] These criteria have included the impact of a proposed transaction on public safety, social order, plurality of the media, strategic national interests, foreign relations, disclosure of state secrets, territorial integrity, independence of the state, protection of rights and freedoms of citizens, continuity of public procurements, or terrorism-related concerns.[61]

The U.N. analysis also indicated that countries have adopted different types of investment regulations to protect their foreign investment-related national security interests. These regulations include (1) prohibiting, fully or partially, foreign investment in certain sensitive sectors; (2) maintaining state monopolies in sensitive sectors; and (3) maintaining a foreign investment review mechanism for a list of predefined sectors or across the board. Some countries maintain two types of FDI review mechanisms, a sector-specific review procedure (e.g., in the defense industry) complemented by a separate cross-sectoral review mechanism for other foreign investments. In the latter case, countries may subject all FDI proposals to entry and establishment approval procedures or they may require approval only of FDI proposals that meet certain monetary thresholds. Some cross-sectoral review mechanisms do not require any prior notifications by investors and are instead initiated at the discretion of national authorities.[62] Among the different changes adopted by various countries:

Canada. In 2015, Canada amended its Investment Canada Regulations and the National Security Review of Investments Regulations to (1) require investors to provide more information; and (2) extend the length of certain time periods for the government to carry out national security reviews.

Canada's mandatory foreign investment review process, defined under the Investment Canada Act (ICA), provides the Canadian government with the right to review any investments that "could be injurious to national security" irrespective of size, whether or not they involve the acquisition of a controlling interest, and even if they have only a tenuous connection with Canada. Under this act, a foreign investor acquiring control of an established Canadian business valued at or above certain threshold values must apply for review of that acquisition to determine the likely net benefits to Canada. For investments valued below the relevant threshold, investors must file a notification, but the investment is not reviewed under the net benefit provisions. In examining the likely net benefit of a proposed investment, the Minister of Innovation, Science, and Economic Development considers six factors set out in the act that provide predictable

[60] Ibid., p. 94.

[61] Ibid., p. 95.

[62] Ibid., p. 97.

guidance for investors while maintaining the flexibility required to ensure economic benefit to Canada:

1. The investment's effect on the level and nature of economic activity in Canada, including employment, resource processing, and the utilization of parts, components, and services.
2. The degree and significance of participation by Canadians in the Canadian business.
3. The investment's effect on productivity, industrial efficiency, technological development, and product innovation and variety.
4. The investment's effect on competition.
5. Its compatibility with industrial, economic, and cultural policies.
6. Its contribution to Canada's ability to compete in world markets.[63]

Under proposed provisions, the minister would have 45 days, which can be extended by up to an additional 45 days, after an application or notification has been certified, or after the closing or implementation of an investment, to assess whether a proposed investment raises national security concerns. The investment notification can then be referred to the Governor in Council (GIC) for an order for national security review. If the GIC decides to order a full national security review, and it is determined that a transaction poses a threat, the GIC may require written agreements or specific terms and conditions, disallow the investment in whole or in part, or even block a completed transaction. The full national security review process can take up to 200 days.

Although the ICA does not define what types of investments might be "injurious to national security," guidance issued in 2016 allows for the government to consider various factors, including

- the effect on Canada's defense capabilities;
- transfers of sensitive technology or know-how outside of Canada;
- involvement in the research, manufacture, or sale of controlled goods/technology;
- impact on critical infrastructure;
- impact on foreign surveillance or espionage;
- negative effects on intelligence or law enforcement operations;
- the potential involvement of terrorists or organized crime;
- impact on the supply of critical goods and services to Canadians and the federal government; and
- impact of an investment on Canada's international interests or foreign relationships.

Investors from countries that are part of the Five Eyes intelligence alliance with Canada—Australia, New Zealand, the United Kingdom, and the United States—reportedly are viewed as not presenting security concerns. On the other hand, buyers from China, the Middle East, and countries subject to sanctions may be scrutinized more closely. By industry, reviewed investments have been connected with such sensitive industry sectors as telecommunications, advanced

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[63] *Investment Canada Act 2016-2017: Annual Report*, Innovation, Science, and Economic Development Canada, 2017, at https://www.ic.gc.ca/eic/site/ica-lic.nsf/vwapj/2016-17AnnualReport.pdf/$file/2016-17AnnualReport.pdf.

technology, and uranium mining. Since 2009, Canada has reviewed around 4,500 foreign investment transactions, 9 of which have been blocked.

China. In July 2015, China's National Security Law came into effect. The law provides for a national security review and oversight mechanism to conduct a national security review of foreign commercial investment, special items and technologies, internet services, and other major projects and activities that might be deemed to affect national security.

European Union. The EU market is generally considered open to foreign investment, and it does not have a comprehensive regime for controlling or screening foreign investment. Twelve of the EU countries, however, have their own national regulations to screen transactions that raise national security concerns.[64] As a result, the current approach to foreign investment screening in the EU is marked by a patchwork of member state laws, where they exist, which vary in scope and criteria. In a European Commission (EC) report issued in May 2017 on globalization, the EC concluded that openness to foreign investment is a key principle for the EU and a major source of growth, but that it had concerns about state-owned enterprises taking over European companies with key technologies for strategic reasons and a disparity in the rights accorded European investors by countries that are home to firms investing in the EU.[65]

Similar concerns are expressed in draft regulations submitted by the EC in September 2017. The regulations would give the commission the authority to carry out its own screening of foreign direct investments on the grounds of "security and public order" that are "likely to affect projects or programs of EU interest."[66] Such projects must involve a significant share of EU funding, or relate to EU legislation and critical areas of infrastructure, technologies, or inputs. Proposed regulations would aim to complement existing national regulations and to establish a mechanism between the EU members and the EC "to inform each other of foreign direct investment that may threaten security or public order and to exchange information." The stated objective of the proposed regulation is to establish a framework for the EU members, and in certain cases the commission, to screen foreign direct investments in the EU, while allowing the members to take into account their individual situations and national circumstances. Individual member states' screening procedures would be required to comply with three basic principles: transparency; nondiscrimination between different third countries; and allowance for the possibility of judicial review of screening decisions. In addition, the proposed EU framework would require members to specify the grounds for screening and relevant procedural rules, establish time frames for issuing screening decisions, and protect confidential information.

The proposed regulation would require EU members to inform other members and the EC about any foreign direct investment undergoing screening within the framework of their national screening mechanisms. The European Commission would not have the authority to block foreign investments, but would have 25 working days to give its opinion. While the opinion would not be

[64] The 12 countries are Austria, Denmark, Germany, Finland, France, Latvia, Lithuania, Italy, Poland, Portugal, Spain, and the United Kingdom.

[65] *Reflection Paper on Harnessing Globalization*, European Commission, May 10, 2017, at https://ec.europa.eu/commission/sites/beta-political/files/reflection-paper-globalisation_en.pdf.

[66] European Commission, Proposal for a Regulation of the European Parliament and of the Council Establishing a Framework for Screening Foreign Direct Investment into the European Union, September 13, 2017, at https://ec.europa.eu/transparency/regdoc/rep/1/2017/EN/COM-2017-487-F1-EN-MAIN-PART-1.PDF; and European Commission, Commission Staff Working Document Accompanying the Document: Proposal for a Regulation of the European Parliament and the Council Establishing a Framework for Screening of Foreign Direct Investments Into the European Union, September 13, 2017, at http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52017SC0297&from=EN.

binding, member states would be required to "take utmost account" of it and provide an explanation if they disregarded the opinion.

The draft EU regulations do not include a reciprocity provision as a factor in deciding the national security concerns of an investment, but background and supporting documents related to the proposed regulations indicate the need for policies to open up other economies and ensure that countries follow the same rules. In deciding the security implications of a foreign investment, the EC and the EU members could consider whether the foreign investor is controlled by a government of a third country, including through significant financial interests. Although the EU Merger Regulation governs mergers, the proposed regulation would provide for the review of mergers that involved the protection of public security, plurality of the media, and prudential rules as legitimate interests of security and public order.

The EU proposal provides guidance on the factors that member states may take into account in deciding whether a foreign direct investment raises "security or public order" concerns. Member states may take into account the potential effects on

- critical infrastructure, including energy, transport, communications, data storage, space, or financial infrastructure, as well as sensitive facilities;
- critical technologies, including artificial intelligence, robotics, semiconductors, technologies with potential dual-use applications, cybersecurity, space, or nuclear technology;
- the security of supply of critical inputs; or
- access to sensitive information or the ability to control sensitive information.[67]

France. The French Minister of Economy issued a decree in 2014 that amended the list of foreign investment activities that are subject for review to include activities that are considered essential to safeguard national interest in public order, public security, and national defense. France requires both EU and non-EU foreign investors receive prior approval to invest in industries in sensitive areas related to

- gambling;
- private security services;
- research, development, or manufacture of pathogens or toxic substances to prevent their use for illegal or terrorist activities;
- mail interception and wiretapping;
- the audit and certification of security provided by products and information technology systems;
- the security of information systems of public or private operators managing critical facilities;
- dual-use products and technologies;
- activities and services relating to cryptology;
- activities carried out by companies holding classified information and national defense secrets;

[67] Uwe Goetker and Alexa Ningelgen, *An Update on Foreign Investment Control in Germany*, October 4, 2017, at https://www.mwe.com/en/thought-leadership/publications/2017/10/an-update-on-foreign-investment-control-in-germany.

- research, development, and sale of weapons, ammunition, explosive powder, and explosive substances used for military and war purposes;
- activities carried out by companies that entered into design or supply agreements with the French Defense Department in certain industries; and
- activities essential to France's interests in matters of public order, public security, and national security, especially when they involve the integrity, security, and continuity of energy supply; water supply; transportation networks and services; electronic communications networks and services; establishment, installation, or facility representing a key military, economic, or security interest, or that is environmentally sensitive; and the protection of public health.

For non-EU investors, an acquisition of more than 33.33% of the stock or voting rights of a company registered in France requires a prior authorization.

EU and non-EU investments require prior authorization from the French Ministry of Economy if the investment results in either (1) the direct or indirect acquisition of a controlling stake in a company that is registered in France; or (2) the acquisition of all or part of a line of business of a company whose registered office is located in France.

Germany. In 2009, Germany amended its legislation to prohibit investments by investors from outside the European Union (EU) and the European Free Trade Association (EFTA) that threaten to impair public security or public order. On July 18, 2017, an amendment to Germany's Foreign Trade and Payments Ordinance of 2004 (GFTPO) entered into effect. The amendment specifies critical industries, introduces obligations to notify the authorities, and extends applicable review periods, among other things. Currently, the GFTPO distinguishes between cross-sectoral reviews and sector-specific reviews. Cross-sectoral reviews may be conducted if the investor is located outside the EU and the EFTA region, and the investment comes under the scope of German foreign trade law, which applies to transactions in which the investor acquires a direct or indirect participation of at least 25% of voting rights in a German company.

The latest amendment identifies acquisitions of German companies that may threaten public order or security, including the following:

- operators of critical infrastructure (particularly in the sectors of energy, transport, water, information technology and telecommunications, finance, insurance, and health);
- developers of software serving the operation of critical infrastructure;
- certain companies in the area of telecommunications and surveillance technology;
- certain companies in the area of cloud computing; and
- certain companies in the area of telematics.

According to the amended rules, acquisitions within these listed industries must notify the Economic and Energy Ministry, which may conduct an in-depth review only if it notifies the firms involved in the investment transaction within three months of becoming aware of the transaction and within five years from the conclusion of the transaction. A "certificate of non-objection" is viewed as being granted if the ministry chooses not to initiate an in-depth review within two months after receiving notice of the transaction. The ministry may restrict or prohibit the transaction within four months of receiving requested documents.

Mandatory sector-specific reviews apply to transactions in the defense and IT security sectors in which the investment is deemed to pose a "threat to material security interests of the Federal

Republic of Germany." Included in the IT security sectors are software companies that develop or amend sector-specific software that serves critical infrastructures that could endanger public order or security.

The regulations indicate that the mandatory sector-specific reviews apply to transactions in which a foreign firm acquires 25% or more of the voting rights in manufacturing firms and IT development firms in certain specified areas

- war weapons;
- specially designed engines and gearboxes for military-tracked armored vehicles;
- products with IT security features used for processing classified government information; and
- certain products that fall within the scope of special foreign trade regulations, including military technology.

Nonmandatory reviews apply to all other industries that pose a "threat to the German public security and order."

Italy. In 2012, Italy established a new mechanism for government reviews of transactions regarding assets of companies operating in the defense or national security sectors, and strategic activities in the energy, transport, and communications industries.

Japan. In 2007, Japan expanded its coverage of prior notification requirements for foreigners acquiring a stake in companies in designated industries. Amendments of the Cabinet Order on Inward Direct Investment and other rules include those industries that produce sensitive products (such as arms, nuclear reactors, and dual-use products), as well as industries that produce sensitive products or provide related services. The stated purpose of the amendments is to prevent the proliferation of weapons of mass destruction and damage to the defense production and technology infrastructure.[68]

Republic of Korea. In 2008, Korea's Ministry of Commerce, Industry and Energy amended the Foreign Investment Promotion Act to provide more clarity on the bases and procedures for restricting foreign investment relative to national security concerns and to allow both foreign and domestic investors to request a preliminary investigation on whether a certain investment is subject to a national security restriction.

Russian Federation. In 2014, Russia amended its foreign investment law by adding four types of activities deemed to be of national strategic importance: (1) the vulnerability of transport infrastructure facilities and the means of transport by specialized organizations; (2) the protection of transport infrastructure facilities; (3) the protection of transport security units from unlawful intervention; and (4) the support of certifying authorities in transportation security. Other amendments exempted certain operations from laws governing strategic entities, while they added the production assets of firms identified as strategic companies.[69]

Australia. Australia's foreign investment review process is divided into three categories: residential real estate, "notifiable actions," and "significant actions." With some exceptions, all residential real estate transactions must by reviewed by the Australian Tax Office. A significant action is any action to acquire interests in securities, assets, or land, or otherwise take action in relation to corporations and trusts, that meets a specific threshold. The relevant threshold varies based on

[68] Ibid., p. 96.

[69] Ibid., p. 96.

- the type of investment (sensitive business, including media, telecommunications, transport, defense and military-related industries and activities, encryption and securities technologies and communications systems, the extraction of uranium or plutonium, and the operation of nuclear facilities);
- particular circumstances (such as whether the target is an agribusiness or media company); and
- if the investor is from a partner country (China, Japan, New Zealand, South Korea, and the United States, except foreign government investors) and exceeds a monetary threshold of A$1.094 billion (approximately U.S. $850 million) for nonsensitive business investments.

Notification of significant actions is voluntary, but the Australian Treasurer can issue a range of orders, including asset disposal orders, in relation to significant actions that are not notified. As a result, foreign investors ordinarily provide notice of all significant actions as a matter of practice.

A notifiable action is a proposed action that meets the specified threshold and is an acquisition of (1) a direct interest in agribusiness; (2) a substantial interest (that is, an interest of at least 20%) in Australian entities; or (3) an interest in Australian land.

Australia reformed its foreign investment framework, the Foreign Acquisition and Takeover Regulations as amended, in 2015 and again in 2017, in part to streamline the process and facilitate foreign investment, while strengthening the national security review process. Under this process, foreign investments are reviewed under a 30-day examination period and a 10-day notification period.

As part of its 2017-2018 budget, the Australian government announced changes to simplify foreign investment regulations and the fee framework. For example, amendments that took effect in July 2017

- introduced new business exemption certificates, including for foreign government investors;
- increased notification thresholds for global transactions that involved Australian interests;
- amended the treatment of residential land used for commercial purposes;
- narrowed the scope of nonvacant commercial land treated as sensitive;
- clarified the treatment of solar and wind farms; and
- allowed for multiple approvals for similar low-risk transactions.

In 2017, Australia launched its Critical Infrastructure Center to "identify and manage" national security risks to the country's most critical assets in the face of espionage, sabotage, and coercion. Australia defined critical infrastructure as "those physical facilities, supply chains, information technologies and communication networks which, if destroyed, degraded or rendered unavailable for an extended period, would significantly impact the social or economic wellbeing of the nation or affect Australia's ability to conduct national defense and ensure national security." Australia has determined that certain sectors are of particular importance to its national security risks, including the telecommunications, electricity, and water sectors and the ports subsector. Australia reviews foreign investments on a case-by case basis to determine their impact on Australia's "national interest," which is interpreted broadly. Such reviews are mandatory according to certain ownership and value thresholds. All foreign investment transactions in residential real estate are also reviewed. The treasurer is the individual within the national government charged with administering the foreign investment reviews, assisted by analysis undertaken by the Foreign Investment Review Board.

Government-Sponsored Firms and National Security

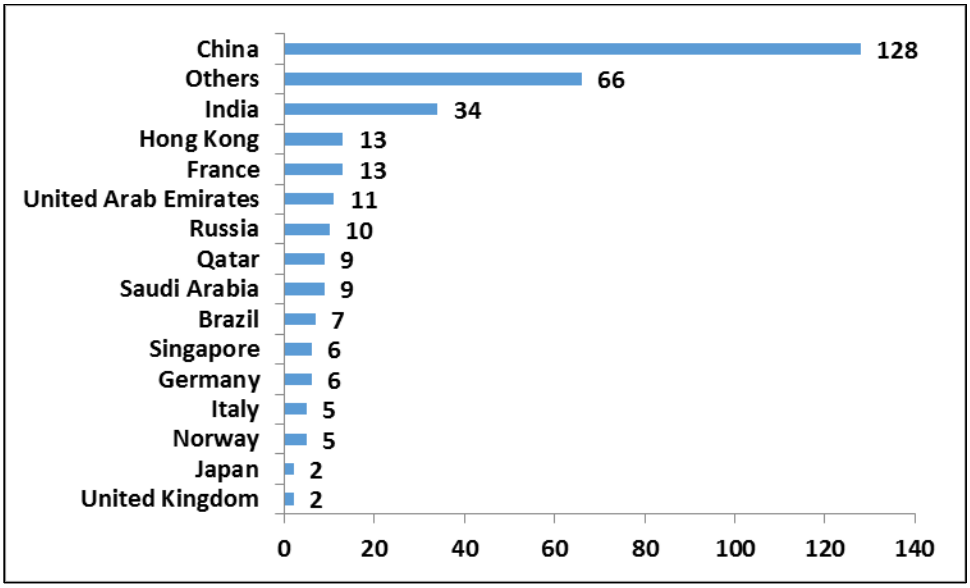
The growing international presence and investment activity of firms that are owned or controlled by foreign governments, sometimes referred to as state-owned enterprises (SOEs), are raising concerns over the economic and security implications of these firms. According to the Organization for Economic Co-operation and Development (OECD) "an estimated 22% of the world's largest 100 firms are now effectively under state control, the highest percentage in decades."[70] This number has been enhanced by the growth of Chinese SOEs, as indicated in **Figure 2**. In particular, policymakers are concerned that some governments give preferential treatment to SOEs in ways that may convey a competitive edge in their overseas activities and may create anticompetitive effects in the global marketplace.[71] Such an association, for instance, may offer firms greater market protection at home from which they arguably can develop a strong competitive position, or offer access to below-market financing terms through other government-controlled entities, providing firms with a competitive advantage over firms that are subject to market conditions. Arguably, these types of close associations between firms and governments may blur the distinction between firms that engage in economic activities purely for commercial reasons and those that operate at the behest of a foreign government to achieve a public policy goal. As a result, some policymakers are concerned that SOEs may engage in foreign investment activities that could compromise national security objectives. OECD has found little evidence to date, however, that these potential advantages affect the international economic performance of SOEs. The OECD concluded that, "Ownership is neither necessary for governments to influence an enterprise's operations, nor does it inevitably entail such influence."[72]

[70] *State-Owned Enterprises as Global Competitors: A Challenge or an Opportunity?*, Organization for Economic Cooperation and Development, 2016, p. 13.

[71] Ibid., p. 27.

[72] Ibid., p. 84.

Figure 2. Number of State-Owned Enterprises by Country, 2016



Source: Organization for Economic Cooperation and Development.

Others argue that firms that are owned or controlled by a foreign government face a potential conflict between engaging in economic activities that serve the competitive interests of the firm versus activities that benefit the goals and ambitions of a foreign government. For instance, corporate espionage is not an uncommon activity, but such activities by foreign firms that are owned or controlled by a foreign government often are viewed differently from such activities by firms that are engaging in corporate espionage for their own competitive interests. Corporate espionage by firms associated with a foreign government is viewed as not being motivated primarily for competitive commercial gains, but directed primarily at achieving the national security interests of a foreign government.[73] The presence of such firms as active players in the area of foreign investment where there is the potential for economic espionage that benefits a foreign government significantly complicates the interaction between economic activities and national security and increases the challenges CFIUS faces in determining the potential threat that any single investment transaction might hold for the U.S. economy or for U.S. national security. In addition, differences in national laws, particularly in criminal law, and practices concerning the treatment of economic espionage potentially create friction between national governments.[74]

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[73] Economic espionage for the benefit of a foreign government is treated differently in U.S. statutes from the theft of trade secrets for the benefit of an individual. U.S. Code title 18, Section 1831 provides for a fine of not more than $5 million or a prison term of no more than 15 years, or both for economic espionage for the benefit of a foreign government, while U.S. Code title 18, Section 1832 on the theft of trade secrets for the benefit of an individual provides for a penalty of no more than $5 million or a prison term of no more than 10 years, or both. For a detailed discussion, see Lewis, Margaret K., "When Foreign is Criminal," *Virginia Journal of International Law*, vol. 55-3, pp. 657-663.

[74] Differences in criminal law systems and how criminal laws are applied are particularly notable between the United States and China. See Lewis, Margaret K., "Criminal Law Pays: Penal Law's Contribution to China's Economic Development," *Vanderbilt Journal of Transnational Law*, March 2014 for a review of recent developments in China's criminal law framework and the role that criminal law is playing in China's economic development.

House Permanent Select Committee on Intelligence

Investments by Chinese firms, in particular, are raising concerns. For instance, on October 8, 2012, the House Permanent Select Committee on Intelligence published a report[75] on "the counterintelligence and security threat posed by Chinese telecommunications companies doing business in the United States." The report offered a number of policy recommendations affecting CFIUS, including the following:

- The Committee on Foreign Investment in the United States (CFIUS) must block acquisitions, takeovers, or mergers involving Huawei and ZTE given the threat to U.S. national security interests.[76] Legislative proposals seeking to expand CFIUS to include purchasing agreements should receive thorough consideration by relevant congressional committees.
- Committees of jurisdiction in the U.S. Congress should consider potential legislation to better address the risk posed by telecommunications companies with nation-state ties or otherwise not clearly trusted to build critical infrastructure. Such legislation could include increasing information sharing among private sector entities, and an expanded role for the CFIUS process to include purchasing agreements.

U.S.-China Economic and Security Review Commission

In addition, in November 2012, the U.S.-China Economic and Security Review Commission[77] issued a report that detailed concerns over Chinese investments by U.S. industries, lawmakers, and government officials about the "potential economic distortions and national security concerns arising from China's system of state-supported and state-led economic growth." In particular, some observers argued that economic concerns focused on the possibility that state-backed Chinese companies choose to invest "based on strategic rather than market-based considerations," and are free from the constraints of market forces because of generous state subsidies. The report proffered a number of recommendations for amending the CFIUS statute

- Congress should examine foreign direct investment from China to the United States and assess whether there is a need to amend the underlying statute (50 U.S.C. app 2170) for the Committee on Foreign Investment in the United States (CFIUS) to (1) require a mandatory review of all controlling transactions by Chinese state-owned and state-controlled companies investing in the United States; (2) add a net economic benefit test to the existing national security test that CFIUS administers; and (3) prohibit investment in a U.S. industry by a foreign company whose government prohibits foreign investment in that same industry.

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[75] Investigative Report on the U.S. National Security Issues Posed by Chinese Telecommunications Companies Huawei and ZTE: A Report by Chairman Mike Rogers and Ranking Member C.A. Dutch Ruppersberger of the Permanent Select Committee on Intelligence, U.S. House of Representatives, October 8, 2012.

[76] Lynch, David J., Damian Paletta, Trump's Fluid Approach to National and Economic Security is Leaving His Allies Baffled, *The Washington Post*, May 28, 2018. Available at: https://www.washingtonpost.com/business/economy/trumps-fluid-approach-to-national-and-economic-security-is-leaving-his-allies-baffled/2018/05/28/b08c5908-5f95-11e8-9ee3-49d6d4814c4c_story.html?utm_term=.43b65904d7cb.

[77] 2012 Report to Congress of the U.S.-China Economic and Security Review Commission, U.S. China Economic and Security Review Commission, November 2012.

- Legislation creating the Committee on Foreign Investment in the United States (CFIUS) could be amended to add a test of "economic benefit" of a Chinese investment in the United States.
- CFIUS's jurisdiction should be extended to include "greenfield" investments, or investments in new industrial plants and facilities.

CFIUS-DIUx Report

In an effort to address growing concerns over certain types of Chinese investment in the United States, a 2017 draft report prepared for the Defense Innovation Unit Experimental (DIUx),[78] proposed numerous changes to CFIUS.[79] This report is similar to other reports that view technological developments and foreign investment in the U.S. technology sector, particularly by Chinese investors, as a component of a U.S. global political-military strategy.[80] The changes recommended by the authors would expand the scope of CFIUS' activities by giving it a larger role in reviewing and potentially prohibiting certain types of foreign direct investment (FDI) in the United States to protect U.S. technological leadership. The report raises a number of issues concerning legal and illegal activities by Chinese firms and individuals in the United States, including venture capital investing, or investing in small, early-stage start-up firms that investors deem to have high growth potential, in order to transfer leading-edge technologies from new U.S. start-up firms to China. In particular, the report highlights such emerging technology sectors as artificial intelligence, augmented reality/virtual reality, robotics, and financial technology.

While the Department of Defense (DOD) supports efforts to acquire developed technologies for military use applications, the report argues for DOD engagement with U.S. high-tech start-up firms at an earlier stage in their development of potential leading-edge technology in a role similar to that of a private equity firm or a venture capital investor. In addition, the report advocates for measures that would prohibit or discourage Chinese investors from funding some U.S. firms involved in developing leading-edge technologies. The report argues that this shift in strategy is necessary to compete with Chinese investors that consider similar investment activities a main component in China's "long-term, systematic effort to attain global leadership in many industries."[81]

The DIUx report estimates that China participates in 10% of U.S. venture capital financing transactions and that the Chinese share of venture financing is around 2.0% to 3.0% of the total annual amount of $137 billion U.S. venture capital investment market. The report also estimates that China's acquisitions of U.S. firms in the technology mergers and acquisition (M&A) market is about 2.0% to 3.0% of the total annual amount of $2.2 trillion in the U.S. M&A market in

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[78] DIUx is a Department of Defense (DOD) unit that was established to fast-track contracts of new and leading-edge technology for adaption for military use. Kaplan, Fred, The Pentagon's Innovation Experiment, *MIT Technology Review*, December 19, 2016. https://www.technologyreview.com/s/603084/the-pentagons-innovation-experiment/.

[79] Brown, Michael and Pavneet Singh, *China's Technology Transfer Strategy: How Chinese Investment in Emerging Technology Enable a Strategic Competitor to Access the Crown Jewels of U.S. Innovation*, Defense Innovation Unit Experimental, February, 2017.

[80] One example is Department of Defense's Third Offset, which seeks to "coordinate and advance technological, operational, and organizational innovation, along with innovative military and civilian talent management, in order to counter rising threats to U.S. conventional deterrence capabilities and maintain U.S. technological superiority." Ellman, Jesse, Lisa Samp, and Gabriel Coll, *Assessing the Third Strategy Offset*, Center for Strategic and International Studies, March 2017, p. 2.

[81] Brown and Singh, p. 2.

2016.[82] One comprehensive measure of Chinese FDI in the U.S. economy is provided by the Department of Commerce's Bureau of Economic Analysis (BEA). According to these data, which originate from an annual survey of foreign direct investment in U.S. firms and commercial real estate, Chinese investments account for small shares of total FDI in the United States. For instance, the total cumulative amount of Chinese FDI in the United States on a historical cost basis, which gives greater weight to more recent investments, reached $14.8 billion in 2015, or 0.5% of total FDI of $3.1 trillion in the United States. Of the total Chinese investment, about $3 billion was in the manufacturing sector.

Despite the relatively small share of Chinese FDI in the U.S. economy as reported by BEA, the DIUx report argues that China's foreign investment activities are unique, because China "aims to displace the U.S. in key industries using its large market size to promote domestic champions which can become global leaders through state subsidies, access to low-cost capital and limiting China's domestic market access to foreign companies."[83] The report also concludes that it is "critical that exports, foreign ownership, and technology partnerships with foreign entities do not become conduits for technology transfers that will directly enable key means of foreign military advantage."[84]

As a result of these concerns, the report recommends that the U.S. government engage the U.S. private sector in developing and implementing a national strategy to prevent the transfer of "sensitive" technology. This strategy is envisioned to include a two-prong approach with offensive and defensive components: (1) expand the scope of CFIUS to include "any commercial activity that could result in technology transfer such as venture investing"; and (2) "restrict investments and acquisitions of U.S. companies that own technologies the DOD identifies as critical to national security."[85] The report also recommends that the U.S. government have the authority to regulate venture capital-based investment and the authority to restrict foreign investment in specific technologies on national security grounds.[86] The report further recommends that the nation adopt a strategy to: (1) stimulate technology development and innovation; (2) increase an emphasis on STEM (Science, Technology, Engineering, and Math) graduates in the United States; (3) consider immigration reform to retain large numbers of foreign graduate students to contribute to the U.S. economy; (4) increase the basic research budget by government; and (5) increase tax incentives for the private sector.[87]

The draft report also recommends that CFIUS play a key role in implementing a more activist foreign investment policy by doing the following:

- Adopting mandatory reporting requirements for foreign investments above a certain monetary threshold (e.g., $1M) for companies working on specified critical technologies and the investment is from a country that represents a national security concern. These actions are intended to deter U.S. startups from accepting financing from entities of countries of national security concerns.
- Expanding CFIUS' jurisdiction to include all technology transfer transactions: joint ventures, green field investments, assets purchased from bankruptcies, reverse mergers, etc.

[82] Ibid., p. 26.

[83] Ibid., p. 10.

[84] Ibid., p. 8.

[85] Ibid., p. 2.

[86] Ibid., p. 4.

[87] Ibid., p. 25.

- Developing a more formal and transparent risk scoring of transactions by country and by sector to facilitate the review of more transactions; strive to accept low-risk transactions quickly while dedicating more resources for analyzing "high-risk" transactions.
- Granting the Departments of Defense, Justice, and Homeland Security the authority that currently is reserved for the President to reject proposed investment transactions on national security concerns based on a formal risk scoring approach and when the three departments agree.
- Minimizing the use of mitigation agreements and denying transactions in cases where the agreements are not simple.
- Appropriating more budget resources to CFIUS agencies in order to review a larger number of transactions.
- Coordinating with U.S. "allies" in developing a coordinated strategy, especially with respect to China, that addresses international security.
- Allowing more time than the 90 days (30-day review; 45-day investigation; 15-day presidential determination) that are provided under the current CFIUS statute to review a proposed foreign investment transaction if the complexity of the national security concerns warrants further investigation.[88]

According to various indicators, China and other emerging economies are playing a growing role in the global economy, including through FDI. For some analysts, this growing role is a positive development, while for others it presents an economic and national security challenge to the United States, which has served as the chief architect of the liberal international economic order. In contrast to the recommendations of the DIUx report and the policies of various countries, U.S. economic policy generally has avoided attempts to protect and promote high technology sectors or control certain types of capital market investment from foreign investors or embraced an industrial-policy style approach that attempts to pick "winners" and "losers." Instead, the United States has opted for a limited government role in controlling foreign investment, in intervening directly in venture capital markets, or in attempting to influence the early stages of technology development by private firms.

Rather than using sectoral protectionist policies to pick winning and losing firms, the United States has used monetary, fiscal, and other broad policies to affect the overall course of the economy and relied on market forces to sort out which firms or technologies are successful. Similarly, the United States generally has followed a minimalist and targeted approach to intervening in the foreign investment process through CFIUS to focus on national security objectives and concerns. It also has numerous other policy tools to address specific trade and investment policy concerns regarding U.S. commercial economic engagement with other countries, to achieve a level playing field, and other policy objectives. In the area of foreign investment, this has been pursued through efforts to remove barriers and provide nondiscriminatory treatment to foreign investment on a reciprocal basis as part of negotiated trade agreements and bilateral investment treaties, which also include exceptions for national security and prudential reasons.

The economic issues related to national security are broad and complex. They involve numerous and intertwined interests, including investment, education, labor, capital markets, and technological development. It is generally understood that national security requirements support the economy by protecting it from foreign enemies. At the same time, a strong, growing economy

[88] Ibid., p. 24.

depends on long-term factors that contribute to economic growth and increase the total resource base available for defense and to provide economic security in the form of income and business opportunities for individuals. Economic growth depends on building human capital, science, technology, and innovation. In addition, the increased integration of the U.S. economy into global markets means that U.S. security also depends on global economic stability, on a balanced international economy, the ability to coordinate key economic policies with other leading nations, and deterring threats to the international financial system. As a result of these competing demands, there is a constant trade-off between resources that are directed toward supporting national defense requirements and resources required as building blocks to maintain strong economic growth. Generally, most economists argue that policies that attempt to protect domestic industries from foreign competition are likely to misallocate resources within the protected sector and the broader economy.

From this perspective, the main issue seems to be one of identifying and addressing long-term threats to the economy while minimizing the costs to the economy in order to promote broader economic fundamentals that drive technological development and, therefore, support U.S. technological leadership. Economists generally argue that government intervention in a broad manner in economic sectors such as the venture capital and foreign investment markets may protect firms in some selected sectors of the economy at the expense of other firms and other sectors. Such protection could also be expected to shift capital and labor resources within the economy toward the protected sectors at the expense of other sectors of the economy, while doing little to address longer-term issues that will determine the U.S. technological and strategic leadership in the future. The DIUx report acknowledges that a more interventionist government approach to foreign investment through CFIUS may reduce capital inflows and investment spending in the venture capital market and, therefore, on developing new technologies and inventions.

Economists generally argue that attempts to reduce Chinese and other foreign investment in certain sectors or technologies in the economy instead of focusing on the impact of an investment in a particular firm could have a number of broad economic effects. First, restricting Chinese investment potentially could reduce the domestic pool of funds available for start-ups and venture capital activity in cases where Chinese investment may provide the only option.[89] In these circumstances, the report argues that such potential losses are acceptable, because the intended purpose of the approach is to reduce Chinese direct investment. At the same time, the potential loss of funding for some firms may limit the overall development of new technologies at the margin, which potentially could have unintended consequences for the long-term rate of growth of the economy. Also, the reduced availability of funds due to a lower amount of foreign capital inflows could lead to a higher cost of capital for other firms in the same sector that potentially could push firms at the margin in that sector out of the market, thereby reducing the overall amount of new investment and new technological development within the protected sector.

Second, government policies that protect a specific sector of the economy or a specific activity can spur a shift in resources within the economy between industrial sectors toward the protected sector. In general, government protection, regardless of the specific form it takes, reduces risks for firms, which potentially increases economic returns and allows firms in the protected sector to compete more aggressively for capital and labor. As a result, capital and labor resources could be shifted not only within the venture capital sector, but also between sectors of the economy, reducing economic efficiency and output in those sectors at the expense of the overall rate of growth of the economy. Also, the combination of a reduced pool of funds at higher costs and

[89] Brown and Singh, p. 26.

concerns over the impact of a higher profile role for the government in the venture capital market potentially could drive some firms to move their operations abroad at an earlier stage of technological development or to shift their research and development activities outside the United States to maintain control over their inventions.

Finally, policies that restrict foreign investment essentially raise the cost of investment transactions. In some cases, start-up firms may turn to foreign investors with deep financial resources for investments. Since Chinese firms are viewed by some as having access to low cost funds through state-supported financial institutions, start-up firms potentially may become even more reliant on Chinese investors for funds, a result that is contrary to the stated objective of the DIUx report.

Other National Security Concerns

Concerns over greenfield investments were sparked in 2013 by efforts of the Russian space agency Roscosmos to build about half a dozen Global Positioning System (GPS) monitor stations in the United States. This proposed investment raised interest about amending CFIUS's provisions that currently do not provide for it to review greenfield investments. The Russian transaction was supported by the U.S. State Department as one way of improving U.S.-Russian relations. The Central Intelligence Agency and the Defense Department, however, opposed the transaction. They argued that the monitoring stations would significantly improve the accuracy and reliability of Moscow's version of the GPS that could help Russia spy on the United States and improve the precision of Russian weaponry.[90]

Economists generally agree that there is little economic evidence to date to conclude that the nationality of a foreign investor or whether the foreign investor is a private entity or an entity that is owned or controlled by a foreign government has a measurable impact on the market performance of the firm or on the U.S. economy. This conclusion does not attempt to assess the differences in economic performance or national security concerns that potentially may arise between privately-owned foreign firms and those that are owned or controlled by a foreign government that engage in such illegal activities as corporate espionage. Others may argue that firms that are owned or controlled by a foreign government pose a risk to national security or to homeland security, but such concerns are not within the purview of this report. Similar issues concerning corporate ownership were raised during the late 1980s and early 1990s when foreign investment in the U.S. economy increased rapidly. There are few new data, however, to alter the conclusion reached at that time that there is no definitive way to assess the economic impact of foreign ownership or of foreign investment on the economy. Although some observers have expressed concerns about foreign investors who are owned or controlled by foreign governments acquiring U.S. firms, there is little confirmed evidence that such a distinction in corporate ownership has any measureable impact on the economy as whole.

For most economists, the distinction between domestic- and foreign-owned firms, whether the foreign firms are privately owned or controlled by a foreign government, is sufficiently small that they would argue that it does not warrant placing restrictions on the inflow of foreign investment. Nevertheless, foreign direct investment does entail various economic costs and benefits. On the benefit side, such investments bring added capital into the economy and potentially could add to productivity growth and innovation. Such investment also represents one repercussion of the U.S. trade deficit. The deficit transfers dollar-denominated assets to foreign investors, who then decide how to hold those assets by choosing among various investment vehicles, including direct

[90] Schmidt, Michael S., and Eric Schmitt, "A Russian GPS Using U.S. Soil Stirs Spy Fears," *The New York Times*, November 16, 2013.

investment. Foreign investment also removes a stream of monetary benefits from the economy in the form of repatriated capital and profits that reduces the total amount of capital in the economy. Such costs and benefits likely occur whether the foreign owner is a private entity or a foreign government.

Issues for Congress

The U.S. policy approach to international investment was intended to establish an open and rules-based system that is consistent across countries and in line with U.S. interests as the largest global foreign investor and the largest recipient of foreign investment. U.S. foreign direct investment policy has also been founded on the concept that the net benefits of such investment were positive and benefited both the United States and the foreign investor, except in certain circumstances concerning risks to national security. Even in these cases, however, the U.S. approach generally has been to limit any market distorting impact of the national security review process. On various occasions, some Members of Congress and others have expressed interest in amending the CFIUS statute to address a broader range of issues concerning foreign direct investment in the U.S. economy. In part, this dissatisfaction stems from differing views of the role CFIUS should play in overseeing foreign investment transactions and the concept of national security, particularly as it relates to national economic security. In some ways, current discussions regarding the role of CFIUS mirror previous debates over a working set of parameters that establish a functional definition of the national economic security implications of foreign direct investment and expose differing assessments of the economic impact of foreign investment on the U.S. economy and differing political and philosophical convictions.

Congressional efforts to amend the CFIUS statute often have been driven by national security concerns over a particular foreign investment transaction. More recently, concerns have focused on a combination of issues, including (1) an increase in foreign investment activity by Chinese state-owned firms; (2) the perception that such investment is part of a government-coordinated approach that serves official strategic purposes, rather than purely commercial interests; and (3) that investments by Chinese firms are receiving government support through subsidized financing or other types of government support that give Chinese firms an "unfair" competitive advantage over other private investors.

While Members of Congress and others have expressed concerns over investments by Chinese entities, concerns about the broader issue of the role of foreign investment in the economy and the interaction between foreign investment and national security predate the creation of CFIUS. Such concerns arguably have been heightened by a changing global economic order that is marked by rising emerging economies such as China that are more active internationally and changing notions of national economic security.[91] Under the CFIUS statute, however, Congress set a legal standard for the President to meet before he could block or suspend investment transactions: no other laws apply, and he determines that there is "credible evidence" that the action does not simply affect national security, but that it "threatens to impair the national security," or that it poses a risk to national security As such, these concerns have raised questions about broadening the focus of CFIUS's reviews and about addressing potential gaps in U.S. foreign investment

[91] For instance, China's One Belt, One Road initiative. Denyer, Simon, As U.S. Retreats in Asia Pacific, China Fills the Void With an Ambitious Global Plan, *The Washington Post*, May 12, 2017. https://www.washingtonpost.com/world/asia_pacific/as-us-retreats-in-the-asia-pacific-china-fills-the-void-with-an-ambitious-global-plan/2017/05/11/54771c0c-3593-11e7-ab03-aa29f656f13e_story.html?hpid=hp_hp-more-top-stories_chinabelt-505am%3Ahomepage%2Fstory&utm_term=.34b36c806ad1.

policy. As a result of these concerns, a number of changes to CFIUS are being discussed, including the following:

- **Changing the scope of CFIUS's review**. Since its inception, CFIUS has been at the center of a debate over the role of foreign investment in the economy and the role of the economy in the rubric of national security. This debate has focused on whether the scope of CFIUS's reviews should rely on a narrow definition of national security, or on a broad definition by incorporating a more robust economic component. This change of focus could expand CFIUS's mandate to include reviewing new, or greenfield, investments, joint ventures, and to adopt a concept of national economic security that would have CFIUS initiate a type of industrial policy that would prohibit foreign investment in certain sectors of the U.S. economy while protecting or promoting other sectors. Such a move toward an industrial policy-style approach would alter U.S. foreign investment policy and inject economic issues directly into the CFIUS process, potentially at odds with international efforts to adopt nondiscriminatory rules regarding foreign investment. In particular, U.S. and international efforts to remove restrictions on foreign investment have promoted the concept that foreign investment generally should be nondiscriminatory with certain exceptions, for example, for national security. It is not clear how broadening the current concept of national security by adopting the concept of national economic security would mesh with other U.S. laws and policies, including U.S. trade policy. Also, it is unclear how such a change would affect foreign reviews of U.S. direct investment abroad, considering U.S. firms collectively are the largest global foreign direct investors.
- **Broadening CFIUS's mandate to adopt a more holistic approach**. In an approach similar in some respects to an industrial policy-style approach, CFIUS may be urged to shift its current process from focusing on individual foreign investment transactions, to adopting a more holistic approach. In addition to evaluating individual investment transactions on their own merits, such an approach would consider the investment in the context of other foreign investment transactions that have occurred in the same industrial sector, by the same foreign entity, or in vertically integrated activities through various stages of production. This approach potentially could provide a broader view of the role of foreign investment in the economy and an assessment of the cumulative impact of such investment on the economy in a way that is not captured by a focus on individual transactions. Such an approach, however, could create a number of issues by: complicating the foreign investment review process; creating conflicts among competing objectives; raising questions about the openness of the United States to foreign direct investment; and broadening CFIUS's reviews to include assessing the economy-wide impact of foreign direct investment.
- **Shifting CFIUS's current review process to a mandatory process**. Such an approach would ensure that all foreign investment transactions are fully reviewed by CFIUS. This change potentially could be viewed as transforming the current CFIUS review process from a disapproval process in which only certain investment transactions are subject to a full CFIUS review to an approval process in which all foreign investment transactions would be required to receive an official approval in order to proceed. Such a change likely would increase the number of reviews from around a hundred a year to around two thousand reviews, thereby increasing the demands on the various individuals who are involved in conducting CFIUS reviews under the current time-frame and likely

would require additional resources. While it is not clear if changing the current review process to a mandatory approval process would necessarily violate international commitments, it would mark a shift in U.S. foreign investment policy.

U.S. foreign investment policy in the post-WWII era generally has been successful in negotiating fewer restrictions by foreign government on U.S. investments and away from a preapproval process except in rare cases of national security. Unlike multilateral rules that govern trade in goods and services, there are limited multilateral agreements that govern the treatment of foreign investment, mostly restrictions or conditions that are placed on in-bound investments that link the approval of an investment project with various performance requirements.[92] Most rules on foreign investment, primarily through bilateral investment agreements (BITs) or free trade agreements (FTAs), generally focus on ensuring that inward investment is not discriminated against and treated similarly to domestic investment (national treatment and most favored nation status).[93]

- **Leveraging access to the U.S. market to gain reciprocal treatment abroad**. As a corollary to the preceding issue, this approach would restrict or prevent foreign investments in certain sectors of the U.S. economy as a form of reciprocity in retaliation for restrictions that foreign governments place on U.S. investment abroad. This approach would attempt to leverage access to the U.S. economy on a country-by-country, quid pro quo basis. Such an approach likely would create a patchwork of restrictions that seemingly would be inconsistent with long-standing U.S. foreign investment policy that has emphasized nondiscrimination and national treatment of foreign investment and could conflict with certain provisions of trade agreements.

  While some governments may abuse the right to restrict foreign investment in certain sectors of their economies for commercial, as well as national security interests, there is no clearly defined method for determining which investment restrictions are serving which objectives, since economic activities can serve both commercial and national security purposes. A foreign investment approach that emphasizes reciprocal treatment potentially could subject U.S. national security restrictions on foreign investment to similar types of reciprocal investment provisions by other trading partners and could raise questions about the principles the United States uses to establish its national security objectives; in other words, is the United States basing its foreign investment restrictions on national security concerns, or is it establishing such restrictions primarily to serve as bargaining chips in order to extract concessions on in-bound foreign investment from foreign governments?
- **Applying penalties to foreign firms that receive subsidized financing or preferential domestic regulations.** Such a policy would favor placing some form of restriction or penalty on foreign direct investors who receive financing at

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[92] CRS In Focus IF10636, *Foreign Direct Investment: Overview and Issues*, by (name redacted) and (name redacted) .

[93] The World Trade Organization's Trade-Related Investment Measures Agreement (TRIMs), https://www.wto.org/english/docs_e/legal_e/18-trims_e.htm; CRS In Focus IF10636, *Foreign Direct Investment: Overview and Issues*, by (name redacted) and (name redacted) ; and CRS In Focus IF10052, *U.S. International Investment Agreements (IIAs)*, by (name redacted) and (name redacted) .

below-market rates or receive some other form of subsidization directly or indirectly by their home government. A similar type of approach regarding subsidized financing for exports is governed by a voluntary agreement among developed countries and export credit agencies.[94] Subsidized financing is viewed as giving foreign firms an "unfair" competitive advantage in acquiring existing firms and in supporting those firms in their continuing operations. While such concerns often are associated with state-owned enterprises, firms do not need to be state-owned in order to receive some form of subsidized financial or regulatory assistance. For instance, firms that have both defense and commercial operations have been criticized for using profits from their defense contracts to subsidize their commercial operations.

Also, some governments may construct a regulatory structure that protects domestic firms from foreign competition until the firms gain sufficient experience and market share at home in order to make them viable international competitors. Efforts to restrict or control foreign financial investment in U.S. firms, particularly firms with new or advanced technologies, raise a number of issues, since U.S. firms ostensibly are private entities that can act without government approval.

- **Discriminating among foreign investors based on membership in certain organizations**. Such a grouping could involve dividing foreign investors into two broad camps of friendly and unfriendly based on official government membership in certain military or security arrangements, such as NATO. According to this approach, nations that share security arrangements are viewed as being more likely to be favorable to U.S. economic and security interests than are those that are not party to such arrangements, although this assumption can be debated. Dividing foreign investors into friendly and unfriendly groups, however, contrasts with U.S. investment policy in the post-World War II era which has promoted nondiscrimination and national treatment of all foreign investment.

Proposed Legislation

As Congress potentially debates these issues, it may consider the role of foreign investment in the economy and what role CFIUS should play in reviewing such investments. So far in the 115th Congress, various measures have been proposed or adopted that could have broad implications for CFIUS's operations and activities.

H.R. 2810, National Defense Authorization Act for Fiscal Year 2018

The measure was signed by President Trump on December 12, 2017, and designated P.L. 115-91.

Section 1069 requires the Secretary of Defense, in concurrence with the Secretaries of State and Treasury and the Director of National Intelligence, to assess and develop a plan and recommendations for agencies of the U.S. government, other than the Department of Defense, to improve the effectiveness of the interagency vetting of foreign investments that could impair the national security of the United States. The recommendations are required to increase collaboration and coordination among U.S. government agencies in identifying and preventing foreign investments that could potentially impair national security; among U.S. allies and partners

[94] The Organization for Economic Cooperation and Development (OECD) Export Credit Arrangement. http://www.oecd.org/tad/xcred/theexportcreditsarrangementtext.htm.

on investments; and among U.S. government agencies in identifying and mitigating potential threats to critical technologies from foreign state-owned or state-controlled entities.

The recommendations are required to be based on seven criteria:

1. Whether the current processes and policies place adequate focus on the potential threats presented by foreign governments over business entities seeking investment in the United States.
2. The current or projected major vulnerabilities of the defense industrial base pertaining to foreign investment, including in the areas of cybersecurity, reliance on foreign suppliers in the defense supply chain with access to materials that are essential for national defense, and the use of transportation assets and other critical infrastructure for training, mobilizing, and deploying forces.
3. Whether the current interagency vetting process for foreign investments (1) requires additional resources to be effective; (2) permits the interagency establishment adequate time to thoroughly review transactions and to conduct national security threat assessments; (3) assesses the risks posed by transactions before they are implemented; and (4) provides adequate monitoring and compliance of agreements to mitigate such risks.
4. The counterintelligence risks posed by purchases or leases of federal land.
5. Whether and to what extent industrial espionage is occurring against private U.S. companies to obtain commercial secrets related to critical or foundational technologies.
6. Whether and to what extent foreseeable foreign investments have the potential to (1) reduce any technological or industrial advantage of the United States; or (2) increase the vulnerability of the United States to information operations, including the purposeful dissemination of false or misleading information to the American public and the manipulation of American public opinion on critical public policy issues.
7. Whether currently mandated annual reports to Congress on the interagency vetting of foreign investments should be revised to ensure that they provide valuable information.

The recommendations are required to consider three issues:

1. Trends in foreign investment transactions, including joint ventures, the sale of assets pursuant to bankruptcy, and the purchase or lease of real estate in proximity to government installations that could impair national security.
2. Strategies used by foreign investors to exploit vulnerabilities in existing foreign investment vetting processes and regulations.
3. Any market distortion or unfair competition incurred by foreign transactions that directly or indirectly impairs the national security of the United States.

The Secretary of Defense is required to present an unclassified interim report (but it may contain a classified annex) no later than 90 days after enactment of the act and an unclassified final report (but with a classified annex) no later than 180 days after enactment. The report is required to be sent to the Committees on Armed Services of the Senate and the House of Representatives; the Committee on Foreign Affairs of the House of Representatives; the Committee on Foreign Relations of the Senate; the Committee on Financial Services of the House of Representatives; the Committee on Finance of the Senate; the Permanent Select Committee on Intelligence of the House of Representatives; and the Select Committee on Intelligence of the Senate.

Section 1071 requires the Secretary of Defense to establish within 90 days of enactment of the act a process for enhancing the ability of the Defense Department to analyze, assess, and monitor the vulnerabilities of, and concentration of, foreign investment in the defense industrial base. This process is required to

- designate a senior official responsible for overseeing the development and implementation of the process;
- develop or integrate tools to support commercial due diligence and business intelligence or to analyze and monitor commercial activity to understand business relationships affecting the defense industrial base;
- develop risk profiles of products, services, or entities based on business intelligence, commercial due diligence tools, and data services;
- as determined necessary by the Secretary, integrate with intelligence sources to develop threat profiles of entities attempting transactions with a defense industrial base company; and
- address other matters as the Secretary deems necessary.

Within 90 days of enactment, the act requires the Secretary of Defense to submit to the Committees on Armed Services of the Senate and House of Representatives a written notice that such process has been established or otherwise designated. The notification is required to include

- the senior official responsible for overseeing the development and implementation of the process;
- the tools currently available to the Department of Defense and any other tools available commercially or otherwise that might contribute to enhancing the analytic capability of the process;
- any statutory changes needed to improve the effectiveness of the process; and
- projected resources necessary to purchase any commercially available tools needed to carry out any statutory changes.

For FY2018 through FY2023, the Secretary of Defense is required to submit to certain designated congressional committees a consolidated unclassified report (but may contain a classified annex) that combines all of the reports required to be provided to Congress for that fiscal year on the adequacy of, vulnerabilities of, and concentration of purchases in the defense industrial sector. The consolidated report is required to include (1) the report required under Section 721(m) of the Defense Production Act of 1950 (50 U.S.C. 4565(m)), relating to concentrations of purchases of the defense industrial base; (2) the report required under Section 723(a) of the Defense Production Act of 1950 (50 U.S.C. 4568(a)), relating to offsets in defense production; (3) the report required under Section 2504 of Title 10, *U.S. Code*, relating to annual industrial capabilities; and (4) any other reports the Secretary determines appropriate.

Not later than 270 days after enactment, the Secretary of Defense is required to submit to the appropriate congressional committees a report describing any need for reforms of policies governing the export of technology or related intellectual property, along with any proposed legislative changes the Secretary believes are necessary.

The designated congressional committees are the Committee on Armed Services, the Committee on Financial Services, the Committee on Foreign Affairs, and the Permanent Select Committee on Intelligence of the House of Representatives; and the Committee on Armed Services, the Committee on Banking, Housing, and Urban Affairs, the Committee on Foreign Relations, and the Select Committee on Intelligence of the Senate.

Section 1612 requires the Commander of the Air Force Space and Missile Systems Center to establish and maintain a watch list of contractors with a history of poor performance on space procurement contracts or research, development, test, and evaluation space program contracts. A contractor could be placed on the watch list for a number of reasons, including "security or foreign ownership and control issues."

Section 1711 requires the Secretary of Defense to develop a four-year pilot program to assess the feasibility and advisability of increasing the capability of the defense industrial base to support production needs to meet military requirements and the manufacturing and production of emerging and commercial technologies. At the end of the period, the Secretary would be required to brief the House and Senate Armed Services Committees on the results of the pilot program. To accomplish these objectives, the program is authorized to

- use contracts, grants, or other transaction authorities to support manufacturing and production capabilities in small and medium-sized manufacturers;
- purchase goods or equipment for testing and certification purposes;
- provide incentives, including purchase commitments and cost sharing with nongovernmental sources, for the private sector to develop manufacturing and production capabilities in areas of national security interest;
- issue loans or provide loan guarantees to small and medium-sized manufacturers to support manufacturing and production capabilities in areas of national security interest;
- give awards to third-party entities to support investments in small and medium-sized manufacturers working in areas of national security interest, including debt and equity investments that would benefit missions of the Department of Defense; and
- include other activities the Secretary determines to be necessary.

Section 1712 requires the Secretary of Defense, in coordination with the Secretary of State and in consultation with the Director of the Information Security Oversight Office, to establish a program to exempt organizations whose ownership or majority control is based in a country that is part of the national technology and industrial base from one or more of the foreign ownership, control, or influence requirements of the National Industrial Security Program (NISP). The NISP is defined as the persons and organizations engaged in research, development, production, integration, services, or information technology activities conducted within the United States, the United Kingdom of Great Britain and Northern Ireland, Australia, and Canada. Established in 1993, the NISP serves as a single, integrated industrial security program directed to protect classified information that is released to contractors, licensees, and grantees of the U.S. government. An exemption would be based on a determination that it (1) is beneficial to improving collaboration within countries that are part of the national technology and industrial base; (2) is in the national security interest of the United States; and (3) will not result in a greater risk of the disclosure of classified or sensitive information.

H.R. 2932, the Foreign Investment and Economic Security Act of 2017

Introduced by Representative DeLauro on June 16, 2017, the measure would alter the composition of CFIUS and require a "net benefits" (cost-benefit) test, as part of a CFIUS national security review of a proposed foreign investment transaction. The proposed measure would remove the Secretaries of State, Defense, and Homeland Security from CFIUS and add the Secretary of Transportation, while making the Secretary of Labor and the Director of National

Intelligence ex officio members and adding the Secretaries of Agriculture and Health and Human Services as needed. In conducting a net benefits test of an investment transaction, the President, acting through CFIUS, "shall" consider the overall effects on the level of economic activity in the United States, including the level and "quality" of employment, resource processing, the utilization of parts and services produced in the United States, and exports from the United States.

The test would also consider the effect of the proposed investment transaction on productivity, industrial efficiency, technology transfers, product innovation in the United States, and competition within the United States and with other countries; its compatibility with national industrial and economic policies; and its effect on public health, safety, the environment, and the "well-being" of U.S. consumers. In the case where the foreign investor is a "government-influenced" transactor, the test would consider the governance and commercial orientation of the foreign transactor; the extent to which the investor is owned or controlled by a foreign government, including government policies regarding support for economic sectors; whether the foreign person adheres to U.S. standards of corporate governance and U.S. laws and practices; and whether the home government promotes and ensures adequate transparency. The foreign investor would also be evaluated on whether they "will operate on a commercial basis" including where to export, where to process, the participation of U.S. citizens in its operations in the "United States and elsewhere," support of ongoing innovation, research and development in the United States, sourcing patterns, and the "appropriate level" of capital expenditures to maintain the United States business in a globally competitive position.

S. 616, the Food Security is National Security Act of 2017

Introduced by Senator Grassley on March 14, 2017, the proposed measure would include the Secretaries of Agriculture and Health and Human Services as permanent members of CFIUS and include the national security impact of foreign investment in the food and agriculture systems as part of the criteria CFIUS uses in deciding to recommend that the President block a foreign acquisition.

S. 2987/H.R. 5515, the Foreign Investment Risk Review Modernization Act of 2018

On November 8, 2017, Senators John Cornyn and Dianne Feinstein and Representative Robert Pittenger introduced companion measures in the Senate (S. 2098) and the House (H.R. 4311), respectively, identified as FIRRMA. On May 22, 2018, the Senate Banking and House Financial Services Committees held their respective markup sessions and approved different versions of the legislation. The Senate version of FIRRMA was added as Title 17 of the Senate version of the National Defense Authorization Act for Fiscal Year 2019 (S. 2987), incorporated into the Senate amendments to H.R. 5515), which passed the Senate on June 18, 2018. The House version of FIRRMA, H.R. 5841 was passed as a standalone bill under suspension vote on June 26, 2018. It is expected that the provisions will go to conference to be reconciled in the coming weeks.[95]

Both pieces of legislation would represent the most comprehensive revision of the foreign investment review process under CFIUS since the Foreign Investment and National Security Act (FINSA) was enacted in 2007. Many say the proposed changes could recast the law's generally defensive approach that largely focuses its reviews and investigations on the potential impact of individual investments on national security, to a more assertive role that emphasizes U.S.

[95] The final version of FIRRMA is expected to be included in the final NDAA conference report. "House Passes Pittenger's Landmark Bill," Press Release, June 26, 2018, https://go.usa.gov/xUCSy.

economic as well as national security interests. Overall, the proposed changes range from provisions that would codify existing administrative actions to provisions that would expand the scope of transactions that fall under CFIUS' jurisdiction and distinguish foreign investments by country. Specifically, investment transactions involving a "country of special concern," would face a higher level of scrutiny, though the criteria for the designation differ between the House and Senate versions.

Left unchanged by both proposed measures are two provisions that effectively serve as the core principles of the CFIUS process. The first provision states that CFIUS can proceed into the national security investigation phase only after it has determined during the initial review that a foreign investment transaction: (1) threatens to impair the national security of the United States; (2) is controlled by a foreign government; or (3) would result in foreign control of any critical infrastructure that would impair U.S. national security, and that the impairment has not been satisfactorily mitigated. Nevertheless, an investigation is not required if the Secretary of the Treasury and the head of the lead agency (as designated by Treasury based on the subject matter of the proposed transaction) jointly determine that the transaction would not impair the national security. The second provision states that the President can exercise his authority to suspend or prohibit a foreign investment only if he: (1) has "credible evidence" that a foreign investor might take action that threatens to impair the national security; and (2) determines that other provisions of law do not provide "adequate and appropriate" authority for the President to protect the national security.

Comparison of House and Senate Versions of FIRRMA

Since the introduction of FIRRMA in November 2017, the Senate and House versions have undergone a number of changes. One key change in both bills includes adjusting the scope of "covered transactions"[96] under CFIUS as proposed in the introduced bills, most notably by removing provisions that would have regulated certain outbound transactions of intellectual property and associated support by U.S. critical technology companies to foreign entities. Instead, both bills address these transactions through separate revisions related to export controls. Other changes include more specificity regarding the treatment of passive investments,[97] as well as how CFIUS treats transactions involving a "country of special concern." In sum, while the House and Senate versions of FIRRMA differ in a number of ways, overall, both measures would

- **Broaden the scope of transactions under CFIUS' purview by including for review** real estate transactions in close proximity to a military installation or U.S. Government facility or property of national security sensitivities; joint ventures (House version); any non-passive investment in a U.S. critical technology company, U.S. critical infrastructure company, or critical technologies; any change in foreign investor rights regarding a U.S. business; transactions in which a foreign government has a direct or indirect substantial interest; and any transaction or arrangement designed to evade CFIUS regulations.
- **Provide for CFIUS to discriminate among foreign investors by country of origin** in reviewing investment transactions by labeling some countries as "a

[96] The term "covered transaction" means "any merger, acquisition, or takeover...by or with any foreign person which could result in foreign control of any person engaged in interstate commerce in the United States." 50 U.S.C.S. app. §2170(d)(3).

[97] Passive investments refer to "ownership interests in which the person holding or acquiring such interests has no plan or intent to exercise control, and takes no actions that indicate otherwise." See, Treasury Department, "Regulations Pertaining to Mergers, Acquisitions, and Takeovers by Foreign Persons; Final Rule," 73 *Federal Register* 70702, November 21, 2008.

country of special concern"—a country that poses a "significant threat to the national security interests of the United States" (Senate version), or a country that is subject to export restrictions, is a state-sponsor of terrorism, or is subject to an arms embargo (House version).

- **Shift the filing process for foreign firms from voluntary to mandatory in certain cases** and provide for a two-track method for reviewing investment transactions, with some transactions requiring a declaration to CFIUS and receiving an expedited process, while transactions involving investors from countries of special concern would require a written notification of a proposed transaction and would receive greater scrutiny.
- **Provide for additional factors for consideration** that CFIUS and the President could use to determine if a transaction threatens to impair U.S. national security, as well as formalize CFIUS' use of risk-based analysis to assess the national security risks of a transaction by assessing the threat, vulnerabilities, and consequences to national security related to the transaction.
- **Authorize CFIUS to suspend transactions that it determined "may pose a risk to the national security of the United States**," in contrast to existing provisions that limit CFIUS' authority to review transactions that threaten "to impair the national security of the United States."
- **Lengthen most time periods for CFIUS reviews and investigations** and for a national security analysis by the Director of National Intelligence; timing differs regarding the permitted extension of an investigation by CFIUS in the event of "extraordinary circumstances" (15-day extension in House version versus 30 days in the Senate version).
- **Provide for more staff to handle an expected increased work load and provide for additional funding for CFIUS** through a filing fee structure for firms involved in a transaction (Senate version), or a combination of a $20 million annual appropriation and a fee structure (House version).
- **Modify CFIUS' annual reporting requirements**, including its annual classified report to specified Members of Congress and non-classified reports to the public to provide for more information on foreign investment transactions.
- **Mandate separate reforms related to export controls**, with requirements to establish an interagency process to identify so-called "emerging and foundational technologies"—such items are to also fall under CFIUS review of critical technologies—and establish controls on the export or transfer of such technologies (more comprehensive export control legislation is included in House version).

The following sections offer more detail on major changes and differences in selected areas.

Sense of Congress and Factors to be Considered

The House version would add six additional "factors to be considered" to the existing 12 factors that CFIUS and the President may choose to use in evaluating whether a transaction threatens to impair U.S. national security (Sec. 308). These include several factors that had been proposed in previously introduced bills including, for example, "the potential national security-related effects of the cumulative control of any one type of critical infrastructure, energy asset, material, or critical technology by a foreign person" and "whether the covered transaction is likely to exacerbate cybersecurity vulnerabilities...." In addition, a distinct factor relates to "the availability of human resources, products, technology, materials, and other supplies and services," with "the availability of human resources" meaning potential losses resulting from reduction in employment of persons "whose knowledge or skills are critical to national security." The Senate version does not include a section on "factors to be considered." Rather it includes some similar factors in a section indicating that it is the "sense of Congress" that CFIUS may consider the factors when considering national security risks (Sec. 1702(b)).

Definitions

Covered Transactions

As noted above, the Senate and House versions would expand the scope of covered transactions that fall under CFIUS review to include certain real estate transactions (with exemptions for purchases of a "single housing unit" or real estate in "urbanized areas"), certain noncontrolling investments involving critical technologies and critical infrastructure, any change in foreign investor rights regarding a U.S. business, and any transaction or arrangement designed to evade CFIUS regulations. Covered transactions would also entail transfers of assets that arise "pursuant to a bankruptcy proceeding or other form of default on debt." The Senate version covers any non-passive investment in a U.S. critical technology or critical infrastructure company that is unaffiliated with the foreign person (Sec. 1703).[98] The House version does not refer to such companies specifically, but refers to "any investment in an unaffiliated United States business by a foreign person" (Sec. 201). This specifically covers a national, government, or foreign entity of a "country of special concern," or a foreign entity controlled by, organized under, or with "substantial interest" held by a "country of special concern," and that would result in obtaining: (1) sensitive personal data of U.S. citizens that "may be exploited in a manner that threatens national security"; (2) involvement in "substantive decisionmaking," including the use of personal data or critical technologies; or (3) "material nonpublic technical information" in possession of the U.S. company.

Countries of Special Concern

Both versions of FIRRMA would mandate additional scrutiny of the above transactions involving countries termed "countries of special concern," but specify different related criteria. The Senate version defines such countries as those that pose a "significant threat to the national security interests of the United States." It authorizes CFIUS to develop regulations to exempt "transactions from identified countries" from additional restrictions, based on certain criteria, including, for example, whether the country is a member of NATO, adheres to nonproliferation control regimes, or has its own effective process for reviewing the national security effects of foreign investment. The House version defines "countries of special concern" to include countries subject to U.S. export restrictions or U.S. arms embargo, state sponsors of terrorism, and other factors as determined by regulations. The House version specifies that CFIUS is permitted to exempt a country from designation as a "country of special concern" for up to one year upon reporting to specified congressional committees that the exemption is important to U.S. national interest, with a detailed explanation for the reasons. The House version further stipulates that a "foreign government-controlled transaction," includes foreign entities of a country of special concern that is a non-market economy, unless CFIUS develops regulations exempting any such company, entity, or country.

[98] A U.S. critical technology company is defined as a U.S. business "that produces, designs, tests, manufactures, or develops one or more critical technologies, or a subset of such technologies, as defined by regulations;" and a critical infrastructure company as a U.S. business that "owns, operates, or primarily provides services to, an entity or entities that operate within a critical infrastructure sector or subsector, as defined by regulations."

Passive Investments

FIRRMA would expand CFIUS review to include certain noncontrolling investments that involve critical infrastructure or technologies, but also provide for exemptions for transactions that are simply financial or passive investments. Under the Senate version, passive investments are defined as investments that do not afford the foreign investor certain rights, such as access to "material nonpublic technical information"[99] or membership or observer status on a board of directors; further, the determination of whether an investment is passive "shall be made without regard to how low the level of ownership interest." The Senate version establishes criteria for certain investments qualifying as "passive," with additional clarification for investment funds such as private equity funds, to be considered as passive investments, for example, in certain cases where a foreign person is a limited partner. The House version does not include a separate section specifying related definitions and guidance for determining what qualifies as passive investment. Both versions of FIRRMA do specify that when considering transactions in which a foreign government has a direct or indirect "substantial interest," passive investment or acquisition of less than 10% voting interest does not qualify as "substantial interest."

Export Control Reform

Both the Senate and House versions establish new export control authorities. Sec. 1725 and Sec. 1726 of the Senate version include provisions that would

- Establish a "regular, ongoing interagency process to identify emerging and foundational technologies" in coordination with the Departments of Commerce, Defense, State, Energy, and others. The process would consider intelligence from the Director of National Intelligence (DNI) and information from CFIUS reviews and investigations, development of such technologies by other countries, and the effect of new export controls on development of such technologies in the United States.
- Grant the Secretary of Commerce explicit authority to "establish appropriate controls under the Export Administration Regulations [EAR] on the export, re-export, or in-country transfer" of emerging and foundational technologies, as identified.
- Permit Commerce, in coordination with other agencies, to specify the applicable level of control, based on several factors, and at a minimum require licenses before export or transfers of technology to any country subject to an embargo. In the case of license applications involving a joint venture or similar collaborative arrangement, Commerce may require the disclosure of "any foreign person with significant ownership interest in a foreign person participating in the arrangement." Certain exemptions apply to the proposed controls, largely to allow for the sales and service of finished products.
- Grant the Secretary of State in consultation with other agencies, authority to propose identified technology to the multilateral export control regimes as appropriate. The Secretary of Commerce would be required to report every 180 days to CFIUS on actions taken.

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[99] The Senate version specifies that "material nonpublic technical information" is to be defined in regulations prescribed by CFIUS, except that it "does not include financial information regarding the performance of a United States critical infrastructure company or United States critical technology company." The House version specifies additional criteria regarding the meaning of the term.

- Require an "Emerging Technology and Advisory Committee" established by the Secretary of Commerce under EAR to advise the interagency process with respect to identifying emerging and foundational technologies.
- Delegate enhanced enforcement authorities to Commerce relative to investigations in the United States and abroad.

Overall, the House version would mandate more comprehensive revision by incorporating the Export Control Reform Act of 2018 (H.R. 5040). Under the U.S. export control system, the Secretary of Commerce has the authority to regulate the export of dual-use items, with potentially both civilian and military applications.[100] However, the underlying authorization for current dual-use export control—the Export Administration Act of 1979, as amended (P.L. 96-72)—has expired, and the export licensing system created under the authority of the EAA has been continued by a presidential declaration of a national emergency and the invocation of the International Emergency Economic Powers Act (IEEPA; P.L. 95-223). H.R. 5040 would put the existing system, including the revisions made during the Obama Administration, under a permanent statutory basis.

Declarations for Certain Covered Transactions

Both versions of FIRRMA would establish an option for foreign entities to voluntarily file a "declaration" with "basic information regarding the transaction," instead of or in advance of a written notice, as well as a mandatory process for certain transactions involving foreign persons in which a foreign government has a "substantial interest." In the Senate version, the process is mandatory for investments that result in "the acquisition, directly or indirectly, of a substantial interest" in a U.S critical infrastructure or critical technology company (Sec. 1706). "Substantial interest" is to be determined by regulations, but "shall consider the means by which a foreign government could influence the actions of a foreign person, including through board membership, ownership interest, or shareholder rights." CFIUS would also be granted authority to mandate declarations based on other factors, as determined, such as the technology or industry in which a U.S. business operates. Foreign entities from identified countries could be exempted. In the House version, voluntary declarations are specifically intended for covered transactions that CFIUS determines "are likely to pose limited risk" (Sec. 302). Mandatory declarations are for investments that result in the release of critical technologies by a U.S. business to foreign persons in which a foreign government has a substantial interest. Similar to the Senate version, "substantial interest" is to be determined by regulations, but does not include less than 10% voting interest or passive investment.

Information Sharing

Current law permits some exceptions to the confidentiality requirements related to information or documentary material filed under CFIUS. The Senate version of FIRRMA would add additional exceptions that such requirements should not prevent the disclosure of "information relevant to any administrative or judicial action or proceeding" or "information to any domestic or foreign governmental entity...to the extent necessary for national security purposes and pursuant to appropriate confidentiality and classification arrangements" (Sec. 1713). By contrast, the House version states that such requirements "shall not prohibit the disclosure of information or documentary material that the party filing such information or material consented to be disclosed to third parties" (Sec. 306). The Senate version also recommends that CFIUS establish a formal

[100] The term "items" include more than finished products; Commerce also controls the test, inspection and production equipment, materials, software, and technology associated with the item.

process for exchanging information, with a view to coordinating action with U.S. allies and partners with respect to trends in investment and technologies that pose national security risks. This would include sharing information on specific technologies and entities acquiring such technologies, and regular meetings between government representatives. The House version includes similar language in a separate section on "Cooperation with United States Allies and Partners" (Sec. 603).

Funding and Other Resources

Both versions of FIRRMA would establish a "fund" and grant CFIUS authority to assess and collect filing fees for covered notices. In addition, the chairperson of CFIUS could centralize various activities within Treasury and CFIUS. In the Senate version, the filing fee amount would be left to regulations, but "may not exceed the costs of administering [the] section" (Sec. 1722). In addition, certain factors must be taken into consideration, including small business concerns, and the fee amount would be periodically reconsidered. CFIUS would also be authorized to establish a fee scale to prioritize the timing of the Committee's response to a draft or final written notice if the Committee is unable to respond during the required time period due to an "unusually large influx of notices." The House version permits a fee assessment subject to a cap, also specifying certain factors to be taken into consideration. Unlike the Senate version, it authorizes an annual appropriation to CFIUS of $20 million, with provisions to charge a filing fee equivalent to one percent of the value of the transaction, or a maximum of $300,000, adjusted annually (Sec. 503). It would also permit the President to include in the budget request for the Treasury a unified request for funding all activities conducted by CFIUS (Sec. 502). The Senate version does not include language on a unified budget, but would require that the President to assess the need for additional resources for CFIUS (Sec. 1721).

Reporting Requirements

Both versions of FIRRMA would require additional detail on transactions in its annual report to Congress, including greater detail on individual transactions. The Senate version specifies additional information required in annual reporting, such as statistics on compliance plans, as well as for the unclassified version of the report specifically. It also mandates new reports to Congress from Commerce on FDI transactions by Chinese entities and from CFIUS on national security threats related to certain investments by state-owned or state-controlled entities (Sec. 1718), and would require a separate review and report to Congress on defense technologies critical to U.S. military superiority from the Secretary of Defense and the Director of National Intelligence, in consultation with the Air Force Research Laboratory and the Defense Advanced Research Projects Agency (DARPA) (Sec. 1730). The House version also specifies additional information required in annual reporting to Congress, with some distinct criteria, such as the number of new hires (Sec. 401); it offers overall, less extensive guidance compared to the Senate version, in particular as related to the unclassified version of the annual report. The House version requires CFIUS to report to Congress on foreign investments in the U.S. entertainment and information sectors that have resulted in or could result in direct or indirect censorship within the United States (Sec. 402).

Procedural, Monitoring, and Other Provisions

In addition to some differences noted above, the Senate version includes other distinct provisions compared to the House version, including

- Section on "acceptance of written notices" (Sec. 1704), provides for CFIUS to respond to filed notices within 10 days, in cases where the parties filing stipulate that the transaction is a "covered transaction";
- Section on "authority for unilateral initiation of reviews" (Sec. 1708), specifies circumstances under which CFIUS may unilaterally initiate reviews of transactions;
- Section on "monitoring of non-notified and non-declared transactions," would establish a mechanism to identify covered transactions that have not been filed (Sec. 1710);
- Provision in "submission of certifications to Congress" (Sec. 1711), would require CFIUS to submit certifications to the respective intelligence committees in both Houses, and provides authority to the chairperson to delegate required signatures on certifications;
- Section on "judicial review" (Sec. 1715), reaffirms the ability of parties to a transaction to file for civil damages in cases where parties allege their rights have been violated during the procedural phase of a CFIUS review;
- Provision within "membership and staff of committee" (Sec. 1716), provides for recusal of members with conflicts of interest with a particular transaction;
- Section on prohibition on modification of civil penalties under export control and sanctions law (Sec. 1727), specifically relates to Chinese telecommunications companies; and
- Section on briefing by the Treasury on transactions reviewed by CFIUS related to foreign efforts to influence democratic institutions and processes (Sec. 1731).

In addition, to some differences noted above, the House version includes other distinct provisions compared to the Senate version, including

- Section on "submission of certifications to congress" (Sec. 304), requires that CFIUS notifications to Congress include certification that all relevant national security factors have received full consideration in CFIUS reviews;
- Provision in "mitigation and other actions by the committee to address national security risks" (Sec. 309), would require CFIUS and the lead agency to periodically review "the appropriateness" of mitigation agreements, and terminate or phase out an agreement if it is no longer required to mitigate a national security threat;
- Section on "additional regulations" (Sec. 311), specifies that CFIUS, in written regulations, would be required to consider national security factors specified in the Defense Production Act of 1950 regarding the capability of U.S. industries to meet national defense requirements, among other factors; and
- Section on "regulatory certainty for United States businesses" (Sec. 602), states that CFIUS may not require divestment by or of a U.S. business as a mitigation measure unless certain conditions are met.

In sum, the proposed legislation to reform CFIUS would entail comprehensive revisions to the CFIUS review process. Between the two versions of FIRRMA, the bill passed by the Senate appears most closely to follow the introduced bill, while the bill passed by the House was modified during its mark-up session.

Appendix. Selected CFIUS Cases

A number of foreign investment transactions have attracted public and congressional attention to CFIUS's review process. These include the following:

Verio

After a lengthy review by CFIUS in 2000, Verio, Inc., a U.S. firm that operates websites for businesses and provides internet services, was acquired by NTT Communications of Japan. Verio's stock price reportedly fell during the CFIUS investigation as a result of uncertainty in the market about prospects for the transaction. The CFIUS review was instigated by the FBI, which had expressed concerns during the initial review stage that the majority interest of the Japanese government in NTT could give it access to information regarding wiretaps that were being conducted on email and other web-based traffic crossing Verio's computer system. After completing its investigation, however, CFIUS did not recommend that President Clinton block the transaction.

Check Point Software

The potentially negative publicity that can be associated with a CFIUS investigation of a transaction apparently has had a major impact on the transactions CFIUS has investigated. Since 1990, nearly half of the transactions CFIUS investigated were terminated by the firms involved, because the firms decided to withdraw from the transactions rather than face a negative determination by CFIUS. In 2006, for instance, the prospect of a CFIUS investigation apparently was the major reason the Israeli firm Check Point Software Technologies decided to call off its proposed $225 million acquisition of Sourcefire, a U.S. firm specializing in security appliances for protecting a corporation's internal computer networks. In addition, the decision by the China National Offshore Oil Company (CNOOC) to drop its proposed $18 billion acquisition of Unocal oil company in 2005 was partly due to concerns by CNOOC about an impending CFIUS investigation of the transaction.

JBS-Pilgrim's Pride

In 2009, Brazilian food producer JBS agreed to pay $800 million to acquire a majority stake in Texas chicken company Pilgrim's Pride Corp., which was undergoing a bankruptcy reorganization plan. The Brazilian firm is among the world's largest meat producers; it is a major beef producer and distributor with dairy and leather industries.

Sprint Nextel

In a separate case, CFIUS reportedly agreed in 2013 to the pending acquisition of Sprint Nextel for $21.6 billion by the Japanese firm SoftBank. One complication with the transaction was that Sprint had agreed to acquire Clearwire for $2.2 billion. Clearwire, however, relied on the Chinese firm Huawei for equipment and for cell tower base stations. SoftBank agreed to remove Huawei as a supplier when the acquisition of Sprint was finalized. In 2014, Sprint attempted to merge with T-Mobile (owned by Deutsche Telekom of Germany), but abandoned the transaction due to regulatory concerns.

Firstgold

Between December 2009 and July 2010, two Chinese firms withdrew their proposed acquisitions of U.S. firms due to opposition from at least one CFIUS agency. In December 2009, the Chinese firm Northwest Nonferrous International Investment Corp., a subsidiary of China's largest aluminum producer, attempted to acquire U.S.-based Firstgold. The transaction was withdrawn by the Chinese firm due to objections by the U.S. Department of the Treasury that Firstgold had properties near sensitive military bases. In June 2010, China's Tangshan Caofedian Investment Corporation withdrew its proposed acquisition of Emcore, which makes components for fiber optics and solar panels, due to "regulatory concerns."[101] In early 2011, some Members of Congress urged the Obama Administration to support a recommendation by CFIUS that the President block a proposed acquisition of 3Leaf Systems by Huawei Technologies over national security concerns. Instead, Huawei discontinued its efforts to acquire the U.S. firm.

AMC Entertainment

In September 2012, the Chinese firm Dalian Wanda Group acquired AMC Entertainment for $2.6 billion. AMC is the owner and operator of over 338 movie theaters in the United States. With the purchase, the Chinese firm became the largest theater owner in the world. In 2012, two investments by Chinese firms attracted public and congressional attention: an investment by the American firm Ralls Corp., owned by Chinese nationals who also owned Sany Electric Company, a Chinese electric company, in a wind farm project in Oregon, known as the Butter Creek Projects; and Wanxiang's acquisition of battery maker A123 Systems Inc. The Ralls transaction, and the associated legal case, likely will affect CFIUS's procedures.

Dubai Ports World

The proposed acquisition of commercial port operations of the British-owned Peninsular and Oriental Steam Navigation Company (P&O) in six U.S. ports by Dubai Ports World (DP World) exposed a number of important aspects of CFIUS's operations that apparently had not been well known or understood by the public in general. The DP World acquisition demonstrated how the informal CFIUS process operates in reviewing a proposed foreign investment transaction. According to officials involved in the review, DP World officials contacted the Treasury Department in early October 2005 to informally discuss their proposed transaction. Treasury officials directed DP World to consult with the Department of Homeland Security, and in November the Treasury officials requested an intelligence assessment from the Director of National Intelligence. Staff representatives from all of the CFIUS members met on December 6, 2005, to discuss the transaction, apparently to determine if there were any security concerns that had not been addressed and resolved during the two-month-long informal review of the proposed transaction.

Ten days after that meeting, DP World filed its official notification with CFIUS, which distributed the notification to all of the CFIUS members and to the Departments of Energy and Transportation. During this process, the Department of Homeland Security apparently negotiated a letter of assurances with DP World that addressed some outstanding concerns about port security. On the basis of this letter and the lack of any remaining concerns expressed by any member of CFIUS or other agencies that were consulted, CFIUS completed its review of the transaction on January 17, 2006, and concluded that the transaction did not threaten to impair the

[101] Kirchgaessner, Stephanie, "US Blocks China Fibre Optics Deal Over Security," *Financial Times*, June 30, 2010.

national security and therefore that it did not warrant a 45-day investigation.[102] As a result of the attention by both the public and Congress, DP World officials decided to sell off the U.S. port operations to an American owner.[103] On December 11, 2006, DP World officials announced that a unit of AIG Global Investment Group, a New York-based asset management company with large assets, but no experience in port operations, had acquired the U.S. port operations for an undisclosed amount.

3Com

On February 20, 2008, Bain Capital and Huawei Technologies withdrew their offer to acquire the network and software firm 3Com for $2.2 billion, due to an inability to successfully negotiate a mitigation agreement with members of CFIUS. Bain Capital is a privately held asset management and investment firm, and Huawei Technologies was the largest networking and telecommunications equipment supplier in China at the time. 3Com was a publicly held company that specialized in networking equipment and in the Tipping Point network intrusion prevention software. Such software is used by various U.S. defense firms to prevent outside groups from accessing their confidential databases. Bain Capital and Huawei reportedly withdrew their proposal after they failed to agree to terms with CFIUS over a mitigation agreement and stated that they would restructure the deal and resubmit it at a later date in 2008.[104] Eventually, 3Com was acquired by Hewlett-Packard.

Ralls Wind Farm Acquisition

In March 2012, Ralls acquired wind farm assets from Terna Energy SA, an Athens, Greece-based company, without reporting the transaction to CFIUS. In June, 2012, CFIUS contacted Ralls and requested that the firm file a voluntary notification to have its investment retroactively reviewed. During its initial review, CFIUS determined that Ralls's acquisition of the wind farm companies posed a national security threat as a result of objections by the U.S. Navy over the placement of wind turbines by Ralls near or within restricted Naval Weapons Systems Training Facility airspace where drones (unmanned aerial vehicles) are tested.

The Ralls case is important, because it provided important court documents that detail an actual CFIUS case and it tested the legal basis for CFIUS's reviews, mitigation procedures, and presidential determination. On July 25, 2012, CFIUS issued an Order Establishing Interim Mitigation Measures to mitigate the threat posed by the acquisition and required Ralls to (1) cease all construction and operations at the Butter Creek project sites; (2) remove all stockpiled or stored items from the sites and not deposit, stockpile, or store any new items at the sites; and (3) cease all access to the sites. On July 30, 2012, CFIUS began its national security investigation of the transaction and on August 2, 2012, it issued an Amended Order Establishing Interim Mitigation Measures. In addition to the July Order restrictions, the second CFIUS Order (1) prohibited Ralls from completing any sale of the acquired wind farm sites or their assets without first removing all items (including concrete foundations) from the Butter Creek project sites; (2) required Ralls to notify CFIUS of any sale; and (3) and required Ralls to give CFIUS 10 business

[102] Ibid.

[103] Weisman, Jonathan, and Bradley Graham, "Dubai Firm to Sell U.S. Port Operations," *The Washington Post,* March 10, 2006. p. A1.

[104] "US Insiders Point to Bain Errors Over 3Com," *The Financial Times Limited,* March 3, 2008.

days to object to any sale. Neither of these orders disclosed the nature of the national security threat the transaction posed nor the evidence on which CFIUS relied in issuing the orders.

Upon the recommendation of CFIUS, President Obama issued an executive order[105] on September 28, 2012, that argued that there was credible evidence that the Ralls acquisition threatened to impair U.S. national security and ordered Ralls to divest itself of the Oregon wind farm project. In response, the Ralls Corporation filed a suit on October 1, 2012, with the United States District Court for the District of Columbia challenging the Obama Administration's authority to block the investment. The Ralls complaint included five counts: Counts I and II challenged the CFIUS Order under the Administrative Procedures Act; Count III attacked CFIUS as having exceeded its authority; and Counts IV and V challenged the constitutionality of both orders, under the Fifth Amendment Due Process Clause (Count IV) and the Equal Protection Clause of the Fourteenth Amendment (Count V).

On February 22, 2013, the District Court dismissed all but the fourth complaint about Due Process in the Ralls suit, which the court indicated that Ralls could pursue through the Appeals Court. The court ruled that it lacked jurisdiction in the other complaints, since the CFIUS statute states that the President's decisions are not subject to judicial review, known as a finality provision.[106] Ralls argued that the President was authorized only to "suspend or prohibit" a transaction, not to order a removal of equipment or a divesture.

The District Court ruled, however, that the CFIUS statute grants the President broad authority by authorizing him to take "such action for such time" as he considers appropriate. The suit also argued that Ralls was treated unfairly under the Due Process Clause of the Fifth Amendment, but the court ruled that it lacked jurisdiction on this motion as well by the CFIUS statute. Nevertheless, the court indicated that its ruling would not prohibit Ralls' due process claim to proceed to the Appellate court. Ralls' due process claim apparently focused on whether the President and/or CFIUS should be required to provide companies that proceed through the CFIUS review and investigation process with an opportunity to review, respond to, and rebut any unclassified evidence used to make a presidential determination.

Ralls appealed the decision[107] and the case was argued before the Appeals Court for the District of Columbia on May 5, 2014, and decided on July 15, 2014. In its written decision, the Appeals Court concluded that the statutory provision establishing CFIUS that bars a judicial review of a CFIUS determination did not meet the legal test of providing "clear and convincing" evidence that Congress intended to preclude a judicial review of due process challenges to a presidential order. The court concluded that the provision bars a judicial review of the final determination of the President to suspend or prohibit a transaction that threatens to impair the national security of the United States, but it also found that it does not prohibit a judicial review of a constitutional claim challenging the process that precedes a presidential action. The court determined that the Ralls complaint did not challenge the President's determination that the acquisition threatened the national security or the President's determination to prohibit the transaction in order to mitigate the national security threat. Instead, the court found that the Due Process Clause entitled Ralls to have notice of, and access to, the unclassified evidence on which the President relied and an opportunity to rebut the evidence before the President reached his determination.

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[105] Order Signed by the President Regarding the Acquisition of Four U.S. Wind Farm Project Companies by Ralls Corporation, The White House, September 28, 2012. Available at http://www.whitehouse.gov/the-press-office/2012/09/28/order-signed-president-regarding-acquisition-four-us-wind-farm-project-c.

[106] Ralls Corporation vs. Committee on Foreign Investment in the United States, et al., Civil Action Number 12-1513; available at https://ecf.dcd.uscourts.gov/cgi-bin/show_public_doc?2012cv1513-46.

[107] Ralls Corporation v. Committee on Foreign Investment in the United States, et al.

The Appeals Court also concluded that the presidential order requiring Ralls to divest itself of the wind farm sites deprived Ralls of its constitutionally protected property interests without due process of law, because Ralls never had the "opportunity to tailor its submission to the Appellees' concerns or rebut the factual premises underlying the President's action." The Court found that this lack of process constituted a "clear constitutional violation," notwithstanding the "Appellees' substantial interest in national security and despite the court's uncertainty that more process would have led to a different presidential decision." The Court also concluded that although it had determined that the procedure followed in issuing the presidential order violated due process, it did not mean that the President would be required, in the future, to disclose his thinking on sensitive questions related to national security in reviewing an investment transaction.

Following the Ralls case, the House Armed Services Committee directed the Government Accountability Office (GAO) to conduct an investigation of foreign investments in mines, energy projects, or other business transactions in close proximity to Department of Defense (DOD) testing and training ranges and facilities.[108] The GAO investigation reported that DOD had

- 533 test and training ranges throughout the United States and overseas;[109]
- not conducted a risk assessment of these facilities that included prioritizing the facilities based on the critical nature of their operations; and
- not assessed the degree to which foreign acquisitions could pose a threat to the mission of the facility.

The GAO concluded that DOD had not attempted to prioritize its facilities to assess potential threats posed by foreign investments because DOD had not developed clear guidance on how to conduct such as assessment. Without such guidance for the various military services to follow, the GAO concluded, it may not be possible for DOD to determine "what, if any," negative impact foreign investment may be having on DOD test or training ranges. GAO also concluded that DOD interacted with a number of different agencies involved in identifying and approving potential business activities near to DOD facilities. In addition to CFIUS, these agencies include the Bureau of Land Management; the Bureau of Ocean Energy Management; the Bureau of Safety and Environmental Enforcement; the Federal Aviation Administration; the National Environmental Policy Act of 1969; and community planning and liaison officers at Marine Corps. and Naval installations. Of these entities, only CFIUS is directed to consider security concerns. The GAO concluded that

> DOD has not obtained sufficient information on commercial activity being conducted near test and training ranges in the level of detail officials say they need—such as if a U.S.-based entity is owned or controlled by a foreign entity—to determine if specific transactions on federally owned or managed land in proximity to ranges pose a threat to the range. Such information is generally not collected by other agencies with responsibilities for these transactions because, in some cases, legal, regulatory, or resource challenges may prevent them from collecting information that is unrelated to their agencies' missions.[110]

[108] *Defense Infrastructure: Risk Assessment Needed to Identify if Foreign Encroachment Threatens Test and Training Ranges*, GAO-15-149, United States Government Accountability Office, December 2014.

[109] Ibid., p. 4.

[110] Ibid., p. i.

A123 Systems

In another case, China's Wanxiang Group received approval in January 2013 from CFIUS to acquire electric car battery maker A123 Systems. Wanxiang outbid other potential buyers by offering to pay $257 million for the U.S. company. Some Members of Congress and the Strategic Materials Advisory Council argued against the acquisition on the grounds that it could jeopardize the nation's energy security. Others opposed the acquisition because A123 Systems had received nearly $250 million in a federal grant to support clean energy, although half of the grant was never released. A123 Systems manufactures lithium-ion batteries for Fisker Automotive, BMW hybrid 3- and 5-series cars, and the all-electric Chevrolet Spark.

Smithfield Foods

The proposed 2013 acquisition of Smithfield Foods Inc., for $4.7 billion, by China's Shuanghui International Holdings Ltd., the largest acquisition of a U.S. firm by a Chinese company up to that time, sparked intense congressional and public interest about the issue of food security as a component of the critical infrastructure/key resources rubric. Smithfield Foods was the world's leading vertically integrated pork processor and pork producer. It was the leading U.S. pork packer and producer, capturing about 26% share of the domestic U.S. hog market, and produced around 20 million-22 million hogs per year, compared with the Chinese market that slaughtered nearly 694 million hogs in 2012. The Smithfield operation spanned facilities including hog farms, pork processing and packing, and pork distribution facilities in more than a dozen states, including North Carolina, Virginia, Maryland, South Dakota, Ohio, Iowa, Illinois, Nebraska, Indiana, Kansas, Minnesota, Missouri, Kentucky, and Wisconsin.

Opposition to the proposed acquisition was expressed by the National Farmers Union and the Center for Rural Affairs, due to concerns over the impact on market concentration. In addition, the proposed acquisition of Smithfield Foods potentially challenged state laws that barred foreign ownership of farmland in Iowa, Missouri, and other Midwest states, given Smithfield's widespread operations. Some observers called for CFIIUS to appoint the Secretary of Agriculture as a temporary member of CFIUS to review the proposed transaction. Another issue was Smithfield's development and use of advanced genetic research to produce especially lean pigs that may have been desired by Shuanghui and potentially raised questions about the protection of Smithfield's intellectual property and future competition. Smithfield Foods announced on September 6, 2013, that CFIUS had decided not to oppose the proposed acquisition by Shaunghui International. Smithfield's shareholders voted overwhelmingly on September 25, 2013, to approve the transaction.

The Smithfield-Shuanghui acquisition raised questions about the implications for U.S. critical infrastructure/key resources associated with this particular investment transaction, but also about U.S. food security over the long term and whether such concerns are being addressed sufficiently during a CFIUIS review or investigation. According to this argument, the nature of Smithfield Foods as a vertically integrated company raised concerns that its acquisition could affect a number of different markets and different parts of the food production infrastructure in ways that might not have been considered in a CFIUS review. In addition, the acquisition potentially provided a future competitor with the necessary resources to mount a competitive challenge to other U.S. food producers. Since CFIUS does not release a public statement outlining the basis for its decision on investment transactions, it is not possible to determine the nature of the CFIUS review of this transaction. All that is publicly known is that the companies involved apparently were successful in addressing any concerns of CFIUS's members. Smithfield executives and others argued that the transaction would benefit Smithfield, because it would give the company an entry into the vast Chinese market through Shuanghui's distribution network and a cash infusion that would ease Smithfield's various financial challenges.

The National Strategy for Critical Infrastructures and Key Assets, adopted in the wake of the 2001 terrorist attacks, identified the critical infrastructure nature of the food and agriculture sector as follows: "the fundamental need for food, as well as great public sensitivity to food safety makes assuring the security of food production and processing a high priority."[111] The strategy defined the food and agriculture sector as (1) the supply chains for feed, animals, and animal products; (2) crop production and the supply chains of seed, fertilizer, and other necessary related materials; and (3) the postharvesting components of the food supply chain, from processing, production, and packaging through storage and distribution to retail sales, institutional food services, and restaurant or home consumption.

Roscosmos

Another transaction invovled efforts by the Russian space agency Roscosmos in 2013 to build six Global Positioning System (GPS) monitor stations in the United States. This case sparked interest in amending CFIUS's mandate, which does not currently provide for it to review greenfield investments or new start-up ventures that are built from the ground up. The transaction was opposed by CFIUS due to concerns raised by the CIA and DOD. In retaliation, Russia shut down U.S. GPS stations operating on Russian soil. In December 2015, Roscosmos was dissolved after a series of budget cuts and charges of corruption and mismanagement.

Fairchild Semiconductor

In November 2015, ON Semiconductor, a Chinese firm, offered to acquire Fairchild Semiconductor for $2.4 billion in cash. Both firms were publicly traded corporations. In February 2016, Fairchild turned down a counteroffer from China Resources Microelectronics and Hua Capital Management and ultimately accepted the offer by ON Semiconductor. The acquisition was not blocked by CFIUS and completed in September 2016.

Micron/Western Digital

In 2016, Tsinghua Holdings, a Chinese state-owned company via Tsinghua University, made an unsuccessful offer of $23 billion to acquire Micron Technologies, but did succeed in its $3.8 billion bid for a 15% share of the computer hard-drive maker Western Digital.

Phillips-Lumileds

In 2016, Dutch electronics firm Phillips terminated a $2.9 billion sale of controlling interest in its Lumileds unit, with over 600 patents and operations in the United States, to a consortium of Chinese investors, GO Scale Capital and GSR Ventures. Phillips indicated that the transaction was terminated because of its inability to mitigate concerns raised by CFIUS, due in part to Lumileds' expertise in semiconductor chips using gallium nitride. In December 2016, Phillips announced that it had agreed to sell its Lumileds unit for $2 billion to affiliates of Apollo Global Management, a U.S.-based global asset management firm.

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[111] *The National Strategy for the Physical Protection of Critical Infrastructure and Key Assets*, February 2003, p. 36.

Syngenta

Also in 2016, China state-owned ChemChina notified CFIUS of its proposed acquisition of the Swiss seed and chemical company Syngenta for $43 billion in cash, which would make it the largest acquisition by a Chinese firm. Syngenta previously had rebuffed an offer of cash and stock from Monsanto to acquire the pesticide and seed company. The companies involved indicated in August 2016 that CFIUS had determined not to oppose the transaction, but requests for additional information by European regulators held up the deal. On April 4, 2017, the U.S. Federal Trade Commission (FTC) cleared the proposed acquisition of antitrust issues, but it required ChemChina to divest itself of several pesticides manufactured by Adama Agricultural Solutions Ltd., an Israeli-based ChemChina subsidiary. American Vanguard Corp. was set to acquire the pesticides, although the terms of this transaction were not disclosed. American Vanguard is an American-based diversified specialty and agricultural products company focusing on crop protection, turf and ornamental markets, and public health applications. Also, on April 5, 2017, the European Union approved the Syngenta acquisition, but it required ChemChina to divest itself of large parts of its European businesses for pesticides and products that regulate crop growth. The products had been developed and marketed by its Adama subsidiary. In addition, the companies reportedly agreed to sell 29 of Adama's generic pesticides under development and grant third parties access to studies and field trial results for the products. From Syngenta, the companies agreed to sell off some of the firm's fungicides and herbicides.[112] In September 2016, Monsanto agreed to be acquired by the German drug and crop chemical company Bayer AG for $66 billion, pending approval of European regulators, potential U.S. antitrust concerns, and a review by CFIUS. Monsanto's shareholders approved the transaction in December 2016.

Chicago Stock Exchange

In 2016, some Members of Congress asked the Obama Administration to review the proposed acquisition of the Chicago Stock Exchange (CHX) by the Chinese-led consortium Chongqing Casin Enterprise Group for a value of about $22 million. In a letter to the Administration, the Members expressed concerns that ties between the company and Chinese government officials could give the Chinese government influence over U.S. equity markets and potentially provide it with the ability to manipulate the markets to the advantage of Chinese companies or the Chinese economy.[113] CFIUS approved the transaction in December 2016, but some Members of Congress sent a letter to the Securities and Exchange Commission (SEC) asking it to block the acquisition. The SEC initially extended its review into March 2017, but announced in June 2017 that it would take another 60 days to finish its review of the proposed transaction. In August 2017, the SEC announced that it was extending the review for an undetermined period of time. The CHX handles an estimated 0.5% of the United States' $22 trillion U.S. equities market and would need the approval of the Securities and Exchange Commission to complete the transaction. CHX reportedly intends to use the cash infusion to revamp its listing program. The acquisition reportedly will be used to help develop financial markets in China and to bring Chinese companies to U.S. investors.

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[112] Drozdiak, Natalia, "EU Clears ChemChina's $43 billion Syngenta With Conditions," *The Wall Street Journal*, April 5, 2017.

[113] Rogin, Josh, "Congress Wary of National Security Implications of Chinese Deal for Chicago Stock Exchange," *Chicago Tribune*, February 17, 2016.

Aixtron

In December 2016, President Obama used the authority granted under CFIUS for the second time during his Administration to block a foreign investment transaction. The presidential action blocked the Chinese firm Fujian Grand Chip Investment Fund from acquiring Aixtron, a German-based semiconductor firm with assets in the United States. Reportedly, the transaction was blocked due to "national security risks" posed by the military applications of the overall technical body of knowledge and experience of Aixtron.[114]

Global Communications Semiconductor

Reportedly, CFIUS determined in August 2016 that it would recommend to President Obama that he block the proposed $226 million acquisition of Global Communications Semiconductor (GCS) by the Chinese firm San'an Opto, but the firms terminated the transaction before a presidential determination. In lieu of an acquisition, GCS opted to form a new integrated chip (IC) joint venture with San'an Opto, and signed a Memorandum of Understanding (MoU) to jointly manage consumer electronics, mobile devices, and other related products.

Citgo-Rosneft

In an unusual case, some policymakers expressed concern that Rosneft, an oil company majority-owned by the Russian government, could take control of Citgo oil company's assets in the United States, principally three refineries and oil transport infrastructure. According to press reports, Citgo's parent company, the Venezuela state-owned Petróleos de Venezuela S.A. (PDVSA), pledged a 49.9% stake in Citgo to Rosneft as collateral for a $1.5 billion loan signed on November 30, 2016.[115] As Venezuela's economic performance declined, some analysts speculated that a default by PDVSA on loan payments to Rosneft could allow the company to exercise the lien it filed against Citgo with the Delaware Department of State. At the time, the lien was disputed by ConocoPhillips and the Canadian mining company Crystallex, which are seeking payment for assets that were expropriated when the Venezuelan government seized international oil and mining operations based in the country during President Hugo Chavez's reign. ConocoPhillips and Crystallex argued in a federal suit against PDVSA that it was attempting to shift assets to Rosneft to avoid making payments to ConocoPhillips.[116] These concerns may be moot, however, at least for the near term, because Venezuela experienced an unexpected increase in its foreign exchange reserves that allowed it to make its debt payment, thereby avoiding a default.[117] In addition, Rosneft and its chief operating officer, Igor Sechin, were placed under sanctions in 2014 by the United States and other countries for Russia's intervention in Ukraine. Venezuelan Oil Minister Eulogio Del Pino reportedly confirmed in October, 2017, that PDVSA was negotiating with Rosneft to swap collateral in Citgo for stakes in oil fields and fuel supplies to avoid complications from U.S. sanctions and legal problems.[118]

[114] Mozur, Paul, "Obama Moves to Block Chinese Acquisition of a German Chip Maker," *The New York Times*, December 2, 2016, p. B1.

[115] Slav, Irina, "Could Rosneft Take Control of Citgo?," *Oilprice*, March 15, 2017.

[116] Kates, Graham, "How Russian Oil Giant Rosneft Could Claim U.S. Oil," *CBS News*, March 9, 2017.

[117] Rapoza, Kenneth, "Looks Like Venezuela's PDVSA Won't Default, But Country Still a Disaster," *Forbes*, March 28, 2017.

[118] Venezuela Confirms Discussing Citgo Collateral Swap With Rosneft, Reuters, October 4, 2017.

Lattice Semiconductor

On September 13, 2017, President Trump blocked the $1.3 billion proposed acquisition of Lattice Semiconductor by the Chinese investment company, Canyon Bridge Capital Partners. The action represents the fourth investment transaction blocked under the CFIUS statute and the first by President Trump. The parties to the proposed acquisition reportedly asked President Trump to overrule the recommendation by CFIUS that the transaction be blocked on national security grounds.[119]

MoneyGram-Ant Financial

On January 3, 2018, MoneyGram and Ant Financial, a subsidiary of Alibaba Group Holding Ltd., terminated a proposed acquisition of MoneyGram for $1.2 billion reportedly due to a failure to gain CFIUS's approval of the acquisition. Since the deal was terminated by the parties involved, it was not sent to President Trump for a presidential review.

Qualcomm-Broadcom

On March 12, 2018, President Trump blocked the acquisition of U.S. semiconductor chip maker Qualcomm by Singapore-based Broadcom in a hostile takeover bid for $117 billion, the largest technology-related foreign investment transaction to date. Broadcom had moved its headquarters to the United States in an apparent effort to address national security concerns. Reportedly, Qualcomm's semiconductor chips are in most cellphones and the firm is a leader in fifth generation high-speed wireless networks.

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[119] Kate O'Keefe, "Trump Blocks China-Backed Fund From Buying Lattice Semiconductor," *The Wall Street Journal*, September 13, 2017.