

**IS NATIONAL SECURITY A THREAT TO TIKTOK?
HOW THE FOREIGN INVESTMENT RISK REVIEW
MODERNIZATION ACT THREATENS TECH COMPANIES**

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I. INTRODUCTION

In November 2017, Beijing ByteDance Technologies (“ByteDance”), a Chinese technology company, purchased the Chinese social media application Musical.ly for \$1 billion.¹ At the time of its purchase, Musical.ly was an immensely popular application among teenagers with approximately sixty million users across the United States and Europe.² Musical.ly allowed users to post short-form, karaoke-styled videos on the application’s platform, collaborate with other users, and share their creations with friends.³

After purchasing Musical.ly, ByteDance released a statement assuring its users that Musical.ly would remain a distinct entity in its vast portfolio of digital applications.⁴ A year after closing the Musical.ly purchase, however, ByteDance was unfaithful to its

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¹ Greg Roumeliotis, Yingzhi Yang, Echo Wang & Alexandra Alper, *Exclusive: U.S. Opens National Security Investigation into TikTok*, REUTERS (Nov. 1, 2019), <https://www.reuters.com/article/us-tiktok-cfius-exclusive/exclusive-u-s-opens-national-security-investigation-into-tiktok-sources-idUSKBN1XB4IL>.

² Paul Mozur, *Musical.ly, a Chinese App Big in the U.S., Sells for \$1 Billion*, N.Y. TIMES (Nov. 10, 2017), <https://www.nytimes.com/2017/11/10/business/dealbook/musically-sold-app-video.html>.

³ *Id.*

⁴ Jack Nicas, Mike Isaac & Ana Swanson, *TikTok Said to Be Under National Security Review*, N.Y. TIMES (Aug. 7, 2020), <https://www.nytimes.com/2019/11/01/technology/tiktok-national-security-review.html?searchResultPosition=22>.

word and merged Musical.ly’s platform with ByteDance’s family of similar applications creating what has become one of the world’s fastest growing and most popular forms of social media: TikTok.⁵ Almost immediately, TikTok reached unprecedented levels of popularity, boasting 750 million downloads in just its first twelve months.⁶

In the fall of 2019, the Committee on Foreign Investment in the United States (“CFIUS,” or “Committee”), a U.S. regulatory body tasked with reviewing foreign transactions for potential national security risks, opened an investigation into the acquisition, citing concerns over ByteDance’s potential access to TikTok users’ data.⁷ Specifically, U.S. government officials were concerned that the Chinese government could access TikTok users’ data through the exercise of a 2017 national intelligence law, which required Chinese companies to comply with intelligence gathering operations.⁸ Although ByteDance and Musical.ly were both Chinese companies and ByteDance’s acquisition of Musical.ly occurred two years prior the commencement of the investigations, CFIUS had broad jurisdiction to scrutinize the transaction under the Foreign Investment Risk Review Modernization Act of 2018 (“FIRRMA”).⁹ At the conclusion of its investigation, CFIUS submitted its recommendations to former President Donald Trump who then ordered ByteDance to divest its interest in TikTok’s U.S. operations in the name of national security.¹⁰

This comment argues that in passing FIRRMA, Congress delegated unprecedented power to the executive branch to regulate foreign commerce. Although FIRRMA provided CFIUS with the tools to investigate modern national security threats, Congress failed to include sufficient checks and balances, which

⁵ *Id.* (describing TikTok as “a global cultural phenomenon”).

⁶ *See id.* (stating that TikTok was downloaded more than Facebook, Instagram, YouTube, and Snapchat over the first twelve months after its creation).

⁷ Roumeliotis, Yang, Wang & Alper, *supra* note 1.

⁸ Nicas, Isaac & Swanson, *supra* note 4.

⁹ Foreign Investment Risk Review Modernization Act of 2018, Pub. L. No. 115-232, §§ 1701–28, 132 Stat. 1636, 2174 (codified at 50 U.S.C. § 4565).

¹⁰ *See* Nicole Sperling, *Trump Officially Orders TikTok’s Chinese Owner to Divest*, N.Y. TIMES (Aug. 14, 2020), <https://www.nytimes.com/2020/08/14/business/tiktok-trump-bytedance-order.html>.

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has allowed the executive branch to weaponize national security interests for political gain. In order to provide foreign investors with confidence in CFIUS's review process and to prevent executive abuse of delegated foreign commerce power, this comment suggests that Congress should make specific amendments to FIRRMA that will both increase CFIUS's transparency and hold the executive branch accountable for misusing foreign investment regulation.

Part II gives a history of CFIUS, how it was created, and how Congress has modified it under the Exon-Florio Provision, the Byrd Amendment, and the Foreign Investment and National Security Act of 2007. Part III of this comment introduces the Foreign Investment Risk Review Modernization Act of 2018, discusses how CFIUS's jurisdiction has expanded under FIRRMA, and analyzes FIRRMA's key procedural changes. Part IV illustrates the implications of CFIUS's expanded jurisdiction under FIRRMA by exploring CFIUS's recent investigations into seemingly innocuous technology companies. Lastly, Part V proposes solutions that will integrate checks and balances proportional to CFIUS's expanded jurisdiction under FIRRMA, which will increase the transparency of foreign investment regulation and prevent the executive branch from abusing CFIUS's powers.

II. CFIUS'S BACKGROUND AND LEGISLATIVE HISTORY

Part II discusses the history of the CFIUS. In discussing CFIUS's origins, this Part explains Congress' role in expanding CFIUS's review power through the following legislation: the Exon-Florio Provision, the Byrd Amendment, and the Foreign Investment and National Security Act of 2007.

A. *CFIUS's Origin*

President Gerald Ford signed Executive Order 11858 on May 7, 1975, establishing CFIUS.¹¹ At its genesis, CFIUS was an interagency committee contained within the Treasury

¹¹ JAMES K. JACKSON, CONG. RSCH. SERV., RL33388, THE COMMITTEE ON FOREIGN INVESTMENT IN THE UNITED STATES (CFIUS), 4-5 (Feb. 14, 2020) [hereinafter JACKSON, CFIUS].

Department.¹² The Executive Order appointed the Secretary of the Treasury as the chair of CFIUS and directed the Secretary of Commerce to participate in CFIUS's review of foreign investment.¹³

The Ford Administration's primary goal in establishing CFIUS was to create a committee that would review foreign investments for potential national security risks.¹⁴ President Ford's executive order tasked CFIUS with monitoring foreign investments and communicating with parties engaged in such transactions.¹⁵ Specifically, CFIUS's creation was the Ford Administration's reaction to "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

¹² *See id.*

¹³ Exec. Order No. 11858, 3 C.F.R. 990 (1971–1975). Specifically, the Secretary of Commerce was tasked with:

- (1) [o]btaining, 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) Observing 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.

See JACKSON, CFIUS, *supra* note 11, at 5–6.

¹⁴ *See* Exec. Order No. 11858, 3 C.F.R. § 990 (1975) (establishing the Committee on Foreign Investment in the United States); *see also* JACKSON, CFIUS, *supra* note 11, at 4–5.

¹⁵ Exec. Order No. 11858, 3 C.F.R. § 900 (1975). The Executive Order included CFIUS's primary objectives:

- (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 U.S. national interests; and
- (4) consider proposals for new legislation or regulations relating to foreign investment as may appear necessary.

JACKSON, CFIUS, *supra* note 11, at 5.

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respond to [congressional] concerns . . . that much of the OPEC investments were being driven by political, rather than economic motive.”¹⁶

Because CFIUS dealt with issues that touched both national security and sensitive business investments, the Ford Administration recognized that the Committee’s investigative operations required complete confidentiality and secrecy.¹⁷ To ensure foreign investors that the new review process was strictly for the purpose of protecting national security, President Ford articulated in Executive Order 11858 that all investment-related information submitted to CFIUS “shall not be publicly disclosed” and that CFIUS would use the provided information “for the purpose of carrying out the functions and activities” prescribed by the Order.¹⁸ The secrecy that President Ford promised to foreign investors in 1975 still cloaks CFIUS today, creating tension between CFIUS’s original national security objective and the potential abuse of CFIUS’s powers.¹⁹

Being a creature of the executive branch that operates in the foreign commerce space, CFIUS’s legal authority was immediately questioned.²⁰ First, CFIUS lacked the constitutional authority to block transactions posing national security concerns; under Article I of the U.S. Constitution, Congress has the express power “[t]o regulate Commerce with foreign Nations.”²¹ CFIUS, having its roots under Article II, did not have the constitutional authority to regulate foreign commerce without congressional delegation.

Another legal hurdle that CFIUS faced in its infancy was whether the Committee had the power to demand sensitive business information from transacting parties. Many government officials had concerns that the federal agency members comprising CFIUS’s structure were without legal authority to

¹⁶ JACKSON, CFIUS, *supra* note 11, at 4.

¹⁷ See Kevin Granville, *CFIUS, Powerful and Unseen, is a Gatekeeper on Major Deals*, N.Y. TIMES (Mar. 5, 2018), <https://www.nytimes.com/2018/03/05/business/what-is-cfius.html>.

¹⁸ Exec. Order No. 11858, 3 C.F.R. § 990 (1971–1975).

¹⁹ See Granville, *supra* note 17; see also discussion *infra* Parts III.A.1–2.

²⁰ JACKSON, CFIUS, *supra* note 11, at 6.

²¹ U.S. CONST. art. 1, § 8, cl. 3.

collect sensitive business information.²² To address concerns over the ambiguous, legal authority vested in CFIUS by the President, Congress passed and President Ford signed into law the International Investment Survey Act of 1976 (“IISA”).²³ The IISA gave the President “‘clear and unambiguous authority’ to collect information on ‘international investment.’”²⁴

After settling legal authority concerns, Congress once again began to question CFIUS, but this time over the Committee’s underutilization.²⁵ Congress complained that CFIUS convened infrequently after having met approximately twice a year from 1975 to 1980.²⁶ CFIUS responded to Congress’ concerns by increasing its investigations and fielding requests from executive agencies taking issue with certain foreign investments.²⁷ The Department of Defense soon became CFIUS’s favorite customer, submitting the most review requests with the Committee between 1980 and 1987.²⁸ Specifically, the Department of Defense requested CFIUS to focus its investigations on investments from Japan—a prominent competitor of the United States at the time—in U.S. corporations that were critical to the production of military weaponry.²⁹ Concerned with Japanese businesses targeting American national defense industries, Congress sought to improve CFIUS by broadening its investigative discretion and expanding its capabilities to scrutinize foreign investment.³⁰

B. *The Exon-Florio Provision*

To expand CFIUS’s authority to meet the concerns relating to Japanese acquisitions of U.S. defense firms, Congress passed

²² JACKSON, CFIUS, *supra* note 11, at 6.

²³ JACKSON, CFIUS, *supra* note 11, at 6.

²⁴ JACKSON, CFIUS, *supra* note 11, at 6.

²⁵ JACKSON, CFIUS, *supra* note 11, at 6.

²⁶ JACKSON, CFIUS, *supra* note 11, at 6.

²⁷ JACKSON, CFIUS, *supra* note 11, at 6.

²⁸ See JACKSON, CFIUS, *supra* note 11, at 6 (stating that transaction review requests were made mostly by the Department of Defense).

²⁹ See JACKSON, CFIUS, *supra* note 11, at 6 (specifying CFIUS’s concerns from increased Japanese investment in a U.S. steel producer and U.S. firms that manufactured “specialized ball bearings for the military”).

³⁰ See JACKSON, CFIUS, *supra* note 11, at 7 (reiterating that Congress was mainly concerned with Japanese investments).

the Exon-Florio Provision as part of the Defense Production Act of 1988 (“Exon-Florio”).³¹ Exon-Florio expanded CFIUS’s jurisdiction by lowering the threshold for executive action and granting the President increased discretion when determining whether a transaction posed a threat to national security.³² Specifically, Exon-Florio granted the President the power 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.”³³ Prior to Exon-Florio, the President could only suspend or prohibit foreign investment after a national emergency was declared.³⁴ Thus, Exon-Florio streamlined the President’s authority to act without having to meet the high burden of declaring a national emergency.³⁵

Critically, Exon-Florio expanded the President’s discretion by not expressly defining “national security.”³⁶ Instead, Exon-Florio provided several factors that the President was to consider in determining whether a foreign transaction presented a national security risk.³⁷ The President, however, could weigh each factor differently, which granted the executive broad discretion in determining what constitutes a threat to national security.³⁸

While Exon-Florio increased the scope of the President’s judgment, Congress placed conditions on its exercise. Specifically, Exon-Florio required that before blocking a transaction, the President must “conclude[] that (1) other U.S. laws were inadequate or inappropriate to protect the national

³¹ JAMES K. JACKSON, CONG. RSCH. SERV., RS22863, FOREIGN INVESTMENT, CFIUS, AND HOMELAND SECURITY: AN OVERVIEW I, (2011) [hereinafter JACKSON, FOREIGN INVESTMENT OVERVIEW].

³² See JACKSON, CFIUS, *supra* note 11, at 7.

³³ JACKSON, CFIUS, *supra* note 11, at 7.

³⁴ 50 U.S.C. § 1701(a) (limiting the President’s power to declare a national emergency in response to an “unusual and extraordinary threat . . . to the national security, foreign policy or economy of the United States.”).

³⁵ See JACKSON, CFIUS, *supra* note 11, at 8 (explaining that the President was required to declare a national emergency before stopping the foreign takeover of U.S. firms).

³⁶ JACKSON, FOREIGN INVESTMENT OVERVIEW, *supra* note 31, at 2.

³⁷ JACKSON, FOREIGN INVESTMENT OVERVIEW, *supra* note 31, at 2.

³⁸ JACKSON, FOREIGN INVESTMENT OVERVIEW, *supra* note 31, at 2.

security; and (2) ‘credible evidence’ existed that the foreign interest exercising control might take action that threatened to impair U.S. national security.”³⁹ This two-prong standard was carried over in the Foreign Investment and National Security Act of 2007 and is still in place under FIRRMA today.⁴⁰

The Exon-Florio Provision marked CFIUS’s first major transformation. As its lasting legacy, Exon-Florio transformed CFIUS “from an administrative body with limited authority . . . 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.”⁴¹ Although CFIUS’s power reached new heights under Exon-Florio, it was still seldom exercised. Between 1988 and 1999, of the nearly 1,300 foreign acquisitions reported to CFIUS by transacting parties, the Committee investigated only seventeen transactions.⁴² Investigating less than two percent of such transactions over an eleven year period was likely the result of CFIUS itself having limited discretion to investigate *sua sponte*.⁴³ As an executive committee that “operates under the authority of the President,” CFIUS investigations were constrained to transactions that “reflect[ed the President’s] attitudes and policies.”⁴⁴

C. *The Byrd Amendment: Shifting Power Back to Congress*

In 1992, Congress amended Exon-Florio through the National Defense Authorization Act for Fiscal Year 1993 (“Byrd Amendment”).⁴⁵ The Byrd Amendment was Congress’ hastened

³⁹ JACKSON, CFIUS, *supra* note 11, at 7.

⁴⁰ JACKSON, CFIUS, *supra* note 11, at 7.

⁴¹ JACKSON, CFIUS, *supra* note 11, at 8.

⁴² U.S. GOV’T ACCOUNTABILITY OFF., GAO/NSIAD-00-144, DEFENSE TRADE: IDENTIFYING FOREIGN ACQUISITIONS AFFECTING NATIONAL SECURITY CAN BE IMPROVED 7–8 (2000).

⁴³ See JACKSON, CFIUS, *supra* note 11, at 8.

⁴⁴ JACKSON, CFIUS, *supra* note 11, at 8.

⁴⁵ See National Defense Authorization Act for Fiscal Year 1993, Pub. L. No. 102-484, §§ 837(a)–(b), 106 Stat. 2315, 2463–64. The provision of the National Defense Authorization Act for Fiscal Year 1993 that amended CFIUS is commonly referred to as the “Byrd Amendment” because Senator Robert Byrd sponsored it. See JACKSON, CFIUS, *supra* note 11, at 9.

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response to a French government-owned corporation's attempt to acquire the missile division of an American conglomerate that was in a contractual relationship with the U.S. Department of Defense at the time.⁴⁶ Although the French government-owned corporation withdrew its bid, the attempted acquisition made clear that Exon-Florio needed an update to address future situations where foreign governments attempt to acquire sensitive U.S. technology by acquiring U.S. defense firms.⁴⁷ The Byrd Amendment made two profound changes to CFIUS's review process. First, the Byrd Amendment required CFIUS to review transactions involving foreign governments.⁴⁸ Second, the Byrd Amendment increased the President's burden to provide detailed reports to Congress regarding CFIUS's investigations.⁴⁹

Turning to the first major change, the Byrd Amendment established a two-part test that mandated CFIUS to investigate proposed and pending mergers, acquisitions, and takeovers where: "(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."⁵⁰ Prior to the Byrd Amendment, the President had "discretion to avoid investigating proposed foreign takeovers."⁵¹ CFIUS's review power was under the President's complete control and was primarily invoked to investigate transactions that aligned with the President's policies and objectives.⁵² Post-Byrd Amendment,

⁴⁶ W. Robert Shearer, *The Exon-Florio Amendment: Protectionist Legislation Susceptible to Abuse*, 30 HOUS. L. REV. 1729, 1763–64 (1993) (discussing Thomson-CSF's proposed acquisition of LTV Corporation's aerospace and defense business).

⁴⁷ See Christopher R. Fenton, *U.S. Policy Towards Foreign Direct Investment Post-September 11: Exon-Florio in the Age of Transnational Security*, 41 COLUM. J. TRANSNAT'L L. 195, 206 (2002) (indicating that Congress was motivated to amend Exon-Florio by Thomson-CSF's proposed acquisition of LTV Corporation's missile division).

⁴⁸ See National Defense Authorization Act for Fiscal Year 1993 §§ 837(a)–(b), 106 Stat. at 2463–64.

⁴⁹ See Fenton, *supra* note 47, at 209 (discussing changes to CFIUS procedures under the Byrd Amendment).

⁵⁰ JACKSON, CFIUS, *supra* note 11, at 9.

⁵¹ Christopher F. Corr, *A Survey of United States Control on Foreign Investment and Operations: How Much Is Enough?*, 9 AM. U. INT'L. L. REV. 417, 429 (1994).

⁵² See *id.*

however, when a transaction met the conditions of the Byrd Amendment's two-part test, CFIUS was mandated to conduct a compulsory investigation, preventing the executive committee from remaining obedient to the "attitudes and policies" of the President.⁵³ Stated differently, even when the President did not want a particular transaction reviewed for political reasons, CFIUS was required to investigate.⁵⁴ Through passage of the Byrd Amendment, Congress restricted the President's discretion to review foreign transactions and regained foreign commerce power it previously delegated to the executive branch.⁵⁵

The second significant change made under the Byrd Amendment was increasing the President's obligation to provide Congress with reports on the state of foreign investment regulation.⁵⁶ Under the Byrd Amendment, the President was to "immediately transmit . . . a written report" to Congress with the "President's determination of whether or not to take action" following CFIUS's investigation.⁵⁷ The Byrd Amendment instructed the President to include within the report a description of the investigation's findings as well as the factors weighed in determining whether to take action.⁵⁸ Pre-Byrd Amendment, the President was only required to provide a report to Congress if a transaction was prohibited.⁵⁹ Therefore, to ensure greater oversight of CFIUS, the Byrd Amendment required the President to provide a report to Congress regardless of whether the transaction was ultimately prohibited.⁶⁰

⁵³ JACKSON, CFIUS, *supra* note 11, at 8; *see also* Corr, *supra* note 51, at 429–30.

⁵⁴ *See* JACKSON, CFIUS, *supra* note 11, at 8; *see also* Corr, *supra* note 51, at 429–30 (explaining that CFIUS was required to review certain transactions irrespective of the President's personal opinion).

⁵⁵ *See* Corr, *supra* note 51, at 429–30.

⁵⁶ *See* National Defense Authorization Act for Fiscal Year 1993, Pub. L. No. 102-484, § 837(c), 106 Stat. 2315, 2463–64 (1992); *see also* Fenton, *supra* note 47, at 209.

⁵⁷ National Defense Authorization Act for Fiscal Year 1993 § 837(c), 106 Stat. at 2463–64; *see also* Fenton, *supra* note 47, at 209.

⁵⁸ National Defense Authorization Act for Fiscal Year 1993 § 837(c), 106 Stat. at 2463–64.

⁵⁹ *See* Fenton, *supra* note 47, at 209.

⁶⁰ U.S. GOV'T ACCOUNTABILITY OFF., GAO-05-686, DEFENSE TRADE: ENHANCEMENTS TO THE IMPLEMENTATION OF EXON-FLORIO COULD STRENGTHEN THE LAW'S EFFECTIVENESS 20 (2005); *see also* National Defense Authorization Act for Fiscal Year 1993 § 837(c), 106 Stat. 2463–64.

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Unlike prior modifications made to CFIUS, the reporting obligations included in the Byrd Amendment represented Congress' ability to introduce mechanisms of accountability. The Byrd Amendment "sen[t] a clear message to CFIUS that Congress will carefully review" CFIUS's investigations.⁶¹ By increasing CFIUS's reporting requirements, Congress could "exert political pressure for more rigorous, stricter enforcement" of the federal foreign investment review process.⁶²

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

The third and final amendment to CFIUS prior to FIRRMA took effect on July 26, 2007, when President George W. Bush signed the Foreign Investment and National Security Act of 2007 ("FINSA") into law.⁶³ FINSA represented congressional concerns that CFIUS's review jurisdiction was inadequate to address the evolving national security threats facing the United States. Specifically, Congress was motivated to expand CFIUS's authority in response to the terrorist attacks on September 11, 2001, the Dubai Ports World controversy, and China National Offshore Oil Corporation's bid to purchase the U.S. energy producer Unocal Corporation.⁶⁴

The following section will examine FINSA, its legislative goals, and how it affected CFIUS's structure. Then, this section will conclude by discussing CFIUS's review procedures under FINSA.

⁶¹ See Corr, *supra* note 51, at 430.

⁶² See Corr, *supra* note 51, at 430–31.

⁶³ See Foreign Investment and National Security Act of 2007, Pub. L. No. 110-49, 121 Stat. 246 (codified as amended at 50 U.S.C. app. § 2170); JAMES K. JACKSON, CONG. RESEARCH SERV., RL34561, FOREIGN INVESTMENT AND NATIONAL SECURITY: ECONOMIC CONSIDERATIONS 16, 16 n.44 (2013), <https://fas.org/sgp/crs/natsec/RL34561.pdf> [hereinafter JACKSON, ECONOMIC CONSIDERATIONS].

⁶⁴ JACKSON, CFIUS, *supra* note 11, at 4 (indicating that the Dubai Ports 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"); David Zaring, *CFIUS as a Congressional Notification Service*, 83 S. CAL. L. REV. 81, 95 (2009) (explaining that the Dubai Ports World transaction and China National Offshore Oil Company for Unocal Corporation motivated Congress to alter CFIUS's jurisdiction).

1. Legitimizing CFIUS

Unlike Exon-Florio and the Byrd Amendment, FINSA delegated the power to take investigatory action directly to CFIUS.⁶⁵ Under FINSA, CFIUS is expressly authorized to “take any necessary actions in connection with the transaction to protect the national security of the United States.”⁶⁶ It is important to note that prior to FINSA, CFIUS’s powers were never truly codified.⁶⁷ As mentioned previously, CFIUS was originally created by executive order and not through Congress’ foreign commerce powers.⁶⁸ The Exon-Florio and Byrd Amendments were Congress’ attempt to regulate and control President Ford’s creation.⁶⁹ Neither Exon-Florio nor the Byrd Amendment, however, brought CFIUS’s powers under a statutory framework.⁷⁰ Thus, FINSA represented Congress’ express desire to legitimize CFIUS in the eyes of the law to assure foreign investors that CFIUS was a stable, foreign investment regulatory body.⁷¹

2. FINSA Expanded the Definition of “Covered Transactions”

In addition to legitimizing CFIUS, regulations set forth by the Department of Treasury provided much-needed clarity to foreign investors by defining the transactions that were subject to CFIUS investigations. FINSA retained Exon-Florio’s definition of “covered transactions,” which included “any merger, acquisition, or takeover . . . by or with any foreign person which could result in foreign control of any person engaged in

⁶⁵ See Foreign Investment and National Security Act § 2(b)(2), 121 Stat. at 248.

⁶⁶ *Id.*

⁶⁷ JACKSON, CFIUS, *supra* note 11, at 10.

⁶⁸ See discussion *supra* Part II.A.; see also JACKSON, CFIUS, *supra* note 11, at 4–5

⁶⁹ See JACKSON, CFIUS, *supra* note 11, at 6.

⁷⁰ See JACKSON, CFIUS, *supra* note 11, at 10 (pointing out that FINSA gives CFIUS statutory authority).

⁷¹ See Souvik Saha, *CFIUS Now Made in China: Dueling National Security Review Frameworks as a Countermeasure to Economic Espionage in the Age of Globalization*, 33 NW. J. INT’L L. & BUS. 199, 234 (2012) (indicating that CFIUS’s framework under FINSA reinforced the United States’ open investment policy).

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interstate commerce in the United States.”⁷² Although FINSA did explicitly define the term “control,” the FINSA regulations provided a broad and functional definition that focused on “power, direct or indirect, whether or not exercised, and whether or not exercised or exercisable.”⁷³ The Treasury’s broad definition of “control” expanded CFIUS’s jurisdiction to investigate not only mergers and acquisitions, but voting interest gained by foreign entities through stock purchases, such as “the acquisition of stock interests with voting rights, forming a joint venture, and the conversion of convertible voting securities.”⁷⁴

Most importantly, FINSA granted CFIUS the power to initiate retroactive reviews of any covered transaction *sua sponte*.⁷⁵ Although parties to a covered transaction retained the ability to initiate a formal CFIUS review by providing written notice to CFIUS, FINSA granted CFIUS independent power to review any covered transaction, even if the parties did not voluntarily notify CFIUS or after the transaction had already been closed.⁷⁶

3. CFIUS’s Composition Under FINSA

FINSA was also significant because it codified CFIUS’s membership structure.⁷⁷ FINSA retained CFIUS’s existing membership with the Secretary of the Treasury as the chairperson of the Committee and the heads of the Departments

⁷² Foreign Investment and National Security Act of 2007, Pub. L. No. 110-49, § 2(a)(3), 121 Stat. 246, 246.

⁷³ *Id.* at § 2(a)(2), 121 Stat. at 247; See JAMES K. JACKSON, CONG. RSCH. SERV., RL33388, THE COMMITTEE ON FOREIGN INVESTMENT IN THE UNITED STATES (CFIUS) 17 (2018), <https://crsreports.congress.gov/product/pdf/RL/RL33388/68> [hereinafter JACKSON, 2018 CFIUS REPORT].

⁷⁴ Maira Goes de Moraes Gavioli, *National Security or Xenophobia: The Impact of the Foreign Investment and National Security Act (“FINSA”) in Foreign Investment in the U.S.*, 2 WM. MITCHELL L. RAZA. J. 1, 26 (2011); see also JACKSON, 2018 CFIUS REPORT, *supra* note 73, at 15 (indicating that certain transactions not considered to be covered transactions under FINSA were not subject to CFIUS review).

⁷⁵ See Foreign Investment and National Security Act of 2007 § 2(b)(1)(D), 121 Stat. at 248 (establishing CFIUS’s power to initiate a unilateral review of covered transactions).

⁷⁶ See Zaring, *supra* note 64, at 96.

⁷⁷ See JACKSON, CFIUS, *supra* note 11, at 10 (indicating that FINSA made CFIUS membership permanent).

of Homeland Security, Commerce, Defense, State, Justice, and Energy as permanent members, with the Department of Energy being the only new permanent member.⁷⁸ By codifying the structure of CFIUS, Congress “stabilized the entire process by firmly establishing the membership of CFIUS, preventing the President from shifting members in and out of CFIUS or from eliminating it completely.”⁷⁹

4. FINSAs Codified CFIUS’s Review Procedures

Under FINSAs, parties to a covered transaction did “not have an affirmative legal requirement to notify CFIUS.”⁸⁰ Instead, the voluntary notification system provided a strategic tool for the parties to a covered transaction to avoid potential retroactive CFIUS review that could reverse a closed transaction.⁸¹ Although FINSAs does not include a statute of limitations, parties could strategically achieve “protect[ion] from future CFIUS interference” if, after filing voluntary notice, CFIUS cleared the transaction.⁸²

Turning to CFIUS’s investigation procedures, FINSAs codified CFIUS’s three-level national security screening process.⁸³ The first level required CFIUS to determine a foreign transaction’s risk to national security by conducting a National Security Review.⁸⁴ FINSAs limited the initial National Security Review to a maximum of thirty days, beginning on the day that

⁷⁸ See JACKSON, CFIUS, *supra* note 11, at 22. The Secretary of Labor and the Director of National Intelligence hold nonvoting, ex officio member status, with their roles defined by statute and regulation. 50 U.S.C. § 4565(k)(2)(H)–(J).

⁷⁹ Jonathan C. Stagg, *Scrutinizing Foreign Investment: How Much Congressional Involvement is too Much?*, 93 IOWA L. REV. 325, 351 (2007).

⁸⁰ Christopher Kimball & Kevin King, *M&A Guide to CFIUS: How the Review Process Can Impact Your Transaction*, COOLEY (Oct. 10, 2017), <https://www.cooley.com/news/insight/2017/2017-10-06-ma-guide-to-cfius-article-1-of-4>.

⁸¹ See *id.* (advising parties to a covered transaction to weigh the costs associated with voluntarily filing with CFIUS against the benefit of being protected from future CFIUS investigation).

⁸² See *id.*

⁸³ Foreign Investment and National Security Act of 2007, Pub. L. No. 110-49, §§ 2–6, 121 Stat. 246, 256.

⁸⁴ *Id.* at § 2, 121 Stat. at 248.

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the Committee accepted written notice from transacting parties.⁸⁵ During the initial thirty-day review period, CFIUS considered the following eleven factors when determining whether a particular transaction presents national security risks:

- (1) domestic production needed for projected national defense requirements;
- (2) the capability and capacity of domestic industries to meet national defense requirements, including the availability of human resources, products, technology, materials, and other supplies and services;
- (3) the control of domestic industries and commercial activity by foreign citizens as it affects the capability and capacity of the United States to meet the requirements of national security;
- (4) the potential effects of the proposed or pending transaction on sales of military goods, equipment, or technology to [certain] countr[ies] . . .;
- (5) the potential effects of the proposed or pending transaction on United States international technological leadership in areas affecting United States national security;
- (6) the potential national security-related effects on United States critical infrastructure, including major energy assets;
- (7) the potential national security-related effects on United States critical technologies;
- (8) whether the covered transaction is a foreign government-controlled transaction;
- (9) a review of the current assessment of [the foreign country's relationship and cooperation with the United States];
- (10) the long-term projection of United States requirements for sources of energy and other critical resources and material; and
- (11) such other factors as the President or [CFIUS]

⁸⁵ *Id.*

may determine to be appropriate, generally or in connection with a specific review or investigation.⁸⁶

If CFIUS determined during the initial thirty-day review that a transaction posed a national security risk, CFIUS was required to initiate the second level of review, which consists of a forty-five day National Security Investigation carried out by the Director of National Intelligence (DNI).⁸⁷ During the forty-five day investigation period, the DNI was required to “expeditiously carry out a thorough analysis of any threat to the national security of the United States” and provide CFIUS with relevant information gathered by the national intelligence community.⁸⁸ In addition, CFIUS could use this information to identify and facilitate mitigation measures necessary to cleanse the transaction and receive approval.⁸⁹ At the conclusion of the forty-five day period, if the national security concerns were not mitigated, CFIUS could either: (1) “take any necessary actions in connection with the transaction to protect the national security of the United States,”⁹⁰ or (2) refer the transaction to the President with recommendations to either approve, reject, or impose mitigation measures on the transacting parties.⁹¹

The final level of CFIUS’s review process under FINSA gave the President fifteen days to make a decision based on the Committee’s recommendations.⁹² Although FINSA granted CFIUS the power to investigate and to make recommendations to the President, Congress placed no obligation on the President “to follow the recommendation of the Committee.”⁹³ Rather, under FINSA, the President had discretion to make a decision irrespective of the Committee’s findings and recommendations.⁹⁴

⁸⁶ *Id.* at § 4, 121 Stat. at 248.

⁸⁷ *See id.* at § 2(b)(4), 121 Stat. at 251.

⁸⁸ *See id.*

⁸⁹ *See* Kimball & King, *supra* note 80.

⁹⁰ Foreign Investment and National Security Act of 2007, Pub. L. No. 110-49, § 2, 121 Stat. 246, 248.

⁹¹ 31 C.F.R. § 800.508(b); *see also* Kimball & King, *supra* note 80.

⁹² Foreign Investment and National Security Act of 2007 § 6, 121 Stat. at 255–56.

⁹³ *See* JACKSON, 2018 CFIUS REPORT, *supra* note 73, at 13.

⁹⁴ *See* JACKSON, 2018 CFIUS REPORT, *supra* note 73, at 13 (“[T]he President is

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If the President ultimately decided to block a transaction, FINSA required the President to follow the two-part set forth under Exon-Florio: (1) conclude that “other U.S. laws are inadequate or inappropriate to protect the national security;” and (2) have “credible evidence” that the foreign interest will impair the national security.⁹⁵ After satisfying these two conditions, the President could 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.”⁹⁶

III. FOREIGN INVESTMENT RISK REVIEW MODERNIZATION ACT OF 2018

The decade following FINSA revealed critical gaps in CFIUS’s jurisdiction to investigate modern foreign investment trends.⁹⁷ For example, foreign investment in the 2010s introduced an increased presence of foreign sovereign control over investments made in the United States, complex fund structures, and the potential for foreign countries to exploit the personal identifiable data of American citizens.⁹⁸ CFIUS was simply not equipped to investigate these developments in investment strategy under FINSA’s outdated framework.⁹⁹

To ensure that CFIUS had the resources and authority to review novel trends in foreign investment, on August 13, 2018, former President Donald Trump signed into law the Foreign Investment Risk Review Modernization Act of 2018 (“FIRRMA”).¹⁰⁰ House congressional leaders praised the final

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.’”).

⁹⁵ Foreign Investment and National Security Act of 2007 § 9, 121 Stat. at 255–56; see JACKSON, 2018 CFIUS REPORT, *supra* note 73, at 5; see also discussion *supra* Part II.B.

⁹⁶ See Foreign Investment and National Security Act of 2007 § 9, 121 Stat. at 255.

⁹⁷ Heath P. Tarbert, *Modernizing CFIUS*, 88 GEO. WASH. L. REV., 1477, 1492–93 (2020).

⁹⁸ *Id.* at 1493.

⁹⁹ *Id.*

¹⁰⁰ Foreign Investment Risk Review Modernization Act of 2018, Pub. L. No. 115-232, §§ 1701-28, 132 Stat. 2173 (codified at 50 U.S.C. § 4565).

FIRRMA billed signed by the former President as “a strong . . . bill, which helps protect our Nation’s security” and a “bipartisan, bicameral product that reflects the work and views of . . . experts” in the fields of defense, intelligence, and business.¹⁰¹ FIRRMA represents the most expansive amendment to CFIUS’s foreign investment review jurisdiction since the Committee was formed in 1975.¹⁰² In passing FIRRMA, Congress recognized that the landscape of foreign investment and national security had shifted during the decade following FINSA and that CFIUS’s review powers were in serious need of an upgrade.¹⁰³ The following sections outline the relevant changes FIRRMA makes to foreign investment regulation in the United States.

A. More Transactions Fall Under CFIUS’s Jurisdiction

FIRRMA was specifically enacted to modernize CFIUS after members of Congress expressed concerns over an influx of Chinese investment in United States technology firms and Chinese investment schemes that took advantage of loopholes to evade CFIUS’s review.¹⁰⁴ Congress expanded CFIUS’s jurisdiction for the first time to include foreign investment in U.S. businesses that do not convey a controlling equity interest, which in effect, gives CFIUS the authority to investigate passive investments.¹⁰⁵ Specifically, FIRRMA expands CFIUS’s investigatory jurisdiction to include any non-controlling investment in the following three areas: critical technologies, critical infrastructure, and sensitive personal data.¹⁰⁶ Most

¹⁰¹ 164 CONG. REC. H7700 (daily ed. July 26, 2018) (statement by Rep. Mac Thornberry); 164 CONG. REC. H7704 (daily ed. July 26, 2018) (statement by Rep. Andy Barr).

¹⁰² J. Russell Blakey, *The Foreign Investment Risk Review Modernization Act: The Doubled Edged Sword of U.S. Foreign Investment Regulations*, 53 LOY. L.A. L. REV. 981, 998–99 (2020) (arguing that FIRRMA is “the most revolutionizing expansion of CFIUS’s reviewing power and jurisdiction”).

¹⁰³ Jeffrey Bialos & Mark Herlach, *How FIRRMA Will Change National Security Review: Part 1*, LAW360 (Aug. 16, 2018, 3:14 PM), <https://www.law360.com/articles/1073822/how-firrma-will-change-national-security-reviews-part-1>.

¹⁰⁴ See JACKSON, CFIUS, *supra* note 11, at 11.

¹⁰⁵ See JACKSON, CFIUS, *supra* note 11, at 19–23.

¹⁰⁶ 50 U.S.C. § 4565(a)(6)(A) (critical technologies); 50 U.S.C. § 4565(a)(5) (critical infrastructure); 50 U.S.C. § 4565(a)(4)(B) (sensitive personal data).

pertinent to this comment is CFIUS's jurisdictional expansion into transactions that involve personal user data. FIRRMA gives CFIUS the authority to investigate investments, whether passive or non-passive, that afford a foreign person access to sensitive personal data of U.S. citizens.¹⁰⁷

Thus, FIRRMA's expansion of CFIUS's jurisdiction is significant for two reasons. First, transactions are now subject to CFIUS review into whether a foreign person has "control" over a U.S. business. Second, many, if not all, U.S. technology companies collect personally identifiable information of U.S. citizens, making almost all foreign investment in U.S. technology firms subject to CFIUS's jurisdiction.

1. Passive Investments

Expanding transactions covered by CFIUS to include passive, non-controlling investments is a significant grant of power. Prior to FIRRMA, truly passive investments were never subject to CFIUS review.¹⁰⁸ A passive investment by a foreign individual is "any investment that gives the foreign investor no de jure or de facto capacity to control, direct, or decide any matters of the U.S. business."¹⁰⁹ To illustrate, a foreign person's purchase of a relatively small block of stock in a U.S. business on the open market would be considered a passive investment; the foreign individual invests seeking a financial return without acquiring any meaningful control over the U.S. business.¹¹⁰ Stated differently, the phrase "passive investment" alludes to the idea that the investment is strictly for the purpose of financial gain and not for purposes such as gaining a seat on the board of directors, or taken to the extreme, to undermine the national security of the United States.

In contrast to a passive investment, a non-passive investment is the acquisition or holding of ownership interests in a U.S.

¹⁰⁷ See JACKSON, CFIUS, *supra* note 11, at 11.

¹⁰⁸ Jonathan Wakely & Andrew Indorf, *Managing National Security Risk in an Open Economy: Reforming the Committee on Foreign Investment in the United States*, 9 HARV. NAT'L SEC. J. 1, 43 (2018) (explaining that passive investments were exempt from CFIUS's jurisdiction prior to FIRRMA).

¹⁰⁹ *Id.* at 42.

¹¹⁰ *Id.*

company with the intent to exercise control over that company.¹¹¹ Under FIRRMA, in addition to having the requisite intent to control a U.S. business, to qualify as a non-passive investment, the interest holder must also either: (i) acquire “any rights that if exercised would constitute control” over the investment; (ii) acquire “any access rights, or involvement in” any covered investment; and (iii) take “action inconsistent with holding or acquiring such interests solely for the purpose of passive investment.”¹¹² An example of a non-passive investment would be a foreign person acquiring a majority voting interest in a U.S. business and then later negotiating the right to appoint a member to the board of directors.¹¹³ In this example, because the foreign person invested with the requisite intent and then actively engaged in asserting control over the U.S. business through the appointment of a director, the foreign investor’s acquisition of the U.S. business’ voting interest would not be characterized as “solely for the purpose of passive investment.”¹¹⁴

2. Personally Identifiable Data of U.S. Citizens

Although Congress did not include a definition for “sensitive personal data” in FIRRMA’s statutory language, regulations set forth by the Department of the Treasury provide a detailed definition and examples of identifiable data that, if exploited, have the potential to threaten national security.¹¹⁵ Under FIRRMA regulations, sensitive personal data includes “identifiable data that is maintained or collected by” U.S. businesses that: (1) “target or tailor” products or services to certain U.S. government agencies and personnel; (2) maintain or collect “any identifiable data . . . on greater than one million individuals;” or (3) have “a demonstrated business objective to maintain or collect any identifiable data . . . on greater than one million individuals and such data is an integrated part of the U.S. business’s primary

¹¹¹ See 31 C.F.R. § 800.243(a).

¹¹² *Id.*

¹¹³ See *id.* § 800.243(b).

¹¹⁴ *Id.* § 800.243(a).

¹¹⁵ *Id.* § 800.241(a)(1)(i)(A)–(C).

products or services.”¹¹⁶ The FIRRMA regulations also list the following ten categories of data maintained or collected by U.S. businesses that may pose a risk to national security: financial data; data in a consumer report; health insurance application data; data relating to the physical, mental, or psychological health of an individual; private communications between end users of a product or service; geolocation data; biometric data; data used for state and federal government identification cards; data concerning security clearances; and data included in security clearance applications.¹¹⁷

B. *Procedural Changes to CFIUS Under FIRRMA*

In addition to expanding CFIUS’s substantive powers, FIRRMA also made significant procedural changes to CFIUS’s investigative process. This section discusses two significant procedural changes made under FIRRMA: mandatory filings and a lengthened review period.

1. Mandatory Filings for Certain Covered Transactions

FIRRMA addresses an issue that has plagued CFIUS since its creation—what to do when a transaction falls under its jurisdiction but is not reported to the Committee.¹¹⁸ Prior to FIRRMA, CFIUS was constrained by limited resources and transacting parties did not have a legal duty to file notice with the Committee.¹¹⁹ In many cases, the transacting parties that provided CFIUS with notice only did so for strategic purposes and not because the law required them to do so.¹²⁰ As a result, many transactions that fell under CFIUS’s jurisdiction were not reviewed simply because CFIUS did not have the means to monitor and identify all such activity.¹²¹

¹¹⁶ *Id.*

¹¹⁷ 31 C.F.R. § 800.241(a)(1)(ii)(A)–(J).

¹¹⁸ COMM. ON FOREIGN INV. IN THE U.S., ANN. REPORT TO CONG. 37 (2018), <https://home.treasury.gov/system/files/206/CFIUS-Public-Annual-Report-CY-2018.pdf> (discussing transactions that were not reported to CFIUS).

¹¹⁹ See JACKSON, CFIUS, *supra* note 11, at 12.

¹²⁰ JACKSON, CFIUS, *supra* note 11, at 8–9.

¹²¹ See U.S. GOV’T ACCOUNTABILITY OFF., GAO-18-249, COMM. ON FOREIGN INV.

To address congressional concerns that predatory foreign investments occurring in plain sight yet beyond CFIUS's reach, Congress shifted the filing process from a voluntary system to a mandatory requirement in certain cases.¹²² FIRRMA mandates foreign investors to file declarations with CFIUS for two types of transactions: (1) when a foreign national or foreign government acquires a "substantial interest" in a U.S. business; and (2) when a foreign national or government invests in a U.S. business that develops "critical technologies."¹²³ To enforce FIRRMA's mandatory filing requirements, Congress granted CFIUS the power to impose monetary penalties.¹²⁴

Under the "substantial interest" prong, CFIUS mandates notification of transactions "by a foreign person in which a foreign government, directly or indirectly, [has a] substantial interest."¹²⁵ It is important to note that a "foreign person," as defined by the FIRRMA regulations, is "[a]ny foreign national, foreign government, or foreign entity" or any entity that can be controlled by any foreign national, government, or entity.¹²⁶ FIRRMA defines "substantial interest" in the negative, stating that an investment or acquisition that results in "less than a [ten percent] voting interest" is "not considered a substantial interest."¹²⁷ To rephrase FIRRMA's definition, any investment or acquisition that results in the foreign control of a ten percent voting interest will trigger CFIUS's "substantial interest" prong.¹²⁸

In addition to triggering mandatory filings under the "substantial interest" prong, mandatory declarations are required under FIRRMA when a foreign person invests "in certain U.S. businesses that produce, design test, manufacture, fabricate, or develop one or more critical technologies in [twenty-eight]

IN THE U.S.: TREASURY SHOULD COORDINATE RESOURCES NEEDED TO ADDRESS INCREASED WORKLOAD 19–20 (2018).

¹²² JACKSON, CFIUS, *supra* note 11, at 50.

¹²³ See JACKSON, CFIUS, *supra* note 11, at 50.

¹²⁴ 50 U.S.C. § 4565(b)(1)(C)(v)(IV)(gg); 31 C.F.R. § 800.901(a).

¹²⁵ 50 U.S.C. § 4565(b)(1)(C)(v)(IV)(bb)(AA); 31 C.F.R. § 800.244(a) (defining "substantial interest" as an acquisition of a 25% or more voting interest in a U.S. business by a foreign person, or 49% or more voting interest in a U.S. business by a foreign government in a foreign person).

¹²⁶ 31 C.F.R. § 800.224(a).

¹²⁷ 50 U.S.C. § 4565(b)(1)(C)(v)(IV)(bb)(BB) (defining "substantial interest").

¹²⁸ See *id.*

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specified activities.”¹²⁹ Requiring mandatory filings for foreign investment in critical technologies is a significant procedural change simply because it increases the number of filings that CFIUS must sift through, further straining the resources of the relatively small executive branch committee.¹³⁰ It is likely that increasing the number of cases on CFIUS’s docket is that it will disincentivize CFIUS to conduct thorough investigations in order to quickly clear as many transactions as possible, which is in friction with FIRRMA’s express purpose of protecting the national security of the United States.

2. Expanded Duration of Review

The second significant procedural change under FIRRMA is the expanded duration of CFIUS’s review process. FIRRMA mostly retained FINSA’s three-level national security screening

¹²⁹ See JACKSON, CFIUS, *supra* note 11, at 16; 31 C.F.R. § 800 app. A. (stating that the twenty-eight activities are: (1) Internet protocol or telecommunications service; (2) Certain internet exchange points; (3) Submarine cable systems; (4) Submarine cable landing systems; (5) Data center at a submarine landing facility; (6) Satellite or satellite systems servicing the /Department of Defense; (7) Industrial resources manufactured or operated for a Major Defense Acquisition Program; (8) Any industrial resource manufactured pursuant to a “DX” priority rated contract; (9) Any facility that manufactures certain specialty metals, chemical weapons, carbon. alloy and steel plates, and other specified materials; (10) Any industrial resource that had been funded by the Defense Production Act, Industrial Base Fund, Rapid Innovation Fund, Manufacturing Technology Program, Defense Logistics Warstopper Program, or the Defense Logistics Agency Surge and Sustainment Program; (11) Electric energy storage systems; (12) Any electric storage system linked to the bulk electric system; (13) Electric energy generation, transmission or distribution for military installations; (14) Any industrial control system used by bulk-power systems, or a facility directly supporting a military installation; (15) Certain refineries; (16) Certain crude oil storage facilities; (17) Certain LNG import or export terminals or certain natural gas underground storage facilities; (18) Systemically important financial market utilities; (19) Certain financial market exchanges; (20) Technology providers in the Significant Service Provider Program; (21) Any rail line designated as part of the DOD Strategic Rail Corridor Network; (22) Certain interstate oil pipelines; (23) Certain interstate natural gas pipelines; (24) Any industrial control system utilized by interstate oil or natural gas pipelines; (25) Certain airports; (26) Certain maritime ports or terminals; (27) Public water systems; (28) Any industrial control system utilized by public water systems or treatment works).

¹³⁰ 50 U.S.C. § 4565(p)(3)(B) (allocating to CFIUS \$20 million dollars per year from 2019 through 2023); 50 U.S.C. § 4565(p)(3)(B)(i)(I)(aa), (bb) (permitting CFIUS to impose filing fees on transacting parties that “may not exceed . . . 1 percent of the value of the transaction; or \$300,000”).

process.¹³¹ Similar to FINSA, FIRRMA requires CFIUS to respond to a written declaration within thirty-days.¹³² During the thirty-day period, if CFIUS discovers that the declared transaction poses national security risks and the risks are not mitigated, CFIUS may either request the transacting parties to file a formal written notice with the Committee, or CFIUS may initiate a unilateral review.¹³³

The next stage of the review process under FIRRMA is the National Security Review, which can last up to forty-five days and is fifteen days longer than it was under FINSA.¹³⁴ The National Security Review can be followed by an additional forty-five-day National Security Investigation if the risks that CFIUS uncovers are not resolved during the forty-five-day National Security Review.¹³⁵ The National Security Review can then be extended an additional fifteen days in “extraordinary circumstances.”¹³⁶ Lastly, the final step of CFIUS’s review process remains unchanged from FINSA, giving the President fifteen days to make a final determination based on CFIUS’s recommendations.¹³⁷

After aggregating the maximum number of days from the initial declaration to the President’s final determination, CFIUS’s review period under FIRRMA for a single transaction has the potential to last 150 days.¹³⁸ The potential 150-day review period under FIRRMA is significantly longer in comparison to the ninety-day review period under FINSA.¹³⁹

Although CFIUS benefits from an extended review period because it has more time to conduct a thorough investigation, U.S. businesses can be harmed by prolonged review periods due

¹³¹ See discussion *supra* Part II.D.4.

¹³² 50 U.S.C. § 4565(b)(1)(C)(v)(III)(bb).

¹³³ *Id.* at § 4565(b)(1)(C)(v)(III)(aa)(BB).

¹³⁴ *Id.* at § 4565(b)(1)(F); see also JACKSON, CFIUS, *supra* note 11, at 14–15 (providing an illustrative figure of CFIUS’s review process).

¹³⁵ 50 U.S.C. § 4565(b)(2)(C)(i); JACKSON, CFIUS, *supra* note 11, at 12.

¹³⁶ 50 U.S.C. § 4565(b)(2)(C)(ii); JACKSON, CFIUS, *supra* note 11, at 12.

¹³⁷ 50 U.S.C. § 4565(d)(2).

¹³⁸ JACKSON, CFIUS, *supra* note 11, at 12–13.

¹³⁹ The aggregation calculations under FIRRMA and FINSA include the fifteen-day period the President is granted to act. Compare Foreign Investment and National Security Act of 2007, Pub. L. No. 110-49, § 6, 121 Stat. 246, 255 (2007), with 50 U.S.C. § 4565(d)(2).

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to associated market risks. For example, in the merger and acquisition context, if an acquiring-corporation's stock price drops during the time between the execution of an agreement with a target company and the deal's official closing post-CFIUS review, the target corporation's shareholders will receive less value in return for their shares. Thus, FIRRMA's longer review period attaches increased transaction costs for parties conducting foreign investment due to market risks associated with waiting an additional two months for CFIUS to complete its review. This also does not include other regulatory hurdles that foreign transactions are subject to, which can prolong the closing of deals even further, leaving the risk of investing in a U.S. business expensive and difficult to justify.¹⁴⁰

IV. IMPLICATIONS OF CFIUS'S EXPANDED JURISDICTION UNDER FIRRMA

CFIUS has been described as an iceberg due to a majority of its investigations into foreign investment occurring "below the surface" and out of the purview of the general public.¹⁴¹ While Congress should be commended for filling many vulnerable gaps in CFIUS's regulation framework, FIRRMA failed to include mechanisms of transparency and accountability that are proportional to CFIUS's expanded powers, leaving the Committee susceptible to executive branch abuse. More specifically, FIRRMA leaves CFIUS vulnerable to political abuse at the hands of the President.

The election of former President Donald Trump, who infamously ran for office on a platform of economic nationalism coined as the "America First Movement,"¹⁴² presented the perfect storm that pushed CFIUS into a politicized position that it was

¹⁴⁰ Transactions involving foreign entities and U.S. businesses, in addition to clearing national security regulations, may also require clearance from other governmental regulatory hurdles, such as antitrust reviews by the Federal Trade Commission and the Department of Justice. See *Merger Review*, FED. TRADE COMM'N, <https://www.ftc.gov/enforcement/merger-review>.

¹⁴¹ Emily Birnbaum, *This Has Been Botched: This is What Makes Trump's TikTok Tirade So Unusual*, PROTOCOL (Aug. 6, 2020), <https://www.protocol.com/cfius-tiktok-not-how-this-works> (quoting former CFIUS employee).

¹⁴² See DONALD J. TRUMP, <https://www.donaldjtrump.com/about> (last visited Oct. 2, 2021).

never meant to be in. While President Trump advanced his “America First” economic agenda by renegotiating NAFTA,¹⁴³ withdrawing from the Trans-Pacific Partnership,¹⁴⁴ and imposing tariffs on Chinese imports,¹⁴⁵ less conspicuously, the former President strategically leveraged CFIUS’s expanded authority under FIRRMA to advance his nationalistic policies. President Trump’s politicization of CFIUS was and remains problematic because “there is little law or precedent around what happens when a President gets personally involved in a CFIUS decision.”¹⁴⁶

A. *Companies That Collect Data, Beware!*

To illustrate how FIRRMA has drastically changed foreign investment regulation in the United States, this section introduces CFIUS’s unorthodox investigations into Grindr LLC and TikTok, Inc. These cases demonstrate CFIUS’s novel authority under FIRRMA to investigate transactions between a foreign person and a U.S. business that collects and maintains user data.

1. Grindr—CFIUS’s Ex-Post Divestment of a Lucrative Dating App

The Trump Administration’s odd mandate to divest Grindr LLC (“Grindr”) illustrates the delicate balance between the executive branch’s duty to protect national security and the potential for the executive branch to abuse CFIUS. Grindr is a popular dating app among the LGBTQ community and was one of the first apps specifically tailored for same-sex online dating.¹⁴⁷

¹⁴³ *United States-Mexico-Canada Agreement*, OFF. OF THE U.S. TRADE REPRESENTATIVE, <https://ustr.gov/trade-agreements/free-trade-agreements/united-states-mexico-canada-agreement> (last visited Oct. 2, 2021).

¹⁴⁴ Peter Baker, *Trump Abandons Trans-Pacific Partnership, Obama’s Signature Trade Deal*, N.Y. TIMES (Jan. 23, 2017), <https://www.nytimes.com/2017/01/23/us/politics/tpp-trump-trade-nafta.html>.

¹⁴⁵ See generally Chad P. Brown & Melina Kolb, *Trump’s Trade War Timeline: An Up-to-Date Guide*, PETERSON INST. FOR INT’L ECON. (Oct. 31, 2021), <https://www.piie.com/sites/default/files/documents/trump-trade-war-timeline.pdf>.

¹⁴⁶ Birnbaum, *supra* note 141.

¹⁴⁷ Jon Shadel, *Grindr Was the First Big Dating App for Gay Men. Now It’s Falling Out of Favor*, WASH. POST (Dec. 6, 2018), <https://www.washingtonpost.com/>

In 2009, technology entrepreneur Joel Simkhai launched Grindr on Apple's iOS.¹⁴⁸ Like many dating and social media apps at the time, Grindr's platform allowed users to post pictures, send private messages, and update their statuses.¹⁴⁹ Most critical to Grindr's success was its use of user geolocation data to facilitate "spontaneous and intimate" hookups.¹⁵⁰ To create these connections, the application would locate Grindr users using GPS and then calculate the distance to other Grindr users in the area.¹⁵¹ As a result of successfully integrating geolocation data into the dating application's algorithm, Grindr began to court offers for its platform.¹⁵² Then, in 2016, the Chinese technology firm Beijing Kunlun Tech Co., Ltd. ("Kunlun"), acquired an approximate sixty percent interest in Grindr.¹⁵³ By 2018, Kunlun acquired the remaining forty percent interest in Grindr, resulting in a full buyout.¹⁵⁴

When listing national security concerns that the United States faces, it is highly unlikely that a popular LGBTQ dating application would make the list. However, the sale of Grindr to Kunlun raised concerns within the national security community because of several well-documented security vulnerabilities

lifestyle/2018/12/06/grindr-was-first-big-dating-app-gay-men-now-its-falling-out-favor. To put Grindr's popularity into perspective, CFIUS opened an investigation into Grindr in 2018, the dating app had approximately 3.8 million daily users and 27 million users across the world at the time, making it one of the most active data apps in the world. *See id.*

¹⁴⁸ Jenna Wortham, *How Grindr Is Changing the Way We Connect*, N.Y. TIMES BITS (Mar. 10, 2013, 1:17 PM), <https://bits.blogs.nytimes.com/2013/03/10/how-grindr-is-changing-the-way-we-all-connect/>; *see also* Jason Kincaid, *Gay Dating Makes its Way to the iPhone*, TECHCRUNCH (Mar. 25, 2009), <https://techcrunch.com/2009/03/25/gay-dating-makes-its-way-to-the-iphone>.

¹⁴⁹ *See* Wortham, *supra* note 148 (comparing and contrasting Grindr's platform with Facebook and Twitter).

¹⁵⁰ Wortham, *supra* note 148.

¹⁵¹ *See* Wortham, *supra* note 148. (describing how Grindr's platform works).

¹⁵² Casey Newton, *How Grindr Became a National Security Issue*, VERGE (Mar. 28, 2019, 9:20 AM), <https://www.theverge.com/interface/2019/3/28/18285274/grindr-national-security-cfius-china-kunlun-military>.

¹⁵³ Sarah Bauerle Danzman & Geoffrey Gertz, *Why is the U.S. Forcing a Chinese Company to Sell the Gay Dating App Grindr?*, WASH. POST (Apr. 3, 2019), <https://www.washingtonpost.com/politics/2019/04/03/why-is-us-is-forcing-chinese-company-sell-gay-dating-app-grindr>.

¹⁵⁴ *Id.*

discovered in Grindr's software.¹⁵⁵ For instance, Grindr was chastised for a flaw in its security that leaked the geolocations data of users—the very data that made the application successful in the first place.¹⁵⁶

It is important to note that CFIUS did not investigate Kunlun's initial acquisition of sixty percent of Grindr in 2016.¹⁵⁷ CFIUS likely did not investigate the initial transaction in 2016 because it did not have the power to do so under FINSA. CFIUS also did not immediately investigate Kunlan's purchase of the remaining forty percent stake in Grindr in 2018 for similar reasons. Nevertheless, Kunlun's fortune of evading CFIUS review changed in March of 2019, when CFIUS exercised its expanded jurisdiction under FIRRMA, launching an ex-post investigation in the Grindr acquisition, which ultimately resulted in the forced divestment of Kunlun's interest in Grindr.¹⁵⁸ CFIUS did not comment publicly regarding the national security risks that this same-sex dating app posed.¹⁵⁹ Many national security commentators theorize that CFIUS was concerned with Kunlun's unfettered access to Grindr users' sensitive data.¹⁶⁰ Specific types of data that CFIUS was likely concerned with included geolocation data, sexual preferences, HIV status, and private messages exchanged between users.¹⁶¹

But even if CFIUS was concerned with Kunlun's access to Grindr's user information, that does not explain the threat to national security uncovered by CFIUS in its investigation. For many Grindr users, access to their information poses absolutely no threat to national security. On the other hand, for a minority of Grindr users, Kunlan's access to sensitive user data could pose

¹⁵⁵ James Cook, *Security Flaw in Gay Dating App Grindr Reveals Precise Location of 90% of Users*, BUS. INSIDER (Aug. 29, 2014, 5:10 AM), <https://www.businessinsider.com/exploit-reveals-location-of-grindr-users-2014-8>.

¹⁵⁶ *Id.*

¹⁵⁷ Danzman & Gertz, *supra* note 153.

¹⁵⁸ Carl O'Donnell, Liana B. Baker & Echo Wang, *Exclusive: Told U.S. Security at Risk, Chinese Firm Seeks to Sell Grindr Dating App*, REUTERS (Mar. 27, 2019, 1:02 AM), <https://www.reuters.com/article/us-grindr-m-a-exclusive/exclusive-u-s-pushes-chinese-owner-of-grindr-to-divest-the-dating-app-sources-idUSKCN1R809L>.

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

¹⁶¹ *Id.*

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a national security threat. For example, certain intelligence sources have reported that CFIUS’s “concern focused on the potential for the blackmail of American officials or contractors, if China threatened to disclose their sexual orientation, or track their movements or dating habits.”¹⁶²

President Trump’s decision to divest Grindr seems to try to solve a national security issue with a hatchet rather than a scalpel. It is not entirely clear how the decision to divest Grindr passes muster under the requirement that other “provisions of law . . . [do not] provide adequate and appropriate authority for the President to protect the national security.”¹⁶³ If President Trump was truly concerned about the potential for foreign adversaries to blackmail government employees and contractors, why did he not just simply execute a narrow executive order preventing U.S. government officials, military personnel, and contractors from downloading Grindr on their personal mobile devices?

The Grindr divestment is an illustration of CFIUS’s expanded jurisdiction to review foreign investments involving U.S. businesses that collect and maintain user data, even after the transactions have been closed and forgotten. Thus, FIRRMA creates yet another transaction cost that foreign persons must consider when investing in or acquiring a U.S. business that collects and maintains user data—the potential for a deal to be unwound in the future. While it is difficult to argue against laws that improve and strengthen the national security of the United States, foreign investors and U.S. businesses face undeniable obstacles and high transaction costs due to CFIUS’s limited transparency and accountability in relation to FIRRMA’s expansion of the Committee’s jurisdiction.

2. The TikTok Debacle: Raising the Alarm on CFIUS Misuse

While the Grindr case illustrates CFIUS’s expanded jurisdiction to review transactions that involve U.S. businesses

¹⁶² David E. Sanger, *Grindr Is Owned by a Chinese Firm, and the U.S. Is Trying to Force It to Sell*, N.Y. TIMES (Mar. 28, 2019), <https://www.nytimes.com/2019/03/28/us/politics/grindr-china-national-security.html>.

¹⁶³ 50 U.S.C. § 4565(d)(4).

that collect and maintain user data, CFIUS's investigation into TikTok illustrates how the executive branch can weaponize foreign investment regulation to achieve political goals unrelated to national security.

In 2019, CFIUS initiated communications with TikTok representatives to determine whether to review ByteDance's acquisition of Musical.ly.¹⁶⁴ In March of 2020, after several months of evaluating whether it had jurisdiction over the acquisition, "CFIUS advised TikTok that it intended to conduct a formal review."¹⁶⁵ Then, on June 15, 2020, CFIUS formally began its review of the ByteDance-Musical.ly transaction.¹⁶⁶ During CFIUS's lengthy review, TikTok claimed to have provided "voluminous documentation and information in response to CFIUS's questions."¹⁶⁷ Specifically, TikTok claimed to have provided CFIUS with documentation "demonstrating TikTok's security measures to help ensure U.S. user data is safeguarded in storage and in transit and cannot be accessed by unauthorized persons—including any government—outside the United States."¹⁶⁸ While TikTok continued to comply with CFIUS's request for important company documentation, CFIUS never articulated specific information about the nature of the national security threat that TikTok posed or why TikTok's proposed mitigation plans were inadequate.¹⁶⁹ Additionally, TikTok claims that CFIUS "terminated formal communications . . . well before the conclusion of the initial statutory review period."¹⁷⁰

With time running out, TikTok received a letter from the Committee, "stating that 'CFIUS has identified national security risks arising from the [Musical.ly acquisition] and that it has not identified mitigation measures that would address those risks.'"¹⁷¹ Consistent with CFIUS's lack of communication with TikTok

¹⁶⁴ Nicas, Isaac & Swanson, *supra* note 4.

¹⁶⁵ Complaint for Injunctive and Declaratory Relief at 13, TikTok Inc. v. Trump, No. 2:20-cv-7672 (D.D.C. Aug. 24, 2020) [hereinafter TikTok Complaint].

¹⁶⁶ *Id.*

¹⁶⁷ *Id.* at 14.

¹⁶⁸ *Id.*

¹⁶⁹ *Id.*

¹⁷⁰ *Id.*

¹⁷¹ TikTok Complaint, *supra* note 165, at 15.

during the investigation, the Committee did not provide TikTok with its findings on the issue of national security.¹⁷²

Similar to CFIUS's concerns with Grindr, the Committee's determination that TikTok posed a national security risk likely resulted from TikTok's well-documented history of cybersecurity vulnerabilities associated with its platform.¹⁷³ In addition, many officials believe that CFIUS was also concerned with China's 2017 national intelligence law, which allows the Chinese government "to gain access to any information held by a Chinese company upon request."¹⁷⁴ Therefore, if ByteDance's operations in China had access to American TikTok users' data, then the Chinese government could demand ByteDance to provide the "vast trove of personal data collected by the app."¹⁷⁵ But interestingly, some CFIUS watchdogs have speculated that CFIUS was concerned with ByteDance's "joint venture with a Chinese state-owned media group."¹⁷⁶ Thus, CFIUS might have also feared TikTok's platform could be used to spread manipulative disinformation to young voters, allowing China to influence the 2020 U.S. national election in a manner similar to Russia's attempt to manipulate the 2016 U.S. national election.¹⁷⁷

CFIUS's investigation into TikTok raised concerns among private sector CFIUS attorneys because the Committee did not follow the "normal" procedures for national security

¹⁷² TikTok Complaint, *supra* note 165, at 15.

¹⁷³ Ronen Berman, Sheera Frenkel & Raymond Zhong, *Major TikTok Security Flaws Found*, N.Y. TIMES, (Jan. 8, 2020), <https://www.nytimes.com/2020/01/08/technology/tiktok-security-flaws.html> (last updated Aug. 7, 2020) (explaining the vulnerabilities discovered in TikTok's cybersecurity).

¹⁷⁴ Benjamin Horney, *TikTok is the Tip of the Iceberg for CFIUS' Data Concerns*, LAW360 (Aug. 7, 2020, 8:15 PM), <https://www.law360.com/articles/1299395/tiktok-is-the-tip-of-the-iceberg-for-cfius-data-concerns>.

¹⁷⁵ *Id.*

¹⁷⁶ David R. Hanke, *TikTok National Security Problem: Don't Ignore the Lessons of 2016*, THE HILL (Jan. 28, 2020), <https://thehill.com/opinion/cybersecurity/480251-the-tiktok-national-security-problem-dont-ignore-the-lessons-of-2016>.

¹⁷⁷ *See id.* (drawing parallels between the use of TikTok to influence voters to the Russian intelligence's alleged use of Twitter and Facebook to influence the 2016 U.S. national election); *see also* Salil K. Mehra, *Algorithmic Competition, Trade and Investment: The CFIUS as Privacy Regulator*, 16 UNIV. PA. ASIAN L. REV. 8, 22 (2020).

investigations.¹⁷⁸ The most concerning aspect of FIRRMA's jurisdictional expansion, which became clear from its investigation into TikTok, is that CFIUS can review any corporate acquisition on the basis that the acquired company satisfies the threshold number of one million U.S. users.¹⁷⁹ Thus, similar investigations into Chinese acquisitions of U.S. firms that collect user data are likely to continue and may become more frequent because data collection has become the norm for many corporations.¹⁸⁰ Without measures in place to prevent CFIUS from targeted investigations, the executive branch can take advantage of the corporate practice of collecting user data to launch CFIUS investigations that further a sitting President's policies and agenda.¹⁸¹

V. **STRIKING A BALANCE BETWEEN NATIONAL SECURITY AND FOREIGN INVESTMENT**

Congress has amended CFIUS's review jurisdiction four times since the Committee was created by executive order in 1975.¹⁸² Each amendment reflects congressional intent to modernize and strengthen CFIUS and to ensure that the foreign investment activity of adversaries will not threaten U.S. national security. FIRRMA represents Congress' most recent attempt to modernize and strengthen CFIUS's National Security Review powers.¹⁸³ While FIRRMA equips CFIUS with the tools to meet today's national security concerns, Congress has failed to provide both sufficient measures to hold CFIUS and the executive branch accountable for misusing foreign investment regulations to advance political objectives as well as mechanisms of transparency for parties conducting foreign transactions that ensure investor confidence in the review process. The Grindr and TikTok cases are recent examples of the secrecy that cloaks

¹⁷⁸ See Birnbaum, *supra* note 141 (quoting Derek Scissors, a resident scholar with the conservative American Enterprise Institute, who commented that Microsoft's involvement was "not normal.").

¹⁷⁹ 31 C.F.R. § 800.241(a)(1)(i)(A)–(C).

¹⁸⁰ See Birnbaum, *supra* note 141 (expressing the concerns of private sector attorneys).

¹⁸¹ See Birnbaum, *supra* note 141.

¹⁸² See discussion *supra* Part II–III.

¹⁸³ See discussion *supra* Part III.

CFIUS's review process.¹⁸⁴ Both cases have made clear that CFIUS fails to give foreign investors the transparency and certainty necessary to conduct proper international transactions.¹⁸⁵ Not only has CFIUS's recent actions left technology companies like Grindr and TikTok in the dark regarding the specific national security risks posed by their platforms, but CFIUS's recent politicization in the media and the inability for the other branches of government to adequately check CFIUS's power has caused the Committee to lose legitimacy in the eyes of foreign investors.¹⁸⁶

To address CFIUS's transparency and accountability issues, and to restore its legitimacy, this comment proposes that Congress should amend FIRRMA in three ways. First, Congress should decrease executive discretion by providing a more specific definition of national security through bright line factors that the President must evaluate when determining whether a transaction poses a national security threat. Second, Congress should strengthen congressional oversight by establishing a joint-congressional committee and by increasing the frequency of CFIUS's reporting requirements. Lastly, Congress should establish a special Article III court, the Foreign Investment Court, that will allow parties to bring claims against improper CFIUS investigations while preserving strict confidentiality of sensitive business information and executive discretion over issues of national security. This comment also argues that the proposed amendments must be made together, because each proposed amendment by itself will not prevent CFIUS from politicization or provide foreign investors with the transparency

¹⁸⁴ See discussion *supra* Part IV.A.1–2.

¹⁸⁵ See Justin Shields, *Smart Machines and Smarter Policy: Foreign Investment Regulation, National Security, and Technology Transfer in the Age of Artificial Intelligence*, 51 J. MARSHALL L. REV. 279, 293–94 (2018) (noting foreign investor's frustration with CFIUS's lack of transparency).

¹⁸⁶ Benjamin Horney, *3 Lingering Questions About Oracle's Deal With TikTok*, LAW360 (Sep. 21, 2020), <https://www.law360.com/articles/1312013/3-lingering-questions-about-oracle-s-deal-with-tiktok>; see also Kate O'Keeffe, *Trump Orders Broadcom to Cease Attempt to Buy Qualcomm*, WALL ST. J. (Mar. 13, 2018), <https://www.wsj.com/articles/in-letter-cfius-suggests-it-may-soon-recommend-against-broadcom-bid-for-qualcomm-1520869867> (highlighting private sector attorney's concerns that CFIUS review of Qualcomm was inconsistent with congressional intent).

and accountability necessary to conduct international business with confidence.

A. *Congressional Claw Back of CFIUS Discretion*

1. Defining National Security by Decreasing the President's Discretion

In reality, most foreign investments are innocuous. Yet, due to FIRRMA's broad definition of national security, CFIUS has discretion to investigate, moderate mitigation negotiations, and provide the President with terminating recommendations, all of which are subject to abuse. While broad discretion allows CFIUS to achieve its purpose of protecting national security, it also gives the President *carte blanche* to execute the White House's economic and political policies.

To begin, substituting more exacting, bright line standards for FIRRMA's broad language would limit the potential for CFIUS's powers to be misused. Specifically, Congress should amend FIRRMA's language to cabin the definition of "national security" by tightening the factors that the President and CFIUS may consider when determining whether a transaction poses a threat to national security. These factors should also recognize that user data is an integral part of many commercial ventures, and that while valuable, user data rarely raises significant national security concerns.

FIRRMA defines the term "national security" as risks that "include those issues relating to 'homeland security,' including its application to critical infrastructure."¹⁸⁷ There are strong policy justifications for defining national security broadly. First, national security threats are hard to pinpoint and are ever changing. Second, a broad definition prevents CFIUS and the President from being pigeonholed into responding to particularized national security threats. Third, allowing CFIUS and the President to have discretion in matters of national security allows for prompt and swift action when threats are identified.

While there are strong policy justifications against limiting

¹⁸⁷ 50 U.S.C. § 4565(a)(1).

the definition of national security, Congress should amend the national security factors under FIRRMA to recognize the importance of user data in modern commercial ventures. The eleven national security factors that CFIUS consults seem to focus primarily on transactions related to American military defense technology, and energy and mineral resource security, as well as the economic, military, and political relationships between the United States and the foreign countries.¹⁸⁸ Consequently, the only factor that can logically relate to user data concerns is the eleventh factor: “such other factors as the President or the Committee may determine to be appropriate.”¹⁸⁹ This eleventh factor is the *carte blanche* that gives unlimited discretion to the President and CFIUS to determine what may be an “appropriate” threat to national security.¹⁹⁰ Giving the executive branch such a broad mandate has the drawback of creating unpredictable standards for foreign investors. To provide foreign investors with confidence, this eleventh factor needs to be constrained to reflect CFIUS’s narrow focus “to review transactions for the purpose of protecting national security” and not to advance political ideology.¹⁹¹ Therefore, the eleventh factor should be removed. As a result, the President and CFIUS would be constrained to evaluate transactions that fall under the penumbra of national security created by the remaining ten factors. This will correctly balance the national security concerns that Congress intended CFIUS to investigate with the interests of foreign investment in technology and data driven companies that are vital to the American economy.¹⁹²

¹⁸⁸ *See id.* at § 4565(f)(1)–(11).

¹⁸⁹ *Id.* at § 4565(f)(11).

¹⁹⁰ *Id.*

¹⁹¹ *See id.* at § 4565(f)(1)–(11).

¹⁹² It is important to note that the eleven “factors to be considered” by the President when determining whether a transaction poses a national security risk have not been updated since FINSA was signed into law in 2007. *Compare* Foreign Investment and National Security Act of 2007, Pub. L. No. 110-49, § 4, 121 Stat. 246, 253–54, *with* 50 U.S.C. § 4565(f)(1)–(11). Therefore, the eleven national security factors were formulated before the smartphone revolution took off, which fostered the market for mobile applications like Grindr and TikTok.

2. Increasing Communications Between CFIUS and Congress

While narrowing the definition of national security can make navigating CFIUS's complex review process slightly simpler for foreign investors, it does not completely address CFIUS's accountability and transparency issues. To protect CFIUS from political abuse, Congress should further amend FIRRMA to increase congressional oversight. Congress should increase its oversight capabilities by creating a specialized joint-congressional committee and increasing CFIUS's reporting requirements.

Reporting requirements ensure congressional engagement in the CFIUS review process. Reporting requirements also keep Congress up-to-date on foreign investment trends, the volume of CFIUS reviews being conducted, and the pros and cons of CFIUS's review procedures. In theory, the proposed amendment to increase Congress' oversight of CFIUS will force CFIUS to disclose more information about how CFIUS conducts investigations. This, in turn, would benefit the public by giving foreign investors confidence that Congress will discover arbitrary and politically motivated national security determinations and hold CFIUS accountable.¹⁹³

Although strengthening congressional oversight may provide the benefits of accountability and transparency, at the same time, increasing communications between CFIUS and Congress poses many drawbacks. First, increasing reporting requirements to Congress runs the risk of compromising the confidentiality of sensitive business information. While CFIUS prides itself on strict observance of statutory confidentiality requirements, Congress is not necessarily bound by such strict provisions.¹⁹⁴ The second risk associated with increasing congressional involvement is that it can have the adverse effect of politicizing CFIUS even further. It is important to note that increasing Congress' involvement in the foreign transaction

¹⁹³ Robert N. Cappucci, *Amending the Treatment of Defense Production Enterprises Under the U.S. Exon-Florio Provision: A Move Toward Protectionism or Globalism?*, 16 *FORDHAM INT'L L. J.* 652, 667-68 (1993) (arguing that congressional oversight makes it difficult for the President and CFIUS to arbitrarily block or suspend foreign investments).

¹⁹⁴ Stagg, *supra* note 79, at 329.

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review process will not necessarily insulate the CFIUS from politicization. Private interest groups have strong influence on congressional decisions, which can lead to the “potential of political mischief.”¹⁹⁵ As elected officials, members of Congress are held accountable by the voters, and therefore, may be influenced by their constituents’ opinions, as well as the opinions of private interest groups that help fund congressional election campaigns. Interest groups lobby specific issues and work the legislature to achieve self-interested goals.¹⁹⁶ Thus, Congress is likely to receive information from interest groups that is both biased and inaccurate in order to advance specific, individualized agendas.¹⁹⁷ Allowing Congress more influence and involvement in the CFIUS review process may encourage private interest groups to increase pressure on Congress for the purpose of achieving a competitive advantage in the marketplace, rather than pressuring Congress to use oversight to ensure CFIUS is held accountable for taking action unrelated to national security concerns.

Nonetheless, the present level of congressional involvement in CFIUS is inadequate to check the executive branch’s almost unlimited discretion in foreign investment regulation. In order for increased congressional oversight to be effective, the first step would be to ensure the confidentiality of the sensitive information businesses disclosed to CFIUS and the determinations CFIUS makes based on that information. Thus, to ensure confidentiality, Congress should establish a joint-congressional committee and restrict CFIUS’s reporting requirements to only the members on the joint-congressional committee. Joint-congressional committee members would have

¹⁹⁵ Stagg, *supra* note 79, at 329 (arguing that heightened congressional involvement in CFIUS’s review process “will encourage the politicization of [foreign investment] transactions and discourage investment in the United States by threatening to compromise corporate confidentiality”).

¹⁹⁶ See Mathew D. McCubbins & Thomas Schwartz, *Congressional Oversight Overlooked: Police Patrols Versus Fire Alarms*, 28 AM. J. POL. SCI. 165, 172 (1984) (indicating that members of Congress are vulnerable to the “particularistic” views of interest groups).

¹⁹⁷ See David Epstein & Sharyn O’Halloran, *A Theory of Strategic Oversight: Congress, Lobbyists, and the Bureaucracy*, 11 J. L. ECON. & ORG. 227, 230 (1995) (stating that members of Congress are generally aware that interest groups have incentives to present one-sided facts to obtain favorable policies).

backgrounds in pertinent areas, such as national security, foreign investment, critical infrastructure, critical technologies, and data privacy.¹⁹⁸ The members of the proposed joint-congressional committee would not have access to the intricate details and documents that businesses provide to CFIUS, but instead would have access to CFIUS's investigative procedures and national security determinations.

With a joint-congressional committee in place to ensure confidentiality, the next step would be to increase the number of mandated reports CFIUS would provide to the proposed committee. Under FIRRMA's current language, CFIUS is only required to provide Congress with a single report "on all of the reviews and investigations of covered transactions completed . . . during the 12-month period covered by the report."¹⁹⁹ Congress should increase its oversight capabilities by amending FIRRMA to mandate that CFIUS provide, in addition to annual report Congress, a quarterly report to the proposed joint-congressional committee "on all of the reviews and investigations of covered transactions completed . . . *during each 3-month period.*"

Requiring CFIUS to provide the proposed joint-congressional committee with a report every three months is ideal because it is approximately the same amount of time CFIUS takes to conduct its foreign investment review on average.²⁰⁰ Thus, requiring CFIUS to provide the proposed joint-congressional committee with a report every three months would allow CFIUS to complete its review of covered transactions that occur each calendar quarter and provide legislatures with its findings and determinations.

Additionally, increased reporting requirements will deter improper CFIUS review. Instead of having to report to Congress once a year, reporting to the proposed joint-congressional

¹⁹⁸ See generally CHRISTOPHER M. DAVIS, CONG. RSCH. SERV., R42106, SECRET SESSIONS OF THE HOUSE AND SENATE: AUTHORITY, CONFIDENTIALITY, AND FREQUENCY (2014), <https://fas.org/sgp/crs/secrecy/R42106.pdf>.

¹⁹⁹ 50 U.S.C. § 4565(m)(1).

²⁰⁰ John Lash & Natasha Moore, *The Invisible Risks of CFIUS: Timing and Uncertainty*, FORBES (Aug. 27, 2020), <https://www.forbes.com/sites/riskmap/2020/08/27/the-invisible-risks-of-cfius-timing-and-uncertainty/?sh=612d5d8576b8> (claiming the average time from the beginning of CFIUS investigation to closing a deal was eighty-five days calendar days in 2019).

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committee four times a year decreases CFIUS's ability to avoid congressional critique. Therefore, increasing Congress' oversight of CFIUS ensures that arbitrary investigations and actions taken by the executive branch are questioned in a timely manner rather than at the end of the calendar year.

A drawback of providing the proposed joint-congressional committee with reports every three months is that it will increase CFIUS's workload, with the potential to cause further delays to an already densely packed docket. Nevertheless, such a tradeoff will promote accountability and transparency necessary to check CFIUS's abuse of expanded foreign investment review powers and will provide select members of Congress with important information on how the executive branch uses CFIUS. Congress can then use the information gathered each quarter to further amend CFIUS, making the Committee more efficient and less capable of politization. If an increased workload truly strains CFIUS's resources, Congress can always appropriate more funds to CFIUS or CFIUS could pass the cost of hiring more regulators to the transacting parties through increased filing fees.²⁰¹

Another justification for the proposed increased oversight is that it will complement FIRRMA's mitigation policies. Under FIRRMA, CFIUS "may . . . negotiate, enter into or impose, and enforce any agreement or condition with any party . . . in order to mitigate any risk of the national security of the United States."²⁰² Turning to the TikTok case, TikTok claims to have entered into mitigation negotiations with CFIUS and to have proposed an "extraordinary" plan that addressed all conceivable national security concerns.²⁰³ Yet, according to TikTok, CFIUS and the President never countered or commented on TikTok's mitigation proposals.²⁰⁴

Whether or not the facts presented in TikTok's complaint are accurate, the situation poses an alarming hypothetical where CFIUS and the President can force the divestiture of a foreign

²⁰¹ 50 U.S.C. § 4565(p)(2) (appropriating \$20,000,000 per year to CFIUS for fiscal years 2019–23); *see* 50 U.S.C. § 4565(p)(3) (authorizing CFIUS to impose reasonable filing fees).

²⁰² 50 U.S.C. § 4565(l)(3)(A)(i).

²⁰³ TikTok Complaint, *supra* note 165, at 25.

²⁰⁴ *See* TikTok Complaint, *supra* note 165, at 25.

company even when mitigation proposals successfully address all material national security concerns.²⁰⁵ An additional concern is that even when a foreign company mitigates all conceivable national security concerns, CFIUS and the President's decision to move forward with a forced divestment is not subject to judicial review.²⁰⁶ Thus, the mitigating party will never truly know whether they adequately addressed national security concerns or whether CFIUS and President acted arbitrarily for political gain.²⁰⁷

B. *Establishing the Foreign Investment Court*

In general, the judiciary is not involved in matters of national security.²⁰⁸ There are strong policy justifications for keeping national security issues away from the courts. First, Article III courts do not have access to the same intelligence information as the Commander-in-Chief.²⁰⁹ Second, unlike the Article III judges who are constitutionally guaranteed life tenure, the President is subject to the political process and can be punished at the polls for making national security decisions that voters disagree with.²¹⁰

The separation of powers doctrine also makes the standard Article III court an improper venue for determining national security issues. Article III judges afford great deference to the executive branch on matters of national security because the Constitution expressly allocates such power to the executive branch.²¹¹ Deference to executive branch decisions on national security stems from the President's inherent and plenary Article

²⁰⁵ See 50 U.S.C. § 4565(l)(3).

²⁰⁶ See 50 U.S.C. § 4565(e)(1) (“[t]he actions of the President . . . shall not be subject to judicial review.”).

²⁰⁷ See *id.* at § 4565(d)(1); see also *Ralls Corp. v. Comm. on Foreign Inv. in the U.S.*, 758 F.3d 296, 310 (D.C. Cir. 2014) (holding that the President's decision to block a transaction is not reviewable).

²⁰⁸ Eric A. Posner & Cass R. Sunstein, *Chevroning Foreign Relations Law*, 116 *YALE L. J.* 1170, 1207–08 (2007) (arguing that courts should defer to the President's national security judgment).

²⁰⁹ *Id.* at 1207.

²¹⁰ *Id.*

²¹¹ U.S. CONST. art. II, § 2; see also LOUIS HENKIN, *FOREIGN AFFAIRS AND THE U.S. CONSTITUTION* 137–48 (2d ed. 1996) (explaining that courts notoriously raise the political question doctrine to avoid hearing foreign affairs cases).

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II powers and the President's Commander-in-Chief powers.²¹² While the judiciary notoriously defers to the President's actions in regards to national security, the Supreme Court has made clear that the President's powers do not necessarily allow the executive branch to make unilateral decisions on the nation's economic affairs.²¹³ As a result, the Court has been more willing to scrutinize a President's national security determination that invades the powers granted to other branches of government by the Constitution.²¹⁴

With this in mind, FIRRMA subjects CFIUS to limited judicial review.²¹⁵ Under FIRRMA, actions or findings by CFIUS are subject to judicial review in the United States Court of Appeals for the District of Columbia.²¹⁶ FIRRMA, however, exempts from judicial review any action taken by the President after CFIUS's referral.²¹⁷ As a result, FIRRMA's judicial review provision is likely illusory. To illustrate, the United States Court of Appeals for the District of Columbia's ruling in *Ralls Corp. v. Committee on Foreign Investment in the United States*²¹⁸ makes clear that involving the judiciary in CFIUS matters carries very little bite.

Ralls Corp. remains the only judicial challenge brought against CFIUS. In *Ralls Corp.*, a Chinese-owned Delaware corporation with its principal place of business in Georgia, purchased four American LLCs that were in the windfarm development business in north-central Oregon (Ralls).²¹⁹ Although the transaction was between businesses incorporated in the United States, in June 2012, CFIUS initiated a National

²¹² U.S. CONST. art. II, § 2.

²¹³ *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 642–43 (Jackson, J., concurring).

²¹⁴ *See id.*; *see also* O'Keeffe, *supra* note 186 (noting that many corporate attorneys believed that CFIUS had overstepped its jurisdiction by blocking Broadcom and Qualcomm merger).

²¹⁵ *See* 50 U.S.C. § 4565(e)(2) (providing United States Courts of Appeals for District of Columbia Circuit with exclusive jurisdiction over civil action brought against CFIUS).

²¹⁶ *Id.*

²¹⁷ *See id.* § 4565(e)(1).

²¹⁸ *Ralls Corp. v. Comm. on Foreign Inv. in the U.S.*, 758 F.3d 296 (D.C. Cir. 2014).

²¹⁹ *Id.* at 304.

Security Review of Ralls acquisition of the Oregon windfarms because of their location near and within Navy airspace.²²⁰ During the initial thirty-day review, Ralls complied with CFIUS's requests and even gave a presentation to CFIUS officials on its operations.²²¹ Consistent with its theme of secrecy, however, CFIUS never "disclosed the information it reviewed."²²²

At the end of the thirty-day National Security Review, CFIUS concluded that Ralls' acquisition of the Oregon windfarms posed a national security threat and ordered Ralls to cease construction and to prevent all employees from accessing the windfarm sites.²²³ After prescribing the orders, CFIUS then initiated a forty-five-day National Security Investigation.²²⁴ Within three days of launching the National Security Investigation, CFIUS issued additional orders to Ralls, prohibiting the company "from completing any sale of the [windfarms] without first removing all items (including concrete foundations) from the [project site in Oregon]."²²⁵ In addition, CFIUS ordered Ralls to notify the Committee of any potential sale and that CFIUS retained the right to object to said sale.²²⁶ At the conclusion of its National Security Investigation, CFIUS submitted its recommendations to President Barack Obama, who ordered Ralls to divest its ownership of the windfarms.²²⁷

Ralls promptly challenged CFIUS's orders on due process grounds, claiming that it had the right under the Fifth Amendment to review and rebut the evidence CFIUS relied on in making its determination that the acquisition was a threat to national security.²²⁸ On appeal, the D.C. Circuit made two important rulings. First, the D.C. Circuit found that foreign

²²⁰ *Id.* at 305; *see also* Foreign Investment and National Security Act of 2007, Pub. L. No. 110-49, § 2(b)(1), 121 Stat. 246, 247 (exercising CFIUS's thirty-day National Security Review).

²²¹ *Id.*

²²² *Id.*

²²³ *Id.*

²²⁴ *Ralls Corp. v. Comm. on Foreign Inv. in the U.S.*, 758 F.3d 296, 305 (D.C. Cir. 2014); *see also* Foreign Investment and National Security Act of 2007 § 2(b)(2), 121 Stat. at 248 (exercising CFIUS's forty-five-day National Security Investigation).

²²⁵ *Id.*

²²⁶ *Id.*

²²⁷ *Id.* at 305–06.

²²⁸ *Id.*

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investors were not precluded from bringing claims against CFIUS even though the statutory text “precludes judicial review of ‘actions of the President.’”²²⁹ Second, the D.C. Circuit ruled that because Ralls had acquired property rights under Oregon law, President Obama’s divestment order “deprived Ralls of its constitutionally protected property interest [without due process of law].”²³⁰

Although the D.C. Circuit technically ruled in favor of the Chinese investors, the court’s ruling was narrow. First, aggrieved parties were precluded from judicial review except for constitutional challenges to CFIUS procedures for failing to provide due process of law.²³¹ Second, the D.C. Circuit held that due process does not require CFIUS or the President to disclose the reasoning for divestment.²³² Lastly, the D.C. Circuit reiterated that “due process does not require disclosure of *classified* information supporting official action.”²³³ Thus, to comply with due process, CFIUS and the President were only required to disclose to Ralls the unclassified information that the President relied upon in making the national security threat determination, and to allow Ralls the opportunity to dispute the unclassified information.²³⁴ Without bright line laws limiting the government’s ability to declare what is and what is not classified, the D.C. Circuit’s holding is problematic for foreign investors like Ralls Corp. because the government has discretion to mark all documents as classified information.²³⁵

With limited judicial review under FIRRMA and the D.C. Circuit’s narrow holding in *Ralls Corp.*, CFIUS has been able to engage in unreasonable conduct under both the Obama and Trump Administrations.²³⁶ Although protecting national security

²²⁹ *Id.* at 310.

²³⁰ *Ralls Corp. v. Comm. on Foreign Inv. in the U.S.*, 758 F.3d 296, 319 (D.C. Cir. 2014).

²³¹ *Id.*

²³² *Id.*

²³³ *See id.* (holding that the President’s decision to block a transaction is not reviewable).

²³⁴ *Id.* at 319–20.

²³⁵ *See* Chang Liu, Note, *Ralls v. CFIUS: The Long Time Coming Judicial Protection of Foreign Investors’ Constitutional Rights Against Government’s National Security Review*, 15 J. INT’L BUS. & L. 361, 375 (2016).

²³⁶ *See* Covington & Burling LLP, *President Obama Blocks Chinese Acquisition*

is an important function of the executive branch, national security concerns can be invoked in bad faith because of the presumption against judicial review. Both the Grindr and TikTok cases make clear that there is a need for judicial review over CFIUS proceedings.²³⁷ Thus, with both the current version of FIRRMA and the D.C. Circuit's holding in *Ralls Corp.* as precedent, injured parties are severely limited in seeking remedies for CFIUS misuse, making FIRRMA's grant of judicial review effectively legislative window-dressing.²³⁸

Introducing a strong judicial check to executive power will encourage CFIUS to adhere to the rule of law and not the pressures of the American political machine. CFIUS, acting as mere cog in said machine, has been able to avoid judicial review because of the judiciary's highly deferential role in national security matters. Thus, the issue is finding the correct balance on the spectrum of judicial review, where full access to the courts is located at one end and FIRRMA's limited access to the courts at the other, all while preserving the doctrine of separation of powers.

The predicament of balancing judicial review and national security is not novel; Congress addressed this issue in the context of warrantless wiretaps when it passed the Foreign Intelligence Surveillance Act ("FISA").²³⁹ FISA established the Foreign Intelligence Surveillance Court ("FISC"), an Article III court with the exclusive power to authorize electronic surveillance for national security purposes.²⁴⁰ Congress' intent in passing

of Aixtron SE, 2 (2016), https://www.cov.com/-/media/files/corporate/publications/2016/12/president_obama_blocks_chinese_acquisition_of_aixtron_se.pdf (arguing that the blocked Fujian-Aixtron transaction was an unusual use of CFIUS's powers); see also Paul Marquardt, *TikTok: Familiar Issues, Unfamiliar Responses*, CLEARLY FOREIGN INV. & INT'L TRADE WATCH (Aug. 6, 2020), <https://www.clearlytradewatch.com/2020/08/tiktok-familiar-issues-unfamiliar-responses> (indicating that it was unprecedented to review the merger between two foreign companies outside the United States).

²³⁷ See discussion *supra* Part IV.A.1–2.

²³⁸ See *Ralls Corp. v. Comm. on Foreign Inv. in the U.S.*, 758 F.3d 296, 301 (D.C. Cir. 2014).

²³⁹ Foreign Intelligence Surveillance Act of 1978, Pub. L. No. 95-511, 92 Stat. 1783 (codified at 50 U.S.C. §§ 1801–1885(c)).

²⁴⁰ Americo R. Cinquegrana, *The Walls (and Wires) Have Ears: The Background and First Ten Years of the Foreign Intelligence Surveillance Act of 1978*, 137 UNIV. PA. L. REV. 793, 794 (1989).

FISA and establishing FISC was to better balance civil liberties with the discretion afforded to the executive branch on matters of national security.²⁴¹ FISC is a specialized court that is composed of eleven district court judges who are appointed by the Chief Justice of the Supreme Court.²⁴² When the government wants to electronically surveil an individual, it applies to FISC for a warrant.²⁴³ A FISC judge is then assigned to review the government's application for electronic surveillance and conducts hearings on the application in a secure setting.²⁴⁴ FISA includes a list of standards that the assigned FISC judge must evaluate when determining whether electronic surveillance is justified.²⁴⁵ In the case of an appeal, a denied application is reviewed by a three-judge panel of federal appellate court judges who have also been appointed by the Chief Justice of the United States.²⁴⁶

Applying Congress' logic in balancing national security and civil liberties through the creation of FISC, Congress should introduce a new Article III court—the Foreign Investment Court—and model its structure after FISC. Similar to FISC, the Foreign Investment Court would be composed of a number of district court judges who would similarly be appointed by the Chief Justice of the Supreme Court.²⁴⁷ In creating the Foreign Investment Court, Congress could prescribe specific factors that the Chief Justice must consider when appointing federal district court judges to the Foreign Investment Court. For example, Congress could require the Chief Justice to appoint only district court judges that have experience in pertinent areas, such as national security law, foreign investment transactional law, international law, critical infrastructure, critical technologies, and U.S. businesses that collect and maintain personal data.²⁴⁸ By

²⁴¹ *Id.* at 811.

²⁴² 50 U.S.C. § 1803(a)(1) (2020).

²⁴³ *See id.* at § 1804(a); *see also* United States v. Belfield, 692 F.2d 141, 145 (D.C. Cir. 1982) (“To get such an order, a federal officer . . . must submit an application to one of the seven USFISC judges.”).

²⁴⁴ 50 U.S.C. §§ 1803–05.

²⁴⁵ *Id.* at § 1805.

²⁴⁶ *Id.* at § 1803(b).

²⁴⁷ *See id.* at § 1803(a)(1).

²⁴⁸ While finding district court judges with the proposed specialized backgrounds may prove to be difficult, only a few judges with specialized backgrounds would be necessary. From 2015 to 2019, transacting parties filed an

limiting the Foreign Investment Court to federal judges with specialized backgrounds, Congress would ensure the court's competency which, in turn, would yield immediate legitimacy.

The Foreign Investment Court would function similarly to any other Article III court allowing both CFIUS and the parties to the transaction to submit briefings, evidence, and oral arguments. To ensure confidentiality, the Foreign Investment Court's proceedings would be conducted in a highly secured setting, much like FISC, allowing for both the government to disclose classified national intelligence and the aggrieved parties to disclose sensitive business information.²⁴⁹ Then, like a traditional Article III court, the assigned judge would review the evidence and conduct a fact-intensive inquiry.

Applying the proposed Foreign Investment Court's framework to the TikTok case would solve a number of issues. First, a federal judge would evaluate the reasonableness of the national security concerns uncovered by CFIUS in its review of ByteDance's acquisition of Musical.ly. As previously noted, CFIUS did not provide TikTok with the specific details of what was uncovered during its investigation.²⁵⁰ Thus, permitting a judge to review CFIUS's specific concerns will allow the Foreign Investment Court to determine whether it was reasonable for CFIUS to conclude that TikTok's platform posed a threat to national security.

Additionally, the assigned judge would have access to the proposed mitigation measures TikTok submitted to CFIUS. If TikTok proposed mitigation measures that adequately addressed CFIUS's national security concerns, then the assigned judge would rule in favor of TikTok, allowing the government and TikTok to enter into a binding mitigation agreement. If TikTok

average of 118 cases with CFIUS, with approximately one case each year requiring the President to make a decision. *See* COMM. ON FOREIGN INV. IN THE U.S., ANN. REPORT TO CONG., 4 (2020), <https://home.treasury.gov/system/files/206/CFIUS-Public-Annual-Report-CY-2019.pdf>.

²⁴⁹ David Cole, *No Reason to Believe: Radical Skepticism, Emergency Power, and Constitutional Constraint*, 75 UNIV. CHI. L. REV. 1329, 1357 (2008) (arguing that courts can be trusted with classified information because data indicates that the courts leaked less classified information than the executive branch post-9/11).

²⁵⁰ TikTok Complaint, *supra* note 165, at 25–26; *see also* discussion *supra* Part IV.A.2.

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failed to propose mitigation measures that adequately addressed CFIUS's concerns, then the assigned judge would rule in favor of CFIUS, allowing the Committee to submit recommendations to the President, who can then take statutory action. Alternatively, if TikTok's proposed mitigation measures inadequately addressed CFIUS's national security concerns, the Foreign Investment Court would provide a secure forum for the two sides to negotiate a mitigation agreement in good faith that adequately addresses the national security concerns raised by CFIUS. If the two sides were to fail to come to an agreement, the assigned judge could rule on a mitigation agreement that balances the national security concerns of CFIUS with the business interests of TikTok.

A strong justification for establishing the Foreign Investment Court is that it would facilitate foreign investment in the United States by increasing foreign investor confidence. Due to the nature of national security intelligence and the sensitivity of competitive business information that would be disclosed behind the Foreign Investment Court's closed doors, not all decision-making would be made available to the public. Similar to FISC, however, Congress could prescribe the declassification of Foreign Investment Court decisions, orders, and opinions "that include[] a significant construction or interpretation of any provision of law."²⁵¹ The Foreign Investment Court will then create a positive feedback loop for the foreign investment community—the Foreign Investment Court will establish precedent, precedent in turn increases predictability, predictability increases foreign confidence in CFIUS, foreign confidence increases foreign investment activity in U.S. businesses, and increased foreign investment activity in U.S. businesses will inevitably create more Foreign Investment Court precedent.²⁵²

²⁵¹ 50 U.S.C. § 1872.

²⁵² Jeremy Waldron, *Stare Decisis and the Rule of Law: A Layered Approach*, 111 MICH. L. REV. 1, 9 (2012) (illustrating that precedent increases the predictability of legal outcomes).

VI. CONCLUSION

This comment advances two arguments. First, this comment demonstrates that FIRRMA lacks adequate congressional and judicial checks and balances necessary to deter executive abuse of CFIUS's review powers. As a result of FIRRMA's expansion of CFIUS's jurisdiction, the executive branch has been granted impermissible discretion to review foreign transactions, subjecting an important interagency committee tasked with protecting the country from national security threats to the turbulence of American politics. In turn, FIRRMA allowed former President Trump to weaponize CFIUS to advance isolationist policies under the guise of national security and will continue to allow sitting Presidents to act similarly.

Second, this comment argues the need to amend FIRRMA so that the foreign investment review power is properly distributed between the three branches of government. To shift power away from CFIUS and the President, FIRRMA should be amended to narrow the definition of national security in manner that recognizes the importance of personally identifiable data in today's digital society. To shift power back to the legislature, provisions should be added to FIRRMA that establish a joint-congressional committee and increase congressional oversight requirements. Lastly, Congress should expressly grant judicial review for aggrieved parties through the creation of the proposed Foreign Investment Court to ensure investor confidence in American foreign investment regulation. By reeling in foreign investment review power from the executive branch and distributing it among the legislative and judicial branches of government, the opportunity for CFIUS to become politicized will be greatly diminished with the benefit of providing transparency and certainty to foreign investors.