Overcoming CFIUS Jitters: A Practical Guide for Understanding the Committee on Foreign Investment in the United States

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OVERCOMING CFIUS JITTERS: A PRACTICAL GUIDE FOR UNDERSTANDING THE COMMITTEE ON FOREIGN INVESTMENT IN THE UNITED STATES

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The U.S. has long been an attractive place for foreign investment. Its reputable government and professional enforcement agencies, strong tradition of protecting private property and vibrant middle-class consumer base makes it a prudent investment choice for many foreign investment entities – both private and public. While the U.S. has long championed a free market ethos, it is not devoid of protectionist bias. Starting in 1988, the Committee on Foreign Investment in the United States (CFIUS) has been charged with monitoring foreign direct investment (FDI) and when necessary recommending that the President block or prohibit FDI transactions that may threaten U.S. national security. While the Committee has traditionally taken a rather laissez-faire attitude towards its gatekeeping role, the recently enacted Foreign Investment and National Security Act (FINSA) has ramped up the Committee’s mandate and increased Congressional oversight. Some foreign investors may perceive this stricter scrutiny as greatly increasing the risk and thus cost involved with undertaking FDI in the U.S. This is likely due to uncertainty about how CFIUS would operate post FINSA and the fact that the review process continues to be vulnerable to political manipulation by private interests. Nevertheless, the CFIUS process should continue to be surmountable for foreign investors with a sophisticated understanding of how the Committee operates. By providing a comprehensive overview of the evolution of the CFIUS mandate and applying the lessons of public choice theory, this article provides critical guidance for those contemplating FDI transactions in the U.S. and highlights strategies for maneuvering through the process with relative ease. It is particularly important that parties to a FDI transaction are proactive in engaging and gaining the support of relevant CFIUS members as well as the public at large.

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I. INTRODUCTION
The importance of foreign investment to the U.S. economy is well established. It provides a critical impetus for job creation and a source of revenue for development and innovation. Investment in U.S. assets by non-American investors occurs in a variety of ways, many of which are uncontroversial. However, foreign investment resulting in effective control of significant assets in the U.S., generally called foreign direct investment (FDI), has long been

1 “The United States is heavily dependent on continuing inflows of foreign investment, because U.S. savings, net on [of?] the drain on these savings created by public-sector deficits, are insufficient to finance domestic investment. As a consequence, the United States must import savings from abroad,… [The] deficit for 2005 was slightly greater than $800 billion, implying that the United States needed to import in excess of $2 billion per day during 2005 to close the gap between domestic investment and saving…” EDWARD M. GRAHAM & DAVID M. MARCHICK, U.S. NATIONAL SECURITY & FOREIGN DIRECT INVESTMENT, 2 (Institute For International Economics ed., 2006).
2 See GRAHAM AND MARCHICK supra at 75-94; see also Jeff Immelt & Ken Chenault, How We’re Meeting the Job Creation Challenge, Wall St. J., A15 (June 13, 2011) (“…we need to make America the most attractive place on Earth for high-tech service jobs and to accelerate foreign direct investment in the U.S’”). Mr. Immelt is the chairman of President Obama’s Jobs and Competitiveness Council.
3 The U.S. government has been more than thrilled to sell U.S. treasuries to anyone who would take them. Small-size, non-control securities holdings are another area where foreign investment is widely solicited. For statistical purposes, the United States defines foreign direct investment as the ownership or control, directly or indirectly, by one foreign person… of 10% or more of the voting securities of an incorporated U.S. business enterprise or an equivalent interest in an unincorporated business enterprise.” James K.
viewed with suspicion and distrust by the U.S. populace. This has particularly been true during times of war and with respect to foreign investors from an enemy country. But even when the U.S. is not at war, critics of FDI have had little trouble provoking suspicion that foreign investors may seek U.S. holdings in order to extract trade secrets or national security information, which can then be used to undermine the U.S. national interests. While there are perhaps a few episodes where something like this has happened, on the whole alarmism about FDI seems unwarranted. This is unfortunate because FDI, more so than other forms of foreign investment, provides an important source of capital for innovation, job growth and manufacturing based expansion—attributes critical for continued economic growth and sustainability.

Since the mid-70s, a high level committee of Executive Branch officers, called the Committee of Foreign Investment in the United States or CFIUS, has been charged with monitoring FDI. For many years CFIUS was a sleepy committee that largely gathered information and got little attention from anyone. More recently, much has been written about

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Jackson, The Committee on Foreign Investment in the United States (CFIUS), CRS Report for Congress, 10 (July 29, 2010); see also Graham & Marchick supra note 1, at 2 (“If both foreign and domestic investors own common stock, then only the portion held by the foreign persons is considered to be FDI, and only if a threshold percentage is attained... for most purposes this threshold stands at 10 percent.”). 5 See Graham & Marchick supra note 1, at 5 (discussing President Woodrow Wilson’s use of the Trading with the Enemy Act to confiscate property held by U.S. subsidiaries of German companies—particularly those in the chemical industry—after WWI erupted in Europe).

6 Id. at 4 (discussing an incident occurring in 1915, where a briefcase inadvertently left by a German diplomat was discovered to contain materials stating that some German-controlled, American-based operations were “aimed at, or at least useful for enhancing German war capabilities...”).

7 Id. at 75 (“... the vast preponderance of evidence supports... the conclusion, that FDI creates benefits for the economy.”). See also Jonathan C. Stagg, Scrutinizing Foreign Investment: How Much Congressional Involvement is Too Much?, 93 Iowa L. Rev. 325, 331 (2007-2008) (“Foreign investment... has played a central role in fueling rapid U.S. economic growth.”); and see also Maira Goes de Moraes Gavioli, National Security or Xenophobia: The Impact of the Foreign Investment and National Security Act (“FINSA”) in Foreign Investment in the U.S., Law Raza J., vol. 2, issue 1, 2 (Winter 2011) (“Foreign investment is a vital source of job creation, innovation, development and critical to the U.S. manufacturing industry.”).
CFIUS – especially following the widely publicized and highly politicized Dubai World Ports fiasco and ensuing legislative action that strengthened the Committee’s authority.  

Existing accounts of CFUIS, however, are largely descriptive or normative in nature.  

These accounts fail to capture the dynamic nature of the CFIUS process as it has evolved in recent years. In particular, they fail to recognize the ways in which the CFIUS review process can be used strategically by narrow interests. Consequently, these accounts are ultimately naïve and offer little practical guidance to parties seeking to navigate the CFIUS approval process.

Ultimately what is absent from existing literature on CFIUS are the insights provided by public choice theory.  

We know from the economic theory of regulation that private interests, such as business firms or unions, will often use the regulatory process to extract economic rents

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9 Most of the literature cited above examines how well FINSA and its implementing regulations balance the competing interests of protecting national security while still promoting much needed FDI. A number of these accounts address FINSA’s potential to further politicize FDI transactions – generally attributed to Congress’s expanded oversight and access to confidential information. See Stagg supra at 352; see also de Moraes Gavioli supra note 7, at 33. Graham and Marchick, who provide by far the most comprehensive discussion on CFIUS, also acknowledge the highly politicized nature of the review process and public choice forces (aka private interests) that frequently come into play, noting that “the CFIUS process has become increasingly politicized for commercial rather than national security reasons...” GRAHAM & MARCHICK supra note 1, at 123. Thus while the high potential for political manipulation of CFIUS process in order to extract private (special interest) rents, has been widely addressed, these discussion fail to come full circle by articulating a theory or model clearly identifying the regulatory incentives at play. Such a model is necessary in order to make informed predictions about the CFIUS review process going forward.

10 Public choice theory, or alternatively the economic theory of legislation or regulation, is the economic study of non-market or political decision making. “Public choice theory treats voters as narrow profit-maximizers who, due to information costs and collective action problems, remain rationally ignorant and thus politically irrelevant to the extent they are not organized into interest groups.” Daniel Shaviro, Beyond Public Choice and Public Interest: A Study of the Legislative Process as Illustrated by Tax Legislation in the 1980s, 139 U. Pa. L. Rev. 1, 64 (1990).
for themselves or impose costs on their rivals.\textsuperscript{11} This is particularly true when regulatory agencies have the power to provide significant benefits such as operating licenses or to block important transactions using vague mandates like the “public interest.”\textsuperscript{12} The CFIUS review process, as it has matured, has evolved into a regulatory power to block foreign direct investment under an equally vague \textit{national security} standard. It should come as no surprise, therefore, that private interests have sought to manipulate the process for their private advantage.

Understanding the strategic or public choice dimension of the CFIUS process is of more than academic interest. Understanding that CFIUS review has been and will likely continue to be used for private advantage has important implications for assessing the public benefits likely to be derived from this process, and in particular for understanding how it is likely to act as a drag over the long term on the continued growth of foreign direct investment into the United States. Perhaps more critically, such a perspective provides a superior framework for developing a pragmatic understanding of how to maneuver one’s way through the CFIUS filing and review process.

This article attempts to fill this gap – and in doing so provide two beneficial contributions to the existing literature on CFIUS and foreign direct investment more generally. First, the article supplements existing accounts of the CFIUS review process by critically examining the

\textsuperscript{11} At its most basic or stripped down level, public choice theory posits that government actors create rents by cartelizing private producers or private interests in order to gain the political support of those who benefit from the wealth redistribution. “Because political action can redistribute wealth generally,… private interest groups… have an incentive to organize, both to obtain the gains and to avoid the losses from a whole menu of government enactments.” Fred S. McChesney, \textit{Rent Extraction and Rent Creation in the Economic Theory of Regulation}, 16 J. Legal Stud. 101, 101 (1987).

\textsuperscript{12} “The state has one basic resource which in pure principle is not shared with even the mightiest of its citizens: the power to coerce. The state can seize money by the only method which is permitted by the laws of civilized society, by taxation. The state can ordain the physical movement of resources and the economic decisions of households and firms without their consent. These powers provide the possibility for the utilization of the state by an industry to increase its profitability…” George J. Stigler, \textit{The Theory of Economic Regulation}, Bell J. of Econ. & Mgmt. Sci. 2, no. 1 (Spring 1971): 1-21.
political and economic forces that have shaped the evolution of that process. Second, this more realistic analysis of CFIUS and the CFIUS review process provides a framework for better understanding the practical considerations that any business person or practitioner contemplating foreign investment in the U.S. should take into account before making a CFIUS filing.

The article begins in Parts II with a general introduction to and overview of CFIUS and the CFIUS review process, giving the reader a basic understanding of what and why the Committee does what it does. Part III examines the highly politicized inception and evolution of CFIUS. This includes an examination of the legislative history as well as discussion of the controversial and widely publicized transactions that have inspired somewhat erratic reform movements. Part IV extracts the lessons of Part III and addresses four broad themes or “pitfalls” that generally underscore the CFIUS review process – highlighting the shortcomings underlying the current CFIUS mandate. It then discusses practical solution for avoiding such pitfalls.

II. THE CFIUS REVIEW PROCESS

The CFIUS regulatory regime was developed through a combination of legislative acts, executive orders and requisite implementing regulations by the Treasury Department.

A. An Overview of Post-FINSA CIFIUS

The evolutionary development of CFIUS culminated in the enactment in 2008 of the Foreign Investment and National Security Act of 2007 (FINSA).13 Passed largely in response to China National Offshore Oil Corporation’s attempted acquisition of Unocal and the Dubai World Ports debacle,14 FINSA broadened the scope of CFIUS’s and President’s authority to block or modify any transaction involving a foreign person taking a controlling stake in a U.S.

14 Both these highly politicized events are discussed infra at Part III.
corporation – where the transaction poses potential national security risks. The legislation also expands the involvement of Congress in the CFIUS process by increasing congressional oversight and reporting requirements.

In January 2008, President Bush issued Executive Order 13,456, implementing the new legislation and directing CFIUS to promulgate supplemental regulations.\(^{15}\) This task was ultimately taken up by the Treasury Department, which finalized and published new CFIUS regulations in November 2008.\(^ {16}\) These regulations retained the basic framework of the previous (“Exon-Florio”) CFIUS review process: the voluntary notification system,\(^ {17}\) a 30 day deadline for the committee to review applications and determine whether further investigation is necessary,\(^ {18}\) and an additional 45 days for CFIUS to investigate the transaction if this is deemed necessary.\(^ {19}\)

There are now, however, additional procedural requirements the Committee must undertake at the conclusion of any investigation. Following any 45-day investigation, the Committee must take one of a delineated number of actions.\(^ {20}\) CFIUS may conclude the review on its own, either sanctioning the transaction allowing it to move forward, or recommending that the parties withdraw their notice and voluntarily abandon the deal.\(^ {21}\) Alternatively, if CFIUS finds the transaction problematic, the Committee may send a report to the President requesting

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\(^{16}\) See THE DEPARTMENT OF TREASURY, REGULATIONS PERTAINING TO MERGERS, ACQUISITIONS, AND TAKEOVERS BY FOREIGN PERSONS; FINAL RULE, Federal Register, Vol. 73, No. 226 (Nov. 21, 2008) (codified at 31 C.F.R. § 800 et seq).

\(^{17}\) See 31 C.F.R. § 800.401 (“A party or parties to a proposed or completed transaction may file voluntary notice of the transaction with the Committee.”).

\(^{18}\) Id. at § 800.502 (“Beginning of the thirty-day review period”), § 800.503 (“Determination of whether to undertake an investigation”) and § 800.504 (“Determination not to undertake an investigation”).

\(^{19}\) Id. at § 800.505 (“Commencement of investigation”) and § 800.506 (“Completion or termination of investigation and report to the President”).

\(^{20}\) Id. at § 800.506 (“Completion or termination of investigation and report to the President”).

\(^{21}\) Id. at § 800.506(d).
that the President make the ultimate decision on the matter. In the latter circumstance the President has a further 15 days to tender his final determination regarding whether to block or modify the proposed acquisition under review.

CFIUS presently has sixteen members (although not all members participate to the same extent), consisting of the heads of or representatives from various Executive Branch departments and agencies. The process of CFIUS review can begin with either a voluntary notice from a party of a potential or proposed “covered” transaction or on recommendation from a CFIUS member agency that believes a given transaction might affect U.S. national security. In practice, CFIUS rarely initiates reviews.

FINSA was the result of growing concern in both Houses of Congress regarding whether there was sufficient scrutiny of FDI in the United States. FINSA retains the basic CFIUS mandate. It provides that the President may prohibit or suspend any “covered” transaction, as well as unwind past transactions occurring after 1988, involving a foreign person taking a

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22 Id. at § 800.506(b)(1),(2)&(3). If CFIUS choses to let the President be the final arbiter on the matter the Committee must send a report to the President putting forth one of three pronouncements – either (1) the Committee recommends that the President suspend the transaction, (2) the Committee cannot come to a consensus on the matter and thus make no recommendation, or (3) the Committee requests that a President make the determination, notwithstanding the Committee’s recommendation (which is nonetheless still provided to the President). See 31 C.F.R § 800.506(c).

23 See 50 U.S.C app. § 2170(d)(2).

24 There are nine full participating members in CFIUS; these include the Department of Treasury, Department of Justice, Department of Homeland Security, Department of Commerce, Department of Defense, Department of State, Department of Energy, Office of the U.S. Trade Representative, and Office of Science & Technology Policy. See 50 U.S.C app. at § 2170(k)(2)(A)-(G) (the first seven members are explicitly established by statute) as well as 50 U.S.C app. at § 2170(k)(2)(J) (providing that the President may add additional members, as “appropriate, generally or on a case-by-case basis) and also Exec. Order No. 11858, Sec. 3(b) (designating the heads of the U.S. Trade Representative and Office of Science & Technology Policy as additional fully participating CFIUS members). There are five further member-offices whose representatives mostly observe CFIUS’ proceedings but will participate from time to time and make reports to the President; these “partial” members include representatives from the Office of Management & Budget, Council of Economic Advisors, National Security Council and Homeland Security Council. See Exec. Order No. 11858, § 3(c). The Director of National Intelligence and the Secretary of Labor are non-voting “ex-officio” members of CFIUS. See 50 U.S.C app. § 2170(k)(2)(H)(I).
controlling interest in a U.S. company (including U.S. subsidiaries of foreign companies), if the
President, in his discretion, deems such transaction to threaten or impair national security.²⁵

Nevertheless FINSA modifies the previous CFIUS process in a number of meaningful
ways.²⁶ Most notably FINSA legislatively codifies CFIUS,²⁷ broadens the definition of national
security to include homeland security,²⁸ includes critical infrastructure²⁹ and critical
technologies³⁰ as elements to be taken into consideration in determining whether a covered
transaction negatively impacts national security,³¹ and requires the Director of National
Intelligence (DNI) to make an independent analysis of any threat posed by a transaction under
CFIUS review.³²

FINSA also expanded the circumstances in which CFIUS is required to undertake a full
blown investigation, as opposed to clearing the transaction following the review stage, as has
traditionally been the practice. An investigation is now mandatory when the U.S. acquisition is

²⁶ The previous review process was established via the Exon-Florio Amendment in 1988, the Byrd
Amendment in 1993 and various executive orders and regulations refining these legislative mandates. See
Exon Florio Provision, Omnibus Trade and Competiveness Act of 1988, Pub. L. No. 100-418, § 5021,
the President’s authority established via the Exon-Florio Amendment to CFIUS) and Exec. Order No.
13,286 (President Bush, February 28, 2003) (adding the head of the Department of Homeland Security
(DHS) as member of CFIUS).
²⁷ See 50 U.S.C app. § 2170(a)(1).
²⁸ Id. at § 2170(a)(5) (“The term ‘national security’ shall be construed so as to include those issues relating
to ‘homeland security,’ including its application to critical infrastructure.”)
²⁹ Id. at § 2170(a)(6) (“The term critical infrastructure means…. systems and assets, whether physical or
virtual, so vital… that the incapacity or destruction of such would have a debilitating impact on national
security.”); also see 50 U.S.C app. at § 2170(f)(6) (establishing that “critical infrastructure” entails
constitutes major energy assets).
³⁰ Id. at § 2170(a)(7) (“The term ‘critical technologies’ means critical technology… essential to national
defense…”)
³¹ Id. at § 2170(f)(6) & § 2170(f)(7). Section 2170(f) enumerates all of the various considerations CFIUS
must take into account when determining whether a particular transaction implicates national security
concerns.
³² FINSA requires that the Director of National Intelligence (an ex officio CFIUS member) conduct “a
thorough analysis of any threat to the national security of the United States posed by a covered
transaction.” See 50 U.S.C app. § 2170(b)(4)(A). This analysis must be submitted to the Committee no
later than 20 days from when notice of the transaction was first accepted. Id. at § 2170(b)(4)(B).
made by a foreign government-controlled entity (FGCE) or is one that could result in any foreign control of critical infrastructure, which includes major energy assets. In such cases, an investigation may still be avoided if the Treasury and the head of the lead agency jointly determine the transaction will not impair national security. In effect, in these types of transactions the burden has been shifted to the filing parties to show that the transaction in question does not threaten national security.

B. The CFIUS Mandate

CFIUS may review any transaction resulting in foreign control of a company engaged in interstate commerce in the United States. CFIUS may further investigate, modify, block or unwind any acquisition or similar transaction resulting in foreign control of a U.S. business where such control is likely to impair or threaten America’s national security.

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33 Id. at § 2170(b)(2)(B)(i)(II) & (III).
34 Id. at § 2170(k)(5) (establishing that the Department of Treasury designate one or more lead agencies for each transaction before the Committee).
35 Pursuant to the Byrd Amendment, investigations were already mandatory for any FGCE acquisitions unless the Treasury otherwise determined the transaction was not a threat to national security. Thus FINSA expanded mandatory investigations in two ways: first by making it more difficult for parties to establish that an FGCE transaction does not implicate national security (before only the Treasury, generally predisposed in favor of free trade, had to make the determination); second by mandating investigations of foreign acquisitions of critical infrastructure – and making exemption from this requirement more difficult.
36 Some commentators have construed these additions to the CFIUS process to signify a fundamental change in America’s view on FDI. See Richard G. Reinis, Practioners Should Advise Clients that Any Transaction Involving Foreign Investment May Come Under the Purview of CFIUS, 33 L.A. Law. 42, 44 (2010-2011) (“One very important change to the CFIUS process included in the 2008 regulations is the elimination of the presumption that a foreign direct investment in a U.S. business contributes positively to the American economy. Previously, CFIUS had to prove that a transaction threatened national security. Now the burden is on the parties to prove that the foreign investor does not pose a threat.”).
37 See 50 U.S.C app. § 2170(b)(1)(D)(i) (“the President or Committee may initiate a review… of any covered transaction”) in conjunction with 31 C.F.R. § 800.207 (“covered transaction” means any transaction posed or pending after August 23, 1988, by or with any foreign person, which could result in control of a U.S. business by a foreign person.”).
38 See 50 U.S.C app. § 2170(b)(2)(A)&(B)(i) (“the Committee shall immediately conduct an investigation…, and take any necessary action in connection with the [covered] transaction… in each case in which… (I) the transaction threatens to impair national security… and that threat has not been mitigated by during or prior to the review… (II) the transaction is a [FGCE]; or (III) the transaction would result in control of critical infrastructure…, if the Committee determines that the transaction could impair
Necessarily the first issue to be resolved is whether the transaction comes within CFIUS’s jurisdiction or regulatory authority. CFIUS only has jurisdiction to review covered transactions – transactions resulting in foreign control of an entity engaged in interstate commerce in the U.S. While FINSA provides little guidance on what constitutes a covered transaction, the Treasury Department regulations provide more clarity on the matter. The key issue is that of control – specifically whether the foreign entity is likely obtain sufficient managerial influence over a U.S. entity pursuant to the proposed transaction. Thus, investments made solely for investment purposes or in which the foreign investor has no intention of determining or directing the business operations of the U.S. target are not considered covered transactions – and fall outside CFIUS’s regulatory purview. Foreign “greenfield” investments or investments in new enterprises, and foreign asset acquisitions where assets do not constitute a U.S. business are also not considered covered transactions.

Investments that are taken solely for investment purposes are defined as those involving a transfer of ownership of less than 10% of the voting securities of the U.S. target, as well as investments that are undertaken directly by a bank, trust company, insurance company, investment company, pension fund, employee benefit plan, mutual fund, finance company or brokerage company “in the ordinary course of business for its own account.” Transactions involving stock splits or pro rata stock dividends not involving a change in control, acquisitions

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39 A covered transaction is broadly defined as “any merger, acquisition, or takeover that is proposed or pending after August 23, 1988, by or with any foreign person which could result in foreign control of any person engaged in interstate commerce in the United States.” Id. at § 2170(a)(3).
40 The regulations state that the “term control means the power, direct or indirect, whether or not exercised,… to determine, direct, or decide important matters affecting an entity.” See 31 C.F.R § 800.204.
41 See 31 C.F.R. § 800.302 (“Transactions that are not covered transactions”).
42 Id. at § 800.301(c), Example 3.
43 Id. at § 800.302(b) & (e).
of an entity that does not constitute a U.S. business, and acquisition by an entity acting as an underwriter also do not constitute covered transactions.\footnote{Id. at § 800.302(a), (c) \& (d).}

Because the statute requires that a covered transaction be one that results in foreign control of an American person, a corollary issue pertains to defining foreign and American persons for the purpose of the statute. It is notable that the acquirer and target can be both. Identification as an American “person” or enterprise depends on the extent or level of business activity that the entity is carrying on in the States.\footnote{There must be control of an entity “engaged in interstate commerce in the United States.” See 50 U.S.C. app. § 2170(a)(3).} This means that a U.S. subsidiary of a foreign-owned company is deemed a U.S. person if it is sold to another foreign owned company, but is deemed a foreign person if it acquires another American-based enterprise.

Parties to a covered transaction may acquire a safe harbor against later unwinding of the transaction by filing a voluntary notice of the proposed transaction with CFIUS.\footnote{See 31 C.F.R § 800.601. CFIUS may unilaterally review a transaction if voluntary notice of the transaction is not filed with the Committee and it is determined that the transaction is in fact a covered transaction. Id. at § 800.401(b).} Parties are encouraged, and often do, proffer informal applications or preliminary submissions prior to the commencement of the formal 30 day review process.\footnote{Procedures for filing voluntary notification to CFIUS are set out in 31 C.F.R. § 800.401. Parties who voluntary file notice with CFIUS must also submit two certifications to the committee. The first certification must be proffered when formal notice is filed. Id. at § 800.402(l). The second certification must be submitted at the conclusion of the review or investigation. Id. at § 800.701(d). The forms certify that the filing party compiled with the CFIUS mandate and that the information provided was in fact true. Material misrepresentations are sanctioned with hefty monetary fines. Id. at § 800.801 (establishing civil liability – up to $250,000 for each offense – for “material misstatement[s] in a notice” or for any “false certification.”).} This allows the parties and CFIUS to work out any preliminary concerns before the formal 30 day review process commences.\footnote{See [check form ital?] Supplementary Information for 31 C.F.R § 800 et seq. at 70703 (“By consulting with CFIUS in advance of filing and, where appropriate, providing CFIUS with a draft notice…, parties can help ensure that their notice, once submitted, will contain the information CFIUS needs to do its work.”).}
CFIUS regulation, it is extremely subjective and circumstance specific – making it difficult to make concrete statements about how the informal review process is likely to unfold, not to mention whether or not it is necessary to notify CFIUS in the first place.  

Of course, if there is any uncertainty about whether the threshold level of control will be triggered by a proposed transaction or whether the transaction involves an industry or company with national security implications, it is prudent to notify CFIUS to get better guidance on whether filing is likely to be necessary.

Once concerns raised by the informal review are addressed, and if it is determined that the transaction in question is a covered transaction with national security implications, the formal process begins with a 30-day review. In most cases a lead agency is designated as the “point person” for communications and negotiations between the Committee and the filing parties.

During the review period, the committee examines the transaction in order to identify and address any national security concerns potentially posed by the transaction. CFIUS may request additional information from the parties, to which parties must respond within 3 business days (including requests for extensions if necessary). The ultimate determination made during the

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49 It is important to note that not every transaction resulting in foreign control of a U.S. entity requires CFIUS notification. As highlighted in the Treasury Department’s regulations, notice is not intended for firms that produce goods or services with no special relationship to national security. Manufacturers or producers of toys, games, food products, hotels and restaurants and legal services are given as examples of industries that do not implicate national security and thus need not notify CFIUS. See Reinis supra note 36, at 45; also see Jackson supra note 4, at 11 (“CFIUS has indicated that in order to assure an unimpeded inflow of foreign investment it would implement that statute ‘only insofar as necessary to protect national security,’ and in a manner fully consistent with the international obligations of the United States.”).

50 The CFIUS process formerly begins when parties to a proposed transaction jointly file notice with CFIUS containing information required by 31 C.F.R § 800.402 of the regulations. If complete, the Staff Chairperson circulates the voluntary notice to all CFIUS members, and the formal review period is initiated on the following business day. See 31 C.F.R § 800.502.

51 Id. at § 800.502(c).

52 See PROCESS OVERVIEW FOR THE COMMITTEE ON FOREIGN INVESTMENT IN THE UNITED STATES, RESOURCES CENTER FOR THE U.S. DEPARTMENT OF TREASURY available at
formal review period is whether the national security risk posed by the transaction warrants a subsequent investigation.\textsuperscript{53}

CFIUS will take various considerations into in when determining of whether a covered transaction consists of a threat to U.S. national security. The Committee is required to consider twelve factors in assessing a transaction’s impact.\textsuperscript{54} These generally consist of issues relating to homeland security and in particular require focus on transactions involving critical infrastructure and critical technologies.\textsuperscript{55}

Prior to the enactment of FINSA, CFIUS had focused its investigations primarily on investments that had an impact on national defense security. However, the additional factors added by FINSA specifically incorporate economic considerations into the rubric of what is considered national security. Most significantly, CFIUS is now required to consider a covered transaction’s impact on critical infrastructure in determining whether or not to recommend that the President block or postpone a proposed transaction.\textsuperscript{56} Additionally, FINSA requires that the Director of National Intelligence conduct its own “analysis” of any threat to national security

\textsuperscript{53} See 31 C.F.R § 800.503(a) & (b) (establishing that CFIUS will undertake an investigation following the review of a noticed transaction if: 1) any CFIUS member, not including ex officio members, believes the transaction threatens to impair national security or 2) the transaction involves an FCGE or critical infrastructure).

\textsuperscript{54} See Jackson \textit{supra} note 4, at 12-13.

\textsuperscript{55} The first six factors were established by the Byrd Amendment in 1993. \textit{See} 50 U.S.C. app. § 2170(f)(1)-(4). The remaining factors were added by FINSA in 2008. \textit{Id.} at § 2170(f)(5)-(11).

\textsuperscript{56} Critical infrastructure is defined as “any systems and assets, whether physical or cyber-based, so vital to the United States that the degradation or destruction of such systems or assets would have debilitating impact on national security, including national economic security and national public health or safety.” 50 U.S.C. app. § 2170(a)(6). The Department of Homeland Security (DHS), an active member in CFIUS has identified 12 sectors it considers to be critical infrastructure including agriculture and food, water, public health, emergency services, the defense industry, telecommunications, energy, transportation, banking and finance, chemicals, postal services and shipping and information technology. Taken together these industries constitute a significant portion of the domestic economy. \textit{See} GRAHAM & MARCHICK \textit{supra} note 1, at 148-9.
posed by any covered transaction and submit this analysis to CFIUS within 20 days from when the noticed transaction is formerly accepted by the Committee.  

FINSA also established elaborated reporting requirements – in particular that CFIUS provide an annual report on the types of transactions that the Committee has reviewed. This injects further information into the public forum, and hence provides further clarification about the factors the Committee takes into account when determining whether a particular transaction amounts to a national security risk. The Committee has articulated that national security considerations are present whenever CFIUS or any member of CFIUS has unresolved questions about whether a transaction poses a national security risk.

The most recently published “Annual Report” provides a list of industries or businesses where foreign control was (and by implication would be) viewed by the Committee as “adversely affect[ing] national security.” This list includes businesses that are supply chains for governmental agencies, businesses susceptible to sabotage and espionage, businesses involved with critical infrastructure (which includes businesses in the energy and transportation sectors), businesses with access to classified information, businesses involved in law enforcement, businesses engaged in technology production subject to export controls, and manufacturers of weapons and munitions, aerospace, radar systems and other advanced technologies used for

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58 Id. at § 2170(m)(1) (“The chairperson shall transmit a report to the chairman and ranking member of the committee of jurisdiction in the Senate and House of Republicans… on all of the reviews and investigations of covered transactions completed… during the 12-month period covered by the report.”).
59 Id. at § 2170(m)(3)(B) (All appropriate portions of the annual report… may be classified. An unclassified version of the report…., shall be made available to the public”).
60 “In reviewing a covered transaction, CFIUS evaluates all relevant national security considerations identified by its members during the review and does not conclude action on a covered transaction if there are unresolved national security concerns.” See CFIUS ANNUAL REPORT TO CONGRESS, REPORT PERIOD: 2009 (CALENDAR YEAR), 15 (November 2010) available at http://www.ofii.org/docs/2009_CFIUS_Report.pdf. This seems to at least implicitly suggest that the burden is on the filing parties to demonstrate that the noticed transaction poses no national security concerns.
61 Id. at 15-16.
military and national defense purposes. This list is not exhaustive – and CFIUS makes this clear, explicitly stating that the Committee continues to use the broad and purposefully open-ended criteria established by FINSA and previous legislative measures.

This does not mean that any transaction with national security implications will necessarily be frustrated by CFIUS or blocked by the President. However, what it does suggest is that any ambiguity should be resolved in favor of CFIUS notification. If there is no threat to national security, CFIUS will clear (or approve) the transaction following the Committee’s review. CFIUS alternatively may request that the parties to the transaction make certain amendments to the deal or provide various safeguards during this review process. Another FINSA quirk requires that any mitigation agreement must be substantiated by a risk-based analysis assessing the transaction’s threat to national security. While this adds an additional bureaucratic step, this should help reduce the implementation of costly compliance measures that have little practical benefit.

Pursuant to FINSA, CFIUS must provide Congress with a briefing of any determination that a covered transaction did not implicate national security concerns and thus why a full investigation was unnecessary. The more “suspect” or politically contentious the subject matter

\[ \text{Id. at 16.} \]
\[ \text{Id. at 17.} \]
\[ \text{See 31 C.F.R § 800.504 (“If the Committee determines… not to undertake an investigation… action under section 721 shall be concluded.”).} \]
\[ \text{See 50 U.S.C. app. § 2170(l)(1)(A) (“The Committee or lead agency may… enter into or impose, and enforce any agreement or condition with any party to the covered transaction in order to mitigate any threat to the national security…””).} \]
\[ \text{Id. at § 2170(l)(1)(B). See also Exec. Order No. 11,858 (as amended by Exec. Order No. 13,456) at Sec. 7(b) (“Prior to the Committee… proposing risk mitigation measures… the department or agency seeking to propose any such measure shall prepare and provide the to the Committee a written statement that… identifies the national security risk posed by the transaction… [and] sets forth the risk mitigation measures… reasonably necessary to address the risk.””).} \]
\[ \text{See 50 U.S.C. app. § 2170(b)(3)(A). This report or “certified notice” must be sent to various members of both the House and the Senate, including, among others, the Majority and Minority Leaders, the chair and ranking member of the Senate’s Committee on Banking, Housing and Urban Affairs, and the chair} \]
of the transaction or the acquirer, the more likely that an investigation will be instigated, and the longer and more excruciating each stage of the review process (and perhaps even more so the “informal review” period – as was the case in China National Offshore Oil Corporation’s attempted acquisition of the Unocal Corporation).\(^{68}\)

If the Committee determines that the transaction does implicate U.S national security concerns, which have not otherwise been resolved or mitigated during the review period, CFIUS will promptly notify the parties of the Committee’s decision to investigate the transaction.\(^{69}\) During the 45-day investigation, CFIUS further investigates the transaction and continues negotiating with the parties regarding the Committee’s final determination on the matter. CFIUS may request that the parties alter the terms of the deal or provide further assurances, which the parties may or may not be willing to do. If they are, and CFIUS finds their compliance forthcoming, CFIUS will allow the transaction to move forward.\(^{70}\) If, however, CFIUS finds the transaction to be inherently problematic, the Committee will recommend that the parties withdraw their notice and voluntarily abandon the deal.\(^{71}\) CFIUS must submit a certified report to Congress upon the conclusion of any investigation.\(^{72}\)

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\(^{68}\) See Part III for a complete discussion of this thwarted takeover attempt.

\(^{69}\) See 31 C.F.R § 800.503 & 800.505.

\(^{70}\) Id. at § 800.506(d).

\(^{71}\) CFIUS usually requests that the parties voluntarily abandon the deal, making it clear that if the parties do not CFIUS will recommend that the President formerly block or unwind it. CFIUS is allowed to submit the transaction to the President for his final determination on the matter in the following circumstances: (1) when the Committee believes that the President should suspend or prohibit a transaction; (2) when the Committee is unable to reach a decision on whether to recommend the President suspend or prohibit the transaction; or (3) when the Committee would like the President to make a determination on the matter without the recommendation from CFIUS. See 31 C.F.R. § 800.506(b). The substantive difference between options two and three is somewhat unclear.

\(^{72}\) See 50 U.S.C. app. § 2170(b)(3)(B). The certification (both for CFIUS action concluded at the review and investigation stage) must contain a description of the Committee’s actions and identification of the determinative factors considered. Id. at § 2170(b)(3)(C)(i).
In theory, the review process is broken into four chronological stages – i) the informal review period, ii) the formal review stage, iii) if deemed necessary pursuant to the review, an investigation stage, and finally iv) if unresolved pursuant to an investigation, a presidential review for final determination on the matter. The tangible difference, however, between the Committee’s analyses at each period is vague and requires a nuanced appreciation of the CFIUS mandate as well as its procedural review process.

The formal “review” period is mandatory for every noticed transaction formally accepted by CFIUS. The later investigation period and presidential review are reserved for the more problematic transactions. Generally speaking, the compliance burden on the filing parties usually ends at the conclusion of the formal review stage regardless of whether or not CFIUS undertakes a formal investigation. The extra 45 days allotted for an investigation more or less gives CFIUS an opportunity to gauge which way the political winds are blowing and to try to and build a consensus on the matter. If the Committee is still unable to reach a consensus it is allowed to punt the issue to the President, who must make a decision in 15 days.

In order to truly understand the CFIUS review process – including how to avoid the gravest pit-falls that can arise in any case – it is necessary to understand how the CFIUS mandate and the Committee’s interpretation and implementation of the review process has evolved over

Traditionally CFIUS very rarely required 45 day investigations. Between 1988 and 2005 CFIUS received voluntary notification of approximately 1,500 transactions, but found it necessary to instigate investigations in only 25 cases. See Georgiev supra note 8, at 129. However, as will be discussed in greater detail in Parts IV and V, CFIUS has more recently greatly increased the percentage of noticed transactions that it subjects to the investigation stage – especially following the enactment of FINSA. In 2008, there were 155 noticed transactions and the Committee instigated investigations in 23 cases – another 18 cases withdrew their notice during the review period. So close to 25% of noticed transactions were likely to be investigated, assuming the filings that were withdrawn did so because the parties were wary of being investigated. In 2009 and 2010 the percentage of noticed transactions being review was almost 40%. There were also fewer withdrawn notices. See Table on Covered Transactions, Withdrawals, and Presidential Decisions 2008-2010, Resources Center for the U.S. Department of Treasury at http://www.treasury.gov/resource-center/international/foreign-investment/Pages/cfius-overview.aspx (last updated Dec. 1, 2010).
the years. As FINSA has almost certainly increased the politicization of the CFIUS process, such an appreciation is now more important than ever.

III. EVOLUTION OF CFIUS

In 1975, responding to congressional concerns regarding the scope and purpose of foreign direct investment in American assets by OPEC countries, President Ford signed an Executive Order establishing the basic structure of CFIUS and assigning the inter-agency Committee with the task of assessing the effects of foreign investment in the U.S.\textsuperscript{74} A year later, in 1976, the International Investment Survey Act was passed, codifying the President’s authority to collect information on international investments.\textsuperscript{75}

In its original form, CFIUS had no regulatory role; it was limited to fact finding and reporting. It also had only six members, which included the Secretary of State, Secretary of Treasury, Secretary of Defense, Secretary of Commerce, the Assistant to the President for Economic Affairs, and the Executive Director of the Council on International Policy. Today CFIUS includes representatives from 16 U.S. departments and agencies, including the Defense, State and Commerce departments, as well as most recently the Department of Homeland Security.\textsuperscript{76}

Until 1988, CFIUS’ role was more or less passive. The Committee collected data on transactions involving classified or sensitive products and reported its findings to Congress. CFIUS had no authority to impede proposed foreign investment transactions. The Committee was, however, able to draw attention to questionable transactions and prevent their effectuation

\textsuperscript{74} See Exec. Order No. 11,858, 3 C.F.R. 990 (1971- 1975).
\textsuperscript{75} See 22 U.S.C §§ 3101-3108 (2000).
\textsuperscript{76} See note 22 supra (listing the member agencies and their role or extent of involvement with CFIUS).
by prodding agencies with the requisite authority to block or otherwise frustrate such deals or, alternatively, by inciting Congress to take action.

During the mid-1980s a relatively weak dollar and a booming Japanese economy left many Japanese companies flush with cash and looking for investment opportunities abroad – particularly in America. This led to burgeoning foreign direct investment, which over the span of the 80s increased from 1.2% to 2.7% of the country’s net wealth [still not sure what this means]. This growth in FDI provoked populist protectionist response and congressional pressure for new, more restrictive regulations concerning FDI.

This growing protectionist sentiment, however, was, and has generally continued to be, in tension with the policy of the executive branch. The executive branch has championed FDI, regarding it to be much less dangerous than it has been at times perceived by popular opinion, and recognizing that it is in fact essential to the continued prosperity of the United States. President Reagan was reluctant to sign any legislation that would cede power to Congress giving it a veto over FDI, and hence the ability to interfere in matters concerning U.S. foreign relations.

The attempted acquisition of Fairchild, a U.S. semi-conductor manufacturer, by Fujitsu, a Japanese company, and the subsequent stand-off between Congress and the President regarding whether to block the unpopular acquisition, galvanized the necessary support for new legislation regulating FDI. Congress was particularly peeved by Reagan’s reluctance to block the

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77 See Lester Davis, Foreign Direct Investment in the U.S. and Its Impact are Highlighted in New Commerce Department Report, Business American (Aug. 23, 1993) at http://findarticles.com/p/articles/mi_m1052/is_n17_v114/ai_14415105/?tag=mantle_skin:content (noting that despite this increase the share of FDI as a percentage of net wealth in the U.S was still smaller than in any other major industrialized country except Japan).

78 A poll taken in 1989 found that 70% of Americans believed that foreign ownership of American companies was “bad for America.” See GRAHAM & MARCHICK supra note 1, at xv.

79 Id. at xxiii (“Without FDI, US manufacturing, employment, competitiveness, and innovation will be at risk. Unless the United States remains open to foreign investment, it will alienate its allies and could find itself increasingly isolated in an increasingly interdependent world… Maintaining an open environment for FDI is in itself deeply in the national security interest of the United States.”)
transaction pursuant to his authority under the Trading with the Enemy Act\textsuperscript{80} as amended.\textsuperscript{81} His reluctance was likely appropriate given that the Act requires a declaration of an “international emergency” in order to be invoked.\textsuperscript{82} And such a declaration could have easily been perceived as an open act of hostility or aggression against Japan – a cold war ally of the United States.

\textit{A. Exon-Florio Amendment}

Congress seemingly won the tussle in 1988 with the passage of the Exon-Florio Amendment (Exon-Florio), which authorized the President to block or suspend transactions involving foreign mergers, acquisitions or takeovers that threatened to jeopardize or “impair” national security.\textsuperscript{83} The amendment, a revision to the Defense Production Act of 1950, also established for the first time a formal review process.

Exon-Florio did not mention CFIUS. Shortly after its enactment, however, President Reagan delegated his authority and responsibility to carry out the Exon-Florio mandate to CFIUS – enhancing its investigative functions while also infusing the Committee, for the first time, with regulatory powers.\textsuperscript{84} Pursuant to Exon-Florio and the accompanying Executive Order, CFIUS was authorized to complete a 30 day review and, if necessary, conduct an additional 45 day investigation in order to determine whether or not to advise the President to block or modify a given transaction.

\textsuperscript{80} See Trading with the Enemy Act, Pub. L. No. 65-91, 40 Stat. 411 (1917) (codified at 12 U.S.C. § 95) [“TWEA”] (authorizing the president at times of war to undertake a number of meaningful actions or measures in regards to U.S. subsidiaries of foreign companies).


\textsuperscript{82} Id.


\textsuperscript{84} See Exec. Order No. 12,661, 3 C.F.R. 618 (1988).
There has been extensive debate regarding the real intent of Exon-Florio.\textsuperscript{85} Specifically, commentators have disagreed over whether the legislation was really aimed at national security concerns or was a protectionist measure clothed in the auspices of national security. The answer is not so black and white. On one hand, Exon-Florio was passed into law as part of a larger omnibus trade bill generally considered a congressional response to the perception that the United States was losing its competitive edge in the global markets. On the other, the Reagan administration explicitly rejected the inclusion of economic considerations in the Act on the grounds that such a broad definition of national security would inhibit foreign investment in the United States. The Reagan administration’s official position favored FDI as being critical to continued growth in the U.S.

What is more evident is that Exon-Florio was reactive in nature – a response to a specific event (the proposed takeover of an American company, Fairchild, by foreign company, Fujitsu) igniting widespread nationalistic fears (whether justified or not) which was then capitalized on by opportunistic politicians. And this is basically true of all prior and subsequent CFIUS related legislation.

Just four years later, the prospect of another unpopular acquisition – this time the French government controlled company Thompson-CSF’s attempted takeover of the missile division of LTV Corporation – provided the impetus for further legislation augmenting the review and investigation of foreign government controlled FDI in the U.S.

\textsuperscript{85} See Carroll \textit{supra} note 8, at 175 (“… there was still strong support in Congress for using economic factors to regulate foreign transactions… [and] multiple attempts to amend Exon-Florio in order to include economic factors in the interpretation of national security.”); \textit{see also} Goes de Moraes Gavioli \textit{supra} note 7, at 8 (“Congress was displeased with President Reagan’s reluctance to block the [Fujitsu-Fairchild] deal… [and] wanted a stronger mechanism to oversee similar transactions, and as a result it proposed the Exon-Florio bill.”); \textit{see also} Jackson \textit{supra} note 4, at 3 (“…amid concerns over foreign acquisition of certain types of firms, particularly by Japanese firms, Congress approved the Exon-Florio provision”).
Opposition to the Thomson-CSF/LTV deal may not have been totally unwarranted.\textsuperscript{86} LTV’s underfunded pension pool had driven the company into bankruptcy. In order to raise much needed cash, LTV decided to sell off its lucrative aerospace and missile divisions. While a handful of defense firms submitted bids, the playing field was quickly narrowed to just two – Thomson-CSF and a Marietta/Lockheed joint venture.\textsuperscript{87} In April 1992, Thomson-CSF submitted a bid of $450 million, outbidding Marietta/Lockheed by $65 million, and this higher bid was ultimately accepted by the bankruptcy judge.\textsuperscript{88}

Following the acceptance of its bid, Thompson-CSF voluntarily submitted notice of the merger to CFIUS, which began reviewing the transaction. However, due to mounting political opposition,\textsuperscript{89} Thompson-CSF withdrew its bid before CFIUS could make an official determination on the matter. And while Thomson-CSF’s acquisition of LTV ultimately failed, the controversy generated by the transaction was enough to marshal congressional concern that Exon-Florio did not provide Congress with sufficient access to information relating to foreign investments.

\textsuperscript{86} It has been described as the “prototypical example of [a] potentially worrisome technology transfer.” Threat II: The Leakage of Technology of Expertise to a Foreign Controlled Entity, Peterson Institute for International Economics, (July 14, 2011, 12:19 A.M.), http://www.piie.com/publications/chapters_preview/4297/03iie4297.pdf.

\textsuperscript{87} Martin Marietta and Lockheed were both U.S.-based defense contractors. The companies have since merged.

\textsuperscript{88} The bankruptcy court judge urged Marietta/Lockheed to increase its bid, but to no avail. See Matthew D. Riven, The Attempted Takeover of LTV by Thompson: Should the United States Regulate Inward Investment by Foreign Owned Enterprises, 7 Emory Int’l L. Rev. 759, 762 (1993). It is likely that Marietta/Lockheed thought that the bankruptcy judge would be forced to reject the Thomson-CSF’s bid regardless of how much higher it was as there was widespread opposition to Thomson-CSF’s acquisition of LTV.

\textsuperscript{89} The Senate passed a non-binding resolution declaring that the sale of LTV to Thomson-CSF would be detrimental to the national security interests of the United States. The House had begun drafting a military spending bill prohibiting the Pentagon from entering into contracts with LTV if it was acquired by Thompson-CSF. Id. at 763.
B. Byrd Amendment

The result was the Byrd Amendment, which was attached to a defense authorization bill signed into law in 1992.\textsuperscript{90} The Byrd Amendment mandated that CFIUS (as the President’s designee) investigate any “proposed” transaction potentially “affecting” national security concerns where the acquiring entity is controlled by or acting on behalf of a foreign government.\textsuperscript{91} This separated foreign government controlled entities (FCGE) from foreign private entities and placed the former under a heightened standard of scrutiny. Under Exon-Florio, CFIUS was required to investigate all foreign controlled transactions that threatened national security; after the Byrd Amendment, CFIUS was required to investigate all FCGE transactions that could affect national security.

One would predict that the Byrd Amendment would greatly increase the number of CFIUS reviews that would necessitate the Committee proceeding to the 45 day investigation stage. Somewhat remarkably, this turned out not to be the case, and not because foreign government controlled acquisitions ceased to occur. Instead it was because CFIUS construed the legislation as continuing to allow the committee to liberally choose when not to proceed to a full investigation, because national security concerns were not at play.\textsuperscript{92} And it turned out that CFIUS found that national security was not implicated in a great majority of cases, including covered transactions involving FCGEs.\textsuperscript{93}

\textsuperscript{91} Id.
\textsuperscript{92} See U.S. GOVERNMENT ACCOUNTABILITY OFFICE, DEFENSE TRADE: ENHANCEMENTS TO THE IMPLEMENTATION OF EXON-FLOREO COULD STRENGTHEN THE LAW’S EFFECTIVENESS 11 (2005) [“GAO Report”] (reporting that CFIUS narrowly construed or had taken a limited definition of national security in order to avoid triggering the 45-day review process).
\textsuperscript{93} Id at 13. CFIUS continued instigate investigations only rarely, believing that increasing the occurrence of investigations would having a chilling impact on future FDI inflows.
This is evident by the remarkably small percentage of CFIUS applications or notices that proceeded to the 45 day investigation stage. From 1988 to 2005, CFIUS received approximately 1,593 voluntary notices, but found it necessary pursue an “investigation” in only 25 instances - with only ten investigations being initiated between 1993 and 2005.\(^\text{94}\) Thus in practice the Byrd Amendment did little to change how CFIUS operated.

While there was no new legislation passed pertaining to CFIUS and foreign investment review until 2008, the structure and attitude of the committee was, unsurprisingly, further transformed by the 9/11 terrorist attacks and their larger implications regarding national security.\(^\text{95}\) In particular, 9/11 ushered in greater focus and scrutiny on foreign investment originating from certain regions. This was particularly true of Muslim countries in the Middle East – regardless of whether the acquirer was backed by state or private funds. President Bush’s 2003 Executive Order, adding the head of the Department of Homeland Security (DHS) to the CFIUS panel, is evidence of this shift in focus towards threats posed by non-state actors.\(^\text{96}\)

\textit{C. Case Studies: Failed Transactions Pre FINSA}

Political outcry over the China National Offshore Oil Corporation’s (CNOOC’s) unsolicited bid for the American-based energy company Unocal Corporation was a stark reminder, however, that foreign government controlled investment still provided a fertile means of capitalizing on nationalistic and protectionist anxieties.

In June 2005, CNOOC announced its (unsolicited) intention to acquire Unocal for $18.5 billion in cash, and shortly thereafter, filed voluntary notification of the proposed acquisition with CFIUS. The announcement was immediately met with fierce hostility by a number of U.S.

\(^{94}\) See GRAHAM & MARCHICK supra note 1, at 56-57.
\(^{95}\) See Carroll supra note 8, at 179 (“The very nature of the 9/11 attacks made it clear that the instruments of globalization could be used to attack the international order itself, and there was a resultant effort on the part of the United States to secure various commercial facilities…”).
\(^{96}\) See Exec. Order 13,286, Sec. 57 (amending Exec. Order No. 11,858) (Feb. 28, 2003).
policymakers. Theoretically this concern was related to the fact that 70% of CNOOC was owned by a Chinese government controlled company – China National Offshore Oil – which was also heavily involved in financing the deal on very favorable terms. Critics also voiced concerns about the potential for the transfer of critical technologies to China and the lack of reciprocity in the counties’ respective attitudes towards FDI. The bid was construed by some politicians and political pundits as an effort by the Chinese government to bolster its own oil reserves to the detriment of the American consumer. However, Congressional antagonism towards CNOOC’s bid for Unocal likely stemmed, at least in part, from the fact that Chevron Corporation, the fourth largest U.S. oil company at the time, had agreed to buy Unocal for $16.4 billion a few months earlier.

Congressional response was swift and decisive. One week after CNOOC announced its intention to acquire Unocal, the House passed by considerable majority a resolution blocking the funds necessary for CFIUS to conduct a review of the CNOOC transaction. On July 13, Representative Pombo proposed an amendment to an energy bill already making its way through Congress which would limit CFIUS’s ability to review the proposed CNOOC-Unocal transaction until the Department of Energy and State completed an exhaustive analysis of the deal. On July

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97 On June 30, 2005, the House of Representatives passed House Resolution 344, expressing the House’s belief that CNOOC’s acquisition of Unocal would impair the national security of the United States. The same day the House voted to cut off funding to CFIUS by passing House Amendment 431, which would have effectively prevented the Treasury from reviewing (and thus approving) the deal. See Joshua W. Casselman, China’s Latest Threat to the United States: The Failed CNOOC-Unocal Merger and Its Implications for Exxon-Florio and CFIUS, 17 Ind. Int’l & Comp. L. Rev. 155, 163 (2007).

98 See GRAHAM & MARCHICK supra note 1, at 130 (“opponents maintained that, since the Chinese would never allow a US Company to acquire a major Chinese oil Company, the United States should block the transaction on reciprocity grounds.”).

99 It has been pointed out that oil and gas are more or less fungible goods, meaning that if even in CNOOC chose to export to China, at a subsidized price, all the oil it acquired via its acquisition of Unocal, CNOOC would be relinquishing the profit it could have otherwise made on the open market. This is an unlikely and unsustainable business model. Further oil that China would have otherwise bought up on the open market would be freed up for the American consumers to purchase. Id.

100 In April 2005, Unocal’s Board accepted Chevron’s offer to acquire Unocal for $16.4 billion. Id. at 128.
15, Senator Dorgan introduced a bill to the Senate that effectively blocked the acquisition. Five days later Senator Schumer proffered an amendment to another bill requiring that the Secretary of State assess whether there was sufficient reciprocity in the acquiring entity’s home-laws regarding FDI.\textsuperscript{101} The final blow came on July 29, when Senate and House negotiators agreed to adopt, with slight variations, the Pombo Amendment.\textsuperscript{102} The Amendment specifically prohibited CFIUS from concluding its review of an “investment in the energy assets of a United States domestic corporation by an entity owned or controlled by the government of the People’s Republic of China” until a period of 141 days had elapsed – extending the maximum 90 day review period by an additional 51 days.

This proved to be the final straw, and CNOOC subsequently withdrew its bid in early August, meaning that CFIUS was never given an opportunity to formally review or investigate CNOOC’s proposal.\textsuperscript{103}

Nevertheless the episode left a bad taste, and there were several proposals to amend Exon-Florio. These proposals sought to broaden Congressional oversight of the CFIUS process as well as to extend the factors CFIUS must consider when determining whether a proposed acquisition is a threat to national security.\textsuperscript{104} Overhaul of the Exon-Florio process was temporarily rebuffed by the Bush administration, voicing confidence in the existing review system.\textsuperscript{105} This hiatus did not last long. The proposed acquisition of Peninsular & Oriental Steam

\textsuperscript{101} Id. at 132-33.
\textsuperscript{103} This was in part due to the fact that CNOOC singlehandedly filed formal notice of the proposed transaction with CFIUS. Unocal, already contractually committed to being acquired by Chevron, never filed the requisite information that is generally required of a target firm in any formal CFIUS notice.
\textsuperscript{104} See e.g. Sen. Richard Shelby Foreign Investment and National Security Act of 2006, S. Rep. No. 109-264 (2d Sess. 2006). This proposal actually sought to give Congress veto power over a transaction otherwise cleared by the President following a CFIUS review.
\textsuperscript{105} See Casselman supra note 97, at 175.
Navigation Company (P&O)\textsuperscript{106} by Dubai Ports World (DP World)\textsuperscript{107} just a few months later provided further fodder for a legislative backlash.

DP World announced its intent to acquire P&O in October 2005. A Singapore based ports operator also threw its hat into the ring, and a bidding war ensued with P&O accepting DP World’s offer on November 29\textsuperscript{th}. DP World is owned by the Government of Dubai\textsuperscript{108} via the Ports, Customs and Free Zones Corporation – a governmental agency. Because P&O had a U.S. subsidiary – P&O Ports North America, which operated six ports in the U.S., it was always understood that the acquisition would require CFIUS review and clearance.

Duly aware of this need, representatives from DP World began meeting with members of the CFIUS staff in mid-October. It is likely that the P&O Board required some sort of assurance that the deal would be cleared by CFIUS before formerly accepting DP World’s offer. Several weeks after P&O announced DP World as the winning bidder, formal notice was filed with CFIUS. A letter of assurance was negotiated during the 30-day review period, which DP World voluntarily allowed to be released to the public.\textsuperscript{109} The transaction was ultimately cleared on January 17, 2006, without recommendation that a 45-day investigation be instigated. At first nobody seemed to notice or care.

\textsuperscript{106} P&O was founded in 1837 and was historically a steamship operator. In 2005, P&O sold the majority of its shipping operating business and became predominately a port operator.

\textsuperscript{107} At the time of proposed acquisition DP World was the seventh largest port operator in the world.

\textsuperscript{108} The United Arab Emirates or U.A.E. is a federal state that is comprised of seven federal emirates, each administered by a hereditary emir. These seven emirates form the electoral college for the federation’s President and Prime Minister. Dubai, a city located in the U.A.E., is one of the U.A.E.’s seven emirates. An emirate is more or less a political territory ruled by a dynastic monarch-styled emir.

\textsuperscript{109} In this letter DP World agreed to maintain or improve current levels of security measures, to provide 30 day notice of any planned change(s) to such security measures, to operate all U.S. facilities, at least to the extent possible, with U.S. management, to designate a corporate officer to serve as a contact person with DHS and to assist any U.S. law enforcement agency in matters related to port security. See GRAHAM & MARCHICK supra note 1, at 138.
Almost a month later, however, all that changed following an AP news story highly critical of the pending acquisition. The article noted that the U.A.E had been home to several of the 9/11 hijackers and highlighted the general vulnerability of ports as targets of future terrorist attacks.110 The story provoked a political firestorm as a number of distinguished politicians criticized the wisdom of approving the DP World/P&O deal and expressed dismay at the Committee and the CFIUS process for sanctioning it.111

In truth, the real catalyst for the controversy seems to have come from lobbying efforts by small, Miami-based stevedoring firm, Eller & Co. Eller hoped to block the deal in order to gain leverage over P&O in another unrelated matter. Eller first approached CFIUS – but was rebuffed. Eller then hired Washington lobbyist Joe Muldoon to create opposition to the transaction in Congress.112 His efforts on the Hill were clearly much more successful.113

On March 8, the House Appropriation Committee voted almost unanimously to block the transaction – and a similar vote was planned for the Senate.114 Unlike with the previous CNOOC-Unocal transaction, President Bush actively defended CFIUS’s approval of the DP

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110 See Ted Bridis, United Arab Emirates Firm May Oversee 6 U.S. Ports, Wash. Post, Feb. 12, 2006. This article was highly inflammatory and had little substantive support. The U.A.E have been ally of the United States throughout the post-9/11 period, and reports suggesting that U.S. ports might be vulnerable to future attack in no way indicated that foreign ownership would be a source of such vulnerability. See GRAHAM & MARCHICK supra note 1, at 139-40.
111 Charles Schumer (NY), Hillary Clinton (NY) and Robert Menendez (NJ) all spoke out against the deal.
112 See GRAHAM & MARCHICK supra note 1, at 139.
113 In attempt to assuage fears and mounting political opposition, DP World volunteered to undergo a 45-day investigation (even though it had already been cleared by CFIUS pursuant to a 30 day review). Unfortunately the political cache of opposing the deal had already become too salient for such rational measures to have much impact.
114 See GRAHAM & MARCHICK, supra note 1, at 140.
World deal – threatening to veto any congressional action seeking to block or prevent it from going through.\footnote{30}

After almost a month of controversy, DP World finally succumbed to the political pressure, announcing it would sell its U.S. operations to an American company.\footnote{115} What makes the whole episode particularly striking is that although no actual threat to national security was ever identified,\footnote{117} Congress was nevertheless incensed by the fact that CFIUS had approved the transaction without instituting a full-blown investigation. And there was a pervasive and growing sentiment that the existing Committee and CFIUS framework were inadequate.\footnote{118}

Seizing the opportunity, Senator Dodd proposed legislation adding the Directors of National Intelligence and CIA to CFIUS, creating an intelligence subcommittee to review all potential deals, requiring Congressional notification at every step of the CFIUS process, and making notification to CFIUS mandatory rather than voluntary.\footnote{119} Senator Inhofe and Senator Shelby also renewed their efforts to introduce similar amending legislation to the CFIUS process.\footnote{120} Reforming the CFIUS mandate was generally seen as one of the highest priorities for the 109\textsuperscript{th} Congress.\footnote{121}

\footnote{115} However it was ultimately determined that there was likely insufficient votes to sustain a presidential veto – and the White House contacted the government of the U.A.E and informed it accordingly. A week later, DP World amended the deal relinquishing its control over P&O’s American ports.
\footnote{116} P&O’s American port operations were eventually sold to AIG – the same insurance giant taken over by the federal government in 2008.
\footnote{117} Because P&O was a British firm, the DP World acquisition was also subject to corollary of CFIUS review in the U.K., which like CFIUS found the transaction completely unobjectionable.
\footnote{118} In the wake of the DP World debacle almost a dozen congressional committee hearings were held on the matter. At most of these, CFIUS officials were berated for the Committee’s clear “lapse in judgment.” \textsc{Graham} \& \textsc{Marchick} \textit{supra} note 1, at 140.
\footnote{119} \textit{See} S. 2380 109\textsuperscript{th} Congress (March 2006).
\footnote{120} In 2005, Senator Inhofe introduced a bill, which Senator Shelby later sought to amend, that among other broad allocations of power gave Congress veto power over presidential decisions to approve particular transactions. It has been duly pointed out that such a provision would surely be unconstitutional, but helps illustrate Congress’s extreme animosity towards CFIUS at the time. \textit{See} \textsc{Graham} \& \textsc{Marchick} \textit{supra} note 1, at 51.
\footnote{121} \textit{Id.} at xxi. \textit{See also} James K. Jackson, \textit{The Committee on Foreign Investment in the}
D. Enactment of FINSA

The culmination (and to some extent compromise) of such reform efforts was the Foreign Investment and National Security Act of 2007 or FINSA, which was signed into law by President Bush on July 26, 2007. The new legislation, which significantly amended the Exon-Florio provisions, squarely addressed many of Congress’s concerns regarding the sufficiency and transparency of the CFIUS process. FINSA was implemented by Executive Order in January 2008, with Treasury Department regulations further articulating the law following in November. While the new regulations provide some additional guidance on preliminary “jurisdictional” issues like what constitutes “control” or a “covered transaction,” the key concept of national security was, somewhat unsurprisingly, left undefined.

Ultimately, FINSA altered the CFIUS and the review process in a number of ways, most significantly by: (1) expanding the instances when a 45-day investigation is necessary, (2) expanding national security to include homeland security, (3) expanding the definition of covered transactions to include transactions involving critical infrastructure, (4) expanding the factors CFIUS must consider in assessing whether a transaction implicates national security

\[\text{United States (CFIUS), CRS Report for Congress, CRS-2 (January 25, 2007) (noting that more than 25 bills addressing various aspects of foreign investment were introduced in the 2nd Session of the 109th Congress).}\]


\[\text{A more extensive House Bill (H.R. 556, 110th Cong., 2007) was eventually replaced with a Senate Banking, Housing and Urban Affairs Committee Bill (S. 1610, 110th Cong., 2007), which was slightly more sympathetic to business community concerns.}\]


\[\text{124 See 31 C.F.R. § 800 et seq. (as amended) (November, 2008).}\]

\[\text{125 See 50 U.S.C. app. § 2170(b)(2)(B).}\]

\[\text{126 Id. at § 2170(a)(5).}\]

\[\text{127 Id. at § 2170(b)(2)(B)(i)(III).}\]
concerns, \(^{128}\) (5) expressly authorizing mitigation agreements and imposing liability for non-compliance, \(^{129}\) (6) prohibiting notice withdrawals without CFIUS’s prior approval\(^ {130}\) and (7) expanding Congressional access to specific information relating to transactions under CFIUS review.\(^ {131}\)

The full impact of these reforms has yet to be revealed. But there are clear practical implications which are already discernable. Perhaps foremost is a significant increase in the number of CFIUS reviews extended into the 45-day investigation stage.\(^ {132}\) Whether or not this increased scrutiny and transparency promote general welfare in the broadest sense will likely take much longer to understand. What can be said is that the passage of FINSA has not put an end to the politicization of the CFIUS review process – much to the contrary it has made it more susceptible to political influence and interference.\(^ {133}\)

\(^{E.}\) Case Study: Foiled Transaction Post FINSA

\(^{128}\) Id. at 2170(f)(6)-(10).

\(^{129}\) Id. at § 2170(l), 2170(l)(3)(B)(ii) & § 2170(h)(3)(A); also see 31 C.F.R. § 800.801 (a)-(g)(2008) (establishing civil penalties not to exceed $ 250,000 for intentional or negligent submission of material misstatements, omissions, false certifications and violation of mitigation agreements).


\(^{131}\) Id. at §§ 2170(b)(3)(A)-(C), 2170(m)(1)-(2) (setting out the content requirements for the annual reports that CFIUS must issue to Congress, which includes, inter alia: a list of all notices filed and all reviews or investigations completed in the period, a detailed discussion of all perceived adverse effects of covered transactions on the national security or critical infrastructure of the United States, and specific cumulative and, as appropriate, trend information on the business sectors involved and the countries from which the investments have been made).

\(^{132}\) See CFIUS ANNUAL REPORT TO CONGRESS, REPORT PERIOD: 2009 (CALENDAR YEAR) supra note 60, at 3. Further discussion of the increased occurrence of 45 investigations and its practical implication for FDI will be taken up in Section Four.

\(^{133}\) There are many commentators who have echoed this opinion. See de Moraes Gavioli supra note 7, at 33 (“FINSA has significantly increased Congress’ ability to politicize foreign investment transactions, even when no real national security threat exists’’); also see Stagg supra note 7, at 352. This view, however, is not shared by all. See, e.g., Matthew C. Sullivan, Mining for Meaning: Assessing CFIUS’s Rejection of the First Gold Acquisition, 4 Publicist 12, 14 (2010) (stating that the CFIUS review process became more predictable and less politicized after the DP World incident).
The attempted acquisition of Firstgold Corp. (Firstgold)\textsuperscript{134} by the China-based Northwest Non Ferrous International Investment (Northwest)\textsuperscript{135} has been described as “the most noteworthy” CFIUS review conducted by the Obama administration.\textsuperscript{136} In many ways, however, it differed from previous CFIUS reviews discussed above. The size of the transaction was much smaller than previous high-profile reviews. Firstgold was an exploration stage company that had been operating since 1995, but had never produced any material revenue, not to mention profit.

In the summer of 2009 Firstgold needed capital in order to shore up its deteriorating position and meet the demands of some of its creditors. Northwest proved to be a willing suitor, and a deal to acquire Firstgold was announced in July 2009.\textsuperscript{137} While the small size of the deal did not seem to play a mitigating factor with CFIUS, it was likely a factor in the filing parties’ lack of sophistication. This is exemplified by the fact that Firstgold did not file its application with CFIUS until three months after the deal was first announced.\textsuperscript{138}

The parties to the transaction submitted their notice for CFIUS review on October 7, and shortly thereafter CFIUS informed the parties that the committee would be undertaking a 45-day investigation of the transaction. According to published reports, the parties and their counsel also met or had conversations with CFIUS staff and Department of Treasury personnel several times.

\textsuperscript{134} Firstgold is a Delaware corporation that owns and leases mining exploration and development properties in Nevada.

\textsuperscript{135} Northwest is controlled by the Shaanxi provincial government. See Memorandum Re. Committee on Foreign Investment in the United States (“CFIUS”), from Davis Graham & Stubbs LLP and Reed Smith LLP to Northwest Non-Ferrous International Company Limited and Firstgold Corp., 1 (Dec 14, 2009) [“Firstgold Memorandum”], \url{http://graphics8.nytimes.com/packages/images/nytint/docs/memo-regarding-the-sale-of-firstgold-corp/original.pdf}.

\textsuperscript{136} Id. at 15.

\textsuperscript{137} Northwest was to provide $26.5 million in return for secured debt currently held by Platinum Long Term Growth LLC and Lakewood Group LLC, which had filed suit earlier in the summer alleging Firstgold had defrauded them. Northwest would also get 51% equity interest, which represented less than $10 million of the total investment package.

\textsuperscript{138} See Bill Newman, Does Firstgold Really Mean That CFIUS Has Gone Hostile?, USA Inbd Acq & Invt Blg (January 26, 2010), \url{http://www.usainbounddeals.com/2010/01/articles/news-commentary/does-firstgold-really-mean-that-cfius-has-gone-hostile/}. 33
to discuss the transaction and possible mitigation measures based on CFIUS’s concerns that the proposed transaction would pose serious national security risks. CFIUS was particularly concerned about the proximity of some of Firstgold properties in Nevada to the Fallon Naval Air Base and its related facilities.

Firstgold was willing to cooperate and suggested instituting mitigation measures. CFIUS, however, rebuffed these proposals, stating that any mitigation measures would be insufficient as the acquisition was inherently problematic. On December 8, CFIUS ultimately informed the parties that the committee was planning on recommending that the deal be blocked due to inherent national security concerns. In the face this opposition, the parties voluntarily withdrew their notice and abandoned the transaction.

As has been pointed out by several commentators, CFIUS’s decision and rationale for blocking the Firstgold-Northwest deal are somewhat surprising. Firstgold’s assets were not “critical infrastructure.” Prior to the Firstgold review, the geographic location of a U.S. business had never been identified as factor in determining whether a transaction imposed national security concerns – and thus this proximity explanation (which CFIUS indicated was the main concern) has been seen as something of a Trojan horse disguising more controversial

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139 See Firstgold Memorandum supra note 135, at 2-3.
140 Id. at 2. The closest Firstgold facility was in Fallon, Nevada, 50 miles from a U.S. Naval air facility that tests advanced weapons.
141 Firstgold proposed an alternative deal that would limit Northwest’s equity interest to 20% and allow for just one board seat. Id. at 4.
142 The Committee also emphasized that it lacks the authority to consider hypothetical transactions. Id. at 4-5.
143 In reality Firstgold and Northwest was given an ultimatum – either voluntarily withdraw its Notice and abandon the deal or at the conclusion of the “investigation period” (aka December 21) CFIUS would send its recommendation to the President Obama that the deal be prohibited. Id.
144 See Newman supra note 138 (noting that some pointed to the Chinese identity of Firstgold as likely being the real CFIUS concern, but ultimately rejecting these arguments as too simplistic).
concerns. There was some speculation that CFIUS’s real concern related to China’s growing
domination over rare earth elements and recent restrictions China imposed on the exportation of
such raw materials.

There is also the possibility that there were other private interests influencing CFIUS’s
decision to block Northwest’s investment. The CFIUS process has certainly been tainted by such
pressures in the past. While in this instance there is no clear evidence of private interests at play,
the subsequent bankruptcy and complete transfer of all Firstgold’s assets – including Relief
Canyon – to secured creditors, Platinum and Lakewood, provokes some suspicion.

However, in many ways this is beside the point. Of greater concern are the big picture
implications. The summer of 2009, when the Firstgold-Northwest deal was announced, the
American economy was struggling to recover from one of the worst recessions the country has
experienced in decades. New investment was in short supply. China was one bright exception as
its trade surpluses over the past decade or so left it with massive capital accumulations.

Firstgold was just another American enterprise fallen victim to an unmanageable debt
load. Fortunately, and somewhat remarkably, Firstgold was able to find a Chinese backer willing
to provide the infusion of capital Firstgold desperately needed. The U.S. government should have
welcomed such foreign infusions of capital. Instead CFIUS determined that the deal was
inherently problematic – and sent Northwest packing and Firstgold to be devoured by the

145 The underlying motivation of the committee is still somewhat unclear as the transaction was
voluntarily withdrawn and CFIUS never made a formal recommendation on the matter.
146 See Eric Lipton, Withdraw Offer for Nevada Gold Concern, N.Y. Times, B3 (December 21, 2009).
147 See Firstgold Releases Control of All Assets to Secured Lenders, Marketwire (April 25, 2010) at
http://www.wikinvest.com/stock/Firstgold_Corp_(FGD)/News/1212112/Firstgold_Releases_Control_of_All_Assets_to_Secured_Lenders.
148 The other bright spot, of course, was the U.S. government who was busy doling out cash to antiquated
institutions in order to keep them afloat.
149 See Firstgold Memorandum supra note 135, at 3 (CFIUS informed Firstgold that there was “no room
for alternative structures” – meaning mitigation measures would be useless).
wolves. The fact that there was scant evidence that the transaction posed any threat to national security adds insult to injury.

The rigorous scrutiny in the Firstgold case, however, is consistent with the Committee’s decision to dramatically increase the number of reviews that get extended to the 45-day investigation stage. This is to some extent what was demanded by FINSA. However, because the 45-day investigation has historically been regarded as adverse publicity for any prospective deal, the heightened prospect of such an extended review is likely to have a chilling effect on future FDI.\(^{150}\) The flip side is that, to some extent, the process has become more comprehensive (and thus predictable) – meaning that the savvy foreign investor, with an appreciation of how CFIUS operates, should be able to maneuver through the review process with greater ease.

IV. IMPLICATIONS FOR FOREIGN INVESTORS

While it is difficult to draw too much from available CFIUS statistics\(^ {151}\) – it is possible to draw a few broad conclusions about the CFIUS process (including how it has evolved since its 1988 inception) and its practical implications.

For starters, it seems pretty clear that CFIUS legislation has been generally driven by protectionist instincts. From the initial Exon-Florio Amendment in 1988 through the most recent FINSA legislation, each extension to CFIUS’s regulatory authority has been prompted by the perception that escalating FDI from various growing economies will result in foreign control of

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\(^{150}\) Ceteris paribus, the riskier the suitor, the higher premium the suitor will have to pay. This additional cost makes FDI that much less profitable and thus less attractive. This ultimately hurts U.S. stock holders who miss out on higher returns that foreign investors are often willing to pay.

\(^{151}\) This is because much of the information submitted to CFIUS is kept confidential – as mandated by statute. The only time information is released is when a “45-day investigation” is initiated. Of course such confidentiality is often crucial to M&A deals, which is why an increased investigation rate could have a chilling effect on FDI.
key industrial sectors.\textsuperscript{152} This is also true of many of the high-profile foreign acquisitions ultimately undone by CFIUS-related pressures – as was seen in the attempted take-overs of Fairchild, LTV, Unocal, P&O, and most recently Firstgold.

Second, while congressional action regarding review of foreign investment and the CFIUS process has always been clothed in concern for national security, there is almost always another side of the story – inevitably in the form of an opportunistic business attempting to utilize (with frequent success) the CFIUS process to advance its own private interests. Evidence of such self-interest is again evident in almost every high-profile CFIUS case.\textsuperscript{153}

Third, while the CFIUS debate has continued to tip its hat to principles of free trade and open markets, concerns over continued perpetuation of an open economic system have clearly taken a back seat to fear about the dangers FDI poses to U.S. national security. The fact that a clear causal connection between FDI and actual (as opposed to potential or perceived) national security has yet to be articulated in any meaningful way makes the imbalance in this discourse all the more disturbing.

And lastly, but certainly not least, the activity of CFIUS, particularly in regards to the 45-day investigation rate, has increased significantly in recent years. From 1975 through 2007, CFIUS received 1,996 voluntary notices – only 60 of which became subject to a 45-day investigation.\textsuperscript{154} This stands in stark contrast to the almost 50 investigations initiated in 2008 and

\textsuperscript{152} See Marchick & Graham supra note 1, at 1-2 (pointing out the Exon-Florio was largely a congressional response to U.S. acquisitions by Japanese companies and, similarly, how FINSA was prompted by concerns over growing FDI from China).

\textsuperscript{153} The undoing of these transactions has frequently been a boon to some other entity. In the LTV acquisition it was Marietta/Lockheed, in Unocal it was Chevron, in the P&O deal it was Eller & Co, and in the most recent impeded transaction involving Firstgold it was secured creditors Platinum and Lakewood.

\textsuperscript{154} See Reinis supra note 36, at 44.
2009 alone.\textsuperscript{155} Given that a significant impetus for the reform agitation culminating in the passage of FINSA was the sentiment that CFIUS had undertaken far too few investigations under old Exon-Florio regime, this does not seem that surprising.\textsuperscript{156}

What does this all add up to? Much of past literature regarding CFIUS has focused on the theoretical implications – specifically whether the current regime adequately balances the competing interests of protecting national security while still promoting America’s free trade policies.\textsuperscript{157} However, these assessments are difficult to evaluate as CFIUS’s impact on national security concerns as well as FDI investments often takes years to fully understand. It is made even harder by the fact that there are many non-CFIUS circumstances or influences that can significantly impact both national security as well as rate of FDI investment in the U.S.\textsuperscript{158}

Furthermore, since FINSA only recently became law, it seems that the current CFIUS mandate (at least at the legislative level) is likely here to stay. Given these constraints, a seemingly more useful endeavor is gaining a practical understanding of CFIUS and its review process.

\textit{A. Public Choice Analysis}

The CFIUS process, as amended, makes an agency of the federal government the gate keeper for much FDI in the U.S. Like many regulations, this gatekeeping process provides an opportunity for private rent seeking.\textsuperscript{159} By implication there are winners and losers of any

\textsuperscript{155} See CFIUS \textit{Annual Report to Congress, Report Period: 2009 (Calendar Year)} supra note 60, at 3.

\textsuperscript{156} “Critics of CFIUS point to the small number of transactions that have gone to an investigation… as evidence that the provision is ineffective.” \textsc{Graham} & \textsc{Marchick} \textit{supra} note 1, at 56.

\textsuperscript{157} See note 8 supra (listing a number of recently published scholarly works and articles most of which examine how well FINSA and pursuant regulations balance the competing interests of protecting national security while also stimulating much needed FDI).

\textsuperscript{158} See \textit{Foreign Direct Investment in the United States: Executive Summary}, U.S. Dep’t. of Commerce, Economics and Statistics Administration, ESA Issue Brief #02-11, 3 (June 2011) (noting that FDI has generally fluctuated with the U.S. business cycle). FDI reached a historical peak of $328 billion in 2008, but dropped to around $150 billion in 2009 its lowest level since 2003. \textit{Id.}

\textsuperscript{159} According to public choice theory, government action is “supplied to well-organized interest groups that are struggling maximize the incomes of their members, often at the expense of the less well-
decision pro or con. The winners are frequently strategic investors with current property interests at stake (i.e. rivals for the target firm, competitors and secured creditors in the target). The losers are more efficient potential investors (or investors who place a greater value on the asset-entity) as well as the passive or non-strategic investors (shareholders and unsecured creditors) who lose out on a higher return for their investment.

The winners and loser are also predictable under a private rent-seeking model. Strategic investors are small, well-organized with concentrated interests, which makes it easier for these investors to take advantage of the system. The loser are dispersed, un-organized and to some extent unknown, making them easy prey in such a scheme.

Of course, once a potential "covered transaction" is on the table, the "interests" in favor of the deal become much more visible. In the case of a friendly merger, both the target and the foreign acquirer should be interested in seeing the deal go through. While there still might be opposition to the deal from others with interests at stake (like the secured creditors in the failed Firstgold-Northwest deal), this should still help even the playing field. Nevertheless, it makes sense for those contemplating a CFIUS filing to be preemptive.

B. Successfully Surmounting the CFIUS Review Process

Companies seeking cross-border mergers would be wise to flush out any CFIUS related issues that might arise if such a transaction were proposed. In fact, highlighting the fact that the

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organized. In effect, legislation is sold to the highest bidder, with bids being paid in the currency of votes, campaign contributions, and personal benefits such as honoraria.” Shaviro supra note 10, at 6-7; see also McChesney supra note 11.  

160 "The private rent seeking model depicts political actors as brokers of legislation, more or less pairing demanders and suppliers of legislation. These political actors “seek to pair those who want a law or a transfer the most with those who object the least… [and] will concentrate on legal arrangements that benefit well-organized and concentrated groups for whom the pro rata benefits are high at the expense of diffuse interests, each of which is taxed a little bit to fund the transfer or legislation.” Robert D. Tollison, Public Choice and Legislation, 74 Va. L. Rev. 339, 343 (1988).  

161 Id.
target is prepared and well-equipped to participate in a CFIUS review should embolden any foreign investor contemplating an acquisition of the target. If the target is experiencing any "internal" discord over the deal, the board would be well advised to be pro-active in organizing the company’s communications and filings with CFIUS. Creating goodwill in the public eye is also important. The company should issue a public statement highlighting the benefits of the proposed deal. In today’s tough economic conditions, transactions that can be construed as promoting job growth or plant expansion are likely to be viewed very favorably.

A more difficult scenario occurs when the proposed foreign acquisition is a hostile one. Here the target has much less incentive to cooperate, and, given the joint-filing requirement, can easily sabotage the CFIUS review process. Thus, in the case of a foreign “hostile” takeover, CFIUS becomes an incredibly potent defensive tool for the target (or more specifically target insiders who want to prevent the deal from going). This is ultimately detrimental to the shareholders who lose out on the higher share price. It may also be detrimental to various stakeholders (i.e. employees, customers and suppliers) who would benefit from the foreign acquisition. This is particularly true in a Firstgold-Northwest type transaction, where the foreign capital is actually necessary in order to prevent a full blown liquidation.

Thus, foreign companies interested in pursuing a hostile takeover of an American enterprise would be well advised to get the CFIUS ducks in a row before making any overtures. Since CFIUS reviews are confidential, the foreign acquirer can engage in preliminary discussions with CFIUS without fear of revealing its intent. This will allow the hostile-buyer an opportunity to gauge whether CFIUS is likely going to have issues with the transaction.

Of course even if CFIUS is amenable to the deal, the Committee is still likely to need information from the target. This could be problematic if the target is dead-set on preventing it.
There is some suggestion that CFIUS is still able to clear a transaction where only one party files, but in practice the Committee has required joint-filings. In order to prevent gamesmanship and manipulation of the CFIUS process, the Committee should be aware of this potential and enact regulations or procedures for dealing with it accordingly.

One possibility would be to simply demand the necessary information from the target, which CFIUS could do pursuant to its authority to initiate reviews. Another possibility would for CFIUS to designate a secondary lead agency that would be responsible for reviewing any noticed transaction from a pro-business or more market-based perspective. This would create the perception of a more balanced CFIUS review process. It would also help draw out a more comprehensive discussion of the business rationale or business objective of any proposed covered transaction. Finally, since the FINSA explicitly allows the President to add additional agencies to CFIUS, it might be advisable for President Obama to issue an Executive Order adding an agency or even agencies charged with enhancing economic welfare through free-market principles. The current CFIUS membership is highly skewed in favor of agencies responsible for defense and law enforcement concerns.

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162 See 50 U.S.C. app. § 2170(b)(1)(D) (providing that the Committee may initiate a review of any covered transaction).
163 This would also be allowed under the current legislative framework. See 50 U.S.C. app. § 2170(k)(5) (providing that the Secretary of the Treasury must designate “a member or members of the Committee to be the lead agency or agencies on behalf of the Committee…”).
164 The perception of a fair, untainted CFIUS review process is crucial for attracting future FDI in the United States. Foreign investors will certainly be discouraged from making such investments if they believe the deck is stacked against them.
165 See 50 U.S.C. app. § 2170(k)(2)(J) (providing that the membership in CFIUS may be extended to “the heads of any other executive branch department, agency, or office, as the President determines appropriate, generally or on a case-by-case basis.”). President Bush added two additional members via Exec. Order No. 13,456 (2008) (amending Exec. Order No. 11,858) – the heads of the U.S. Trade Representative and Office of Science and Technology Policy.
166 Of the nine full participating members in CFIUS only three – the Department of Treasury, Department of Commerce and Office of the U.S. Trade Representative – have mandates relating to economic well-being of the U.S. The other six – which include the Department of Justice, the Department of Homeland Security, the Department of Defense, the Department of State, the Department of Energy and Office of...
on promoting national economic welfare would likely help achieve a more balanced and thorough CFIUS review process.

At the end of the day it will inevitably come down to the foreign investor who must be pro-active in the CFIUS process. Lack of knowledge and sophistication with the review process has been the probable culprit in most acquisitions ultimately undone by CFIUS-related pressure. Fortunately, there are two important ways in which the foreign investor can both make review process less trying as well as better ensure the Committee’s ultimate approval of the deal.

The first pertains to the foreign investor’s relationship with CFIUS (and perhaps more importantly the relevant agencies that make up the Committee). It is important for the foreign investor to identify the agencies that understand the benefits of FDI and thus can serve as an ally through the filing and review process. An obvious choice would be the Treasury Department which has historically championed FDI. As Chair of the Committee, the Treasury Department has powerful sway over the CFIUS process. Thus any foreign investor contemplating a covered transaction would be wise to cultivate relevant Treasury officials. It might also make sense to

Science & Technology Policy – are more focused on security and law enforcement issues, and thus more susceptible to protectionist biases.

167 The recently dismantled Huawei-3Leaf deal is another example of an FDI transaction likely undone by the filing parties’ lack of sophistication with the CFIUS process. In May 2010, Huawei purchased $2 million in assets – mostly in the form of intellectual property – from 3Leaf, an insolvent technology start-up based in California. At the time the parties did not think that a CFIUS filing was necessary, because Huawei was not acquiring all of 3Leaf’s assets. Voluntary notice was later filed in November after Huawei discovered that CFIUS was interested in the transaction. However, the damage was already done, and in February CFIUS suggested that the Chinese company voluntarily divest its 3Leaf assets. See Loretta Chao, Huawei Executive’s Open Letter to the U.S., Wall St. J., China Real Time Report (Feb. 25, 2011) at http://blogs.wsj.com/chinarealtime/2011/02/25/huawei-executives-open-letter-to-the-u-s/.

168 The Commerce Department may be an even better ally for investors contemplating a covered transaction; the Commerce Department recently issued a report touting the many benefits of FDI. See FOREIGN DIRECT INVESTMENT IN THE UNITED STATES: EXECUTIVE SUMMARY supra note 158, at 1 (“Encouraging more FDI and expanding the numbers of countries that invest in the United States would potentially lead to more economic growth and create even more new, high-paying U.S. jobs.”).
identify other agencies (not currently represented in CFIUS) that would be likely to view the proposed transaction favorably and might be willing to go to bat in its defense.\textsuperscript{169}

The second measure relates more to the public perception of the proposed covered transaction. Considering the highly politicized nature of the CFIUS process, creating a positive public image is crucial for any deal. As discussed above, the negative publicity surrounding past FDI mis-fires has often played a key role in transaction’s collapse. Time and time again, generating negative media coverage in regards to potential FDI transactions has been a potent tool for private interests looking to gain from the transaction’s undoing. This type of maneuvering, however, can also be employed by those who would like to see the transaction consummated. Given the prominent and widespread trepidations over the future strength of the economic stability in this country, FDI transactions are likely to be viewed more favorably than then they have in a long time.\textsuperscript{170} Pro-actively reaching out to the suitable media outlets with information regarding the benefits of any proposed FDI transaction allows the foreign investor to shape the conversation rather than being on the defensive. This will also create public support for the transaction making it that much more resistant to political attack.

VI. CONCLUSION

By expanding the instances in which CFIUS must extend a review to a 45-day investigation as well as increasing Congressional scrutiny of, and thus involvement in, the review process, FINSA has almost certainly increased the politicization (or at least the perception of politicization) of CFIUS. This is bad for FDI, because it makes FDI transactions

\textsuperscript{169} The recently created Jobs and Competitiveness Council is an example of an agency that recognizes the importance of FDI and would likely promote such transactions.
\textsuperscript{170} See FOREIGN DIRECT INVESTMENT IN THE UNITED STATES: EXECUTIVE SUMMARY supra note 158, at 5 (“Given the power of FDI as an economic engine and the quality of jobs it supports, there is great potential benefit from broadening and deepening foreign direct investment in the United States.”).
that much riskier and thus expensive. This in turn drives away foreign demand for American enterprises, which drives down the demand for and thus market valuation of these institutions. It also allows for wealth redistribution from a target’s shareholders and stakeholders to well-organized insiders or other private interests positioned to gain from the undoing of a proposed FDI transaction.

Fortunately, over 20 years of experience have made the CFIUS filing and review processes less opaque than they once were. There is now enough information available to understand how parties to a proposed covered transaction should conduct themselves in order to successfully maneuver through the CFIUS process. Understanding the nuances of the CFIUS mandate as well as pro-actively engaging the Committee as well as relevant media and lobbying sources makes surviving CFIUS review readably achievable. This type of preparation gives parties to a proposed FDI transaction a competitive edge by reducing unexpected compliance costs, but more importantly by greatly minimizing the risk that the transaction will be blocked or frustrated by CFIUS and its review process.