# RICE PADDIES ON THE WHITE HOUSE LAWN: CFIUS & THE FOREIGN CONTROL REQUIREMENT

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*Our peaceful trading partners are not our enemies; they are our allies. We should beware of the demagogs who are ready to declare a trade war against our friends—weakening our economy, our national security, and the entire free world—all while cynically waving the American flag. The expansion of the international economy is not a foreign invasion; it is an American triumph, one we worked hard to achieve, and something central to our vision of a peaceful and prosperous world of freedom.*[1] *– President Ronald Reagan*

*Americans have long been skeptical of foreign investment in American companies. Since the end of the Second World War, Congress and Presidents have utilized the Committee on Foreign Investment in the United States (CFIUS) to monitor foreign investments in the U.S. with national security concerns. However, determining what is "foreign" for CFIUS review purposes is not a straight-forward analysis given increasingly complex financing structures. This Note traces developments in case law from an early twentieth-century case involving the treatment of a "colorless" corporation wholly owned by African-Americans, to mid-century Trading With the Enemy Act cases during the Second World War, to a more recent case involving an American company wholly owned by Chinese nationals. Modern courts have found that corporations can take on the race or national identity of their founders or investors, which, as this Note describes in greater detail below, represents a shift in how the courts view corporat-ions. Additionally, this Note describes the inadvertent foreign person problem where a corporation majority-owned by Americans, incorporated in America, and*

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[1] President Ronald Reagan, President of the U.S., *Radio Address to the Nation on the Canadian Elections and Free Trade*, RONALD REAGAN PRESIDENTIAL LIBRARY & MUSEUM (Nov. 26, 1988), https://www.reaganlibrary.gov/research/speeches/112688a.

*solely operated in America could become foreign for CFIUS purposes if the corporation received a substantial amount of foreign investment.*

*This Note will recommend that CFIUS stop using the foreign control analysis as a gatekeeping function. Instead, CFIUS should shift the foreign control analysis to the formal review stage and use the scale of foreign control as informative rather than dispositive. This solution addresses national security concerns, promotes efficiency and effectiveness for all three branches of government as well as private industry, and adheres to American free-market and anti-discriminatory policies.*



## I. INTRODUCTION

The Committee on Foreign Investment in the United States (CFIUS) has broad power to review and investigate transactions that

have potential "national security" implications.[2] However, the review process only applies to "foreign"[3] persons or entities making an investment or acquisition that would lead them to control a U.S. based business.[4] While significant attention has been paid to treatment of businesses based on their country of origin (China in particular)[5] and the specific industries that fall under CFIUS' "national security" purview,[6] very little scholarship has focused

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[2] JAMES K. JACKSON, CONG. RESEARCH SERV., RL33388, THE COMMITTEE ON FOREIGN INVESTMENT IN THE UNITED STATES (CFIUS) 1 (2018).

[3] Foreign Entity, 31 C.F.R. § 800.212 (2018) ("[F]oreign entity" is defined in the statute as "[a]ny branch, partnership, . . . corporation . . . or organization organized under the laws of a foreign state if either its principal place of business is outside the United States or its equity securities are primarily traded on one or more foreign exchanges."); Foreign Person, 31 C.F.R. § 800.216 (2018) ("[F]oreign person" is defined in the statute as "[a]ny foreign national, foreign government, or foreign entity" or "[a]ny entity over which control is exercised or exercisable by a foreign national, foreign government, or foreign entity.").

[4] 31 C.F.R. § 800.212; 31 C.F.R. § 800.216; Transaction, 31 C.F.R. § 800.224 (2018) ("[T]ransaction" is defined in the statute as "a proposed or completed merger, acquisition, or takeover.").

[5] *See* Joshua W. Casselman, *China's Latest 'Threat' to the United States: the Failed CNOOC-UNOCAL Merger and Its Implications for Exon-Florio and CFIUS*, 17 IND. INT'L & COMP. L. REV. 155 (2007) (examining CFIUS' role in a failed merger between a Chinese oil company and an American oil company); Stephen Sothmann, *Let He Who is Without Sin Cast the First Stone: Foreign Direct Investment and National Security Regulation in China*, 19 IND. INT'L & COMP. L. REV. 203 (2009) (comparing Chinese protectionist policies to CFIUS); Angela Huyue Zhang, *Foreign Direct Investment from China: Sense and Sensibility*, 34 NW. J. INT'L L. & BUS. 395, 395 (2014) (focusing on how organizations can leverage "public fear" of Chinese investment).

[6] *See* Christopher M. Tipler, *Defining 'National Security': Resolving Ambiguity in the CFIUS Regulations*, 35 U. PA. J. INT'L L. 1223 (2014) (stating that Congress has not properly defined "national security" for CFIUS review purposes); Joanna Rubin Travalini, Comment, *Foreign*

on how the committee determines whether a business is "foreign" in the first place. If CFIUS' review process hinges on the national identity of at least two businesses (the investor(s) and the investee(s)),[7] how is a business' national identity determined with increasingly complex and cross-border deals? The stakes are high—CFIUS has indefinite jurisdiction[8] and the ear of the President and Congress.[9] There is no clear-cut test to determine nationality,[10] which, this Note argues, leads to over-policing companies and individuals considered "foreign."[11] Most of the relevant scholarship on CFIUS to date, if it discusses nationality at all, focuses on sovereign wealth funds (SWFs), which are investment

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*Direct Investment in the United States: Achieving a Balance Between National Economy Benefits and National Security Interests*, 29 NW. J. INT'L L. & BUS. 779, 785 (2009) (addressing how 9/11 impacted the way CFIUS reviews transactions for "national security" implications); Christopher M. Weimer, *Foreign Direct Investment and National Security Post-FINSA 2007*, 87 TEX. L. REV. 663 (2009) (focusing on which types of transactions impact national security); Christopher Fenton, Note, *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 (2002) (stating that post-9/11 focus on national security and FDI increases executive authority to alter cross-border transactions).

[7] JACKSON, *supra* note 2, at 1, 9. Both sides of the transaction matter for CFIUS review purposes. CFIUS only reviews transactions that may pose "a risk to the national security," so the investee(s) identity also matters for determining if the transaction will impact national security. *Id.*

[8] Thomas M. Shoesmith et al., *CFIUS: Inadvertent "Foreign Person" Status*, PILLSBURY WINTHROP SHAW PITTMAN LLP 2 (2018), https://www.pillsburylaw.com/images/content/1/1/v2/118163/Client-Briefing-CFIUS-Inadvertent-Foreign-Person-Status-Jul.-2.pdf.

[9] JACKSON, *supra* note 2, at 1; *see infra* Section II.B. (CFIUS Creation and Purpose).

[10] *See infra* Section III.A. (Challenges in Determining Corporate Identity).

[11] *See infra* Section II.B. (CFIUS Creation and Purpose).

funds closely affiliated with a sovereign government, or on state-owned enterprises (SOEs), which are run under the control of a sovereign government.[12] This Note attempts to fill the gap of legal scholar-ship analyzing CFIUS through the lens of what it means to be "foreign." Over-policing of foreign investment in the name of national security via CFIUS has led to decreased investment in the U.S. from China,[13] will likely lead to overall decreased invest-

[12] Adam Gutin, Comment, *Regulating Sovereign Wealth Funds in the U.S.: A Primer on SWFs and CFIUS*, 5 FIU L. REV. 745 (2010) (discussing the impact that SWFs have on national security); Locknie Hsu, *SWFs, Recent US Legislative Changes, and Treaty Obligations*, 43 J. WORLD TRADE 451 (2009) (analyzing how treaty obligations and governance guidelines impact SWFs' FDI); Gil Lan, *Foreign Direct Investment in the United States and Canada: Fractured Neoliberalism and the Regulatory Imperative*, 47 VAND. J. TRANSNAT'L L. 1261 (2014) (comparing American and Canadian treatment of SOEs and SWFs); Gerard Lyons, *State Capitalism: The Rise of Sovereign Wealth Funds*, 14 L. & BUS. REV. AM. 179 (2007) (examining protectionist backlash against SWFs).

[13] Alan Rappeport, *In New Slap at China, U.S. Expands Power to Block Foreign Investments*, N.Y. TIMES (Oct. 10, 2018), https://www. nytimes .com/2018/10/10/business/us-china-investment-cfius.html ("[F]rom the first half of 2017 to the first half of 2018" FDI from China "fell more than 90 percent . . . .").

ment in the U.S.,[14] and is contrary to U.S. free-market values of anti-discrimination.[15]

Part I of the Note will focus on the history and purpose of CFIUS and foreign direct investment (FDI) in the U.S. While CFIUS was initially formed to curb harsher legislation that would have prevented foreigners from investing in the U.S. whatsoever, over

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[14] Katy Stech Ferek, *U.S. Seeks to Heighten Scrutiny of Foreign Investment in Tech, Infrastructure, Data*, WALL STREET JOURNAL (Sept. 17, 2019, 5:48 PM), https://www.wsj.com/articles/u-s-seeks-to-heighten-scrutiny-of-foreign-investment-in-technology-infrastructure-data-11568750471 (stating that new restrictions on foreign investment "could scare off foreign money that has been a lifeline to such companies as Silicon Valley startups and biotech enterprises."); Steve Dickman, *US Crackdown On Foreign Biotech Investment Makes Us Poorer, Not Safer*, FORBES (May 24, 2019, 7:21 AM), https://www.forbes.com/sites/stevedickman/2019/05/24/us-crackdown-on-foreign-biotech-investment-makes-us-poorer-not-safer/#5f96acdd5581 (explaining that the "updated version" of "CFIUS immediately triggered layoffs and reduced international fund flows into biotech companies.").

[15] Robert H. Mundheim & David W. Heleniak, *American Attitudes Toward Foreign Direct Investment in the United States*, 2 J. COMP. CORP. L. & SEC. REG. 221, 222 (1979) ("Development of the open [investment] policy is due in part to [the American] belief in the free market system, and in part to a careful and pragmatic assessment of our national self-interest."); *see also* Mina Gerowin, Note, *U.S. Regulation of Foreign Direct Investment: Current Developments and the Congressional Response*, 15 VA. J. INT'L L. 611, 633 (1975) ("The foundation of [the policy of unrestricted investments] is the maintenance of a strong belief in the free market as a means of achieving maximum efficiency in the allocation of scarce resources. As the strongest force in the market, the United States also stands to gain the most from it."); *but see Does the Free Market Protect Against Discrimination?*, BERKELEY ECON. REV. (Apr. 20, 2018), https://econreview.berkeley.edu/does-the-free-market-protect-against-discrimination/ ("[W]e should recognize that while the free market may disincentivize discrimination, it is not a sufficient force to eliminate it.").

time, CFIUS has become a powerful tool to limit foreign investment under the guise of national security concerns. Part II of the Note will focus on the case law surrounding corporate personhood and the racial and national identity of businesses. Additionally, Part II contains a case study illustrating the challenge of determining a business' national identity in complex private equity investment structures. Part III of the Note will recommend that CFIUS stop using the "foreign" control analysis as a gatekeeping function. Instead, CFIUS should review all relevant transactions that impact national security and use the "foreign" control analysis during the formal review stage. This solution promotes legal clarity and adheres to American free-market and anti-discriminatory policies.

## II. FOREIGN DIRECT INVESTMENT IN THE UNITED STATES AND THE CREATION OF CFIUS

CFIUS' role in reviewing foreign investments is critical because the U.S. is the largest recipient in the world of FDI.[16] Americans benefit from the presence of foreign investment in the U.S. Over 7 million Americans work for "foreign-owned firms" in the U.S.[17] and, in 2013, "foreign-owned companies" paid over 16% of the total revenue from U.S. federal corporate income tax.[18] Additionally, "foreign sources" filed for over 50% of recent utility

[16] *FDI In The USA*, U.S. DEP'T OF COMMERCE, https://www.selectusa.gov/why-fdi. The large volume of FDI in the U.S., combined with the potential that bad actors would target the U.S., put pressure on the U.S. government, and CFIUS specifically, to monitor foreign investment in the U.S. JACKSON, *supra* note 2, at 1–3; *see infra* note 22 and accompanying text.

[17] *Benefits of Foreign Direct Investment (FDI)*, U.S. DEP'T OF COMMERCE, https://www.selectusa.gov/FDI-benefits (reporting the U.S. Bureau of Economic Analysis's calculation as of 2016).

[18] *Id.* (reporting the Internal Revenue Service's calculation as of 2013).

patents.[19] However, along with the benefits of FDI, there are concerns that foreign countries will use investment opportunities to conduct espionage on the U.S.[20] These concerns have some merit. From 2018 to 2019, the U.S. Department of Justice brought several federal indictments against Chinese nationals for economic espionage.[21] To counter foreign governments' attempts to use FDI for nefarious purposes, the U.S. government relies on CFIUS to review filings made by companies conducting trans-actions in "national security" industries.[22]

Initially, Congress created the legislative precursor to CFIUS as a data gathering committee.[23] President Gerald Ford formed the data gathering committee as a concession to members of

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[19] *Id.* (reporting the U.S. Patent Office's calculation as of 2016). A utility patent "protects the way an article is used and works," whereas a design patent "protects the way an article looks." THE UNITED STATES PATENT AND TRADEMARK OFFICE, https://www.uspto.gov/web/offices/pac/mpep/s1502.html.

[20] JACKSON, *supra* note 2, at 21.

[21] U.S. DEP'T OF JUSTICE, TWO CHINESE HACKERS ASSOCIATED WITH THE MINISTRY OF STATE SECURITY CHARGED WITH GLOBAL COMPUTER INTRUSION CAMPAIGNS TARGETING INTELLECTUAL PROPERTY AND CONFIDENTIAL BUSINESS INFORMATION (2018), https://www.justice.gov/opa/pr/two-chinese-hackers-associated-ministry-state-security-charged-global-computer-intrusion; Katie Benner, *Chinese Officer Is Extradited to U.S. to Face Charges of Economic Espionage*, N.Y. TIMES (Oct. 10, 2018), https://www.nytimes.com/2018/10/10/us/politics/china-spy-espionage-arrest.html; Katie Benner, *Chinese Intelligence Officers Accused of Stealing Aerospace Secrets*, N.Y. TIMES (Oct. 30, 2018), https://www.nytimes.com/2018/10/30/us/politics/justice-department-china-espionage.html?module=inline; Alan Rappeport, *Justice Department Charges Chinese Company With Espionage*, N.Y. TIMES (Nov. 1, 2018)https://www.nytimes.com/2018/11/01/us/politics/chinese-company-espionage-charges.html
[hereinafter *China Economic Espionage*].

[22] JACKSON, *supra* note 2, at 21.

[23] Gerowin, *supra* note 15, at 612.

Congress who wanted to severely limit FDI in the U.S.[24] However, over time, the data gathering committee transformed from "obscurity" to a powerful tool controlling which foreign investors can access U.S. markets and invest in national-security-related industries.[25]

Part I reviews the importance of FDI in the U.S. and CFIUS' transformation over time. Each time Congress has altered CFIUS' role, it was responding to public outcry over foreign investors becoming more influential in American businesses. Part I shows that public uproar has historically followed increased investment from Asia or the Middle East. Presidents have alluded to the idea that this public outcry is at least partially driven by racial discrimination.[26] Each time Congress has reviewed CFIUS, it has ratcheted up the organization's influence and authority to review transactions with foreign control that impact national security.[27]

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[24] *Id.* at 633.

[25] JACKSON, *supra* note 2, at 1, 5–6.

[26] President Ronald Reagan, President of the U.S., *Radio Address to the Nation on the Canadian Elections and Free Trade*, *supra* note 1 ("The expansion of the international economy is not a foreign invasion . . . ."); David E. Sanger, *Under Pressure, Dubai Company Drops Port Deal*, N.Y. TIMES (Mar. 10, 2006), https://www.nytimes.com/2006/03/10/politics/under-pressure-dubai-company-drops-port-deal.html (President George W. Bush "issued a strong defense [of the DP World deal], suggesting that racial bias lay at the core of the objections . . . ."). Additionally, commentators have pointed out that opposition to these transactions is driven by racism. Gideon Rose, *Racism is Behind DP World Port Furore*, FIN. TIMES (Feb. 27, 2006), https://www.ft.com/content/72cf6ad8-a6f7-11da-b12c-0000779e2340 (arguing that racism drove the public's outrage over the DP World and not xenophobia because other foreign companies had run the ports previously without any public outcry).

[27] Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100–418, § 5021, 102 Stat. 1110 (1988) (giving "the President or the President's designee" the power to "investigate" foreign investment activity); National Defense Authorization Act for Fiscal Year 1993, Pub. L. No. 102–484, 106 Stat. 2315 (1992) (CFIUS is required to

### A. History of Foreign Direct Investment in America

FDI is defined as a "cross-border investment made by a resident in one economy" in a different economy.[28] One of the first major upticks in FDI came after World War II, when there was an "unparalleled explosion of economic growth throughout Europe and the United States."[29] In 1973, there was an abrupt $2 billion surge in FDI in the U.S. (total accumulated FDI at the time was $16.5 billion)[30] driven by investment from western Europe, Japan, and the newly created Organization of Petroleum Exporting Countries (OPEC).[31] Politicians began to question the

investigate "any instance" in which a foreign investor attempted "a merger, acquisition, or takeover which could result in control of a person engaged in interstate commerce . . . that could affect the national security of the United States."); Exec. Order No. 13456, 73 Fed. Reg. 4677 (Jan. 25, 2008) (CFIUS has the ability to add committee members from "any other executive department, agency, or office, as the President or the Secretary of the Treasury determines appropriate . . . ."); Alexandra Yoon-Hendricks, *Congress Strengthens Reviews of Chinese and Other Foreign Investments*, N.Y. TIMES (Aug. 1, 2018), https://www.nytimes.com/2018/08/01/business/foreign-investment-united-states.html?module=inline (FIRRMA expanded CFIUS' jurisdiction to "joint ventures, minority stakes, and real estate transactions near military bases or other sensitive national security facilities.").

[28] ORGANIZATION FOR ECONOMIC COOPERATION AND DEVELOPMENT, OECD BENCHMARK DEFINITION OF FOREIGN DIRECT INVESTMENT 17 (4th ed. 2008).

[29] Terry R. Spencer & Christian B. Green, *Foreign Direct Investment in the U.S.: An Analysis of Its Potential Costs and Benefits and a Review of Legislative Tools Available to Shape Its Future Course*, 6 TRANSNAT'L L. 539, 541 (1993).

[30] SENATOR WARREN G. MAGNUSON (WA-D), Foreign Investment Study Act of 1974, S. REP. NO. 93-910, at 2 (1974) (Conf. Rep.).

[31] Mundheim & Heleniak, *supra* note 15, at 222.

volume of FDI and its impact on the American workforce[32] in the context of public concern regarding "an imminent Arab takeover."[33] While there was a legitimate concern over how to manage a large influx of foreign capital, there were also "elements of discrimination and protectionism."[34] From 1973 to 1977, legislators introduced a variety of bills to oversee, control, and, to some extent, discourage FDI.[35] For example, the Dent-Gaydos bill, which ultimately failed in Congress, would have prevented foreigners from "acquiring more than five percent of voting securities of any publicly-held corporation."[36] Other failed pieces of legislation proposed preventing foreigners from owning more than ten percent of voting shares of publicly traded corporations involved in energy or defense, and establishing a commission to prevent foreign ownership in companies important to the "economic security and national defense" of the country.[37]

In 1974, Congress did successfully pass the Foreign Investment Study Act, which directed the Secretaries of Treasury and Commerce to "conduct a comprehensive, overall study of foreign direct and portfolio investments" in the U.S.[38] The Ford

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[32] Gerowin, *supra* note 15, at 641 ("[A]s unemployment and inflation spiral in the country [more restrictive investment policies] are now gaining even greater popularity in Congress."); Spencer & Green, *supra* note 29, at 542 ("By the mid-1970s, the laissez-faire policy toward FDI taken by the U.S. government came into serious question due to the short term adjustment costs associated with increased FDI, such as the closing of less efficient facilities.").

[33] Gerowin, *supra* note 15, at 611.

[34] Mundheim & Heleniak, *supra* note 15, at 222.

[35] *Id.* The 93rd Congress was inaugurated on January 3, 1973 and served through January 3, 1975. The 94th Congress was inaugurated on January 3, 1975 and served through January 3, 1977.

[36] Gerowin, *supra* note 15, at 612.

[37] Mundheim & Heleniak, *supra* note 15, at 222.

[38] Foreign Investment Study Act of 1974, Pub. L. No. 93-479, 88 Stat. 1450 (15 U.S.C. § 78b note).

Administration, which was pro-trade,[39] used the Foreign Investment Study Act to forestall more "restrictive legislation" that would have significantly restricted FDI.[40] In the report accompanying the bill, the Committee on Commerce stated that "[i]t is foreign direct investment which disturbs most individuals since this type of investment implies a degree of foreign control."[41] However, Sidney Weintraub, Deputy Assistant Secretary for International Finance and Development, was concerned that the Foreign Investment Study Act could be "misinterpreted . . . as signaling a move toward a more restrictive U.S. Government policy toward foreign investment."[42] Weintraub added that foreigners could misunderstand Congress' posturing and that "such a misinterpretation could have an unfortunate negative impact on the attractiveness of the United States to foreign investors," even if Congress did not ultimately take a more "protectionist" stance towards foreign investment.[43] Upon signing the bill into law, President Ford stated "[a]s I sign this act, I reaffirm that it is intended to gather information only. It is not in any sense a sign of a change in America's traditional open door policy towards foreign investment."[44]

Despite the passage of the Foreign Investment Study Act, members of Congress continued to propose legislation seeking to

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[39] ROBERT A. PASTOR, CONGRESS AND THE POLITICS OF U.S. FOREIGN ECONOMIC POLICY 341 (U.C. Press eds., 1980). President Ford's stated approach on FDI was "freer trade and enhanced global economic stability and prosperity." *Id.* (quoting International Economic Report of the President, 1976, p. iii). However, President Ford was also concerned with unemployment, which could be considered to be a "competing goal[]" with increasing trade. *See Id.*

[40] Gerowin, *supra* note 15, at 612.

[41] S. REP. NO. 93-910, at 2.

[42] *Id.* at 10 (Weintraub's testimony on March 7, 1974).

[43] *See id.*

[44] Statement on Signing the Foreign Investment Study Act of 1974, Aug. 9 to Dec. 31, 1974, PUB. PAPERS 479 (Oct. 28, 1974).

monitor or limit FDI.[45] In committee hearings, government agency leaders expressed concerns about "overreacting" to FDI and the new proposals' real and perceived discrimination against foreign investors.[46] In a statement to the Senate, Thomas Enders, the Assistant Secretary for Economic and Business Affairs, suggested that, because the Securities and Exchange Commission (SEC) already collected both foreign and domestic investment information, agencies could leverage the SEC's data set rather than collecting their own.[47] Using the SEC as a data gathering channel would avoid placing "special reporting burdens on foreign investors only" and thus reduce the "appearance of discrimination against foreign investors."[48] Concerned that Congress would continue to propose legislation limiting FDI, the Ford Administration proposed a committee approval process that would "dissuade Congress from enacting new restrictions."[49]

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[45] Mundheim & Heleniak, *supra* note 15, at 222.

[46] Thomas O. Enders, *Department Gives Views on Bills Relating to Foreign Investment in the United States*, THE DEPARTMENT OF STATE BULLETIN Volume LXXII, No. 1876, 779, 782 (1975) (testifying before the Senate Subcommittee on Foreign Commerce and Tourism of the Senate Committee on Commerce).

[47] *Id.* at 781. The Williams Act of 1968 amended the Securities Exchange Act of 1934 to require that any person or entity who obtains 5% or more of a publicly traded corporation's equity must file a schedule 13D with the SEC. Percolating in the background of the foreign person disclosure is that the SEC already required any person or entity, domestic or foreign, to publicly disclose this information to the SEC. Enders did not think there needed to be an additional reporting requirement that only burdened foreign investors. *Id.*

[48] *Id.*

[49] JACKSON, *supra* note 2, at 1 (quoting *The Operations of Federal Agencies in Monitoring, Reporting on, and Analyzing Foreign Investments in the United States: Hearing Before the Subcomm. on Commerce, Consumer, and Monetary Affairs of the H. Comm. on Government Operations*, 96th Cong., 1st Sess. 334–335 (1979).

### A. CFIUS Creation and Purpose

In order to prevent Congress from enacting severe restrictions on foreign investment, in 1975, President Ford signed an Executive Order establishing CFIUS.[50] The Secretary of the Treasury would serve as the chairman and the Committee would include representatives from the State Department, the Treasury Department, the Defense Department, and the Commerce Department, as well as the Assistant to the President for Economic Affairs and the Executive Director of the Council on International Economic Policy.[51] The Committee was charged with "monitoring" foreign investment in the United States, including analyzing large-scale market changes, proactively working with foreign governments making large investments in the U.S., "reviewing investments" with "major implications" for the U.S., and "consider[ing] proposals for new legislation or regulations relating to foreign investment."[52]

Over the next decade, CFIUS operated in "relative obscurity" until Congress was motivated to codify the executive order due to an unexpected increase in FDI from Japan.[53] One particular transaction caught the attention of both the government and the general public. In 1987, Fujitsu Ltd. (a Japanese company) attempted to buy Fairchild Semiconductor Corporation (an American company), which specialized in computer chips.[54] The Defense Secretary and Commerce Secretary unsuccessfully requested that the Reagan Administration block the acquisition for national security reasons.[55] However, the New York Times reported that, beyond the national security concerns, "some

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[50] Foreign Investment in the United States, Exec. Order No. 11858, 40 Fed. Reg. 20,263 (May 7, 1975); JACKSON, *supra* note 2, at 1.
[51] Foreign Investment in the United States, *supra* note 50.
[52] *Id.*
[53] JACKSON, *supra* note 2, at 4–5.
[54] David E. Sanger, *Japanese Purchase of Chip Maker Canceled After Objections in U.S.*, N.Y. TIMES, Mar. 17, 1987, at 1.
[55] *Id.*

Federal officials" were concerned with "the mounting trade friction with Japan . . . particularly in strategically important high technology."[56] Despite the more laissez-faire approach of the Reagan Administration, Congressional Democrats were opposed to increased FDI.[57] Congress responded to increased Japanese investment with legislation either monitoring or limiting FDI, in much the same way it responded to Middle Eastern investment in the 1970s.[58] In a floor statement for legislation requiring foreigners to disclose their American investments,[59] Representative Traficant (D-OH) stated:

> [The Japanese] are buying up our banks and our securities . . . Our soldiers won the war, but Congress is letting Japan win the peace. And all of these other Europeans who keep our products and laugh in our face . . . The day will come when American's cash crops will not be soybeans and wheat and corn; they will be rice, and we will have

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[56] *Id.*

[57] *See* Spencer & Green, *supra* note 29, at 543 ("The Reagan administration, however, took a more aggressive approach by undertaking to promote rather than limit FDI."). At this period in time, many liberal democrats were anti-trade and "argued that increases in FDI were nothing more than opportunistic efforts by foreign nationals to take advantage of the relatively weak U.S. economy . . . ." *Id.* Many liberal democrats believed that job losses during this time frame were directly connected to the surge in FDI. In his floor speech on HR 5410, Representative Traficant said "[w]e have lost 55,000 jobs in my district . . . in the last 10 years that averaged $12 per hour . . . . You know what we have gotten? About 7,000 jobs that pay an average of $3.50 to $5.50 . . . ." 134 CONG. REC. 8, at 107 (1988).

[58] Mundheim & Heleniak, *supra* note 15, at 222.

[59] Representative Traficant speaking on HR 5410. HR 5410 was similar to the Foreign Investment Study Act in that it required a separate reporting requirement for foreign investors which was duplicative of the data the SEC already gathered.

> a rice paddy on the East Lawn of the White House. We ought to be ashamed of ourselves.[60]

As a result of growing concern over foreign investment, Congress passed the Omnibus Trade and Competitiveness Act of 1988.[61] The bill included the Exon-Florio Amendment, which gave "the President or the President's designee" the power to "investigate" foreign investment activity like the proposed Fujitsu Ltd. acquisition.[62] The bill effectively codified President Ford's executive order establishing the CFIUS review process.[63] When President Reagan issued an executive order making CFIUS his delegate for overseeing the Exon-Florio provisions,[64] CFIUS transformed from an "obscure" administrative committee with "limited authority" to an "important component of U.S. foreign investment policy with a broad mandate."[65]

For several years, CFIUS had discretion over which transactions to investigate,[66] but in 1993, Congress amended Exon-Florio with the Byrd Amendment, which mandated that CFIUS investigate specific types of transactions.[67] After the Byrd Amendment was signed into law, CFIUS was required to investigate "any instance" in which a foreign investor attempted "any merger, acquisition, or takeover which could result in control of a person engaged in

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[60] 134 CONG. REC. 828, at 501 (1988).
[61] JACKSON, *supra* note 2, at 5-7.
[62] P.L. 100-418, Title V, Section 5021, August 23, 1988; 50 U.S.C. § 2170 (now 50 U.S.C. § 4565 (2018); Marc Greidinger, *Exon-Florio Amendment: A Solution in Search of a Problem*, 6 AM. U. INT'L L. REV. 111, 115 (1991).
[63] JACKSON, *supra* note 2, at 5–6.
[64] *Id.* at 6.
[65] *Id.* at 5–6.
[66] Foreign Investment in the United States, Exec. Order No. 11858, 3 CFR 990 (1971-1975) (CFIUS "may conduct its own inquiry with respect to the potential national security risk posed by a transaction . . . .").
[67] JACKSON, *supra* note 2, at 8 (the Byrd Amendment was part of the "National Defense Authorization Act for Fiscal Year 1993").

interstate commerce . . . that could affect the national security of the United States."[68] The Byrd Amendment's mandate was tested in 2006, when DP World (an SOE from the United Arab Emirates) attempted to acquire Peninsular & Oriental Steam Navi-gation (P&O, a British company).[69] P&O ran six American ports, including one in New York City.[70] CFIUS reviewed and approved the transaction.[71] Shortly thereafter, Senator Chuck Schumer (D-NY) called for additional scrutiny of the transaction and held a press conference with 9/11 victims' families.[72] While there was no debate about whether DP World was "foreign controlled" (it was clearly controlled by the United Arab Emirates), the potential transaction spurred a national debate on whether a company's nationality in itself can pose a national security concern; "pro-tecting the homeland" became a "sort of super-national security" issue.[73] Despite the public outcry, President George W. Bush strongly

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[68] P.L. 102-484, National Defense Authorization Act for Fiscal Year 1993, October 23, 1992.

[69] Deborah M. Mostaghel, *Dubai Ports World Under Exon-Florio: A Threat to National Security or a Tempest in a Seaport?*, 70 ALB. L. REV. 583, 606 (2007). Part of the public's concern was that most container ships entering the U.S. went "uninspected and [were] vulnerable to security gaps at many points." Sanger, *Under Pressure, Dubai Company Drops Port Deal*, supra note 26. Additionally, the UAE was perceived as connected to the 9/11 terrorist attacks because several of the hijackers had travelled through the UAE prior to coming to the U.S. Heather Timmons, *Dubai Port Company Sells Its U.S. Holdings to A.I.G.*, N.Y. TIMES (Dec. 12, 2006), https://www.nytimes.com/2006/12/12/business/worldbusiness/12ports.html. These facts combined led to a perception that the ports were vulnerable and would be increasingly vulnerable under UAE management. Sanger, *Under Pressure, Dubai Company Drops Port Deal*, *supra* note 26.

[70] Timmons, *supra* note 69.

[71] JACKSON, *supra* note 2, at 58–59.

[72] Peter Overby, *Lobbyist's Last-Minute Bid Set Off Ports Controversy*, NPR (Mar. 8, 2006), https://www.npr.org/templates/story/story.php?storyId=5252263.

[73] *See* Mostaghel, *supra* note 69, at 610.

defended the transaction and made statements "suggesting that racial bias lay at the core of the objections and warning that an undercurrent of isolationism would ultimately harm American efforts to enlist other nations in antiterrorism campaigns."[74] Just before Congress was set to block the acquisition, DP World announced it was no longer pursuing the transaction.[75]

Following the national debate on the DP World transaction, Congress sought to clarify the Byrd Amendment's requirement that CFIUS investigate transactions in which a foreigner could gain control of an entity that could impact national security.[76] Ultimately, President Bush signed the Foreign Investment and National Security Act of 2007 (FINSA) into law.[77] In addition to formally codifying CFIUS, FINSA allows the President to delegate their authority to CFIUS after two considerations are met.[78] First, the President must show that "other U.S. laws are inadequate or inappropriate to protect the national security."[79] Second, the President must provide "'credible evidence' that the foreign interest exercising control might take action that threatens to impair the national security."[80] Additionally, President Bush issued an executive order granting CFIUS the opportunity to expand its membership by allowing "the heads of any other executive department, agency, or office, as the President or the Secretary of the Treasury determines appropriate" to join CFIUS.[81] Despite Congress' and President Bush's motivation to clarify "national security" after the DP World incident,[82] neither

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[74] Sanger, *Under Pressure, Dubai Company Drops Port Deal*, *supra* note 26.
[75] *Id.*
[76] Weimer, *supra* note 6, at 663.
[77] *Id.* at 671–72.
[78] JACKSON, *supra* note 2, at 9–10.
[79] *Id.* at 9.
[80] *Id.*
[81] Exec. Order No. 13,456, 73 Fed. Reg. 4677 (Jan. 25, 2008); Weimer, *supra* note 6, at 672.
[82] JACKSON, *supra* note 2, at 2.

FINSA nor President Bush's Executive Order "attempt an explicit definition of the term 'national security.'"[83]

Nevertheless, FINSA did clarify CFIUS' review process as consisting of three formal stages.[84] First, upon notification of a transaction,[85] CFIUS determines whether the President can delegate his or her authority to CFIUS for reviewing the transaction (largely a review determining that "no other laws apply" and there is "credible evidence" of an issue impacting national security).[86] This process is supposed to be completed in 30 days with discretion for additional time if needed.[87] If the President meets the legal standard, then CFIUS proceeds to the second stage.[88] In this stage, CFIUS has 45 days to review national security risks and determine whether there is a way to "negotiate, impose, or enforce an agreement or condition" to mitigate the national security issues.[89] If the concerns can be

[83] Weimer, *supra* note 6, at 673.

[84] JACKSON, *supra* note 2, at 10. Scholars have pointed out that before CFIUS' formal review process begins, there is a "triggering event" that makes CFIUS aware of the transaction. Weimer, *supra* note 6, at 672–73 (explaining that a "triggering event" could include a voluntary filing or a tip from "any CFIUS member agency . . . "). Additionally, CFIUS conducts "informal" reviews before official filings take place. JACKSON, *supra* note 2, at 11. These informal reviews give companies time to work with CFIUS and resolve national security issues before an official filing. *Id.* Another benefit to the informal review is that companies can prevent the "negative publicity" which would result from having the transaction rejected or "labeled as impairing U.S. national security interests." *Id.* In some instances, publicity around a CFIUS investigation has negatively impacted the relevant company's stock price. *Id.* at 11–12.

[85] JACKSON, *supra* note 2, at 19, 53 (stating that CFIUS evaluates covered transactions that are either filed voluntarily by the companies engaging in the transaction or flagged by CFIUS itself for review).

[86] JACKSON, *supra* note 2, at 9–10 fig.1, 11.

[87] *Id.* at fig.1, 11, 13.

[88] *Id.* at 41–42.

[89] *Id.* at 13.

addressed, then CFIUS submits a positive determination to the President.[90] If the concerns cannot be addressed, however, then CFIUS submits a negative determination to the President.[91] In the third and final stage, the President has a 15 day period to review CFIUS' recommendation and make a final determination on whether the transaction should move forward.[92] The President is under no obligation to follow CFIUS' recommendation.[93] The President's decision is "not subject to judicial review," although the review process itself can be challenged.[94]

President Barack Obama blocked his first transaction based on CFIUS' recommendation in 2012.[95] In 2012, the Ralls Corporation (Ralls) acquired four American limited liability companies in order to further its business of developing "wind farms in north-central Oregon."[96] Ralls was incorporated in Delaware, its principal place of business was in Georgia, and it was owned by two Chinese nationals who were also senior executives of the Sany Group China, a Chinese manufacturing company.[97] Ralls did not file the transaction voluntarily with CFIUS, and stated in district court that it only provided notice because CFIUS "informed

[90] *See id.* at fig.1, 11.
[91] *Id.*
[92] *Id.*
[93] *Id.* at 13.
[94] *Id.* at 14; *see* Ralls Corp. v. Committee on Foreign Investment in the United States, 758 F.3d 296, 325 (D.C. Cir. 2014).
[95] JACKSON, *supra* note 2, at 7. Ultimately, President Obama only blocked two transactions. *Id.* The first described above, and the second blocked transaction was a Chinese corporation that sought to acquire Aixtron, "a German-based semiconductor firm with U.S. assets." *Id.* This note does not cover the second transaction because national identity was not a significant issue in that case.
[96] *Ralls*, 758 F.3d at 301.
[97] *Id.* at 301, 304; Qingxiu Bu, *Ralls Implications for the National Security Review*, 7 GEO. MASON J. INT'L COM. L. 115, 120 (2016).

[Ralls] that the Defense Department intended to file a notice triggering CFIUS review if Ralls did not file first."[98]

The main issue surrounding Ralls' acquisitions was that the target companies had wind farm sites "located in and around the eastern region of a restricted airspace and bombing zone maintained by the United States Navy . . . ."[99] Despite the fact that there were "hundreds" of other "foreign-made and foreign-owned" wind turbines near the "restricted airspace,"[100] CFIUS recommended that President Obama order Ralls "to divest Ralls' ownership in the target project . . ."[101] While the order President Obama ultimately issued recognized "credible evidence"[102] that Ralls' transactions posed a national security threat, neither President Obama's order nor CFIUS' order "disclosed the nature of the national security threat [that] the transaction posed or the evidence on which CFIUS relied in issuing the orders."[103] When Ralls challenged the decision, the D.C. Circuit Court found that FINSA did not bar a "judicial review of the final determination of the President" to prevent a transaction from moving forward.[104] However, the court determined that Ralls' complaint "did not challenge the President's determination that the acquisition threatened the national security" and President Obama's order was upheld.[105]

Interestingly, the D.C. Circuit Court mentioned that Ralls' owners were executives in Sany,[106] but squarely placed the motivation behind CFIUS' review on the fact that "both of Ralls's

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[98] *Ralls*, 758 F.3d at n.7.
[99] *Id.* at 304.
[100] *Id.* at 305.
[101] Bu, *supra* note 97, at 119.
[102] Regarding the Acquisition of Four U.S. Wind Farm Project Companies by Ralls Corporation, 77 Fed. Reg. 60281 (Sep. 28, 2012).
[103] *Ralls*, 759 F.3d at 305.
[104] JACKSON, *supra* note 2, at 60.
[105] *Id.*
[106] *Ralls*, 759 F.3d at 304.

owners are Chinese nationals."[107] In court, Ralls pointed out that there were "other foreign-owned wind turbines near the restricted airspace" that, presumably, were allowed to continue to operate near the U.S. Navy site in question.[108] Despite the fact that Ralls was incorporated in Delaware and operated out of Georgia,[109] CFIUS reviewed the transaction as though Ralls was a Chinese corporation. In effect, the corporation had taken on the national identity of its owners and become foreign for the purposes of CFIUS' review.

### B. The Trump Administration and CFIUS

CFIUS underwent another major transformation during the Trump Administration as a result of an anti-foreign, anti-globalist agenda.[110] From 2015 to 2016, FDI from China to the U.S. tripled to $46B.[111] Shortly after, in 2016, the American people elec-

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[107] *Id.* at 301.
[108] *Id.* at 305.
[109] *Id.* at 304.
[110] Noah Bierman, *Trump, the Anti-Globalist, Declares America 'Open for Business' in Davos Speech to Globalists*, L.A. TIMES (Jan. 26, 2018, 2:12 AM), https://www.latimes.com/politics/la-fg-trump-davos-speech-20180126-story.html. President Trump has described his perspective on global trade as "America First." *Id.* President Trump claims that his administration "will no longer turn a blind eye to unfair economic practices, including massive intellectual property theft, industrial subsidies, and pervasive state-led economic planning . . ." *Id.* While giving a speech at the United Nations, President Trump stated "[w]e reject globalism . . ." W.J. Hennigan, *'We Reject Globalism.' President Trump Took 'America First' to the United Nations*, TIME (Sept. 25, 2018), https://time.com/5406130/we-reject-globalism-president-trump-took-america-first-to-the-united-nations/.
[111] Ana Swanson, *Targeting China's Purchases, Congress Proposes Tougher Reviews of Foreign Investments*, N.Y. TIMES (Nov. 8, 2017), https://www.nytimes.com/2017/11/08/us/politics/china-foreign-investments.html?module=inline; Thilo Hanemann, *Arrested Development: Chinese FDI in the US in 1H 2018*, RHODIUM GROUP fig.1 (Jun.

ted President Donald Trump, who campaigned by stating that China was "raping our country" and perpetrating "one of the greatest thefts in the history of the world."[112] Dramatic rhetoric aside, there was a growing concern in Congress that American companies were becoming increasingly vulnerable to Chinese cyberattacks.[113] For example, Senator John Cornyn (R-TX) warned that legislation was needed to "put an end to the backdoor transfer of dual-use technology that has gone unchecked for too long" letting "bad actors, like China, erode our national security advantage by circumventing our laws."[114] In response, on August 1, 2018, Congress passed the Foreign Investment Risk Review Modernization Act (FIRRMA), which President Trump signed into law.[115] FIRRMA expanded CFIUS' jurisdiction to "joint ventures, minority stakes, and real estate transactions near military bases or other sensitive national security facilities."[116] In addition, the definition of "critical technologies" was broadened to encompass "new innovations" or "cutting-edge technology,"[117] potentially expanding CFIUS' role from merely policing transactions with national security implications to more proactively protecting the U.S.'s technological position in the world.

Legal practitioners have argued that FIRRMA directly targets the preferred FDI strategy of Chinese investors – "real estate acquisitions in sensitive areas," "minority investments" through "private equity-type structures" ("joint ventures" in which

19, 2018), https://rhg.com/research/arrested-development-chinese -fdi-in-the-us-in-1h-2018/.

[112] Frances Coppola, *We Really Don't Want a Trade War With China, Mr. Trump*, FORBES Mar. 22, 2018, https://www.forbes.com/sites/francescoppolaa-trade-war-with-china-mr-trump/#303a55117fec.

[113] Yoon-Hendricks, *supra* note 27. For examples of economic espionage, *see China Economic Espionage*, *supra* note 22.

[114] Yoon-Hendricks, *supra* note 27.

[115] Foreign Investment Risk Review Modernization Act, § 1703; Yoon-Hendricks, *supra* note 27.

[116] Yoon-Hendricks, *supra* note 27.

[117] *Id.*

U.S. technology is transferred to the Chinese partner), and transactions that are structured to "circumvent CFIUS."[118] Even though the Trump Administration has argued that FIRRMA is meant to "safeguard" American technology,[119] practitioners have stated that it is not a coincidence that the areas FIRRMA targets "pertain to particular Chinese investment trends."[120]

On August 23, 2018, President Trump hosted a roundtable event at the White House to celebrate the signing of FIRRMA.[121] During the event, President Trump stated, "if we see something we don't like – some country is buying something that we don't want them to be buying – we stop it. We now have the right to stop it. They won't be stealing our companies anymore, especially companies that are quite complex."[122] Presumably, the "we" to which President Trump refers to in "we stop it" is CFIUS.[123] Additionally, President Trump stated, "[w]e're putting a lot of safeguards in, and we're doing a lot of things against foreign acquisition of property . . . ."[124] President Trump's remarks highlight the shift that has taken place in CFIUS' purpose since it was created. Originally, President Ford created CFIUS through an executive order to slow down the severe limitations on FDI that

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[118] Farhad Jalinous et al., *CFIUS Reform Becomes Law: What FIRRMA Means for Industry*, WHITE & CASE, (Aug. 13, 2018), https://www.whitecase.com/publications/alert/cfius-reform-becomes-law-what-firrma-means-industry.

[119] President Donald J. Trump, President of the U.S., Remarks by President Trump at a Roundtable on the Foreign Investment Risk Review Modernization Act (FIRRMA) (Aug. 23, 2018), https://www.whitehouse.gov/briefings-statements/remarks-president-trump-roundtable-foreign-investment-risk-review-modernization-act-firrma/.

[120] Jalinous et al., *supra* note 118.

[121] Remarks by President Trump at a Roundtable on the Foreign Investment Risk Review Modernization Act (FIRRMA) (Aug. 23, 2018), *supra* note 119.

[122] *Id.*

[123] *Id.*

[124] *Id.*

Congress was proposing at the time.[125] CFIUS has since transitioned from a data gathering organization to a body that has significant oversight power over transactions that the administration considers related to "national security."[126]

Today, the United States receives more money in the form of FDI than any other nation in the world.[127] However, the Trump Administration's posturing and trade measures[128] have already substantially reduced FDI from China – from January 2017 to June 2018, FDI fell over 90%,[129] the lowest level of FDI from China in seven years.[130] While recent changes to CFIUS are not solely responsible for the FDI reduction, the changes reflect broader foreign and economic policy goals that are largely responsible for the decrease in FDI.

## III. WHERE ARE YOU REALLY FROM? OUTDATED REQUIREMENTS AND DISTRACTING REGULATORY BURDENS

Although CFIUS is used to promote policies that dis-criminate based on both race and national origin, there is a legitimate concern that foreign investors may use FDI to conduct espionage

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[125] JACKSON, *supra* note 2, at 1.

[126] *Id.* at 1–2.

[127] *Benefits of Foreign Direct Investment (FDI)*, *supra* note 18; Jonathan Masters & James McBride, *Foreign Investment and U.S. National Security*, COUNCIL ON FOREIGN RELATIONS (Aug. 28, 2018), https://www.cfr.org/backgrounder/foreign-investment-and-us-national-security.

[128] Rappeport, *In New Slap at China, U.S. Expands Power to Block Foreign Investments*, *supra* note 13. Earlier trade measures include tariffs on "$250 billion worth of Chinese goods as a form of punishment" and the Trump Administration's threats to "tax all Chinese imports if Beijing does not change its trade practices." *Id.*

[129] Hanemann, *supra* note 111, at fig.1.

[130] Rappeport, *In New Slap at China, U.S. Expands Power to Block Foreign Investments*, *supra* note 13.

in the U.S.[131] In order to prevent economic espionage, it is useful for the government to determine a company's national origin, as some countries have a targeted economic espionage agenda.[132] The determination matters—CFIUS does not review transactions that are considered non-foreign.[133] Nevertheless, determining a company's national identity is not as straightforward an analysis as it may seem (as illustrated by this Note's case study).[134]

[131] *See China Economic Espionage*, *supra* note 21.

[132] Marc Santora, *Huawei Threatens Lawsuit Against Czech Republic After Security Warning*, N.Y. TIMES (Feb. 8, 2019), https://www.nytimes.com/2019/02/08/business/huawei-lawsuit-czech-republic.html (describing China's National Intelligence Law in 2017 which "requires Chinese companies to support, provide assistance to and cooperate in Beijing's national intelligence work, wherever they operate.").

[133] Transactions that are Covered Transactions, 31 C.F.R. § 800.301 (2018) ("[C]overed transactions" is defined in the statute as transactions which would "result in control of a U.S. business by a foreign person."); Foreign Person, 31 C.F.R. § 800.216 (2018) (defining "control" and "foreign person").

[134] Shoesmith et al., *supra* note 8, at 2; *see infra* Section III.D. (Case Study: From All-American to Foreign).

For individuals, racial and national identity is a construct,[135] but nationality is established by citizenship.[136] While corporations have a place of incorporation (similar to an individual's citizenship),[137] CFIUS looks beyond this and investigates who controls a company to determine if it is "foreign."[138] In effect, CFIUS examines the national identity of the corporation. While the common law treats the corporation as a construct (or a legal fiction),[139]courts

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[135] *See* Richard R.W. Brooks, *Incorporating Race*, 106 COLUM. L. REV. 2023, 2066 (2006). Racial and gender categories are socially constructed by governments and by individuals. Kimberlé Williams Crenshaw, *Mapping the Margins:* Intersectionality, Identity Politics, and Violence Against Women of Color, 43 STAN. L. REV. 1241, 1296–97 (1991). Over time, these categories grow to have "particular values attached to them" and "those values foster and create social hierarchies." *Id.* at 1297. The creation of the categories themselves may be an "exercise of power" as well as using the categories to apply "social and material consequences." *Id.* For the purposes of this Note, national identity is defined as a category with which an individual might choose to identify. Nationality is defined as a formal govern-ment recognition. For example, someone may choose to identify as Chinese-American (their national identity) even though the government formally recognizes them as American (their nationality).

[136] *U.S. Citizenship Laws and Policy*, U.S. DEP'T OF STATE, https://travel.state.gov/content/travel/en/legal/travel-legal-considerations/us-citizenship.html (last visited Oct. 19, 2019) (The statute defines U.S. citizenship as "acquired either at birth or through naturalization subsequent to birth.").

[137] Tyler Barnett & Jennifer Gardner, *The Incorporation Process – Key Legal Documents*, DLA PIPER, https://www.dlapiperaccelerate.com/knowledge/2017/the-incorporation-process-key-legal-documents.html.

[138] *See* § 800.216, *supra* note 133 (defining "foreign person").

[139] In Roman law, there was one rule that has been interpreted as pertaining to the rights of structured organizations: "the slave of a corporation may be compelled, by torture, to give information against the members of that corporation . . . ." RUDOLPH SOHM, THE INSTITUTES OF ROMAN LAW 104 (Oxford, 1892). Given the context of other rules involving torture of the enslaved owned by private persons, this corporate rule is interpreted to mean that "[r]ights and liabilities of

have occasionally found that corporations can take on the racial or national identity of their founders or owners.[140] For example, in *Ralls*, the Court stated that the Delaware incorporated company was "foreign" because of its two Chinese-national owners.[141] In other words, when Ralls' owners incorporated Ralls, the corporation acquired their identity and became Chinese.[142]

Determining an entity's national identity is critical for CFIUS review—a company that is deemed American does not have to go through CFIUS' review process. Nevertheless, determining the national identity of an entity is fraught with problems. The central problem with relying on a national identity standard to conduct a CFIUS review is that it is simultaneously over-inclusive and underinclusive. CFIUS may be missing investments that are actually controlled by a foreign person where invest-ments are made through an entity that does not trip the foreign person requirement. Similarly, CFIUS may spend valuable resources reviewing an investment that does not involve foreign control. In essence, there is a danger of missing an investment that is a threat to national security while being distracted by questions surrounding national identity. Additionally, there is a concern that overpolicing on the basis of national identity results in race-based discrimination.[143]

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a corporation do not mean joint rights and joint liabilities of the members, but sole rights and sole liabilities of another person, an invisible, a 'juristic' person . . ." *Id.* The Supreme Court, in recent opinions involving corporations, reiterated that corporate "personhood is but a fiction and that the entity is but a device to further the ends of human beings associated in an enterprise . . ." Gregory A. Mark, *Hobby Lobby and the Corporate Personhood: Taking the U.S. Supreme Court's Reasoning at Face Value*, 65 DEPAUL L. REV. 535, 536 (2016).

[140] *See* Ralls Corp. v. Comm. on Foreign Inv. in the United States, 758 F.3d 296, 304 (D.C. Cir. 2014); *see* Brooks, *supra* note 135.

[141] *Ralls*, 759 F.3d at 304.

[142] *See id.*

[143] *See* Brooks, *supra* note 135, at 2027.

### A. Challenges in Determining Corporate Identity

While corporations have legal personhood, courts have often been puzzled by whether corporations can take on the truly human characteristics – religion, race, or nationality – of their owners.[144] During wartime, courts have commented on whether corporations can acquire the nationality of their shareholders under the Trading With the Enemy Act (TWEA).[145] Outside of wartime, courts have not frequently opined on whether a corporation acquires the nationality of its shareholders, but questions on corp-orate racial identity offer a proxy for how courts might consider the question of corporate national identity in peacetime.[146]

In 1908, a Virginia corporation wholly owned by African-Americans was initially prevented from purchasing land for a public park because a covenant prevented the transfer of land to "colored persons."[147] In 1900, a 125-acre tract of land had been purchased from the prior owner's estate.[148] The land had passed through several hands[149] before People's Pleasure Park Company, Incorporated purchase it.[150] However, the party that sold the land to People's Pleasure Park was unaware of a covenant stipulating that

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[144] *See id.*

[145] Trading With the Enemy Act, 50 U.S.C. §§ 4301–4341 (1917); Clark v. Uebersee Finanz-Korporation, A.G., 332 U.S. 480, 488 (1947); Hamburg-American Line Terminal & Navigation Co. v. U.S., 277 U.S. 138, 138 (1928). President Wilson signed TWEA in 1917 during World War I. Daniel A. Gross, *The U.S. Confiscated Half a Billion Dollars in Private Property During WWI*, SMITHSONIAN, https://www.smithsonianmag.com/history/us-confiscated-half-billion-dollars-private-property-during-wwi-180952144/. The purpose of the act was to allow the U.S. to seize the property of people suspected of aiding the enemy. *Id.*

[146] *See* Brooks, *supra* note 135, at 2081.

[147] *Id*. at 2024.

[148] People's Pleasure Park Co. v. Rohleder, 61 S.E. 794, 794 (Va. 1908).

[149] *Id.*

[150] *Id.* at 795.

title to the land was "never to vest in a colored person or persons."[151] The owners of the neighboring land sued to invalidate the sale based on a violation of the covenant.[152] The Supreme Court of Appeals of Virginia held in *People's Pleasure Park* that corporations are legal entities "distinct from the persons composing it."[153] The court ruled that the corporation was "a person only in law"[154] and that, "in law, there can be no such thing as a colored corporation."[155] Judge Cardwell stated that, as a corporation, People's Pleasure Park "leads its own life, as it were, quite unaffected by any change of members. It stands apart as a separate subject or proprietary capacity, and in contemplation of law, as a stranger to its own members."[156] Thus, the court declined to extend the shareholders' race to the corporation it-self.[157]

The Supreme Court applied this logic to corporations wholly owned by Germans during World War I.[158] In *Hamburg-American Line Terminal & Navigation Co. v. U.S.*, the Hamburg-American Line Terminal & Navigation Company and the Atlas Line Steamship Company were both incorporated in New Jersey, but wholly owned by the Hamburg-American Line, a German corporation.[159] The U.S. government seized the New Jersey corporations' property under the TWEA, claiming that the New Jersey corporations qualified as enemies because they were wholly owned by a German corporation.[160] The Court, however, held that the New Jersey corporations' "status . . . was not fixed by the stock-holders'

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[151] *Id.* at 794.
[152] *Id.*
[153] *Id.* at 797.
[154] Brooks, *supra* note 135, at 2024.
[155] *Id.*
[156] *People's Pleasure Park Co.*, 61 S.E. at 796 (quoting SOHM, *supra* note 140, at 105).
[157] *Id.* at 797.
[158] Hamburg-Am. Line Terminal & Navigation Co. v. U.S., 227 U.S. 138, 138 (1928).
[159] *Id.* at 139–40.
[160] *Id.* at 140.

nationality."[161] Rather, the Court ruled that a U.S. corporation was entitled to have its corporate status shield its shareholders, regardless of their nationality.[162] This logic, applied to a CFIUS analysis today, would mean that entities incorporated in the U.S. could only be considered American, leaving room for bad actors to circumvent a CFIUS review.

However, during World War II, Congress amended TWEA to prevent U.S. corporations from being used as a "Trojan horse" for foreign enemies.[163] In *Clark v. Uebersee Finanz-Korporation*, after the U.S. government had seized stock owned by a Swiss corporation,[164] the Court held that the Congressional amendment was intended to "illustrat[e]" that the law could apply to "all property of any foreign country or national so that no innocent appearing device could become a Trojan horse."[165] In the view of the Court, Congress had passed the bill "hast[ily]," and for the Court to not look beyond the place of incorporation would be counter to Congress' intent.[166] In language that is echoed in contemporary statements about Chinese investment in the U.S.,[167] the Court asserted that Germany was "notorious" for developing "numerous techniques for concealing enemy ownership or control of property

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[161] *Id.* at 141.

[162] *Id.*

[163] Clark v. Uebersee Finanz-Korporation, A.G., 332 U.S. 480, 488 (1947).

[164] *Id.* at 482. The corporation was incorporated in Switzerland and its principal place of business in Switzerland. *Id.* The stock seized was stock in U.S. corporations. *Id.*

[165] *Id.* at 488.

[166] *See id.* Congress amended TWEA in 1941, after the U.S. declared war against Japan, in order to clarify that TWEA was fully "applicable during wartime" and applied to "all foreign countries (not merely enemy ones) . . . ." Benjamin A. Coates, *The Secret Life of Statutes: A Century of the Trading with the Enemy Act*, 1 MOD. AM. HIST. 151, 163 (2018). Additionally, the amendment extended TWEA to apply during peacetime. *Id.*

[167] Coppola, *supra* note 112.

which was ostensibly friendly or neutral . . . for the purposes of economic warfare."[168] The effect of *Clark* is that entities incorporated in the U.S. can take on the nationality of their shareholders.[169] However, the *Clark* Court expressed the concern that a corporation with numerous shareholders of different nationalities could not easily be classified as foreign or American.[170] For example, the Court stated that it would be "absurd and uncertain" to classify a corporation as foreign "merely because a negligible stock interest, perhaps a single share, was directly or indirectly owned or controlled by an enemy or ally of an enemy."[171] The Court's approach addressed the "Trojan horse" issue of bad actors circumventing CFIUS review.[172] Nevertheless, the Court struggled with the same issues with which CFIUS struggles today, namely how to determine what qualifies as "foreign" and what qualifies as "control."[173]

Additionally, over time, courts have found that some corporations can take on the attributes of their shareholders, specifically race, "as a matter of law" for 42 U.S.C. § 1981 (1999) claims.[174] In *Thinket Ink Information Resources, Inc. v. Sun Microsystems, Inc.*, Thinket, an information technology contractor

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[168] *Clark*, 332 U.S. at 484–85.
[169] *Id.*
[170] *Id.* at 489.
[171] *Id.*
[172] *Id.* at 488.
[173] Shoesmith et al., *supra* note 8, at 2.
[174] Thinket Ink Info. Res., Inc. v. Sun Microsystems, Inc., 368 F.3d 1053, 1058 (9th Cir. 2004); Brooks, *supra* note 135, at 2025. There is a distinction between corporate liability concepts and the corporation taking on characteristics of its owners. Brooks, *supra* note 135, at 2057. With enterprise liability and piercing the corporate veil, a corporation closely affiliated with a particular person or run closely in conjunction with other entities, can be held liable for the corporation's debts and liabilities. *Id.* However, with corporate race or national identity, a corporation takes on the racial or national identity of the shareholders. *Id.*

wholly owned by African-Americans, sued Sun Microsystems for racial discrimination under § 1981.[175] Thinket was registered with the U.S. Small Business Administration (SBA) as a company "owned and operated by socially and economically disadvantaged individuals" and was eligible for certain federal contracts under the SBA's "business development program."[176] The Court held that a corporation could gain standing for racial discrimination when the corporation had "acquired an imputed racial identity sufficient to take it out of the general observation about corporations made by Justice Powell in *Arlington Heights.*"[177] The court heavily weighed the fact that Thinket was "required to be certified as a corporation with a racial identity" in order to access SBA benefits.[178] Since the racial identity relevant to the SBA certification was the same racial identity upon which Thinket alleged discrimination,[179] the court concluded that Thinket had standing and that a "departure from *Arlington Heights*" was warranted.[180]

The Ninth Circuit extended "imputed racial identity" to circumstances without SBA or government certification of a racial identity.[181] In *Bains LLC v. Arco Products Co.*, a Sikh owned

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[175] *Thinket*, 368 F.3d at 1056.

[176] *Id.* at 1055.

[177] *Id.* at 1059. In *Arlington Heights*, Justice Powell, writing for the majority, stated that "as a corporation [the plaintiff] has no racial identity and cannot be the direct target of the petitioners' alleged discrimination." Village of Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252, 263 (1977). In *Arlington Heights*, the corporate plaintiff alleged racial discrimination against racial minorities that would live in the integrated housing. *Id.* at 252. However, the corporate plaintiff did not allege that it had a racial identity itself nor did the corporation allege that it was being discriminated against because of its corporate racial identity. *Thinket*, 368 F.3d at 1059.

[178] *Thinket*, 368 F.3d at 1059; Brooks, *supra* note 135, at 2077.

[179] *Thinket*, 368 F.3d at 1059.

[180] *Id.*

[181] Bains LLC v. Arco Products Co., 405 F.3d 764, 770 (9th Cir. 2005).

corporation, Flying B, sued a contractor for racial discrimination.[182] The court noted that the corporation's owners were all Sikh, and that even non-Sikh employees alleged discrimination against by the contractor because of their employment status with the company.[183] The court then concluded that "Flying B undoubtedly acquired an imputed racial identity," that its contract "was terminated due to the effects of racial discrimination," and that Flying B thus had standing for a § 1981 claim.[184]

Despite court challenges to CFIUS decisions,[185] courts have not weighed in on how to determine corporate national identity when there is no controlling shareholder. Similar to courts that have considered corporate racial identity, courts considering corporate national identity would likely have difficulty when the corporation has a complex investment structure.[186]

### B. The Foreign Person Requirement

Due to CFIUS' lack of a robust definition of "foreign control," determining a corporation's national identity is a convoluted process.[187] The Exon-Florio Amendment outlines CFIUS' role: CFIUS "shall review the covered transaction to determine the effects of the transaction on the national security of the United States."[188] The statute also states that investors must disclose a transaction to CFIUS when it "involves an investment that results in the acquisition, directly or indirectly, of a substantial interest in a United States business . . . by a foreign person in which a foreign

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[182] *Id.* at 769.
[183] *Id.* at 770.
[184] 42 U.S.C. § 1981 (1999); *Bains*, 405 F.3d at 770.
[185] *See* Ralls Corp. v. Committee on Foreign Investment in the United States, 758 F.3d 296 (D.C. Cir. 2014).
[186] *See* Brooks, *supra* note 135, at 2063.
[187] Foreign Person, 31 C.F.R. § 800.216 (2018) (defining "foreign person").
[188] 50 U.S.C. § 4565(b)(1)(A) (2018).

government has, directly or indirectly, a substantial interest."[189] However, the statute does not define "foreign person" and does not state whether legal persons (corporations) are included.[190]

In 1991, the Treasury Department published its regulations to implement the Exon-Florio Amendment.[191] The regulations were updated again in November 2008.[192] Today, the Federal Code describes a "foreign person" as "[a]ny foreign national, foreign government, or foreign entity" or "[a]ny entity over which control is exercised or exercisable by a foreign national, foreign government, or foreign entity."[193] Nevertheless, FIRRMA provides a vague definition of control and states that the definition is "subject to regulations prescribed by the Committee."[194] Additionally, FIRRMA states that CFIUS will "prescribe regulations that further define the term 'foreign person,'" and that the Committee will consider "how a foreign person is connected to a foreign country or foreign government, and whether the connection may affect the national security of the United States."[195] Practicing attorneys who work with companies going through the CFIUS review process have contended that CFIUS's choice to define "foreign person" broadly or narrowly will be "among the most important aspects of the regulations implementing this new legislation."[196]

Despite lacking clarity on the definition of "foreign person," FIRRMA did clarify which types of private equity investments, a

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[189] § 4565(b)(1)(C)(v)(IV)(bb)(AA).
[190] *See generally* § 4565.
[191] JACKSON, *supra* note 2, at 7.
[192] *Id.*
[193] Foreign Person, 31 C.F.R. § 800.216 (2018) (defining "foreign person").
[194] Foreign Investment Risk Review Modernization Act, § 1703(a)(3) (defining "control").
[195] *Id.* at § 1703(a)(4)(E).
[196] Jalinous et al., *supra* note 118.

common investment vehicle for FDI, would be subject to CFIUS review.[197]

### C. Impact on Private Equity

Private equity (PE) is a common investment vehicle for FDI and PE firms use a variety of investment structures.[198] One of the most common structures used by PE firms is the leveraged buyout (LBO), a structure in which a PE fund secures debt financing, buys a publicly traded corporation, and takes the corporation private in order to make changes to the corporation (presumably to make it more profitable).[199] Venture capital (VC) firms are similar to PE firms in that both types of firms work with private companies, however, VC firms work with "less mature non-public companies" in order to help grow the business.[200] PE investors include institutions or wealthy individuals who provide financing to PE funds for investment by becoming "limited partners" in a fund.[201] PE investments are made for the long-term; investors typically "sign investment contracts that lock up their money for as long as 10 to 12 years."[202] PE assets under management tripled from $399 billion in 2003 to $1.2 trillion in 2010, representing a 23% compound annual growth rate.[203] In 2017, PE funds raised more money than ever before: $621 billion.[204] This continued level of high interest in PE as an investment vehicle means that at least some companies will

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[197] *Id.*

[198] DAVID STOWELL, AN INTRODUCTION TO INVESTMENT BANKS, HEDGE FUNDS, AND PRIVATE EQUITY 283 (Elsevier Inc., 2010).

[199] *Id.*

[200] *Id.*

[201] *Id.* at 286.

[202] *Id.*

[203] *Id.* at 284 fig.16.1.

[204] Antoine Drean, *10 Predictions for Private Equity in 2018*, FORBES (Jan. 24, 2018, 12:24 PM), https://www.forbes.com/sites/antoinedrean/2018/01/24/ten-predictions-for-private-equity-in-2018/#5ffb05f4319e.

change owners as a result of PE investment strategies. As PE funds buy companies in order to take them private, the companies' identities may change and may have implications for a CFIUS review.

Publicly traded securities, such as stock, are required to be registered with the SEC, but private securities, such as invest-ments in private equity funds, are not.[205] PE funds are exempt from the SEC registration requirement because PE funds only allow institutional investors or wealthy individuals to invest in their funds.[206] One major implication of not registering with the SEC is that there is very little transparency required on behalf of PE funds.[207] For a company seeking PE investment, this lack of transparency would make it difficult, if not impossible, to determine whether CFIUS would consider the PE fund "foreign." The case study below illustrates the implications of a start-up receiving investment from a PE fund and the start-up not being aware of how the PE funds' "foreign" status impacts the start-up's status for CFIUS review.

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[205] *See* Rules Governing the Limited Offer & Sale of Securities Without Registration Under the Securities Act of 1933, 17 C.F.R. § 230.506 (2018) (known as Regulation D); Rebecca L. Hinyard, Note, *Striking the Right Balance: Extending CFIUS Review to Private Equity Transactions*, 37 PUB. CONT. L.J. 843, 858 (2008).

[206] *Updated Investor Bulletin: Accredited Investors*, SEC (Jan. 31, 2019), https://www.investor.gov/additional-resources/news-alerts/alerts-bulletins/updated-investor-bulletin-accredited-investors (Accredited investor is defined as a natural person with "a net worth of over $1 million" or an entity with over $5 million in total assets.). Private funds "do not have to make prescribed disclosures to accredited investors" because accredited investors "are financially sophisticated and able to fend for themselves or sustain the risk of loss, thus rendering unnecessary the protections that come from a registered offering." *Id.*

[207] Hinyard, *supra* note 205, at 859–60.

### D. Case Study: From All-American to Foreign

Start-up companies seeking investment may become "inadvertent[ly] foreign" by accepting investment from a "foreign" PE fund.[208] Start-up companies seek investors in a variety of forms, but investment from a reputable VC is especially coveted because VC's provide funding, business guidance, and a signal to the larger business community that the start-up is taken seriously.[209] However, a significant consequence of receiving VC funding is a lack of transparency—it is possible that the start-up company's owners will not know all of the limited partners of the fund and their respective nationalities.[210]

Take, for example, a newly formed start-up company, Better Turbine, Inc. (BTI), has improved the standard wind turbine design, achieved limited production, and a small number of sales. Now, the company is looking for financing to increase its production and to buy property on which to test the wind turbines.[211] The company, Better Turbine, Inc. (BTI), is both incorporated and headquartered in California. Additionally, the two founders (Founders) and owners of the company are U.S. citizens who live in California. Founders seek investment from VC funds located in Silicon Valley. Founders are successful—they receive Series A financing[212] from

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[208] Shoesmith ET AL., *supra* note 8, at 3.

[209] Mike Sullivan & Richard D. Harroch, *A Guide to Venture Capital Financing for Startups*, FORBES (Mar. 29, 2018), https://www.forbes.com/sites/allbusiness/2018/03/29/a-guide-to-venture-capital-financings-for-startups/#55917cfe51c9.

[210] Hinyard, *supra* note 205, at 859–60.

[211] This case study is based on wind turbine business in *Ralls*. Ralls Corp. v. Committee on Foreign Investment in the United States, 758 F.3d 296, 301 (D.C. Cir. 2014). Additionally, the case study is based on a practitioner's analysis of challenges surrounding inadvertent foreign person status. Shoesmith, ET. AL., *supra* note 8, at 2.

[212] Many start-up companies seek investors through several rounds of financing as the company develops. These rounds of financing are typically called "Series A," "Series B," and "Series C." While there is

VC Fund A, which takes a 9% stake in BTI. However, VC Fund A has several limited partners who are non-U.S. citizens and considered "foreign" by CFIUS.[213] Founders are aware of the "foreign" status of limited partners at VC Fund A, but BTI is not engaged in any kind of "national security" activity warranting CFIUS review.[214] Additionally, an invest-ment worth "less than a 10% voting interest" is "not considered a substantial interest" and, therefore, would not trigger the mandatory filing with CFIUS.[215]

Founders begin production of their new wind turbine design and sales are successful. They decide to purchase more land and to expand their sales reach across the U.S. However, they need more financing to accomplish these goals and, as such, they start the process of Series B financing.[216] BTI successfully

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no fixed timeline for when Series A financing takes place in the life-cycle of a company, Series A financing is typically done when a start-up has developed a business model and has some kind of "key performance indicator" such as revenue or a customer list. In the case study above, BTI has "key performance indicators" with its limited production and sales. Series A financing usually raises between $2 million and $15 million depending on the industry and types of investors. Nathan Reiff, *Series A, B, C Funding: How It Works*, INVESTOPEDIA, Feb. 8, 2019, https://www.investopedia.com/articles/personalfinance/102015/series-b-c-funding-what-it-all-means-and-how-it-works.asp.

[213] Foreign Person, 31 C.F.R. § 800.216 (2018) (defining "foreign person").

[214] JACKSON, *supra* note 2, at 1.

[215] 50 U.S.C. § 4565(b)(1)(C)(v)(IV)(bb)(BB) (2018) (defining substantial interest).

[216] Like Series A financing, Series B financing is not done at a fixed point in time during a start-up's development. Reiff, *supra* note 213. Typically, Series B financing takes place when a company wants to move "to the next level" and has solid "performance indicators" including increasing revenue and a "substantial user base." *Id.* In the case study above, BTI has a proven track record of sales and is looking

secures additional funding from VC Fund B, which also takes a 9% stake in BTI. Similarly to VC Fund A, VC Fund B has several limited partners who are non-U.S. citizens. Founders are not concerned because BTI is still not engaged in CFIUS regulated activity.[217]

Founders search for the perfect spot on which to test their new wind turbines and identify a parcel of land in Washington state. The land is currently occupied by other wind turbine companies and BTI determines that, rather than compete with the other companies, it should buy the other companies out.[218] During its due diligence, BTI realizes that the land is near "restricted airspace and bombing zone maintained by the United States Navy."[219] BTI moves forward with the purchase. Unbeknownst to Founders, BTI should have filed the transaction with CFIUS for review.

While VC Fund A and VC Fund B each only purchased 9% of BTI, and thus did not trigger the mandatory filing with CFIUS,[220] the combined total of investment between the two VC funds is 18%, which does qualify as "substantial interest"[221] if there is "foreign" control.[222] Even though Founders realized there were non-U.S. citizens involved in the VC Funds, the VC Funds did not directly disclose the number of "foreign"[223] limited partners and their level of involvement in the VC fund.[224] As

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to expand geographically. *Id.* Series B financing usually raises between $7 million and $10 million. *Id.*

[217] JACKSON, *supra* note 2, at 1.

[218] *See* Ralls Corp. v. Committee on Foreign Inv. in the U.S., 758 F.3d 296, 304 (D.C. Cir. 2014).

[219] *Id*. at 304–305.

[220] § 4565(b)(1)(C)(v)(IV)(bb)(BB) (defining substantial interest as not "less than a 10 percent voting interest").

[221] *Id.*

[222] Foreign Person, 31 C.F.R. § 800.216 (2018) (defining "foreign person").)

[223] *Id.*

[224] FIRRMA states that indirect investment in a U.S. business (such as through a PE fund) will not constitute a covered transaction, even if a

such, BTI received financing from the VC funds without realizing that the VC funds were themselves "foreign persons" by CFIUS review standards.[225] Since the VC funds are "foreign persons" and the VC funds' total control in the start-up is over 10%, it is possible that the start-up company, though located in the U.S. and founded by U.S. citizens, is a "foreign person for the purposes of CFIUS."[226] Since BTI is making an investment in a "CFIUS-covered" transaction, the company is required to file the transaction with CFIUS for approval.[227]

This phenomenon, which practitioners call "inadvertent foreign person status," presents significant issues.[228] First, there are organizations that may not realize they have sufficient levels of foreign investment requiring a CFIUS filing. Second, even those organizations that realize they must file with CFIUS are forced to incur expensive filing costs as well as lawyers' fees to properly file with CFIUS.[229] Third, the volume of complex transactions (similar to the aforementioned case study) are so prevalent[230] that the "foreign" requirement for CFIUS filing may

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foreign person is an LP. *New CFIUS Legislation Enacted*, DAVIS POLK & WARDWELL LLP 2–3 (2018), https://www.davispolk.com/files/2018-08-13_new_cfius_legislation_ enacted.pdf. However, to be exempt, the fund must be exclusively managed by someone who is not a foreign person. *Id.*

[225] § 800.216 (defining "foreign person").

[226] *Id.*; Shoesmith ET AL., *supra* note 8, at 2.

[227] *Id.*, at 3.

[228] *Id.* at 1–3.

[229] JACKSON, *supra* note 2, at 9–11 (outlining the three formal filing steps); Shoesmith ET AL., *supra* note 8, at 8 (stating that "there can be significant timing delays in [the CFIUS review] process" because of "an overwhelming number of cases and limited resources . . ."); *Id.*, at 2 (describing the CFIUS filing as "expensive").

[230] In 2018, over 1,800 cross-border PE deals worth $456 billion were recorded. Interview with Matthias Jaletzke, Partner, Hogan Lovells, LLP. *Another Strong Year Predicted as Cross-Border Private Equity Activity Hits Record High Value in 2018*, HOGAN LOVELLS LLP (Apr. 25, 2019), https://dealdynamics.hoganlovells.com/another-strong-year-

become an ineffectual mechanism for filtering truly "foreign controlled" entities into the reporting process.[231] Fourth, CFIUS' definition of foreign creates a bizarre scenario in which a company could be considered foreign by part of the U.S. government and domestic by another part. In the aforementioned case study, for example, the IRS would consider BTI domestic while CFIUS would consider BTI "foreign."[232]

## IV. SOLUTIONS TO THE INADVERTENT FOREIGN PERSON PROBLEM

To address potential discrimination based on racial and national identity, Congress, the President, and CFIUS should take steps to address the inadvertent foreign person status problem[233] and the broader challenges associated with determining corporate national identity for CFIUS review. There are several solutions Congress can take to simplify and reduce the regulatory uncertainty for businesses operating with foreign investors. First, individual states could allow for corporations to self-identify with a national identity other than American. Second, Congress could ignore CFIUS' "foreign" control requirement altogether.[234] Third, the President could disallow specific countries and bad actors from

predicted-as-cross-border-private-equity-activity-hits-record-high-value-in-2018.

[231] 31 C.F.R.§ 800.216 (2018) (defining "foreign person").

[232] CFIUS defines "foreign" differently than other government entities. For example, the Internal Revenue Service (IRS) defines a foreign corporation as a corporation that is not "domestic." The IRS defines a "domestic corporation" as being "created or organized in the United States or under the laws of the United States . . . ." *Foreign Persons*, INTERNAL REVENUE SERVICE (Nov. 5, 2019), https://www.irs.gov/individuals/international-taxpayers/foreign-persons.

[233] Shoesmith ET AL., *supra* note 8, at 1–3.

[234] Transactions that are Covered Transactions, 31 C.F.R. § 800.301 (2018) (defining "covered transactions" as transactions which would "result in control of a U.S. business by a foreign person"); Foreign Person, 31 C.F.R. § 800.216 (2018) (defining "control" and "foreign person").

investing in the U.S, rather than allocating Presidential power to CFIUS. Fourth, Congress could incentivize foreign investors to be transparent with their investments and connections to foreign governments by offering an expedited CFIUS review process. Finally, as this Note advocates, CFIUS should stop using the foreign control inquiry as a gatekeeping function and should instead shift the foreign control analysis to the formal review stage, using the scale of foreign control as informative rather than dispositive to its ultimate recommendation.

### A. Self-Identification

To alleviate questions of whether or not a U.S. corporation is foreign controlled, corporations could explicitly include a national identity in their charter or bylaws. Corporate charters and bylaws have flexibility at the stage of incorporation and could contain a provision stating that the corporation identifies as "Canadian" or "Mexican" or "Chinese," for example.[235] In this scenario, the

[235] Delaware General Corporate Law (DGCL) outlines both mandatory and optional corporate charter provisions. DEL. CODE ANN. tit. 8, § 102 (2019). DGCL allows for corporate charters to contain "[a]ny provision for the management of the business and for the conduct of the affairs of the corporation . . . ." § 102(b)(1). Delaware's Division of Corporations provides sample language for a corporate charter. *Certificate of Incorporation for Stock Corporation*, ST. DEL., https://corpfiles. delaware.gov/incstk09.pdf. The form states "[t]his form contains the basic information required by statute; if you need to add additional information permitted by statute you may draft a new document." *Id.* at 3. A corporation could self-identify with a national identity by using an optional provision in its charter. Additionally, Delaware "leave[s] almost complete discretion with respect to the contents of the bylaws." Albert H. Choi & Geeyoung Min, *Amending Corporate Charters & Bylaws*, U. PA. L. LEGAL SCHOLARSHIP REPOSITORY, Aug. 16 2017, at 3, https://scholarship. law.upenn.edu/cgi/viewcontent.cgi?article=2900 &context=faculty_scholarship. Corporations could self-identify using the charter, the bylaws, or both. This Note uses Delaware as an example because over 60% "of the Fortune 500 companies are incorporated in

corporation would still be governed under its state of incorporation in the U.S.[236]

The benefit for a corporation in explicitly stating its national identity is clarity in the CFIUS review process. Beyond CFIUS review, corporations may see a benefit to aligning with a country. Professor Richard Brooks argues in favor of allowing corporations to take on a racial identity.[237] He argues that "legal persons adopt and are ascribed identities for the same reasons as natural persons: Identities signify commitments of persons to other persons, communities, beliefs, and conventions."[238] Similarly, allowing corporations to claim a national identity would achieve Professor Brooks goals by allowing corporations to further expand upon their corporate identities and values to shareholders, customers, suppliers, etc.

However, to be effective during CFIUS review, corporations that engage in national security transactions would have to state a national identity in their corporate documents. This scenario presents challenges because corporate law is state-based law and,

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Delaware." *Why Businesses Choose Delaware*, ST. DEL., https://corp law.delaware.gov/why-businesses-choose-delaware/(last visited Nov. 13, 2019). Delaware's popularity is driven by a combination of Delaware's Court of Chancery which "only hears cases involving business entities" and weak competition from other states. Anne Anderson ET AL., *How State Competition for Corporate Charters has Changed the Delaware Effect*, COLUM. L. SCH. BLUE SKY BLOG, http://clsbluesky.law.columbia.edu/2017/10/16/how-statecompetition-for-corporate-charters-has-changed-the-delaware-effect/.

[236] Corporations can incorporate in any of the 50 states, "regardless of where the firm's principal place of business, or other assets and activities, are located." John Armour ET AL., *The Essential Elements of Corporate Law: What is Corporate Law?*, HARV. L. SCH. JOHN M. OLIN CTR. FOR L., ECON. & BUS. DISCUSSION PAPER SERIES, 23 (2009). When a corporation is sued, the choice of law rule in most states has the court look to the laws of the state in which the corporation is incorporated in. *Id.*

[237] Brooks, *supra* note 135, at 2026.

[238] *Id.*

without all states requiring self-ID, there would be a patch-work of corporations self-identifying with nations. This would require a state-by-state legislative fix.[239] While corporate documents are flexible at the time of incorporation, amending a corporate charter requires at least approval of the majority of the board of directors.[240] Already established corporations may have difficulty gathering enough votes to amend their charter or bylaws.[241] Additionally, CFIUS and those concerned about CFIUS review would still need a reliable way to test the accuracy of a corporation's self-identification. Those auditing corporate self-identifiers would run into similar challenges experienced by CFIUS today, as there is no clear-cut test for determining a corporation's national identity.[242] Corporations may also run into the same difficult questions of identity that plague individuals.[243]

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[239] Armour ET AL., *supra* note 236, at 23.

[240] Amending a corporate charter requires the approval of the majority of shareholders and the majority of the board of directors. DEL. CODE ANN. tit. 8, § 242 (2018). Amending corporate bylaws requires the approval of either the majority of the board of directors or the majority of shareholders. § 109.

[241] Choi & Min, *supra* note 236, at 22. There are plenty of reasons why a corporation may "want to amend its charter and bylaws" including "respond[ing] to new, previously unforeseen circumstances and challenges." *Id.* However, "going through [a] shareholder voting process is costly and time-consuming" because the board of directors either has to "wait until the next shareholders' meeting or convene a special shareholders' meeting" to present the amendment for a vote. *Id.* at 22, 24. Additionally, public corporations have to comply with federal laws that require "circulat[ing] a proxy statement" which "imposes an additional cost . . . ." *Id.* at 24.

[242] *See infra* Section III.D. (Case Study: From All-American to Foreign).

[243] Crenshaw, *supra* note 135, at 1298 (explaining that governments and people create social constructs of different categories of people); Donald C. Hambrick ET AL., *When Groups Consist of Multiple Nationalities*, 19/2 ORGANIZATION STUDIES 181, 185 (1998) (noting that determining one nationality for a large, global corporation could

The most important detriment to relying on self-identification is that it does not fully address national security concerns. It is likely that a corporation acting as a "Trojan horse"[244] for a foreign investor with nefarious purposes would self-identify as American regardless. During World War II, the Court noted that "some of the most dangerous of the Axis-influenced enterprises may be Swiss, Dutch, Swedish or American" (nationalities which were considered to be friendly to the U.S. at the time).[245] Additionally, the Court noted that corporate owner-ship ran "through tangled mazes of holding companies" purposely structured to make it "extremely difficult to negate a claim that the ownership of the corporation was coincident with the state of incorporation."[246] Today's criticisms of China are similar, and the most recent FIRRMA changes targeted deals structured in a way to circumvent CFIUS review.[247] A self-identification system would be unlikely to alleviate the major concern of foreign economic espionage.[248]

### B. Ignore Foreign Status

CFIUS could ignore the "foreign" control requirement altogether and redefine covered transaction solely in terms of national security. After all, given the growing complexity of global finance and FDI, the foreign control component is difficult to determine and may no longer prove useful.

The benefit to eliminating the foreign control requirement is increased efficiency and effectiveness. The foreign analysis is likely both underinclusive and overinclusive. CFIUS may be reviewing trans-

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prove challenging when "nationality is a potent factor in explaining individuals' psychological attributes and behaviour").

[244] Clark v. Uebersee Finanz-Korporation, A.G., 332 U.S. 480, 488 (1947).

[245] *Id.* at 485, n.3.

[246] *Id.*

[247] Jalinous ET AL., *supra* note 118.

[248] *See China Economic Espionage*, *supra* note 21.

actions in which there is negligent foreign involvement,[249] slowing down the free-market and costing companies legal fees. Simultaneously, CFIUS likely misses transactions that are purposely structured to evade CFIUS review.[250] Therefore, CFIUS may be more efficient and effective by reviewing every major transaction impacting national security.

However, nationality implies allegiance to, or control by, a specific country, a fact that may have significant implications in how management operates a corporation in America.[251] By excluding nationality from the review process, CFIUS may lose out on insightful information. For example, China passed the National Intelligence Law in 2017, which, according to American officials, "requires Chinese companies to support, provide assistance to and cooperate in Beijing's national intelligence work, wherever they operate."[252] In 2018, shortly after the law was passed, Canadian officials (at the request of American law enforcement) arrested Meng Wanzhou, the chief financial officer of Huawei, a Chinese technology company,[253] and accused her of "defrauding banks to help Huawei's business in Iran."[254] Ren Zhengfei, Wanzhou's father and the founder and chief executive of the company, claims that Huawei does not conduct espionage on behalf of China.[255] However, shortly after Wanzhou's arrest, Poland officials arrested a Huawei employee on spying charges.[256] Additionally, Germany,

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[249] *Clark*, 332 U.S. at 489.

[250] Jalinous ET AL., *supra* note 118.

[251] PAUL CLOSE, CITIZENSHIP, EUROPE AND CHANGE 105 (Basingstoke, eds. 1995).

[252] Santora, *supra* note 132.

[253] Raymond Zhong, *Huawei's Reclusive Founder Rejects Spying and Praises Trump*, N.Y. TIMES (Jan. 15, 2019), https://www.nytimes.com/2019/01/15/technology/huawei-ren-zhengfei.html.

[254] *Id.*

[255] *Id.*

[256] Adam Satariano & Joanna Berendt, *Poland Arrests 2, Including Huawei Employee, Accused of Spying for China*, N.Y. TIMES (Jan. 11,

Britain, the Czech Republic, and Norway "have recently questioned how deeply Huawei should be involved in developing" their technology infrastructure.[257] By ignoring the foreign control analysis, CFIUS could miss out on valuable information, such as the information in the case of Huawei.

Aside from laws that blatantly require overseas espionage, there are business structures that tie entities close to their nation's political leaders.[258] For example, SOEs and SWFs are closely affiliated with their respective government such that their investments are "plausibly an extension of state policy rather than a function of market dynamics."[259] Specifically, SOEs are businesses run under the control of the government[260] and SWFs are special investment funds that are created, owned, and controlled by a government.[261] Typically, SWFs are owned by the national government, not the local government or the state government, and they invest outside of their home country.[262] Given their close ties to governments, SOEs and SWFs may be ordered to invest in the U.S. for nefarious purposes. Thus, the foreign control requirement proves valuable when the business in question either is from a country that mandates behavior contrary to U.S. national security interest or is of a structure that implies close contact with a foreign government.

### C. Presidential Power

The President could use executive power to disallow specific bad-actor countries from investing in the U.S. whatsoever.

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2019), https://www.nytimes.com/2019/01/11/world/europe/poland-china-huawei-spy.html?module=inline.

[257] *Id.*

[258] Patrick Griffin, Note, *CFIUS in the Age of Chinese Investment*, 85 Fordham L. Rev. 1757, 1760 (2017).

[259] *Id.*

[260] *Id.*

[261] Gutin, *supra* note 12.

[262] *Id.*

The President has the ability to declare a national emergency for "any unusual and extraordinary threat . . . to the national security, foreign policy, or economy of the United States."[263] In addition, the President may "investigate . . . [or] prohibit, any acquisition, . . . use, [or] transfer . . . [of] any property in which any foreign country or a national thereof has any interest by any person, or with respect to any property, subject to the jurisdiction of the United States."[264] It is thus within the President's purview to broadly eliminate investment from countries that are bad actors.

The benefit to a broad declaration eliminating investment from certain countries would be clarity. Investors would know the rules and could plan their investments accordingly, without having to worry about a CFIUS review. Additionally, the U.S. government would have a more straightforward national security policy.

However, the President may be hesitant to make sweeping declarations barring all of a country's investors from investing in the U.S. For example, while President Trump has stated on many occasions that Chinese investments are a threat to American national security,[265] the Administration would have to acknowledge the large volume of capital that Chinese investors pour into the U.S. annually.[266] This amount of investment supports American jobs and small businesses in the U.S.[267] Additionally, Congress has previously been concerned about the chilling effect of discriminatory rules that would reduce FDI.[268] In *Clark*, the Court stated, "[i]t is hard for us to assume that Congress [expanded TWEA] . . . in the case of friendly or neutral [foreign] interests whose investments in our economy were in no way infected with

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[263] 50 U.S.C. § 1701(a) (2008).
[264] 50 U.S.C. § 1702(a)(1)(B) (2001).
[265] Coppola, *supra* note 112; *See also China Economic Espionage*, *supra* note 21 (stating that Chinese espionage concerns are not unfounded).
[266] Hanemann, *supra* note 111 (stating that, in 2016, Chinese investment in the U.S. peaked at $46 billion).
[267] *Benefits of Foreign Direct Investment (FDI)*, *supra* note 17.
[268] Yoon-Hendricks, *supra* note 27.

enemy ownership or control."[269] Banning an entire country and its citizens from investing in the U.S. would have a chilling effect on the global economy. Further, such bans may prove discriminatory in nature.

### D. Expedited Review Process

Congress could incentivize foreign investors to be transparent with their connections to foreign governments by offering an expedited CFIUS review process. Specifically, CFIUS could develop a faster review for investors and entities that have been pre-approved. These investors and entities would be required to open their books to CFIUS on a regular basis for audits. Additionally, each investor and entity would be required to go through the CFIUS review process at least once before applying for pre-approval.

The benefit of an expedited review process is that it allows CFIUS to use a carrot (a speedier review process), rather than only using a stick (recommending the President block the deal and generating negative publicity).[270] Additionally, incentivizing would-be investors gives CFIUS the opportunity to build relationships with repeat investors and to establish a dialogue. Investors and entities can use their pre-approval status as an investment incentive in itself—they can market themselves as more stable investors or investees because of their special status with CFIUS. This, in turn, will funnel more investment to the pre-approved investors and entities. American companies could benefit by having more certainty with their foreign investors, as well as the opportunity to work with foreign investors more easily. Ideally, this approach would increase FDI in the U.S. and reduce claims of anti-discrimination.

However, an expedited review process for select pre-approved investors or entities may result in nefarious foreign actors targeting the "approved" investors or entities to do their bidding.

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[269] Clark v. Uebersee Finanz-Korporation, A.G., 332 U.S. 480, 487 (1947).

[270] JACKSON, *supra* note 2, at fig.1, 11.

This expedited review may also incentivize foreign governments to create squeaky clean profiles for a select group of people or companies to gain the pre-approved CFIUS status. These concerns could be addressed through a mechanism that would automatically revoke the pre-approved status if CFIUS' audits determined there were bad actors involved. However, managing a separate review process could prove cumbersome for CFIUS.

### E. Review All Transactions with a National Security Implication

Congress and the President should acknowledge that determining whether a company has foreign control is a complex process that rarely provides a straight-forward answer.[271] Currently, CFIUS has oversight over transactions in which there is foreign control and a national security implication. If a transaction is not deemed to be under foreign control, it is not subject to a CFIUS review, regardless of the national security implications therein. This approach means that CFIUS runs the risk of missing transactions that are purposely structured to avoid CFIUS review.[272] CFIUS should shift its oversight to review all transactions with a national security implication. In this scenario, instead of using the foreign control inquiry as a gatekeeping function, CFIUS should shift the foreign control analysis to the formal review stage and use the scale of foreign control as informative rather than dispositive.[273]

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[271] Foreign Person, 31 C.F.R. § 800.216 (2018) (defining "foreign person"); *see infra* Section III.D. (Case Study: From All-American to Foreign).

[272] Jalinous ET AL., *supra* note 118 (stating that recent legislation is an attempt to address investment structures the Chinese used to circumvent CFIUS review); *see China Economic Espionage*, *supra* note 21 (recent examples of Chinese companies using FDI to conduct espionage in the U.S.).

[273] FIRRMA takes a step in this direction through its pilot program for "critical technologies." Ignacio E. Sanchez & Christine Daya, *CFIUS*

With this change, stakeholders will benefit from a simplified process. First, Congress will not struggle with determining which investment structures should lead to CFIUS review.[274] Amending legislation is not a timely mechanism to manage new investment structures that might evade CFIUS review. In this scenario, Congress could narrowly focus on which industries to include in the scope of national security and thereby subject any new investment structures to CFIUS review.[275] Second, Congress and the President will worry less that CFIUS is missing transactions that are purposely structured to avoid CFIUS review. By not using "foreign" control as a gatekeeping function, CFIUS can review the investor's level of foreign control and the strength of the foreign influence on a case-by-case basis.[276] Third, the private sector will have clarity on which businesses are subject to CFIUS review. Rather than being concerned that adding another "foreign" board

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*pilot program mandates declarations for certain non-controlling investments in critical technologies*, DLA PIPER (Oct. 17, 2018), https://www.dlapiper.com/en/us/insights/publications/2018/10/cfius-pilot-program-mandates-declarations/. During the pilot program, CFIUS' foreign control requirement for review will include both investments with foreign "control" and foreign "non-control[]" in 27 specific industries. *Id.* However, this Note advocates for CFIUS to review all transactions with a national security implication, not just transactions with some element of foreign investment.

[274] Jalinous ET AL., *supra* note 118 (stating that recent legislation is an attempt to address investment structures the Chinese used to circumvent CFIUS review).

[275] *See* Griffin, *supra* note 258, at 1783–84 (Senators from the mid-west argued that "food safety" and "food security" should be included under CFIUS' national security review); JACKSON, *supra* note 2, at 62–63 (discussing the proposed acquisition of Smithfield Foods Inc. by a Chinese corporation and the public concern for food security).

[276] ORGANIZATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT, OECD BENCHMARK DEFINITION OF FOREIGN DIRECT INVESTMENT 23 (4th ed. 2008) ("It has been argued that in practice there are several factors which may determine the influence a direct investor has over the direct investment enterprise.").

member will lead to CFIUS review, for example, business leaders will know which trans-actions are likely to lead to CFIUS review.

There are broader benefits to shifting the foreign control question to the review stage. In particular, this process would be more neutral with respect to race and nationality, as all trans-actions with national security implications would be subject to the CFIUS review process.[277] CFIUS would retain the ability to examine the scale of foreign control during the review process and determine whether an element of control would impact national security, ensuring that CFIUS can still identify entities engaging in FDI for nefarious purposes.[278] Finally, CFIUS would avoid defining foreign control in a way that is at odds with other government agencies, such as the IRS.[279]

Granted, this change may increase CFIUS' workload. CFIUS may need to review more transactions with this change, although it is difficult to determine the degree to which CFIUS' workload would increase. In CFIUS' most recent report to Congress, CFIUS disclosed that it reviewed 143 covered transactions in 2015.[280] However, CFIUS does not disclose the parties involved in the transactions it reviews.[281] Without such disclosure, it is difficult to assess how many transactions with national security implications took place without going through a CFIUS review. Therefore, it is impossible to determine how many additional transactions CFIUS would need to review if the gatekeeping analysis would be limited to national security implications.

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[277] Sanger, *Under Pressure, Dubai Company Drops Port Deal*, *supra* note 27 (stating that President George W. Bush "issued a strong defense [of the DP World deal], suggesting that racial bias lay at the core of the objections . . . ").

[278] *See China Economic Espionage*, *supra* note 21.

[279] *See* INTERNAL REVENUE SERVICE, *supra* note 232.

[280] COMMITTEE ON FOREIGN INVESTMENT IN THE UNITED STATES, ANNUAL REPORT TO CONGRESS 2 (2017) (reporting on data from 2015).

[281] JACKSON, *supra* note 2, at 3.

Overall, shifting the foreign control question to the review stage is the ideal solution to address the legal challenges of determining corporate nationality. Additionally, this solution adheres to the loftier goals of American enterprise: a free-market that does not discriminate based on racial or national identity.[282]

## V. CONCLUSION

While CFIUS was originally created to appease Congressional opponents to FDI, over time, its mission has shifted to the policing of foreign investment under the guise of national security, often with discriminatory overtones. In particular, courts and CFIUS have struggled to determine what constitutes national identity and to apply this determination to corporations and complex investment structures. Additionally, the modern, globalized market-place renders the foreign control review by CFIUS simultaneously overinclusive and underinclusive for addressing national security concerns. An ideal solution to this set of challenges is for CFIUS to stop using the foreign control inquiry as a gate-keeping function. Instead, CFIUS should shift the foreign control analysis to the formal review stage and use the scale of foreign control as informative rather than dispositive. This solution addresses national

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[282] *See* President Ronald Reagan, President of the U.S., Radio Address to the Nation on the Canadian Elections and Free Trade, *supra* note 1 ("The expansion of the international economy is . . . central to our vision of a peaceful and prosperous world of freedom."); Sanger, *Under Pressure, Dubai Company Drops Port Deal*, *supra* note 26 (President George W. Bush "issued a strong defense [of the DP World deal], suggesting that racial bias lay at the core of the objections . . . ."); Mundheim & Heleniak, *supra* note 15, at 222 ("Development of the open [investment] policy is due in part to [the American] belief in the free market system, and in part to a careful and pragmatic assessment of our national self-interest."); Gerowin, *supra* note 15, at 633 ("The foundation of [the policy of unrestricted investments] is the maintenance of a strong belief in the free market as a means of achieving maximum efficiency in the allocation of scarce resources. As the strongest force in the market, the United States also stands to gain the most from it.").

security concerns, promotes efficiency and effectiveness for all three branches of government, and adheres to American free-market and anti-discriminatory policies.