NOTES

A TALE OF TWO STATUTES: USING IEEPA'S ACCOUNTABILITY SAFEGUARDS TO INSPIRE CFIUS REFORM

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Since its inception more than four decades ago, the Committee on Foreign Investment in the United States (CFIUS) has transformed from a relatively powerless monitoring body to a major regulatory hurdle for cross-border deals. This shift has been accompanied by increasing concerns from scholars and transacting parties regarding CFIUS's lack of accountability and transparency. Yet, CFIUS's scope has only continued to widen, as evidenced by recent legislation giving the body jurisdiction over new types of transactions and considerations.

This Note highlights this accountability concern by comparing CFIUS's statutory scheme with another law focused on national security, the International Emergency Economic Powers Act (IEEPA). Finding that IEEPA incorporates accountability safeguards at three key points—prior to taking national security–related action, while such action is ongoing, and following the conclusion of the action—this Note then suggests that CFIUS reformers borrow IEEPA's general accountability framework and add safeguards at these same stages in the CFIUS process. Incorporated alongside reforms to broaden CFIUS's mandate and scope, these accountability reforms will enable CFIUS to respond to national security threats without compromising CFIUS's hallmarks of confidentiality, speed, and political independence.

INTRODUCTION

At a campaign rally in October 2016, Donald Trump, Republican nominee for President of the United States, alleged: "Hillary Clinton gave Russia twenty percent of American uranium."[1] Candidate Trump was referencing then-Secretary of State Hillary Clinton's role as a member of the Committee on Foreign Investment in the United States (CFIUS),

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1. Michelle Ye Hee Lee, The Facts Behind Trump's Repeated Claim About Hillary Clinton's Role in the Russian Uranium Deal, Wash. Post (Oct. 26, 2016), https://www.washingtonpost.com/news/fact-checker/the-facts-behind-trumps-repeated-claim-about-hillary-clintons-role-in-the-russian-uranium-deal (on file with the *Columbia Law Review*).

which had approved the partial sale of Uranium One, a Canadian mining company with holdings in the United States, to a Russian entity in 2010.[2] CFIUS, an interagency body led by the Secretary of the Treasury, is authorized by the Foreign Investment and National Security Act of 2007 (FINSA) to review foreign investments for national security risks.[3] If the risks posed by a certain transaction are deemed too great upon CFIUS review, the President may block the transaction.[4]

Despite calls from members of Congress to block the Uranium One transaction,[5] CFIUS approved the deal, seemingly without hesitation.[6] Seven years after Uranium One's approved sale—by which time Donald Trump had become President—Republican lawmakers, concerned that conflicts of interest involving Clinton had impaired CFIUS's review, announced a probe into the matter.[7]

Politics aside, the Uranium One controversy highlights a significant criticism of CFIUS: that CFIUS, with its review process shielded from view, is too much of a black box.[8] Much of this criticism surrounds CFIUS's statutory scheme, which gives CFIUS seemingly unlimited discretion,[9] prevents the public and most members of Congress from accessing much information about specific reviews,[10] and specifically exempts the President's findings on national security and any subsequent decision to

2. See Jessica Kwong, What We Know About the Russian Uranium Scheme Involving Clinton and Obama, Newsweek (Oct. 25, 2017), http://www.newsweek.com/what-we-know-about-russian-uranium-scheme-involving-clinton-and-obama-693348 (on file with the *Columbia Law Review*).

3. See 50 U.S.C. § 4565(k) (Supp. IV 2017) (authorizing CFIUS to review mergers, acquisitions, and takeovers if so authorized by the President).

4. Id. § 4565(d)(1); see also infra note 23 (providing examples of President Trump taking such action).

5. See Ros-Lehtinen, Bachus, King, McKeon Send Letter to Geithner Opposing Russian Takeover of U.S. Uranium Processing Facility, House Comm. on Foreign Affairs (Oct. 6, 2010), http://archives-republicans-foreignaffairs.house.gov/news/story/?1618 [https://perma.cc/4GNK-QZQE].

6. See Jo Becker & Mike McIntire, Cash Flowed to Clinton Foundation amid Russian Uranium Deal, N.Y. Times (Apr. 23, 2015), https://www.nytimes.com/2015/04/24/us/cash-flowed-to-clinton-foundation-as-russians-pressed-for-control-of-uranium-company.html (on file with the *Columbia Law Review*).

7. Jeremy Herb, House Republicans Investigating Obama-Era Uranium Deal, CNN (Oct. 24, 2017), http://www.cnn.com/2017/10/24/politics/house-investigating-uranium-deal [https://perma.cc/9ESV-NQ2A].

8. Xingxing Li, National Security Review in Foreign Investments: A Comparative and Critical Assessment on China and U.S. Laws and Practices, 13 Berkeley Bus. L.J. 255, 272 (2016) (describing CFIUS as "a secretive process in a black box exempt from judicial review"); see also infra section II.B (discussing CFIUS's accountability shortcomings).

9. See 50 U.S.C. § 4565(f)(11) (providing that CFIUS may consider, in addition to certain statutorily enumerated factors, "such other factors as . . . determine[d] to be appropriate" in its reviews).

10. See id. § 4565(b)(3)(A) (limiting the members of Congress who may receive information regarding specific reviews); id. § 4565(b)(3)(B) (same).

block a transaction from judicial review.[11] As commentators wrote regarding the Uranium One deal, for instance, "Because of the secrecy surrounding the process, it is hard to know whether [CFIUS] weighed the desire to improve bilateral relations against the potential risks of allowing the Russian government control over the biggest uranium producer in the United States."[12]

While one would anticipate that concerns regarding CFIUS's lack of accountability would tend to encourage legislative reform limiting CFIUS's authority—or at least, reform giving third parties oversight of the CFIUS review process—the recent CFIUS-reform effort, which culminated in enacted legislation in August 2018, instead favored a strengthened foreign investment review body with broader authority to consider and block transactions.[13] Sponsors of this effort argued that CFIUS is outdated and must be given greater authority to consider novel threats outside its traditional scope.[14]

This Note focuses on the tension between lawmakers' recent expansion of CFIUS on the one hand and criticisms regarding CFIUS's lack of accountability on the other. More specifically, this Note looks to the accountability mechanisms required of another Treasury-led entity charged with reviewing national security threats, the Office of Foreign Assets Control (OFAC), by virtue of its statutory scheme, the International Emergency Economic Powers Act (IEEPA).[15] This is a particularly apt comparison given CFIUS's and OFAC's similar focuses on national security[16] and their governing statutes' conferring of similar powers on the executive.[17] Drawing inspiration from OFAC and IEEPA—the latter of which governed CFIUS prior to 1988[18]—this Note proposes how CFIUS can be made more accountable even as it is given the power to review transactions and considerations beyond those historically permitted.

In Part I, this Note introduces CFIUS and its governing statute, FINSA, describing changes to CFIUS since its creation in 1975 and the recent legislative steps taken to broaden CFIUS's scope. In Part II, this

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11. See id. § 4565(e) ("The actions . . . and the findings of the President . . . shall not be subject to judicial review."). In contrast, agency determinations are generally subject to judicial review. See Administrative Procedure Act, 5 U.S.C. § 702 (2012) (providing a general right to judicial review for "[a] person suffering legal wrong because of agency action").

12. Becker & McIntire, supra note 6.

13. See infra section I.B.1 (detailing the reform).

14. See infra notes 70–74 and accompanying text.

15. 50 U.S.C. §§ 1701–1707 (2012). Scholars have previously discussed IEEPA as the statutory predecessor to FINSA. See, e.g., Jose E. Alvarez, Political Protectionism and United States International Investment Obligations in Conflict: The Hazards of Exon-Florio, 30 Va. J. Int'l L. 1, 69 (1989). This Note, however, compares these statutes in their contemporary applications, with particular attention to the obligations they impose on the executive.

16. See infra notes 48–53, 104 and accompanying text.

17. See infra notes 22–23, 108–113 and accompanying text.

18. See infra notes 31–42 and accompanying text.

Note expands on a criticism of CFIUS as lacking accountability and transparency by introducing a similar national security body headed by the Department of the Treasury, OFAC, and overviewing the safeguards required by OFAC's statutory scheme: IEEPA's (1) national-emergency requirement, (2) congressional-oversight provisions, and (3) imposition of judicial review. Part II notes that FINSA lacks safeguards comparable to IEEPA's and argues that the recent CFIUS legislation does not remedy FINSA's shortcomings in this regard but rather worsens them.

Following Part II's suggestion that enhancing accountability should be a goal of CFIUS reform, Part III draws inspiration from IEEPA's accountability mechanisms. While noting that the specific safeguards provided for by IEEPA may not be appropriate for CFIUS, Part III proposes that CFIUS adopt IEEPA's general approach of incorporating safeguards at three key points throughout executive action: before a review is initiated ("ex ante"), while a review is ongoing ("ongoing"), and after the conclusion of a review ("ex post"). Part III then suggests several specific reforms to this end: clarifying CFIUS's definition of national security, enhancing communication with Congress regarding CFIUS's process, and providing parties with limited judicial review.

I. CFIUS: PAST AND PRESENT

This Part introduces CFIUS and its governing statute, FINSA. Section I.A describes CFIUS's history, process, and purpose by considering CFIUS's transformation from a relatively powerless body between 1975 and 2006, described in section I.A.1, to a more robust regulator as a result of FINSA, detailed in section I.A.2. Section I.B then details the recent legislative effort that expanded CFIUS.

A. *Overview of CFIUS: History, Process, and Purpose*

CFIUS plays a crucially important role in an increasingly globalized business environment.[19] A nine-member, interagency body—chaired by the Secretary of the Treasury and comprising the heads of the Departments of Justice, Homeland Security, Commerce, Defense, State, and Energy; the Offices of the U.S. Trade Representative and Science and Technology

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19. Indeed, because of CFIUS's growing influence, one foreign newspaper author asserted that doing business in the United States amounts to a "gruelling, soul-destroying, and perhaps, fruitless experience." Ann Shi, Should I Stay or Should I Go? Coping with CFIUS Woes, FinanceAsia (Oct. 26, 2017), http://www.financeasia.com/News/440478,should-i-stay-or-should-i-go-coping-with-cfius-woes.aspx (on file with the *Columbia Law Review*).

Policy;[20] and other agencies on a case-by-case basis[21]—CFIUS has the power to review cross-border transactions for national security risks. If it finds a transaction would pose risks to the national security of the United States, CFIUS may condition approval of the deal on certain mitigating circumstances[22] or recommend that the President block a transaction altogether.[23]

For any given transaction, CFIUS operates in one of two ways: through CFIUS's own decision to review the transaction, or in response to transacting parties' filing with CFIUS. Under the first approach, CFIUS may consider any transaction covered by its authorizing statute—that is, "any merger, acquisition, or takeover . . . by or with any foreign person which could result in foreign *control* of any person engaged in interstate commerce in the United States."[24] This in turn requires a finding of control, a functional threshold met when CFIUS determines that a transaction will provide a foreign entity with "the power, direct or indirect, whether or not exercised, through the ownership of a majority or a dominant minority of the total outstanding voting interest in an entity, . . . to determine, direct, or decide important matters affecting [the U.S. entity]."[25]

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20. Composition of CFIUS, U.S. Dep't of the Treasury, https://www.treasury.gov/resource-center/international/foreign-investment/Pages/cfius-members.aspx [https://perma.cc/67LX-K2TY] (last updated Dec. 1, 2010). The Secretary of Labor and Director of National Intelligence are also CFIUS members, although they have more limited roles. See 50 U.S.C. § 4565(k) (Supp. IV 2017).

21. For instance, the Department of Agriculture joined CFIUS in reviewing ChemChina's proposed takeover of Swiss pesticides-and-seeds group Syngenta in 2016 to advise on how a completed transaction would affect food security in the United States. See Michael Shields & Greg Roumeliotis, U.S. Clearance of ChemChina's Syngenta Deal Removes Key Hurdle, Reuters (Aug. 22, 2016), https://www.reuters.com/article/idUSKCN10X0DS [https://perma.cc/P3QE-3HAT].

22. See infra notes 45–47 and accompanying text (discussing the development of mitigation agreements and providing examples).

23. Most recently, in March 2018, President Trump acted on CFIUS's recommendation to block Singapore-based Broadcom's proposed takeover of chipmaker Qualcomm. See Cecilia Kang & Alan Rappeport, Trump Blocks Broadcom's Bid for Qualcomm, N.Y. Times (Mar. 12, 2018), https://www.nytimes.com/2018/03/12/technology/trump-broadcom-qualcomm-merger.html (on file with the *Columbia Law Review*). Just six months earlier, President Trump also blocked Canyon Bridge Capital Partners' proposed acquisition of Lattice Semiconductor Corporation, citing "the potential transfer of intellectual property to the foreign [acquiror], the Chinese government's role in supporting [the] transaction, the importance of semiconductor supply chain integrity to the U.S. government, and the use of Lattice products by the U.S. government" as the bases for the block. Davis Polk, CFIUS: President Blocks Lattice Semiconductor Corporation Acquisition; Senate Holds Hearing on Possible CFIUS Reforms 1 (2017), https://www.davispolk.com/files/2017-09-19_cfius_president_blocks_lattice_semiconductor_corporation_acquisition_senate_holds_hearing_possible_cfius_reforms.pdf [https://perma.cc/R6W7-N52P].

24. 50 U.S.C. § 4565(a)(3) (emphasis added); see also Treas. Reg. § 800.207 (2017) (defining "covered transaction").

25. Treas. Reg. § 800.204. The CFIUS regulations, however, specifically exempt certain transactions from being subject to this "control" determination and thus CFIUS

Under the second route—considering a transaction upon the parties' own initiative—CFIUS *must* review any transaction filed with it by the transacting parties.[26] While a foreign party seeking to acquire an American target is not required to submit its transaction to CFIUS, many foreign parties will voluntarily do so before closing in order to secure a transaction's safe harbor, or assurance that CFIUS will not review and unwind the transaction.[27] While deals are seldom pursued by parties to the point at which CFIUS recommends presidential action,[28] blocks have become more common in recent years: Of the five transactions a president has rejected on CFIUS's recommendation since 1988, four were blocked since 2012.[29]

1. *CFIUS Since 1975: From "Paper Tiger" to Bulwark.* — While CFIUS has existed since 1975, its authority and reach have expanded greatly in the last few decades. Created by President Ford[30] in response to increasing foreign investment, especially from Arab states,[31] CFIUS was originally authorized only to monitor foreign direct investments.[32] Further, the

review altogether. See, e.g., id. § 800.302 (exempting various types of transactions, among them passive investments of ten percent or less of an entity's voting interest, from review); id. § 800.303 (exempting lending transactions from review).

26. 50 U.S.C. § 4565(b)(1)(A)(i)–(ii) (providing that CFIUS must review a transaction "[u]pon receiving written notification . . . or pursuant to a unilateral notification").

27. See Treas. Reg. § 800.601 (authorizing power of divestment when there has been no "[f]inality of action[]" under FINSA, and implicitly offering safe harbor to parties whose transactions are approved by CFIUS). For illustrations of CFIUS's power of divestment, see Timothy Gardner, U.S. Senators Seek Review of Potential Russian Control of Citgo, Reuters (Sept. 19, 2017), https://www.reuters.com/article/idUSKCN1BU2O4 [https://perma.cc/WED3-GTTU] (describing recent calls for CFIUS to review the earlier PDVSA–Citgo transaction, in light of PDVSA's potential acquisition by a Russian entity); infra note 151 and accompanying text (discussing the divestment order against Ralls Corporation).

28. See infra note 64 (explaining that a party is incentivized to withdraw a transaction from CFIUS review if it appears that the transaction may be blocked).

29. See James K. Jackson, Cong. Research Serv., RL33388, The Committee on Foreign Investment in the United States (CFIUS) 7 (July 3, 2018) [hereinafter Jackson, 2018 Report], https://fas.org/sgp/crs/natsec/RL33388.pdf [https://perma.cc/E6XT-J8D9]. The recent increase in blocks is commonly attributed to the Trump Administration's "America First" policy. See Wilson Sonsini Goodrich & Rosati, CFIUS in 2017: A Momentous Year 3–4 (2018), https://www.wsgr.com/PDFSearch/CFIUS-Report/2017/CFIUS-YIR-2017.pdf [https://perma.cc/3QTT-B9Q4]. However, blocks were relatively frequent under President Obama, as well, who blocked two transactions during his presidency. Jackson, 2018 Report, supra, at 7.

30. See Exec. Order No. 11,858, 3 C.F.R. 990 (1975).

31. See Matthew J. Baltz, Institutionalizing Neoliberalism: CFIUS and the Governance of Inward Foreign Direct Investment in the United States Since 1975, 24 Rev. Int'l Pol. Econ. 859, 861 (2017) (discussing the shift in the 1970s away from a liberal foreign investment regime).

32. See The Operations of Federal Agencies in Monitoring, Reporting on, and Analyzing Foreign Investments in the United States: Part 3—Examination of the Committee on Foreign Investment in the United States, Federal Policy Toward Foreign Investment, and Federal Data Collection Efforts: Hearings Before the Subcomm. on Commerce, Consumer, & Monetary Affairs of the H. Comm. on Gov't Operations, 96th

President could block a transaction only in tandem with IEEPA,[33] passed in 1977, much as he or she can today.[34]

Importantly, to block a transaction during this early period, the President had to abide by IEEPA's requirement of first declaring a national emergency with respect to the transaction.[35] Because such an action amounted to "a hostile declaration against the country involved," few transactions were blocked during the late 1970s and early 1980s.[36] In its first four years, from 1975 to 1978, CFIUS met only six times and considered just two transactions;[37] in contrast, from 2012 to 2015, CFIUS reviewed more than 500 transactions.[38] During this early period, therefore, CFIUS was in essence a "paper tiger,"[39] with IEEPA's national-emergency requirement thwarting any real enforcement power.

While increased Arab investment motivated President Ford to create CFIUS, new perceived threats—concern among Americans about the United States' declining economic position and a worsening trade relationship with Japan[40]—encouraged President Reagan to strengthen it.[41] Congress ultimately passed the Exon–Florio Amendment of 1988, which authorized the President to investigate and block foreign "mergers,

Cong. 334–35 (1979) [hereinafter The Operations of Federal Agencies] (memorandum from C. Fred Bergsten to Deputy Secretary Carswell).

33. 50 U.S.C. §§ 1701–1707 (2012).

34. Alvarez, supra note 15, at 69.

35. See 50 U.S.C. § 1701(b) (providing for presidential authority under IEEPA only if the President declares a national emergency due to an "unusual and extraordinary threat").

36. Amy S. Josselyn, Comment, National Security at All Costs: Why the CFIUS Review Process May Have Overreached Its Purpose, 21 Geo. Mason L. Rev. 1347, 1351 (2014).

37. The Operations of Federal Agencies, supra note 32, at 335 (memorandum from C. Fred Bergsten to Deputy Secretary Carswell).

38. See Comm. on Foreign Inv. in the U.S., Annual Report to Congress 3 (2015), https://www.treasury.gov/resource-center/international/foreign-investment/Documents/Unclassified%20CFIUS%20Annual%20Report%20-%20(report%20period%20CY%202015).pdf [https://perma.cc/78NP-KVCM].

39. Stewart A. Baker, Skating on Stilts: Why We Aren't Stopping Tomorrow's Terrorism 260 (2010).

40. See Jackson, 2018 Report, supra note 29, at 5; see also Alvarez, supra note 15, at 56 (noting concerns over American firms' increased vulnerability to foreign takeover threats).

41. Jackson, 2018 Report, supra note 29, at 5–6. In particular, the highly publicized attempt by Japanese company Fujitsu to purchase a majority of Fairchild Semiconductor's shares served as the impetus for CFIUS reform. See id. ("[T]he Fujitsu-Fairchild incident marked an important shift in the Reagan Administration's support for unlimited foreign direct investment in U.S. businesses and boosted support within the Administration for fixed guidelines for blocking foreign takeovers of companies in national security-sensitive industries."). For an overview of foreign investment policy in the United States through 1988, see Cecelia M. Waldeck, Note, Proposals for Limiting Foreign Investment Risk Under the Exon-Florio Amendment, 42 Hastings L.J. 1175, 1179–90 (1991).

acquisitions, or takeovers"—absent the national-emergency declaration required under CFIUS's IEEPA-era regime.[42]

Between the adoption of Exon–Florio in 1988 and the enactment of the modern CFIUS governing scheme in 2007,[43] legislators took two additional measures to strengthen CFIUS's power of review. First, in 1992, Congress passed the Byrd Amendment, which enhanced CFIUS scrutiny over any transaction involving an acquiror controlled by a foreign government.[44] Second, in 2006, President George W. Bush introduced mitigation agreements, transaction-specific agreements imposing conditions with which parties to the transaction have to comply to receive CFIUS approval of their deal.[45] While mitigation measures provided CFIUS with enhanced flexibility to approve deals that it may have earlier felt the need to block, the introduction of mitigation agreements also created uncertainty for transacting parties: CFIUS has the power to reopen review of a transaction approved pursuant to a mitigation agreement if CFIUS believes a party to the transaction "intentionally materially breache[d]" the mitigation agreement.[46] In effect, some critics allege that the

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42. Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100-418, § 5021, 102 Stat. 1425, 1425–26 (codified as amended at 50 U.S.C. § 4565 (Supp. IV 2017)). Exon–Florio did not specifically mention CFIUS as the vehicle through which the power to suspend or prohibit transactions would be exercised; when President Reagan implemented provisions of the omnibus legislation by executive order, however, he delegated his authority to administer Exon–Florio to CFIUS. See Exec. Order No. 12,661, 3 C.F.R. 620 (1989). For an in-depth account of Exon–Florio and its legislative history, see generally Marc Greidinger, The Exon-Florio Amendment: A Solution in Search of a Problem, 6 Am. U. J. Int'l L. & Pol'y 111 (1991).

43. See infra section I.A.2 (discussing FINSA's changes to CFIUS).

44. National Defense Authorization Act for Fiscal Year 1993, Pub. L. No. 102-484, § 837, 106 Stat. 2463, 2463–65 (1992) (codified as amended at 50 U.S.C. § 4565). As interpreted by some members of Congress, the Byrd Amendment *required* CFIUS to undertake a full forty-five-day investigation—the second step of the CFIUS process, which follows an initial thirty-day review, see infra notes 54–63—when an acquiror is controlled by or acting on behalf of a foreign government. CFIUS's position, however, was that the full forty-five-day investigation was discretionary in such cases, not mandatory. See James K. Jackson, Cong. Research Serv., RL33388, The Committee on Foreign Investment in the United States (CFIUS) 8 (June 13, 2017) [hereinafter Jackson, 2017 Report], https://www.hsdl.org/?view&did=801702 (on file with the *Columbia Law Review*) (discussing competing interpretations of the Byrd Amendment by Congress and CFIUS). CFIUS's interpretation ultimately prevailed; under current practice, CFIUS must conduct a full investigation *only if* the lead agencies do not certify that the transaction will not impair national security. See 50 U.S.C. § 4565(b)(2)(D)(i).

45. See Baker, supra note 39, at 248–50. Among other measures, CFIUS may impose mitigation agreements requiring that only certain persons have access to certain technology, assuring the continuity of supply of certain products, or establishing an independent audit committee to oversee compliance with the mitigation agreement. See Comm. on Foreign Inv. in the U.S., supra note 38, at 21 (detailing these and other mitigation measures). For FINSA's codification of mitigation authority, see 50 U.S.C. § 4565(*l*)(1)(A).

46. 50 U.S.C. § 4565(b)(1)(D)(iii)(I). But see Treas. Reg. § 800.509 (2017) ("The Committee generally will not consider as material minor inaccuracies, omissions, or changes relating to financial or commercial factors not having a bearing on national secu-

introduction of mitigation agreements rendered the safe-harbor effect of CFIUS review null by giving CFIUS essentially perpetual power of review over mitigated transactions.[47]

2. *CFIUS Since 2007: Breaking Down the Black Box.* — In 2007, the United Arab Emirates–owned Dubai Ports World (DP World) sought CFIUS's approval of its acquisition of six U.S. port-management businesses. Much to the surprise of Congress and the public, who were aghast at the possibility of Arab control of American terminal operations in the wake of 9/11, CFIUS approved the acquisition.[48] In response, Congress introduced CFIUS reform through FINSA,[49] establishing the modern CFIUS regime. FINSA will continue to govern CFIUS until the Foreign Investment Risk Review Modernization Act of 2018 (FIRRMA), passed by Congress in August 2018, is implemented.[50]

FINSA's aim was twofold. Through FINSA, legislators sought increased accountability from CFIUS, both to Congress and the executive branch.[51] At the same time, however, FINSA was an attempt by legislators

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rity."). In the case of an intentional material breach, CFIUS presumably may even overturn its prior approval, if it deems such reversal necessary. See, e.g., Stephanie Kirchgaessner, Alcatel Completes Acquisition of Lucent, Fin. Times (Nov. 30, 2006), https://www.ft.com/f25293f4-80b6-11db-9096-0000779e2340 (on file with the *Columbia Law Review*) (illustrating such a possibility in the context of the pre-FINSA Alcatel–Lucent transaction). Admittedly, unwinding a completed transaction would be a complicated endeavor for which there appears to be no precedent; in fact, it seems that CFIUS has never even exercised its power to reopen a case on breach.

47. See Baker, supra note 39, at 259–60, 262–63 (referring to a mitigation agreement as an "'evergreen' provision because CFIUS's right to disapprove the transaction would remain in effect forever"). For further discussion on the reaction to mitigation agreements, see, e.g., Jeremy Pelofsky, Businesses Object to US Move on Foreign Investment, Reuters (Jan. 20, 2007), https://uk.reuters.com/article/idUKN0534982920061206 [https://perma.cc/BV7V-HE5S].

48. For an overview of the DP World controversy, the arguments in support of and against the deal, and the company's response to such outcry, see Baker, supra note 39, at 243–73; David E. Sanger, Under Pressure, Dubai Company Drops Port Deal, N.Y. Times (Mar. 10, 2006), http://www.nytimes.com/2006/03/10/politics/under-pressure-dubai-company-drops-port-deal.html (on file with the *Columbia Law Review*).

49. Foreign Investment and National Security Act of 2007, Pub. L. No. 110-49, 121 Stat. 246 (codified as amended at 50 U.S.C. § 4565). President Bush implemented FINSA in 2008 by executive order. See Exec. Order No. 13,456, 3 C.F.R. 171 (2009).

50. See infra section I.B.1 (describing FIRRMA's recent adoption).

51. See Jackson, 2018 Report, supra note 29, at 2 ("Members of Congress introduced more than 25 bills in the second session of the 109th Congress . . . following the proposed DP World transaction. . . . [FINSA] altered the CFIUS process in order to enable greater oversight by Congress and increased transparency and reporting by the Committee on its decisions."). FINSA addressed this aim by requiring the Secretary of the Treasury to designate a lead agency for each transaction under CFIUS review, 50 U.S.C. § 4565(k)(5), providing Congress with annual classified and unclassified reports, id. § 4565(m), and giving certain members of Congress the power to request confidential briefings on certain transactions, id. § 4565(g)(1).

to build on prior CFIUS reforms[52] and to strengthen and expand CFIUS even further.[53]

Under FINSA, the typical CFIUS review process comprises three time-limited stages: review, investigation, and presidential action.[54] CFIUS first has thirty days to conduct a review of a transaction and determine whether it would pose a national security threat if consummated.[55] If no national security risks are discovered during review, CFIUS will notify the parties to the transaction that it has decided not to pursue the deal further, granting the deal safe harbor.[56] However, under various circumstances—if national security risks are found,[57] CFIUS is not satisfied with the results of its review,[58] the transaction involves critical infrastructure,[59] or, as required by the Byrd Amendment and FINSA, the acquiror is foreign-government controlled and the lead agencies have not certified that

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52. See supra notes 40–47 and accompanying text (describing these efforts).

53. FINSA addressed this goal by broadening the definition of national security—and therefore expanding what CFIUS could consider in its reviews—to include threats to homeland security and critical infrastructure. 50 U.S.C. § 4565(a)(5); see also Jackson, 2018 Report, supra note 29, at 2 (noting that despite this expansion, "[n]ot all Members [of Congress] were satisfied with the law").

54. See 50 U.S.C. § 4565(b)(1) (providing for national security reviews); id. § 4565(b)(2) (providing for national security investigations); id. § 4565(d) (providing for presidential authority to "suspend or prohibit" a transaction). In addition to this formal process encompassing review, investigation, and presidential action, CFIUS tends to engage in informal, prefiling review of proposed transactions. While not authorized by FINSA, prefiling review is provided for in CFIUS's guidance to parties. See Treas. Reg. § 800.401(f) (2017); Process Overview, U.S. Dep't of the Treasury, https://www.treasury.gov/resource-center/international/foreign-investment/Pages/cfius-overview.aspx [https://perma.cc/EP8E-HZJ8] (last updated Aug. 13, 2018).

At the prefiling stage, CFIUS focuses on reviewing draft notices for completeness in order to expedite subsequent review and generally does not issue advisory opinions regarding a specific transaction's likelihood of approval. See Baker Botts, A Guide to Demystify the CFIUS Process 6 (2013), http://www.bakerbotts.com/~/media/files/ideas/publications/2013/11/a-guide-to-demystify-the-cfius-process/files/cfius-booklet–english-version/fileattachment/cfius-booklet–english-version.pdf [https://perma.cc/DJ74-ZY45]. As the number of transactions CFIUS reviews continues to increase, such informal review may grow increasingly more important. See Farhad Jalinous et al., White & Case LLP, CFIUS: President Trump Blocks Acquisition of Lattice Semiconductor by Canyon Bridge 2 (2017), https://www.whitecase.com/sites/whitecase/files/files/download/publications/cfius-president-trump-blocks-acquisition-of-lattice-semiconductor-by-canyon-bridge.pdf [https://perma.cc/CA3E-ZD3Z] (noting a recent trend toward longer and more regular prefiling reviews); supra notes 37–38 and accompanying text (discussing CFIUS's increasing caseload).

55. 50 U.S.C. § 4565(b)(1)(E).

56. See Treas. Reg. § 800.504.

57. See 50 U.S.C. § 4565(b)(2)(B)(i)(I).

58. See id. § 4565(b)(2)(B)(ii).

59. See id. § 4565(b)(2)(B)(i)(III). As defined by FINSA, critical infrastructure refers to "systems and assets, whether physical or virtual, so vital to the United States that the incapacity or destruction of such systems or assets would have a debilitating impact on national security." Id. § 4565(a)(6).

the transaction "will not impair" national security[60]—CFIUS will move onto its second stage, investigation, essentially a continuation of CFIUS's initial review.[61] An investigation may last as long as forty-five days,[62] during which CFIUS may negotiate, impose, or enforce a mitigation agreement.[63] In rare cases, CFIUS may conclude an investigation by recommending that the President block the transaction.[64] While the President is not obligated to follow CFIUS's recommendation,[65] the President must act within a fifteen-day window following a completed investigation to block a transaction if he or she wishes to act upon CFIUS's recommendation to do so.[66]

B. *Recent Calls for CFIUS Reform*

Although legislators have introduced various bills related to CFIUS since 1975, not many past CFIUS-reform efforts have amounted to enacted legislation.[67] Unlike these "periodic legislative efforts to effect [CFIUS] reform that . . . rapidly faded from view,"[68] FIRRMA, an effort to expand CFIUS scrutiny over foreign investment, was passed by Congress and signed by President Trump in August 2018.[69]

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60. See id. § 4565(b)(2)(D)(i); see also supra note 44 and accompanying text.

61. See Latham & Watkins LLP, Overview of the CFIUS Process 6 (2017), https://www.lw.com/thoughtLeadership/overview-CFIUS-process [https://perma.cc/7JBU-TCA7].

62. 50 U.S.C. § 4565(b)(2)(C).

63. See Jackson, 2018 Report, supra note 29, at 13; see also supra notes 45–47 (discussing the history of mitigation agreements and noting their controversial nature, given CFIUS's ability to reconsider an already-approved-and-closed transaction upon intentional material breach of a mitigation agreement).

64. A presidential block of a transaction is rare in part because it will be publicly announced, whereas the results of CFIUS's preceding review and investigation are kept confidential. Fearing reputational risk from its transaction being publicly labeled a national security threat, a firm will typically withdraw a transaction if it appears that it is headed for a presidential block. See Jackson, 2017 Report, supra note 44, at 11–12 (noting that public knowledge of even a CFIUS investigation may have a detrimental effect on a firm's stock price).

65. See Jackson, 2018 Report, supra note 29, at 13.

66. 50 U.S.C. § 4565(d)(2).

67. See, e.g., S. 3161, 114th Cong. § 2 (2016) (seeking to permanently appoint the Secretary of Agriculture to CFIUS); H.R. 4929, 109th Cong. § 2 (2006) (attempting to give Congress veto power over transactions approved by CFIUS).

68. Covington, CFIUS Reform Legislation Introduced in Congress 3 (2017) [hereinafter 2017 Covington Memorandum], https://www.cov.com/-/media/files/corporate/publications/2017/11/cfius_reform_legislation_introduced_in_congress.pdf [https://perma.cc/UQB4-EE7Y].

69. FIRRMA passed against the backdrop of broader economic tensions with China. For a timeline of the so-called trade war between China and the United States since the beginning of 2018, see Rebecca Tan, The U.S.-China Trade War Has Begun. Here's How Things Got to This Point., Wash. Post (July 6, 2018), https://www.washingtonpost.com/news/worldviews/a-timeline-of-how-the-u-s-china-trade-war-led-us-to-this-code-red-situation (on file with the *Columbia Law Review*). After threatening to unilaterally curb Chinese investment, see, e.g., Shawn Donnan, Trump Targets China Investments as Trade War Heats Up, Fin.

FIRRMA's unique momentum stemmed from concerns about increasing Chinese investment in American businesses[70] and fears that certain investments that have traditionally circumvented CFIUS review due to their structure—minority investments, some joint ventures, and greenfield investments, among others[71]—may nonetheless pose national security risks.[72] Of particular concern is the vulnerability of U.S. technology, which some argue needs to be better protected in light of potential military applications.[73] Further, comments by Chinese officials and a pattern of acquisitions indicating that the Chinese government may be attempting to acquire U.S. technology through strategic, government-funded transactions increased calls for CFIUS reform, leading to FIRRMA.[74]

Times (June 25, 2018), https://www.ft.com/c002dadc-766b-11e8-b326-75a27d27ea5f (on file with the *Columbia Law Review*), President Trump instead embraced what was perceived to be a more moderate approach—increasing CFIUS's power through FIRRMA, see, e.g., Saleha Mohsin & Jenny Leonard, Trump Decides Against Harshest Measures on China Investment, Bloomberg (June 27, 2018), https://www.bloomberg.com/news/articles/2018-06-27/trump-seeks-to-bolster-government-panel-to-curb-china-investment (on file with the *Columbia Law Review*).

70. See Thilo Hanemann & Cassie Gao, Record Deal Making in 2016 Pushes Cumulative Chinese FDI in the US Above $100 Billion, Rhodium Grp. (Dec. 30, 2016), http://rhg.com/record-deal-making-in-2016-pushes-cumulative-chinese-fdi-in-the-us-above-100-billion [https://perma.cc/9EMD-YBFJ] (finding that Chinese investment in the United States increased threefold between 2015 and 2016 and tenfold since 2011). Politicians from both the left and the right viewed increasing Chinese investment with alarm. See, e.g., Covington, CFIUS and Foreign Direct Investment Under President Donald Trump 5 (2016), https://www.cov.com/-/media/files/corporate/publications/2016/11/cfius_and_foreign_direct_investment_under_president_donald_trump.pdf [https://perma.cc/9SRF-S42Z] ("While there are significant policy differences between congressional Democrats and Republicans on many fronts, one potential area of convergence among left-leaning Democrats, especially those supported by the trade unions, and more hawkish Republicans, may be on trade and investment matters focusing on China.").

71. Because CFIUS's power of review is tied to the notion of control—that is, the functional ability to direct an entity's business decisions—FINSA does not allow CFIUS to consider those transactions, such as minority investments and some joint ventures, that fall short of a transfer of control to a foreign entity. See supra notes 24–25 and accompanying text. Further, because a greenfield investment involves the acquisition of a collection of assets, as opposed to an investment in a preexisting U.S. business, it is not covered by FINSA. Treas. Reg. § 800.301(c), ex. 3 (2017).

72. See, e.g., Cornyn, Feinstein, Burr Introduce Bill to Strengthen the CFIUS Review Process, Safeguard National Security, John Cornyn: U.S. Senator for Tex. (Nov. 8, 2017), https://www.cornyn.senate.gov/content/news/cornyn-feinstein-burr-introduce-bill-strengthen-cfius-review-process-safeguard-national [https://perma.cc/YB4X-DRH5] ("[G]aps in the current process have allowed foreign adversaries to weaponize their investment in U.S. companies and transfer sensitive dual-use U.S. technologies, many of which have potential military applications.").

73. Id.

74. See Hearing on Examining the Operations of the Committee on Foreign Investment in the United States (CFIUS) Before the Subcomm. on Monetary Policy & Trade of the H. Comm. on Fin. Servs., 115th Cong. 4–6 (2017), https://docs.house.gov/meetings/BA/BA20/20171214/106738/HHRG-115-BA20-Wstate-SegalA-20171214.pdf [https://

1. *FIRRMA: Broadening Foreign Investment Review's Scope.* — In response to these concerns over foreign investment, FIRRMA was introduced in Congress on November 8, 2017.[75] FIRRMA quickly became the leading CFIUS-reform effort[76] and was ultimately incorporated into and enacted

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perma.cc/Z5JK-VUPR] (statement of Adam Segal, Ira A. Lipman Chair in Emerging Technologies and National Security and Director of the Digital and Cyberspace Policy Program) ("China's innovation strategy . . . encourages Chinese companies to acquire core technologies and know-how abroad as a means of catching up or leapfrogging the competition."); Yoko Kubota, Trade War Punctures China's Pride in Its Technology, Wall St. J. (June 28, 2018), https://www.wsj.com/articles/trade-war-punctures-chinas-pride-in-its-technology-1530186663 (on file with the *Columbia Law Review*) ("A core U.S. concern is what the Trump administration says are attempts by China to steal U.S. technology and use subsidies to build up national champions to conquer world markets.").

75. S. 2098, 115th Cong. (2017); H.R. 4311, 115th Cong. (2017). While identical copies of FIRRMA were introduced in the House and the Senate, the two versions soon diverged. Compare S. 2987, 115th Cong. tit. XVII (2018), with H.R. 5841, 115th Cong. (2018). Each version was passed as amended in its respective chamber in June 2018. Pascal Bine et al., Skadden, President Trump Tentatively Looks to FIRRMA to Expand U.S. Foreign Investment Reviews 1 (2018), https://www.skadden.com/insights/publications/2018/06/president-trump-tentatively-looks-to-firrma (on file with the *Columbia Law Review*).

76. FIRRMA had more support than other recent reform efforts largely because it "focused in a laser-like way on national security interests." Foreign Investments and National Security: A Conversation with Senator John Cornyn, Council on Foreign Relations (June 22, 2017), https://www.cfr.org/event/foreign-investments-and-national-security-conversation-senator-john-cornyn [https://perma.cc/2RTB-N4VB]. Such an approach contrasts with more controversial recent proposals, such as the United States Foreign Investment Review Act of 2017, introduced by Senators Charles Grassley and Sherrod Brown to create an additional review process headed by the Department of Commerce to consider economic consequences of foreign investment. See S. 1983, 115th Cong. § 1002(d)(1)–(5) (2017) (providing a list of factors that the Secretary of Commerce could consider under the Grassley–Brown bill, including "any other factors the Secretary considers appropriate"). Based on the results of its review, the Secretary of Commerce could approve, prohibit, or require modification of a transaction. Id. § 1002(c)(2)(A)(ii).

The bill sponsored by Senators Grassley and Brown is not the first to suggest screening foreign investments for economic concerns. Others include the Foreign Investment and Economic Security Act of 2017, H.R. 2932, 115th Cong. § 3 (2017), which would require CFIUS to find that a transaction would confer a net economic benefit to the United States for approval; and the True Reciprocity Investment Act of 2017, S. 1722, 115th Cong. § 2 (2017), which would require CFIUS to consider whether an investor's home country would permit a reciprocal American investment in the same industry.

Many view as problematic the consideration of economic effects in deciding whether to approve cross-border transactions. See, e.g., Grover Norquist, Opinion, The Feds Need to Return to the Original Intent of Foreign Investment Review, Hill (Nov. 17, 2017), http://thehill.com/opinion/international/360758-the-feds-need-to-return-to-the-original-intent-of-foreign-investment-review [https://perma.cc/UXX8-H8VN] ("CFIUS is supposed to be strictly about national security. It is not supposed to be an instrument of protectionism or an antitrust regulatory body."). They argue that such an approach is contrary to the United States' longtime policy of open investment and could strain foreign relations and incite retaliation abroad. See, e.g., Chris Griner et al., Stroock & Stroock & Lavan LLP, The Elephant in the Room: Senate Legislation Would Make "Economic Security" a Factor in Foreign Investment Reviews 2 (2017), https://www.stroock.com/siteFiles/Publications/TheElephantInTheRoom.pdf [https://perma.cc/B72S-D7VV]; Rod Hunter, The Grassley-Brown Bill, a New Approach to Foreign Investment Reviews, Baker McKenzie: Trade

as part of the John S. McCain National Defense Authorization Act for Fiscal Year 2019.[77] Once the Department of the Treasury promulgates regulations implementing FIRRMA, likely sometime in 2019,[78] CFIUS's operations will change substantially. In particular, FIRRMA will increase CFIUS's reach, authority, and discretion, continuing the trend in CFIUS reform since 1975.[79]

FIRRMA is intended as a "modernization of the processes and authorities of [CFIUS] and of the [U.S.] export control system," in response to recent changes in both the national security landscape and the "nature of the investments that pose the greatest potential risk to national security."[80] Legislators pursued modernization of CFIUS through FIRRMA by expanding the types of transactions CFIUS may consider[81] and creating an expedited channel of CFIUS review to encourage greater use of CFIUS.[82] Because FIRRMA's reforms will substantially increase CFIUS's workload,[83]

Crossroads (Oct. 25, 2017), http://tradeblog.bakermckenzie.com/the-grassley-brown-bill-a-new-approach-to-foreign-investment-reviews [https://perma.cc/2XQ3-CM7N].

However, there is some indication that national security interests and economic concerns have become conflated under the Trump Administration, potentially blurring the distinction between FIRRMA and these more controversial efforts. See Donnan, supra note 69 ("The Trump administration . . . has very much blurred the line and seems to be saying that any significant economic challenge the US faces is also a national security challenge." (internal quotation marks omitted) (quoting Peter Harrell, Ctr. for a New Am. Security)).

77. Foreign Investment Risk Review Modernization Act of 2018, Pub. L. No. 115-232, § 1701; see also Kimberly Hope Caine et al., President Trump Signs into Law CFIUS Reform Bill, Norton Rose Fulbright (Aug. 16, 2018), http://www.nortonrosefulbright.com/knowledge/publications/169816 [https://perma.cc/6NHM-VC4H] (describing inclusion of FIRRMA within the 2019 National Defense Authorization Act, passed by Congress and signed by President Trump in August 2018). For the conference report on FIRRMA approved by both the House and the Senate, see H.R. Rep. No. 115-874, at 1078–88 (2018) (Conf. Rep.).

78. See Foreign Investment Risk Review Modernization Act § 1721(a) (requiring CFIUS to develop a plan for implementing FIRRMA within 180 days); id. § 1727 (establishing immediate and delayed effective dates for various provisions).

79. See supra notes 42–47 and accompanying text (discussing past reforms). But see Paul Marquardt et al., Cleary Gottlieb, Congress Passes CFIUS Reform Bill 1 (2018) [hereinafter Cleary Memorandum], https://www.clearygottlieb.com/-/media/files/alert-memos-2018/congress-passes-cfius-reform-bill.pdf [https://perma.cc/W5FY-HZGJ] ("[U]ltimately, FIRRMA's changes to current CFIUS practice are modest, and many of the changes merely codify practices in place since the later years of the Obama Administration.").

80. Foreign Investment Risk Review Modernization Act § 1702(b)(4).

81. See infra notes 85–87 and accompanying text.

82. See infra notes 88–91 and accompanying text.

83. A report issued by the Government Accountability Office (GAO) prior to FIRRMA's enactment noted CFIUS's difficulty in handling its workload in recent years. See U.S. Gov't Accountability Office, GAO-18-249, Committee on Foreign Investment in the United States: Treasury Should Coordinate Assessments of Resources Needed to Address Increased Workload 13–21 (2018) [hereinafter GAO Report]; see also Laura Fraedrich et al., Jones Day, Looking Beyond the Recent CFIUS Annual Report 1 (2017), http://www.jonesday.com/looking-beyond-the-recent-cfius-annual-report-10-11-2017 (on file with

FIRRMA also provides CFIUS with additional resources.[84]

First, FIRRMA expands CFIUS's jurisdiction over certain types of transactions and considerations not currently covered by FINSA. Significantly, FIRRMA breaks away from FINSA's key control limitation, broadening the definition of covered transaction to include certain noncontrolling investments involving critical infrastructure, critical technology, and sensitive personal data.[85] FIRRMA also departs from FINSA by enabling CFIUS to consider purchases, leases, or other concessions of vacant land, so long as such land is located within the United States and meets certain other requirements; FINSA had allowed CFIUS to consider only real estate transactions associated with a U.S. business.[86] Under FIRRMA, CFIUS may also consider whether a transaction "involves a country of special concern that has a demonstrated or declared strategic goal of acquiring a type of critical technology or critical infrastructure that would affect [U.S.] leadership in areas related to national security" as part of its review.[87]

Second, FIRRMA seeks to encourage increased filing with CFIUS by introducing an expedited CFIUS review known as a declaration, which will exist alongside the traditional FINSA filing system.[88] Once this

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the *Columbia Law Review*) (showing an increased number of CFIUS reviews over 2015, 2016, and the first part of 2017). CFIUS not only faces an enormous workload from increased filings but also lacks the resources to handle this influx of work, exacerbated by vacancies in career staff and political appointees since 2017. See Tatman Savio et al., Akin Gump Strauss Hauer & Feld LLP, CFIUS's 2015 Annual Report and Published 2016 Data Demonstrate Uptick in Review Activity and Scrutiny 1 (2017), https://www.akingump.com/images/content/6/0/60540.pdf (on file with the *Columbia Law Review*) (discussing this combination of increased filings and staff vacancies). The GAO report stressed that "CFIUS may be limited in its ability to fulfill its objectives and address threats to the national security of the United States," especially "if legislative changes to CFIUS's authorities further expand its workload." GAO Report, supra, at 31; see also Benjamin Horney, Proposed CFIUS Bill Could Have Opposite of Intended Effect, Law360 (Jan. 11, 2018), https://www.law360.com/articles/1000645 (on file with the *Columbia Law Review*) (reporting an opinion among experts that "[i]n its current form, [FIRRMA] asks too much of CFIUS").

84. See infra notes 92–99 and accompanying text.

85. Compare Foreign Investment Risk Review Modernization Act sec. 1703, § (a)(4)(B)(iii), with supra notes 24–25 and accompanying text (describing FINSA's primary requirement of control).

86. Compare Foreign Investment Risk Review Modernization Act sec. 1703, § (a)(4)(B)(ii), with Treas. Reg. § 800.302(c) (2017) (clarifying that "[a]n acquisition of any part of an entity or of assets, if such part of an entity or assets do not constitute a U.S. business," is not a covered transaction under FINSA).

87. Foreign Investment Risk Review Modernization Act § 1702(c)(1). As originally introduced in both chambers, FIRRMA mandated a stricter country-specific framework under which CFIUS would be *required* to scrutinize transactions originating from any country believed to pose a "significant threat to the national security interests of the United States." S. 2098, 115th Cong. § 3 (2017); H.R. 4311, 115th Cong. § 3 (2017). Commentators noted that the designation was likely intended to increase scrutiny of investments from China and Russia. 2017 Covington Memorandum, supra note 68, at 6.

88. Foreign Investment Risk Review Modernization Act § 1706.

mechanism is implemented, CFIUS will be required to respond to a declaration within thirty days, either by asking the parties for more information, initiating a traditional CFIUS review, or concluding consideration of the transaction altogether.[89] While some investors may voluntarily pursue a declaration due to perceived cost and timing benefits,[90] FIRRMA will require declarations for direct or indirect acquisitions of a "substantial interest" in a U.S. business that could potentially compromise critical infrastructure, critical technology, or sensitive personal information.[91]

Third, in light of the increased demands it imposes on an already-burdened CFIUS,[92] FIRRMA provides CFIUS with a number of resources. Most significantly, FIRRMA authorizes appropriation of funds to CFIUS[93] and introduces a CFIUS filing fee,[94] the proceeds of which will be used to fund CFIUS operations, such as hiring additional CFIUS staff.[95] In addition, FIRRMA extends CFIUS's review period from thirty to forty-five days and allows a fifteen-day extension to the forty-five-day investigation period under "extraordinary circumstances."[96] While this reform appears to lengthen the CFIUS process from seventy-five days of review and

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89. Id. sec. 1706, § (v)(III)(aa)–(bb).

90. But see Cleary Memorandum, supra note 79, at 7 ("[I]t seems unlikely that CFIUS will clear many transactions on the basis of a 5-page declaration, and if CFIUS proceeds to a full examination of the transaction, the filing of a short-form declaration merely adds another 30 days to the process.").

91. More specifically, declarations will be required for acquisitions of a substantial interest in a U.S. business that: (1) owns, operates, manufactures, supplies, or services critical infrastructure; (2) produces, designs, tests, manufactures, fabricates, or develops one or more critical technologies; or (3) maintains or collects sensitive personal data by a foreign person in which a foreign government owns, directly or indirectly, a substantial interest. See Foreign Investment Risk Review Modernization Act sec. 1706, § (v)(IV)(bb)(AA). FIRRMA does not precisely define substantial interest, although it provides guidelines for CFIUS to prescribe such a definition by regulation. See id. sec. 1706, § (v)(IV)(bb)(BB).

92. See supra note 83.

93. Foreign Investment Risk Review Modernization Act sec. 1723, § (p)(1)–(2).

94. Id. sec. 1723, § (p)(3)(A). In contrast to other merger regulation statutes, such as the Hart–Scott–Rodino Antitrust Improvements Act of 1976, see Filing Fee Information, FTC (June 25, 2018), https://www.ftc.gov/enforcement/premerger-notification-program/filing-fee-information [https://perma.cc/4292-FR4Y], FINSA did not provide for a filing fee.

95. See Foreign Investment Risk Review Modernization Act sec. 1723, § (p)(3)(B)(ii). FIRRMA limits the filing fee to the lesser of $300,000, adjusted for inflation, or one percent of the deal's value. Id. sec 1723, § (p)(3)(B)(i)(I)(aa)–(bb). Further, FIRRMA contemplates a "prioritization fee"—essentially an additional fee to expedite a party's filing. Id. sec. 1723, § (p)(3)(D)(i) (requiring "a study of the feasibility and merits of establishing a [prioritization] fee"). A previous version of FIRRMA had explicitly provided for such a fee. S. 2987, 115th Cong. § 1722 (2018).

96. Foreign Investment Risk Review Modernization Act sec. 1709. FIRRMA provides that what constitutes extraordinary circumstances will be defined by regulation. Id. sec. 1709, § (C)(ii)(I).

investigation under FINSA to one hundred five days,[97] CFIUS is also newly required under FIRRMA to act within ten business days of receiving a filing;[98] because CFIUS reviews have often extended beyond FINSA's statutory timeline, this additional reform may actually speed up CFIUS reviews once FIRRMA is implemented.[99]

II. JUXTAPOSING FINSA AND IEEPA: HIGHLIGHTING CFIUS AS A BLACK BOX

There are several oft-cited criticisms of CFIUS. One is the concern reflected in the momentum behind FIRRMA: that CFIUS is unable to address considerations and transactions that increasingly pose a national security threat to the United States.[100] Another is a criticism quite prevalent among foreign transacting parties, yet nearly opposite in nature: that CFIUS lacks accountability, transparency, and predictability.[101] This Part describes this criticism of CFIUS and argues that while accountability has not been a goal of CFIUS reform, it should be.

Rather than discuss CFIUS's current accountability shortcomings in isolation, this Part compares CFIUS's contemporary FINSA regime with IEEPA,[102] the statutory scheme of OFAC, another national security body headed by the Department of the Treasury.[103] This comparison both highlights CFIUS as a black box and inspires the accountability reforms proposed in Part III.

Section II.A introduces OFAC and IEEPA, noting the overlapping functions and purposes of CFIUS and OFAC. Section II.B then compares three accountability mechanisms required of OFAC by IEEPA—a national-emergency-declaration requirement, congressional oversight through reporting requirements and a legislative veto, and judicial review—with those that FINSA currently imposes on CFIUS. Section II.C notes that FIRRMA exacerbates CFIUS's accountability problems as they exist under FINSA rather than remedies them and concludes by arguing that enhancing accountability should be a goal of CFIUS reform.

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97. See supra notes 54–64 and accompanying text.

98. Foreign Investment Risk Review Modernization Act sec. 1704, § (II)(aa).

99. Cleary Memorandum, supra note 79, at 8 ("These changes to the formal timetable may reduce the frequency of CFIUS's bending its rules to extend that timetable . . . .").

100. See supra section I.B.

101. See, e.g., Li, supra note 8, at 272 (likening the CFIUS process to a "lottery" for foreign investors). But see Jon D. Michaels, The (Willingly) Fettered Executive: Presidential Spinoffs in National Security Domains and Beyond, 97 Va. L. Rev. 801, 862 (2011) ("Rather than serving to game the system in either direction, CFIUS appears to cultivate accountability, where it otherwise would not naturally take root.").

102. 50 U.S.C. §§ 1701–1707 (2012).

103. See infra notes 108–114.

A. *Overview of OFAC and IEEPA*

Like CFIUS, OFAC is charged with protecting national security and administered by the Department of the Treasury.[104] Rather than reviewing cross-border transactions on a case-by-case basis like CFIUS, however, OFAC plans and administers ongoing economic-sanctions programs for a variety of reasons, from terrorism to narcotics trafficking.[105] While OFAC programs vary, the general OFAC scheme prohibits trading with or providing economic support to sanctioned individuals or persons in sanctioned countries, with a licensing regime providing for general and specific exemptions.[106] OFAC may freeze assets and prevent access to the U.S. financial system to enforce its prohibitions, as well as institute penalties against those who defy its directives.[107]

Unlike CFIUS, OFAC's statutory scheme is not unique to its work. Rather, OFAC's sanctions programs are primarily enforced pursuant to

104. See About: Office of Foreign Assets Control (OFAC), U.S. Dep't of the Treasury, https://www.treasury.gov/about/organizational-structure/offices/Pages/Office-of-Foreign-Assets-Control.aspx [https://perma.cc/6EPN-QNJ8] (last updated Feb. 6, 2018) ("[OFAC] of the US Department of the Treasury administers and enforces economic and trade sanctions based on US foreign policy and national security goals . . . ."). Created in 1962 as an office of the Department of the Treasury, which had long imposed sanctions to further foreign policy objectives, OFAC is the modern counterpart to a number of predecessors, among them the Office of Foreign Funds Control, which focused on hindering Nazi access to European assets in the United States during World War II, and the Division of Foreign Assets Control, which managed the sanctions program against China and North Korea during the Korean War. OFAC FAQs: General Questions, U.S. Dep't of the Treasury, https://www.treasury.gov/resource-center/faqs/Sanctions/Pages/faq_general.aspx [https://perma.cc/ZJ79-DGEU] [hereinafter OFAC FAQs] (last updated July 17, 2018); Records of the Office of Foreign Assets Control, Group 265, U.S. Nat'l Archives & Records Admin., https://www.archives.gov/research/guide-fed-records/groups/265 [https://perma.cc/Z995-95P6] (last updated Aug. 15, 2016); see also Robert E. Wright & David J. Cowen, Financial Founding Fathers: The Men Who Made America Rich 100–02 (2006) (describing an early Treasury sanctions program in response to British harassment of American sailors before 1812); William Harvey Reeves, The Control of Foreign Funds by the United States Treasury, 11 Law & Contemp. Probs. 17, 17–18 (1945) (overviewing how actions taken by the Treasury furthered foreign policy objectives during World War II).

105. Currently, OFAC has sanctions programs against the Central African Republic, Cuba, Iran, Iraq, Libya, North Korea, Somalia, Syria, Ukraine, Venezuela, and Zimbabwe, among other countries and individuals. Sanctions Programs and Country Information, U.S. Dep't of the Treasury, https://www.treasury.gov/resource-center/sanctions/Programs/Pages/Programs.aspx [https://perma.cc/UCT8-XX6Q] (last updated Sept. 7, 2018). For an example of a long-standing sanctions program recently concluded by OFAC, see Obama Lifts Sanctions Against Ivory Coast, Citing Progress, Reuters (Sept. 14, 2016), https://www.reuters.com/article/idUSKCN11K1SJ [https://perma.cc/5LEZ-TYGK].

106. See Treas. Reg. § 501.801 (2017); OFAC FAQs, supra note 104.

107. See Samuel Rubenfeld, OFAC Rises as Sanctions Become a Major Policy Tool, Wall St. J.: Risk & Compliance J. (Feb. 5, 2014), https://blogs.wsj.com/riskandcompliance/ofac-rises-as-sanctions-become-a-major-policy-tool (on file with the *Columbia Law Review*). For more information on OFAC, see Alan F. Enslen et al., Balancing Free Trade with International Security: What Every Alabama Attorney Should Know About International Trade Controls, 74 Ala. Law. 96, 100–01 (2013).

IEEPA,[108] a more general grant of emergency powers that has been invoked outside the OFAC context.[109] IEEPA gives the President authority to regulate commerce—including the power to investigate, regulate, and block transactions[110]—in response to "any unusual and extraordinary threat, which has its source in whole or substantial part outside the United States, to the national security, foreign policy, or economy of the United States."[111] So long as the President meets IEEPA's threshold requirement of publicly declaring a national emergency with regard to a specific threat, the President has broad authority to regulate commerce under IEEPA,[112] comporting with traditional deference to the executive in national security matters.[113] Unlike CFIUS, OFAC does not act pursuant to a single set of regulations but rather to particular regulations issued

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108.OFAC may act pursuant to other statutes, including the Trading with the Enemy Act of 1917 (TWEA), which enables the United States to restrict trade with countries in times of war. See 50 U.S.C. §§ 4301–4341 (Supp. IV 2017). Due to TWEA's wartime restriction, however, most OFAC sanctions have been issued pursuant to IEEPA since it was passed in 1977. See U.S. Dep't of the Treasury, OFAC Regulations for the Financial Community 2 (2012), https://www.treasury.gov/resource-center/sanctions/Documents/facbk.pdf [https://perma.cc/5VMU-KNQ4] (providing that the only sanctions issued pursuant to TWEA are sanctions against Cuba and North Korea).

109. Importantly, prior to Exon–Florio, IEEPA provided the statutory authorization for the President to block a transaction much as he or she can under FINSA today. See Alvarez, supra note 15, at 15 ("Exon-Florio merely 'codified' the status quo since it gave the President the formal statutory authority he always claimed to have had with regard to foreign investment."); supra notes 33–34 and accompanying text. For a recent example of threatened action under IEEPA outside the OFAC context, see Donnan, supra note 69.

110. 50 U.S.C. § 1702 (2012).

111. Id. § 1701.

112. The Supreme Court case *Dames & Moore v. Regan*, in which the Court heard a challenge to several executive orders issued by President Carter implementing the agreement ending the Iran hostage crisis, demonstrates the breadth of presidential power granted by IEEPA. 453 U.S. 654, 662–66 (1981). Pursuant to the aforementioned agreement, the United States had agreed to transfer certain assets held by U.S. banks to Iran, nullify certain attachments against Iranian property, and transfer claims by U.S. nationals in U.S. courts against "Iran and its state enterprises" to binding arbitration. Id. at 665. While Carter's agreements to nullify attachments of Iranian property and transfer Iranian assets were explicitly authorized by IEEPA, the power to suspend claims was not. Id. at 674–75. Nonetheless, the Court found implicit authorization for the President's suspension of claims, in light of IEEPA and other congressional action. See id. at 676–86 (looking to "the inferences . . . from the character of the legislation Congress has enacted in the area"). For a confirmation of this broad authority in the OFAC context, see United States v. McKeeve, 131 F.3d 1, 10 (1st Cir. 1997) ("IEEPA codifies Congress's intent to confer broad and flexible power upon the President to impose and enforce economic sanctions against nations that the President deems a threat to national security interests.").

113. See William G. Howell, Wartime Judgments of Presidential Power: Striking Down but Not Back, 93 Minn. L. Rev. 1778, 1778 (2009) ("Supreme Court Justices . . . often argue, and almost always imply, that foreign threats sanction judicial deference to the President."). For a recent illustration of judicial deference, see Trump v. Hawaii, 138 S. Ct. 2392, 2408–09 (2018) (finding that the President has broad discretion to suspend the entry of foreign nationals into the United States if the President believes they pose a national security threat).

for each sanctions program, each in turn authorized by a separate national-emergency declaration.[114]

B. *Comparing Accountability Mechanisms Provided by FINSA and IEEPA*

Both FINSA and IEEPA were drafted to enable the executive to protect the country from national security threats,[115] and both statutes involve the Department of the Treasury in a leadership capacity.[116] Further, while IEEPA confers somewhat broader authority on the President than FINSA does,[117] both statutes provide the executive with the same authority to investigate, regulate, and block transactions,[118] as delegated to CFIUS and OFAC. Yet, despite these similarities in purpose and authority, FINSA and IEEPA differ in terms of accountability, as IEEPA includes a number of safeguards to promote transparency that FINSA lacks.[119]

This section considers the IEEPA safeguards that enhance accountability at three key points in the OFAC process and juxtaposes them with comparable CFIUS safeguards at those same three stages of review. First, section II.B.1 considers IEEPA's national-emergency-declaration requirement. Second, section II.B.2 discusses IEEPA's reporting requirements and (now unconstitutional) legislative veto, mechanisms that provide for congressional oversight while OFAC action is ongoing. And third, section II.B.3 takes up judicial review of OFAC actions, an ex post safeguard.

1. *IEEPA's Ex Ante Safeguard: The National-Emergency-Declaration Requirement.* — IEEPA's national-emergency-declaration requirement, which requires the President to declare that some foreign circumstance constitutes a national emergency before taking action authorized under

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114. See Treas. Reg. pts. 510–598 (2017) (setting out OFAC's current sanctions programs and corresponding regulations).

115. See supra notes 48–53, 108–113 and accompanying text.

116. See supra notes 20, 104 and accompanying text.

117. While CFIUS is required to find that a transaction would result in foreign control of a U.S. business to assert jurisdiction over the transaction, see supra notes 24–25 and accompanying text, IEEPA gives the President authority to consider "any transaction[]," seemingly without a threshold requirement. 50 U.S.C. § 1702(a)(1)(A)(i) (2012). As a result of IEEPA's broader mandate, one could argue that it is natural that IEEPA incorporates more safeguards than FINSA. However, IEEPA *does* incorporate a comparable threshold requirement, because the President may only act to investigate, regulate, and block those transactions relevant to the applicable national emergency. See infra note 127 and accompanying text (describing this aspect of the national-emergency requirement).

118. See supra notes 54–66, 110 and accompanying text.

119. See infra sections II.B.1–.3 (discussing these safeguards). But see David Zaring, Administration by Treasury, 95 Minn. L. Rev. 187, 188, 217–20 (2010) (arguing that OFAC acts with "radical administrative independence," relatively unencumbered by accountability and transparency safeguards).

IEEPA,[120] serves as a significant ex ante safeguard in the OFAC realm.[121] Much to the contrary, the CFIUS process incorporates few safeguards to encourage deliberation before launching a review or to curtail the Committee's discretion in its reviews.[122]

First, IEEPA's national-emergency-declaration requirement provides a check on the executive's readiness to take action under IEEPA. Because such a public declaration is likely to have negative political repercussions regarding the target of that declaration, it encourages more careful deliberation of the costs and benefits of such an exercise of authority.[123] In contrast, FINSA has no comparable means of deterring review of a transaction ex ante. CFIUS is not required to notify Congress or seek its approval prior to conducting a review, even in cases in which CFIUS unilaterally initiated the review.[124] Further, while under current law CFIUS must find that an acquisition would result in foreign control of a U.S. business in order to assert jurisdiction over the transaction,[125] such a finding lacks the severity of IEEPA's national-emergency-declaration requirement, which may have grievous political consequences.[126]

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120. See 50 U.S.C. § 1701(a).

121. See infra notes 123, 127 and accompanying text. While not necessarily caused by the national-emergency-declaration requirement itself, the controversy surrounding President Trump's proposed use of IEEPA to address concerns about Chinese investment demonstrates the strength of IEEPA's ex ante safeguards. See Donnan, supra note 69; Nancy A. Fischer et al., Trump Administration Considering Use of IEEPA to Restrict U.S. Technology Transfer to China, Pillsbury (Apr. 12, 2018), https://www.globaltradeandsanctionslaw.com/trump-administration-considering-use-of-ieepa-to-restrict-u-s-technology-transfer-to-china [https://perma.cc/2SL9-BRT4] (labeling the proposal "unprecedented" and indicating that President Trump would have to declare a national emergency "with respect to Chinese acquisition of U.S. critical technology").

IEEPA additionally requires the President, "in every possible instance," to "consult with the Congress before exercising any of the authorities granted" by IEEPA. 50 U.S.C. § 1703(a). While this provision may operate as an ex ante deterrent to a certain extent, the national-emergency-declaration requirement is likely more impactful.

122. See infra notes 124–126, 128–131 and accompanying text.

123. In fact, before Exon–Florio empowered the President to block transactions without declaring a national emergency as required by IEEPA, CFIUS took relatively little action, which may demonstrate the deterrent effect of the national-emergency-declaration requirement. See Jackson, 2017 Report, supra note 44, at 6 (stating that Exon–Florio transformed CFIUS "from an administrative body with limited authority . . . to an important component of U.S. foreign investment policy"); supra notes 35–39 and accompanying text (contrasting CFIUS's limited activity under IEEPA with CFIUS's activity today).

124. See 50 U.S.C. § 4565(b)(3)(A) (Supp. IV 2017) (providing that CFIUS's first communication with Congress with respect to a given transaction is only "[u]pon completion of a review").

125. See supra notes 24–25 and accompanying text.

126. An additional ex ante safeguard in the CFIUS context may be the concern that excessive use of CFIUS will discourage foreign investment and harm the economy over time. Cf. Gaurav Sud, Note, From Fretting Takeovers to Vetting CFIUS: Finding a Balance in U.S. Policy Regarding Foreign Acquisitions of Domestic Assets, 39 Vand. J. Transnat'l L. 1303, 1327 (2006) (proposing that CFIUS consider issues of economic prosperity along-

Second, IEEPA's national-emergency-declaration requirement narrows the range of possible actions that may be taken pursuant to such a declaration. IEEPA provides that "[t]he authorities granted to the President . . . *may not be exercised for any other purpose*," and further, that "[a]ny exercise of such authorities to deal with *any new threat shall be based on a new declaration of national emergency*."[127] In contrast, neither FINSA nor the CFIUS regulations limit what CFIUS may consider in its review of a given transaction. Although FINSA provides a list of ten national security factors that CFIUS may consider in reviewing a foreign investment, such as the transaction's potential effects on critical infrastructure[128] and concerns regarding the foreign acquiror's home country's missile proliferation,[129] FINSA expands CFIUS's discretion over its reviews in two ways. First, CFIUS may contemplate the potential effects of a given transaction, as opposed to its realized effects.[130] Second, FINSA allows CFIUS to consider a broad eleventh factor: "such other factors as the President or the Committee may determine to be appropriate, generally or in connection with a specific review or investigation."[131]

2. *IEEPA's Ongoing Safeguard: Congressional Oversight.* — In addition to the discrepancy in ex ante safeguards seen above, IEEPA, through its reporting requirements,[132] provides for congressional oversight of OFAC for the duration of the declared national emergency. This monitoring is unmatched by any comparable safeguard in the CFIUS context, as FINSA

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side national security threats in light of these concerns). However, this consideration is unlikely to have much effect as CFIUS considers, on a case-by-case basis, whether to review a transaction. Despite CFIUS, the United States continues to play a central role in the global economy, and cross-border merger activity continues to increase. See Michael Cortez, U.S. Dep't of Commerce, Office of the Chief Economist, Foreign Direct Investment in the United States 1 (2017), https://www.commerce.gov/sites/commerce.gov/files/migrated/reports/FDIUS2017update.pdf [https://perma.cc/E3FG-8NPQ]; Ping Deng & Monica Yang, Cross-Border Mergers and Acquisitions by Emerging Market Firms: A Comparative Investigation, 24 Int'l Bus. Rev. 157, 157 (2015) ("In the last two decades, outward foreign direct investment . . . from emerging economies has grown massively and has become an important engine for the global economic growth.").

127. 50 U.S.C. § 1701(b) (2012) (emphasis added).

128. 50 U.S.C. § 4565(f)(6).

129. Id. § 4565(f)(4)(A)(ii).

130. CFIUS's contemplation of potential effects is practical, given that it typically reviews transactions before they close, but the practice may nonetheless raise transparency concerns. See Christopher M. Tipler, Comment, Defining 'National Security': Resolving Ambiguity in the CFIUS Regulations, 35 U. Pa. J. Int'l L. 1223, 1241–42 (2014).

131. 50 U.S.C. § 4565(f)(11); see also Office of Investment Security, Guidance Concerning the National Security Review Conducted by the Committee on Foreign Investment in the United States, 73 Fed. Reg. 74,567, 74,570 (Dec. 8, 2008) (providing for similar discretion). For an argument that national security "could easily be read to include consideration of economic security," see Michaels, supra note 101, at 825.

132. See infra notes 134–135 and accompanying text.

specifically limits congressional oversight of CFIUS while a particular review is ongoing.[133]

More specifically, IEEPA requires that the President immediately transmit to Congress a report specifying his or her actions taken under IEEPA and the reasons for taking such actions,[134] and update Congress on this information at least once every six months.[135] IEEPA also originally provided for additional congressional oversight through a legislative veto provision, by which Congress could act by concurrent resolution to prevent further executive action under IEEPA,[136] but after *INS v. Chadha*, that measure is no longer constitutional.[137]

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133. See infra notes 138–142 and accompanying text. For a contrary perspective stating that FINSA actually introduced more routine congressional involvement in the CFIUS process, see Matthew C. Sullivan, CFIUS and Congress Reconsidered: Fire Alarms, Police Patrols, and a New Oversight Regime, 17 Willamette J. Int'l L. & Disp. Resol. 199, 232–38 (2009).

134. 50 U.S.C. § 1703(b) (2012) (requiring a report detailing "the circumstances . . . necessitat[ing] such exercise of authority," "why the President believes those circumstances constitute an unusual and extraordinary threat," "the authorities to be exercised," "why the President believes such actions are necessary," and the "foreign countries with respect to which such actions . . . [will] be taken").

135. Id. § 1703(c).

136. Id. § 1706(b) ("The authorities . . . may not continue to be exercised . . . if the national emergency is terminated by the Congress by concurrent resolution . . . and if the Congress specifies in such concurrent resolution that such authorities may not continue to be exercised under this section.").

137. 462 U.S. 919, 951–58 (1983) (striking down the legislative veto as unconstitutional legislating by one house of Congress). While the legislative veto provision at issue in *Chadha* provided for a veto by just one chamber of Congress, and IEEPA, by contrast, specifically provides for *concurrent* resolution—or veto by both chambers—at least the dissent in *Chadha* perceived the majority's holding as extending to two-chamber vetoes as well. See id. at 997 (White, J., dissenting) ("Although the idea may be initially counterintuitive . . . the one-House veto is of more certain constitutionality than the two-House version."); id. at 967 ("Today the Court not only invalidates § 244(c)(2) of the Immigration and Nationality Act, but also sounds the death knell for nearly 200 other statutory provisions in which Congress has reserved a 'legislative veto.'"). Indeed, twenty years later, the Eleventh Circuit in *United States v. Romero-Fernandez* severed IEEPA's legislative veto and struck it down. 983 F.2d 195, 196–97 (11th Cir. 1993).

In light of *Chadha*, it is noteworthy that the debate over a legislative veto in the CFIUS context has not focused on such a veto's unconstitutionality, and thus impracticality. Rather, the debate has exhibited a more principled opposition to congressional involvement in CFIUS due to politicization and insider trading concerns, among others. See CFIUS and the Role of Foreign Direct Investment in the United States: Hearing Before the Subcomm. on Domestic & Int'l Monetary Policy, Trade & Tech. of the H. Comm. on Fin. Servs., 109th Cong. 5 (2006) (statement of Rep. Barney Frank) ("[A]ny suggestion that we should get early advance notice, we and the Congress, of particular transactions on a confidential basis seems to me an invitation to greatly expand the law of insider trading abuses."); id. at 24 (comment by Rep. Joseph Crowley during statement of Daniel K. Tarullo, Professor of Law, Georgetown University Law Center) ("I'm worried about the politics . . . entering too deeply into the CFIUS process. This Congress needs to be . . . notified about the actions of CFIUS . . . . But I don't believe we should have any final say or veto over the CFIUS process.").

In contrast, FINSA sharply limits congressional involvement in a given transaction until CFIUS has concluded action on that transaction.[138] Although FINSA does require CFIUS to transmit a certified notice and report following each review, with "a description of the actions taken by the Committee with respect to the transaction" and an "identification of the determinative [national security] factors considered,"[139] and to provide for briefings upon request following the conclusion of CFIUS review,[140] only certain members of Congress are entitled to receive such certifications or briefings.[141] In addition, while CFIUS is required to provide Congress with annual reports, transmission of these reports is often delayed,[142] doing little to enhance congressional oversight of specific transactions.

3. *IEEPA's Ex Post Safeguard: Judicial Review.* — Lastly, actions taken under IEEPA are subject to judicial review, an ex post safeguard, whereas FINSA specifically exempts the President's actions and findings on foreign investment from judicial review.[143] Notably, courts have reviewed—and even overturned[144]—OFAC actions under IEEPA in a number of cases.

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138. See 50 U.S.C. § 4565(b)(3)(A) (Supp. IV 2017) (providing for the transmission of a report to certain members of Congress only "[u]pon completion of a review . . . that concludes action under [FINSA]"); id. § 4565(b)(3)(B) (providing for the transmission of a report to certain members of Congress only "after completion of an investigation . . . that concludes action under [FINSA] . . . unless the matter under investigation has been sent to the President for decision"); id. § 4565(g)(1) (providing for briefings upon request regarding a covered transaction or mitigation agreement so long as "all action has concluded under [FINSA]").

139. Id. § 4565(b)(3)(C)(i).

140. Id. § 4565(g)(1).

141. See id. § 4565(b)(3)(C)(iii) (limiting recipients of such reports to high-ranking legislators, chairmen of committees holding jurisdiction over CFIUS, and in certain instances, legislators representing the target's principal place of business); id. § 4565(g)(1) (similarly limiting requests for such briefings to members of Congress specified in subsection (b)(3)(C)(iii)).

142. See Stephen Heifetz et al., CFIUS Releases Long-Awaited 2015 Annual Report, Steptoe: Int'l Compliance Blog (Sept. 26, 2017), https://www.steptoeinternationalcomplianceblog.com/cfius-releases-long-awaited-2015-annual-report [https://perma.cc/5LQ6-KABS] (announcing the September 2017 release of CFIUS's 2015 annual report and explaining that the delay in the report's release was likely a result of "a significant increase in cases occupying CFIUS's resources and a significant lack of political appointees at the Department of Treasury and other relevant agencies").

Admittedly, differences between FINSA and IEEPA in ongoing reporting may stem more from a divergence in the nature of the underlying national security threat—that is, a standalone deal for CFIUS versus an ongoing security threat for OFAC—than any congressional initiative or lack thereof. Because CFIUS operates on a transaction-by-transaction basis, whereas OFAC acts pursuant to a preexisting, ongoing program, slight differences in their reporting systems may be warranted.

143. See Locknie Hsu, 2000–2009: A Decade of Security-Related Developments in Trade and Investment, 11 J. World Investment & Trade 697, 728 (2010) (contrasting the availability of judicial review under IEEPA and FINSA).

144. IEEPA provides for judicial review even in cases involving classified information, although it notes that such information "may be submitted to the reviewing court ex parte

For example, in *Al Haramain Islamic Foundation, Inc. v. United States Department of the Treasury*, a nonprofit organization brought a challenge against OFAC, which had frozen the organization's assets pursuant to its finding that the organization supported terrorism.[145] The Ninth Circuit found that OFAC violated Al Haramain's rights to procedural due process[146] and freedom from unreasonable seizures.[147]

In marked contrast to IEEPA, FINSA's judicial review exemption prevents a would-be acquiror or target company whose transaction is blocked by CFIUS from appealing the prohibition of the transaction.[148] Admittedly, this wholesale disclaimer of judicial review was complicated by the limited judicial review of CFIUS decisions declared by *Ralls Corp. v. Committee on Foreign Investment in the United States*.[149] In *Ralls*, a corporation owned by Chinese nationals purchased several American companies without first seeking CFIUS approval.[150] Several months later, however, CFIUS and President Obama, citing national security concerns, ordered Ralls to divest itself of those companies; in response, Ralls brought a due process claim challenging the order.[151] Noting that FINSA exempts from judicial review the President's decision to block a transaction and findings in reaching that decision,[152] but discovering no clear and convincing evidence that Congress intended to bar due process challenges to CFIUS,

and in camera." 50 U.S.C. § 1702(c) (2012). But see Holy Land Found. for Relief & Dev. v. Ashcroft, 333 F.3d 156, 162–68 (D.C. Cir. 2003) (scrutinizing OFAC's findings and determinations but ultimately ruling in favor of OFAC); Vanessa Ortblad, Comment, Criminal Prosecution in Sheep's Clothing: The Punitive Effects of OFAC Freezing Sanctions, 98 J. Crim. L. & Criminology 1439, 1439, 1449–51 (2008) ("[T]he courts have consistently deferred to OFAC's decision under the umbrella of deference to agency decisions pursuant to the Administrative Procedures Act and deference to executive decisions relating to foreign policy and national security.").

145. 686 F.3d 965, 970 (9th Cir. 2011).

146. Id. at 985. The court subsequently found that the procedural due process violations were harmless. Id. at 990.

147. Id. at 995. In connection with its investigation, federal and state officials had executed a search warrant at the organization's offices and found photographs and other documents related to violence in Chechnya. Id. at 973. The court did exhibit some deference to OFAC, however. See id. at 976 (affirming the highly deferential arbitrary and capricious standard in reviewing OFAC determinations); id. at 979 (holding that substantial evidence pointed to Al Haramain's support of persons posing terrorism threats).

148. See 50 U.S.C. § 4565(e) (Supp. IV 2017) ("The actions . . . and the findings of the President . . . shall not be subject to judicial review."); see also Ralls Corp. v. Comm. on Foreign Inv. in the U.S., 758 F.3d 296, 311 (D.C. Cir. 2014) ("[T]he most natural reading . . . is that courts are barred from reviewing final 'action[s]' the President takes 'to *suspend or prohibit* any covered transaction that threatens to impair the national security of the United States.'" (alteration in original) (quoting 50 U.S.C. § 4565(d)(1))).

149. 758 F.3d at 296.

150. See id. at 304–05. The transactions, therefore, were not granted safe harbor. See supra note 27 and accompanying text.

151. *Ralls*, 758 F.3d at 306.

152. Id. at 307–08.

the court held that FINSA allowed judicial review of "the *process* preceding such presidential action."[153] Further, the court held that notwithstanding its compelling interest in national security, CFIUS is required to provide to transacting parties the most basic elements of procedural due process: "at the least, that an affected party be informed of the official action, be given access to the unclassified evidence on which the official actor relied and be afforded an opportunity to rebut that evidence."[154]

To be sure, *Ralls* brought FINSA closer to IEEPA in terms of an ex post safeguard: CFIUS is now required to not only provide unclassified information to parties but also give parties the opportunity to respond to such information, either by rebutting it or tailoring the transaction to avoid CFIUS's national security concerns.[155] However, there are reasons to believe that the judicial recourse provided by *Ralls* may be limited in practice as an ex post safeguard, failing to match the accountability and transparency provided by judicial review of OFAC determinations.[156]

First, in *Ralls*, the plaintiff's procedural due process claim rested on the finding that it had a vested state law property interest in the acquired companies.[157] This interest vested upon "completion of the transaction"—notwithstanding any contingency posed by Ralls's lack of safe harbor under FINSA.[158] Most parties submit transactions to CFIUS after the merger agreement has been signed but *prior* to closing, since parties generally want safe harbor from CFIUS before concluding the deal;[159] in

153. Id. at 311.

154. Id. at 318–19. The process utilized by CFIUS prior to *Ralls*, which gave a party the opportunity "to submit written arguments, meet with CFIUS officials in person, answer follow-up questions and receive advance notice of the . . . intended action," was deemed insufficient because it did not enable a party "to tailor its submission to [CFIUS's] concerns or rebut the factual premises underlying the President's action." Id. at 319–20.

155. Mayer Brown, US Appellate Court Clarifies Due Process Rights for Parties Subject to CFIUS Review of Foreign Investments 3 (2014), https://www.mayerbrown.com/files/Publication/8d895be2-f677-45f4-9084-ae976d43cc28/Presentation/PublicationAttachment/39aa6220-d2b3-48c6-ba3a-1cb848c5f053/Update-140722-US-Appellate-Court.pdf (on file with the *Columbia Law Review*). These requirements imposed an administrative burden on an already overwhelmed CFIUS, however. See Ivan A. Schlager et al., Skadden, Court Finds CFIUS Violated Ralls Corporation's Due Process Rights 3 (2014), https://files.skadden.com/sites/default/files/publications/court_finds_cfius_violated_ralls_corporations_due_process_rights.pdf (on file with the *Columbia Law Review*) (noting that *Ralls* could prolong CFIUS reviews); supra note 83 and accompanying text (discussing CFIUS's caseload and limited resources).

156. See, e.g., Christopher M. Fitzpatrick, Note, Where *Ralls* Went Wrong: CFIUS, the Courts, and the Balance of Liberty and Security, 101 Cornell L. Rev. 1087, 1113 (2016) (arguing that even if *Ralls* remains good law, its effect on CFIUS will be "[l]ikely a minimal one"); infra notes 157–162.

157. *Ralls*, 758 F.3d at 315–17.

158. Id. at 316.

159. See Baker Botts, supra note 54, at 6 (noting that "the [CFIUS] filing can be accepted as soon as the deal has been signed" and "[p]arties to a transaction should always include a condition precedent to closing requiring a CFIUS determination"). For an example of a merger agreement that includes CFIUS approval as a condition precedent

Ralls, however, the transactions had closed prior to CFIUS review.[160] If *Ralls* means that a deal must have closed for "completion of the transaction," many would-be acquirors, most of whom have not yet closed their deals, would not have a vested property interest upon which to bring a procedural due process claim.[161] Second, even if a claimant's property interest in a transaction is sufficiently vested under *Ralls*, the bulk of the evidence may be classified for national security reasons and accordingly withheld by CFIUS, such that a party has little basis on which to respond to CFIUS's concerns.[162]

C. *Accountability as a Focus of CFIUS Reform*

Given FINSA's lack of mechanisms to provide for accountability and transparency throughout the CFIUS process, the existence of a recent congressional effort to reform CFIUS is unsurprising. What is surprising, however, is that FIRRMA focused almost entirely on giving CFIUS greater power through broadened jurisdiction[163] rather than heeding the aforementioned accountability and transparency criticisms[164] and proposing reforms to limit CFIUS's power.[165]

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to closing, see Agreement and Plan of Merger Among Seagull Int'l Ltd., Seagull Acquisition Corp., and Omnivision Techs., Inc. § 7.1 (Apr. 30, 2015), https://www.sec.gov/Archives/edgar/data/1106851/000110465915032002/a15-10372_1ex2d1.htm [https://perma.cc/E2FH-L7GB] ("The respective obligations of Investor, Acquisition Sub and the Company to consummate the Merger shall be subject to the satisfaction or waiver (where permissible under applicable Law), at or prior to the Effective Time, of each of the following conditions: . . . (iii) CFIUS Approval shall have been obtained . . . .").

160. See supra note 150 and accompanying text.

161. See Judy Wang, Note, *Ralls Corp. v. CFIUS*: A New Look at Foreign Direct Investments to the US, 54 Colum. J. Transnat'l L. Bull. 30, 46 (2016), http://jtl.columbia.edu/ralls-corp-v-cfius-a-new-look-at-foreign-direct-investments-to-the-us (on file with the *Columbia Law Review*) (arguing that *Ralls* encourages parties to wait until their transactions are completed to file with CFIUS).

162. See Chang Liu, Note, *Ralls v. CFIUS*: The Long Time Coming Judicial Protection of Foreign Investors' Constitutional Rights Against Government's National Security Review, 15 J. Int'l Bus. & L. 361, 375 (2016) ("It would be constitutional, and in fact very likely, for the government to only provide a small fraction of the information and mark the other as classified."). For a discussion of CFIUS invoking executive privilege to shield information, see *Ralls*, 758 F.3d at 319 (leaving open the question of "whether disclosure of certain unclassified information is nonetheless shielded by executive privilege"); Liu, supra, at 385–87 (discussing the potential for an executive privilege defense). But see Karlee Weinmann, In Rare Move, CFIUS Hands Over Cache of *Ralls* Docs, Law360 (Nov. 26, 2014), https://www.law360.com/articles/599760 (on file with the *Columbia Law Review*) (noting that CFIUS handed over 3,487 pages of documents from its review of the Ralls transaction and withheld only two unclassified documents on the basis of executive privilege).

163. See supra section I.B.1.

164. See supra note 101; supra section II.B.

165. FIRRMA is particularly perplexing given that Congress has recently sought enhanced accountability in related areas. See, e.g., Kevin Freking, Senate Calls for More Say on Tariffs in Bipartisan Vote, Associated Press (July 11, 2018), https://apnews.com/

For example, rather than clarify or limit FINSA's broad definition of national security, FIRRMA increases the number of factors that CFIUS may consider in its discretion.[166] In addition, FIRRMA restricts jurisdiction for challenges to the D.C. Circuit, curtailing the limited judicial review provided for by *Ralls*.[167] All in all, FIRRMA expands CFIUS's authority while taking very few steps to enhance its accountability and transparency.[168] Further, by broadening CFIUS's reach but failing to address CFIUS's accountability—or lack thereof—in its more limited, FINSA form, FIRRMA will in fact exacerbate the problem of CFIUS as a black box, since more transactions and parties will be impacted by CFIUS.[169]

This disregard of accountability and transparency cannot be explained by a lack of salience among lawmakers: The Uranium One controversy, which led to calls for a congressional investigation into CFIUS's review of the transaction, in fact suggests that such issues are quite salient within Congress.[170] Despite a lack of legislative impetus behind this issue, improving CFIUS's accountability and transparency should be an aim of future CFIUS reform for several reasons.

Critics assert that an opaque foreign investment review process generates uncertainty for investors and permits CFIUS to act outside its

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141e6967ca28453faac0081333319990 [https://perma.cc/BLZ6-BS9L] (discussing a non-binding measure seeking to require congressional approval before presidential issuance of tariffs).

166. See Foreign Investment Risk Review Modernization Act of 2018, Pub. L. No. 115-232, § 1702(c)(1)–(6).

167. See id. sec. 1715, § (2). It should be noted, however, that perhaps legislators relegated civil actions to the D.C. Circuit to ensure that judges with sufficient expertise hear CFIUS cases, rather than to further curtail judicial review. See generally Eric M. Fraser et al., The Jurisdiction of the D.C. Circuit, 23 Cornell J.L. & Pub. Pol'y 131, 145–48 (2013) (offering explanations for why legislators grant exclusive jurisdiction over agency matters to the D.C. Circuit, including judicial expertise in administrative law).

168. While FIRRMA increases communication between CFIUS and Congress, most provisions appear intended to ensure CFIUS adequately carries out FIRRMA's broadened mandate. See, e.g., Foreign Investment Risk Review Modernization Act § 1719(b) (introducing a new report on Chinese foreign investment to be made to Congress every two years, including an analysis of how Chinese transactions align with the Chinese government's stated goal of acquiring U.S. technology).

169. See 2017 Covington Memorandum, supra note 68, at 4–11 (describing CFIUS's expansion under FIRRMA to parties and transactions previously outside its scope).

170. See supra notes 1–12 and accompanying text (discussing the Uranium One transaction and surrounding controversy). While wholesale accountability and transparency do not appear to be a focus of FIRRMA, legislators responded to Uranium One with a one-time request for a briefing on "transactions reviewed by [CFIUS] [in the past five years] that the Committee determined would have allowed foreign persons to inappropriately influence democratic institutions and processes within the United States and in other countries," Foreign Investment Risk Review Modernization Act § 1726(1), as well as the introduction of recusal procedures for conflict-of-interest situations, id. § 1717(b)(1).

scope.[171] For example, while FINSA's vague definition of national security helps to ensure CFIUS's "flexibility with an evolving concept of national security,"[172] it nonetheless "virtually eviscerate[s] any predictive capabilities" from FINSA.[173] Furthermore, this broad instruction on national security gives CFIUS leeway to review a transaction for reasons that "may seem quite far strayed from accepted notions of national security,"[174] which is particularly problematic in light of the apparent conflation of economic and national security concerns under the Trump Administration.[175] Paired with CFIUS's limited judicial review,[176] CFIUS could theoretically block a transaction for any reason—related to national security or not—with would-be acquirors having little recourse to challenge such conduct. As a result, CFIUS may ultimately encourage retaliation abroad and deter foreign investment if steps are not taken to enhance its accountability and transparency.[177]

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171. For example, in a recent, unprecedented move, CFIUS postponed Qualcomm's annual meeting of shareholders in order to conduct a review of Broadcom's proposed acquisition of the company. See Ronald Orol, Qualcomm's Surprise Tactic It Has Used to Fight Off Broadcom Is Unusual, TheStreet (Mar. 5, 2018), https://www.thestreet.com/story/14510355/1 [https://perma.cc/ERM3-3WJS] (noting that CFIUS's decision to postpone Qualcomm's annual meeting "was met by [CFIUS] lawyers with shock and surprise").

172. Li, supra note 8, at 274.

173. Tipler, supra note 130, at 1242; see also Li, supra note 8, at 272 (noting that an investor may be unable to extrapolate from the examples provided by CFIUS to determine whether a transaction would trigger national security concerns); cf. W. Robert Shearer, Comment, The Exon-Florio Amendment: Protectionist Legislation Susceptible to Abuse, 30 Hous. L. Rev. 1729, 1768 (1993) (arguing that the vague national security standard provided by FINSA's predecessor, Exon–Florio, generated uncertainty for investors).

174. Li, supra note 8, at 274.

175. See supra note 76.

176. See supra notes 157–162 and accompanying text.

177. See Qingxiu Bu, *Ralls* Implications for the National Security Review, 7 Geo. Mason J. Int'l Com. L. 115, 128 (2016) (noting that China established its own foreign investment review process in 2011 as a response to CFIUS); Li, supra note 8, at 272–74 ("[T]he CFIUS process has the negative effect of deterring foreign investments that should generally be welcomed because it places the burden of uncertainty and unpredictability on a wide array of foreign investors."); Paul Connell & Tian Huang, Note, An Empirical Analysis of CFIUS: Examining Foreign Investment Regulation in the United States, 39 Yale J. Int'l L. 131, 150 (2014) (providing an empirical analysis of CFIUS's "adverse effects" and noting that, "[i]n light of the magnitude of its actions, CFIUS . . . should be aware of the potential for international retaliation"); Robert Delaney, China's Trade Officials Want Easier US Security Reviews as a Concession During Trump Visit, S. China Morning Post (Oct. 19, 2017), http://www.scmp.com/news/china/policies-politics/article/2115984/chinas-trade-officials-urge-easing-us-security-reviews [https://perma.cc/TTB7-RLN3] (last updated Oct. 20, 2017) (describing Chinese frustration with the CFIUS process).

III. INCORPORATING THE IEEPA FRAMEWORK INTO CFIUS REFORM

Despite criticisms of CFIUS as a black box,[178] the recent CFIUS-reform effort largely ignores accountability and transparency concerns in favor of broadening CFIUS's scope.[179] Following Part II's instruction that accountability and transparency should be a key focus of CFIUS reform,[180] this Part draws on IEEPA's statutory scheme to propose several reforms that may be adopted to this end.

In sections III.A, III.B, and III.C, respectively, this Part considers whether the specific safeguards that provide for accountability before, during, and after the exercise of authorities under IEEPA—a national-emergency-declaration requirement, congressional oversight, and judicial review[181]—could serve as feasible reforms for CFIUS. While noting the limitations of IEEPA's particular accountability mechanisms in the CFIUS context due to confidentiality, flexibility, and speed concerns, among others, this Part proposes that CFIUS borrow IEEPA's more general framework of incorporating accountability mechanisms at three key points. In each section, this Part draws on IEEPA and suggests specific reforms that may provide for comparable accountability in the CFIUS context.

Importantly, this Part's proposed accountability safeguards and FIRRMA's expansion of CFIUS are not necessarily mutually exclusive. Rather, CFIUS would benefit from adopting *both* sets of proposals, as FIRRMA's effort to make CFIUS more responsive to novel national security threats and this Note's proposal to improve CFIUS's accountability and transparency each address distinct criticisms of the FINSA-era CFIUS process. By failing to incorporate accountability mechanisms alongside FIRRMA's expansion of CFIUS's jurisdiction, however, legislators may in fact worsen the accountability and transparency concerns already plaguing CFIUS.

A. *Proposed Ex Ante Safeguard: Clarify CFIUS's Definition of National Security*

As discussed, IEEPA's requirement that the President declare a national emergency prior to taking action under IEEPA serves as an ex ante check on OFAC action, both encouraging greater deliberation prior to taking action and limiting OFAC's scope of allowable action.[182] While the history of CFIUS prior to Exon–Florio suggests that a national-emergency-declaration requirement would encourage greater deliberation

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178. See supra notes 171–177 and accompanying text; supra section II.B (using a comparative approach to illustrate this concern).

179. See supra notes 166–169 and accompanying text; supra section I.B.1.

180. See supra section II.C.

181. See supra section II.B.

182. See supra notes 123, 127 and accompanying text.

prior to reviewing any given transaction,[183] such a requirement has practical limitations in the CFIUS context.[184] A more effective reform would be to clarify FINSA's national security definition, an ex ante safeguard better suited to the CFIUS review process.[185]

First, a cross-border acquisition is less appropriately captured by a national-emergency declaration than is a typical situation targeted for OFAC sanctions. IEEPA defines a national emergency as a declaration issued with respect to "any unusual and extraordinary threat, which has its source in whole or substantial part outside the United States, to the national security, foreign policy, or economy of the United States."[186] In light of the frequency of cross-border transactions,[187] it may be difficult to argue that a given transaction poses an "unusual and extraordinary" threat, at least from a political perspective, if not a legal one.[188]

Second, the national-emergency-declaration requirement and its accompanying political consequences may be *too* great of a deterrent in the CFIUS context. Certainly, Congress once felt that evolving national security needs required eliminating the national-emergency-declaration requirement in the CFIUS context.[189]

Despite the infeasibility of requiring the President to declare a national emergency prior to acting on a cross-border transaction, CFIUS may nevertheless borrow the more general idea provided for by IEEPA's national-emergency-declaration requirement: that the incorporation of

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183. See supra notes 35–39 and accompanying text (referencing the infrequent action taken by CFIUS prior to Exon–Florio, when the President was required to declare a national emergency in order to block a transaction).

184. See infra notes 186–189 and accompanying text.

185. See infra notes 190–193 and accompanying text.

186. 50 U.S.C. § 1701(a) (2012).

187. See Deng & Yang, supra note 126, at 157.

188. Cf. Gary Clyde Hufbauer, Could a President Trump Shackle Imports?, *in* Marcus Noland et al., Peterson Inst. for Int'l Econ., Assessing Trade Agendas in the US Presidential Campaign 5, 13 (2016), https://piie.com/system/files/documents/piieb16-6.pdf [https://perma.cc/3LW6-HM8K] ("[T]he courts have never questioned presidential declarations of a 'national emergency[]' . . . . Maybe a future Supreme Court would rein in a future president, but for now the absence of cases limiting presidential authority to declare an emergency is telling.").

189. See supra note 42 and accompanying text (discussing the elimination of this requirement with Exon–Florio). Perhaps the President could avoid these practical problems by declaring *all* foreign investment a national emergency, as opposed to having to issue a separate declaration for each transaction. By allowing the national-emergency-declaration requirement to be done away with in one fell swoop, however, it would no longer serve its intended purpose of encouraging deliberation prior to each CFIUS review. Further, it is unclear whether such a broad category could legally be captured under a single national-emergency declaration. Cf. Presidential Implementation of Emergency Powers Under the Int'l Emergency Econ. Powers Act, 4A Op. O.L.C. 146 (1979) (responding to whether a single executive order pursuant to a single national-emergency declaration under IEEPA could be used to both block Iranian property and implement a trade embargo against Iran).

certain ex ante checks may increase accountability and transparency. This may be best accomplished by clarifying CFIUS's definition of national security—especially how CFIUS utilizes FINSA's eleventh national security factor, which authorizes it to consider "such other factors as the President or [CFIUS] may determine to be appropriate."[190]

In particular, CFIUS should take steps to more effectively provide ex ante notice to transacting parties of what constitutes a national security threat. CFIUS could update its regulations to include examples of what, in its discretion, it would deem a national security threat and publish select analyses of transactions with confidential information redacted.[191] Admittedly, ever-evolving national security threats make it impractical to entirely eliminate CFIUS's discretion in defining national security;[192] however, greater clarity as to how CFIUS uses its discretion over national security considerations could serve as an ex ante safeguard and increase CFIUS's transparency, even as legislators broaden its scope.[193]

B. *Proposed Ongoing Safeguard: Increase Communication with Congress Regarding CFIUS's Reasoning*

Further, as previously discussed, IEEPA requires the transmission of certain information regarding OFAC's actions and motivations to Congress even while action is ongoing under IEEPA, providing for a level of congressional oversight unmatched by any applicable FINSA provision or CFIUS practice.[194] While some congressional oversight over CFIUS is important, the type and frequency of ongoing reporting should be limited in the CFIUS context to ensure that CFIUS's confidentiality, speed, and political independence are not compromised.[195]

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190. 50 U.S.C. § 4565(f)(11) (Supp. IV 2017).

191. See Tipler, supra note 130, at 1282–83.

192. But see James F.F. Carroll, Comment, Back to the Future: Redefining the Foreign Investment and National Security Act's Conception of National Security, 23 Emory Int'l L. Rev. 167, 197–99 (2009) (proposing to eliminate altogether FINSA's eleventh national security factor authorizing discretion).

193. Other scholars have suggested that CFIUS publicize which industries, companies, or countries are presumed to pose national security threats, in order to put on guard parties with relevant transactions. See Tipler, supra note 130, at 1278–82; cf. Patrick Griffin, Note, CFIUS in the Age of Chinese Investment, 85 Fordham L. Rev. 1757, 1790 (2017) (proposing mandated CFIUS review of transactions in certain industries). However, blacklisting companies, countries, or industries could have negative economic and foreign relations implications. Cf. Tan, supra note 69 (discussing retaliatory trade moves by China and the United States in 2018). FIRRMA implicitly incorporates some of this proposed blacklisting through its requirement of reports on Chinese foreign investment and discussion of countries of special concern. See supra notes 87, 168 and accompanying text. To a certain extent, then, FIRRMA could be viewed as providing some ex ante notice to investors from China and other countries that their transactions will likely undergo CFIUS scrutiny.

194. See supra section II.B.2.

195. See infra notes 205–214 and accompanying text.

First, a party with a transaction under CFIUS review would likely be wary of increased communication between CFIUS and Congress due to the possibility that sensitive business information may be compromised—for instance, deal provisions that the party does not want revealed to the public. Accordingly, confidentiality has always been a hallmark of CFIUS[196] and could be threatened by increased communication between CFIUS and persons not party to a given transaction.[197] Ultimately, such increased communication could discourage foreign investment to the United States in favor of jurisdictions viewed to be more protective of corporate information.[198]

Second, extensive reporting requirements may hinder CFIUS's ability to consider transactions in a timely fashion.[199] As the timeframe for regulatory approval lengthens, market risks increase; as with the confidentiality concerns discussed above, longer wait times for CFIUS determinations could ultimately deter foreign investment.[200]

Third, the active involvement of Congress during CFIUS review could politicize the process, encouraging consideration of factors outside CFIUS's scope, such as political opposition or public opinion.[201] CFIUS

196. See Li, supra note 8, at 274 ("[A]s CFIUS notices contain a great deal of private and proprietary information from both buy and sell sides of the transaction, the parties do not wish to make their submissions publicly accessible."); Aimen Mir, Deputy Assistant Sec'y for Inv. Sec., U.S. Dep't of the Treasury, Remarks at the Council on Foreign Relations (Apr. 1, 2016), https://www.treasury.gov/press-center/press-releases/Pages/jl0401.aspx [https://perma.cc/3648-BLQY] ("[P]rotection from public disclosure of sensitive business information about particular transactions is critical to the effective functioning of the CFIUS process."). FINSA accordingly provides for limited transmission of confidential information to the public. See 50 U.S.C. § 4565(c) (Supp. IV 2017).

197. Cf. supra note 137 (discussing congressional concerns over insider-trading violations).

198. See Jonathan C. Stagg, Note, Scrutinizing Foreign Investment: How Much Congressional Involvement Is Too Much?, 93 Iowa L. Rev. 325, 357 (2007) ("Congress should limit the number of individuals allowed access to confidential information in order to assure foreign investors of true confidentiality.").

199. See supra notes 54–66 and accompanying text (explaining FINSA's strict statutory timeline).

200. Cf. Brent Kendall, U.S. Antitrust Reviews of Mergers Get Longer, Wall St. J. (June 7, 2015), https://www.wsj.com/articles/u-s-antitrust-reviews-of-mergers-get-longer-1433724741 (on file with the *Columbia Law Review*) (discussing longer and more intensive government scrutiny of mergers for antitrust concerns and noting that "[n]o one wants their deals to hang out there very long" due to "market risk" (quoting Paul Denis, Dechert LLP)).

201. A pair of transactions, submitted to CFIUS several years apart by Chinese oil company China National Offshore Oil Corporation (CNOOC), illustrates this concern about politicization resulting from congressional involvement. CNOOC first proposed to acquire American firm Unocal, but following a congressional uproar against the deal, CNOOC withdrew its bid. Yang Wang, Comment, Incorporating the Third Branch of Government into U.S. National Security Review of Foreign Investment, 38 Hous. J. Int'l L. 323, 363–64 (2016) [hereinafter Wang, Incorporating the Third Branch]. In contrast, CFIUS approved a second acquisition by CNOOC of Nexen's assets in the Gulf of Mexico seven years later, despite the second deal posing nearly identical threats as the Unocal bid: "Other than the fact that Nexen's moderate name recognition drew less political attention

reviews characterized by extensive congressional involvement have even been marred by xenophobic rhetoric.[202] Acknowledging that such considerations are inappropriate in the CFIUS context, even members of Congress have resisted deepening congressional involvement while CFIUS review is ongoing.[203]

Nonetheless, a certain level of increased congressional oversight over CFIUS may be advisable, particularly because the judiciary has limited ability to reveal CFIUS's inner workings.[204] In light of the confidentiality, speed, and politicization concerns detailed above, however, congressional oversight should be limited in two important ways. First, given politicization concerns,[205] the focus of information provided to Congress by CFIUS should be on CFIUS's *reasoning* regarding particular transactions rather than the intricacies of the transactions themselves. While FINSA already provides that certain members of Congress receive information regarding the national security factors considered in a given transaction,[206] it does not explicitly require CFIUS to specify, in detail, its reasoning under FINSA's eleventh national security factor. Presumably, under FINSA's requirement that CFIUS identify the "determinative [national security] factors considered under subsection (f)," CFIUS could simply point to subsection 4565(f)(11)—the *category* providing for discretion—without greater specificity.[207] Requiring CFIUS to specify the determinative considerations in its review of a given transaction will help to ensure that CFIUS does not act arbitrarily and remains within the scope of its mandate. While Congress would lack the power to veto a CFIUS decision on the basis of this information,[208] this reform would nevertheless increase CFIUS's transparency, as well as provide Congress with a stronger understanding of the CFIUS process for future reform efforts.

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and that CNOOC stepped up their political lobbying efforts, no other reason could seemingly explain why the same company succeeded in the Nexen acquisition but failed in the previous one." Id. at 364 (juxtaposing these two transactions to highlight accountability concerns); see also Norman P. Ho, Asian-American Jurisprudence and Corporate Law: Politicization, Racialization, Foreignness, and the U.S. CFIUS Foreign Direct Investment Review Mechanism, 4 Widener J.L. Econ. & Race 1, 15 (2012) (noting that the "small scale" of the CNOOC–Unocal transaction indicated that it would pose little, if any, national security threat); Michael Petrusic, Recent Development, Oil and the National Security: CNOOC's Failed Bid to Purchase Unocal, 84 N.C. L. Rev. 1373, 1388 (2006) (arguing that the withdrawn CNOOC–Unocal deal "illustrat[es] the effects of arbitrary use of Exon-Florio on foreign direct investment").

202. See Ho, supra note 201, at 13 (discussing the CNOOC–Unocal bid, among other transactions, as characterized by "[r]hetoric . . . based on national origin grounds rather than general economic arguments or takeover policy").

203. See supra note 137 and accompanying text.

204. See supra notes 148–162 and accompanying text.

205. See supra notes 201–203 and accompanying text.

206. 50 U.S.C. § 4565(b)(3)(C)(i)(II) (Supp. IV 2017).

207. Id.

208. See supra note 137 (discussing the established unconstitutionality of the legislative veto).

Second, to ensure continued confidentiality and speed of CFIUS review,[209] disclosure to Congress should be limited to those instances that would in fact promote accountability and transparency—not when "the need [for disclosure] might not be . . . as pressing."[210] For example, information as to CFIUS's reasoning could be provided to Congress in the aggregate on a post hoc basis,[211] through an exhaustive list included in CFIUS's classified annual report to Congress,[212] rather than as an additional requirement for each transaction. Further, while the number of members of Congress who receive this information should perhaps be expanded from the short list provided by FINSA to enhance oversight,[213] this information could be limited to those legislators who regularly handle sensitive information, such as members of the Senate and House Committees on Foreign Affairs, or presented in secret sessions.[214] While perhaps not rising to the level of congressional oversight provided by IEEPA, these reforms, by illustrating when and how CFIUS uses its discretion, would nonetheless increase CFIUS's accountability and transparency over time.

C. *Proposed Ex Post Safeguard: Remove Obstacles to* Ralls

Lastly, as exhibited by cases like *Al Haramain*, courts have scrutinized and even reversed OFAC actions, providing an ex post check in the OFAC context.[215] While incorporating judicial review of the sort provided for by IEEPA would certainly increase CFIUS's accountability and transparency,[216] comprehensive judicial review of CFIUS decisions would be contrary to congressional intent[217] and could pose national security risks

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209. See supra notes 196–200 and accompanying text.

210. Stagg, supra note 198, at 356.

211. See id. at 358 (proposing aggregation of information as "[t]he most efficient method").

212. See 50 U.S.C. § 4565(m)(2) (omitting national security factors from both CFIUS's classified annual report presented to certain members of Congress and CFIUS's unclassified annual report provided to the public).

213. See supra note 141 (discussing which members of Congress receive this privileged information under FINSA). But see Stagg, supra note 198, at 353 ("By allowing so many members of Congress, their staffs, and even state senators to view confidential information disclosed in the CFIUS review process, FINSA significantly increases the probability that foreign investment deals will be scuttled for political purposes.").

214. See generally Christopher M. Davis, Cong. Research Serv., R42106, Secret Sessions of the House and Senate: Authority, Confidentiality, and Frequency (2014), https://fas.org/sgp/crs/secrecy/R42106.pdf [https://perma.cc/RR8P-8VHC].

215. See supra notes 144–147 and accompanying text.

216. See Li, supra note 8, at 273 (noting the value of "judicial decisions . . . delivered by politically impartial judges"); Wang, Incorporating the Third Branch, supra note 201, at 365 (elaborating further that judicial review is crucial for determinations made by a body like CFIUS because judges are insulated from political pressures as a result of lifetime tenure and salary protections).

217. See infra notes 220–221 and accompanying text.

and administrability concerns.[218] A more limited ex post safeguard in the CFIUS context would be to eliminate the practical obstacles preventing parties from realizing *Ralls*'s promise of limited judicial review.[219]

First, wholesale judicial review is problematic in the CFIUS context because it is contrary to clear legislative intent, as exhibited by FINSA[220] and FIRRMA.[221] Second, FINSA's judicial review exemption, while problematic from a transparency perspective, nevertheless serves very important aims in the CFIUS context. Because judicial review may require CFIUS to reveal to foreign parties the national security rationales behind its findings and determinations, judicial review could itself represent a risk to national security.[222] Further, judicial review of CFIUS decisions would impose an additional administrative burden on the already overloaded and understaffed Committee,[223] making it even more difficult for CFIUS to manage its reviews within its strict timeframe.

Despite the problems posed by applying IEEPA's comprehensive judicial review to CFIUS, reforms could be implemented to ensure that parties do in fact have the limited judicial review provided by *Ralls*,[224] an ex post safeguard perhaps more suited to the CFIUS context. Most importantly, procedural due process claims should be available for any transaction reviewed by CFIUS, not only those transactions that closed prior to CFIUS review, as in *Ralls*.[225] Because the court in *Ralls* never clarified what it means for a transaction to be complete such that a party's property and subsequent due process rights vest, *Ralls* leaves unresolved the question of whether limited judicial review is available for all parties under CFIUS or only those parties that closed their deals prior to seeking

218. See infra notes 222–223 and accompanying text.

219. See infra notes 224–231 and accompanying text.

220. See Ralls Corp. v. Comm. on Foreign Inv. in the U.S., 758 F.3d 296, 311 (D.C. Cir. 2014) (implying that while there is no clear and convincing evidence that FINSA's judicial review exemption bars judicial consideration of procedural due process claims, there is clear and convincing evidence that Congress intended to bar judicial reconsideration of blocked transactions).

221. See supra note 167 and accompanying text.

222. See Mir, supra note 196 ("Only in exceptional instances are the parties unaware of the national security concern at stake. In those instances, revelation of the concerns would itself create a risk to national security.").

223. See supra notes 83, 155; cf. Michaels, supra note 101, at 829 (suggesting that "[t]he imposition of legal constraints such as judicial review . . . could jeopardize the twin imperatives of speed and secrecy" in the context of the CIA).

224. See supra notes 153–155 and accompanying text.

225. While federalism and separation of powers issues may arise if Congress explicitly legislates that there is a federal property interest in a tentative, unclosed deal, Congress could encourage such a reform through a sense of Congress resolution. See generally Christopher M. Davis, Cong. Research Serv., 98-825, "Sense of" Resolutions and Provisions (2016), https://fas.org/sgp/crs/misc/98-825.pdf [https://perma.cc/J8RV-KUKS] (discussing sense of Congress resolutions and asserting that they are influential, even though they lack the force of law).

CFIUS review.[226] If the latter, a party would be better off closing its deal as soon as possible, filing notice of the transaction with CFIUS after closing, and, if CFIUS finds national security risks and issues a divestment order, arguing ex post for limited judicial review.[227] Legislative reform clarifying that due process rights do indeed attach to any transaction reviewed under CFIUS—even if a particular transaction has not yet closed—could both prevent this misaligned incentive and ensure that more parties receive this limited judicial review, enhancing CFIUS's transparency.[228]

As an additional reform, a third party, rather than CFIUS staff, should make the determination regarding what information must be provided to parties to meet *Ralls*'s due process requirements.[229] Such a reform would

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226. See Jonathan Wakely & Lindsay Windsor, *Ralls* on Remand: U.S. Investment Policy and the Scope of CFIUS' Authority, 48 Int'l Law. 105, 115 (2014) (recognizing "when do due process rights attach?" as one "open question[] concerning the scope of the due process right" acknowledged in *Ralls*); supra notes 158–161 and accompanying text.

227. See Wakely & Windsor, supra note 226, at 117 (arguing that this "bizarre incentive[]" is "starkly contrary to the statutory framework, which promotes voluntary early notification to CFIUS").

228. In fact, this clarification—providing due process rights for all claimants regardless of whether a deal has closed prior to CFIUS review—may be a reading of *Ralls* most consistent with the Supreme Court's procedural due process precedents. See id. at 116 (discussing case law dictating that to have a property interest, a person must only "have a legitimate claim of entitlement" (citing Castle Rock v. Gonzales, 545 U.S. 748, 756 (2005))). Arguably, signing a merger agreement—even if the merger agreement states that the transaction is contingent upon federal regulatory approvals—would be sufficient to confer a legitimate claim of entitlement, particularly if the agreement incorporates deal-protection clauses, such as a no-shop provision or a termination fee, as many deals do. See Latham & Watkins LLP, Deal Certainty 41, 64 (2016), https://www.lw.com/admin/Upload/Documents/OilAndGasMandA/General%20Concepts/Consolidated_Deal_Certainty_to_Going_Private_Transactions.pdf [https://perma.cc/7JBU-TCA7] (defining both types of deal protection clauses). Further, the Supreme Court has suggested that for due process purposes, a property right is "created and . . . defined by existing rules or understandings that stem from an independent source such as state law." *Gonzales*, 545 U.S. at 756 (internal quotation marks omitted) (quoting Paul v. Davis, 424 U.S. 693, 709 (1976)). Under Delaware state law, a merger is "effective" upon resolution of the boards of directors, approval by shareholders, and filing of the merger agreement with a state official; the statute is silent as to the effect, if any, of contingencies posed by federal regulatory review. Del. Code tit. 8, § 251 (2018). Even more, the court in *Ralls* suggested that such federal contingencies have no bearing on a party's state law property right, rejecting CFIUS's argument that "the nature of a property interest recognized under *state* law is affected by potential *federal* deprivation." Ralls Corp. v. Comm. on Foreign Inv. in the U.S., 758 F.3d 296, 316 (D.C. Cir. 2014).

This dichotomy between federal and state law rights in *Ralls* may actually indicate that the D.C. Circuit would deem a transaction complete upon signing the merger agreement. Given the uncertainty provided by *Ralls* and lack of subsequent clarity on this point, however, reform clarifying that *any* party with a transaction under CFIUS review may bring a procedural due process claim—regardless of whether CFIUS reviews the transaction before or after the deal has closed—is an important first step in ensuring that *Ralls*'s limited judicial review serves as a viable ex post check increasing CFIUS's accountability.

229. See supra note 154 and accompanying text.

not run counter to congressional intent to limit judicial review of CFIUS,[230] as CFIUS's findings and ultimate determination on a transaction would continue to be given deference. Rather, simply the issue of whether certain information is classified or unclassified would be delegated to a neutral third party, ensuring that all unclassified information that can be provided to a party is in fact provided. While this proposal may appear problematic from an administrability standpoint, involving a third party would in fact help reduce CFIUS's workload.[231]

CONCLUSION

Since its creation in the 1970s, CFIUS has transformed from a "paper tiger" to a major focal point of cross-border deal work. As legislators have enhanced CFIUS's ability to respond to national security threats posed by foreign investment, CFIUS's accountability, predictability, and transparency have suffered, largely due to deficiencies in CFIUS's statutory scheme. Surprisingly, however, CFIUS-reform efforts have largely ignored these concerns, pursuing an expansion of CFIUS's scope while incorporating few, if any, mechanisms intended to enhance CFIUS's accountability. This Note argues that accountability and transparency must be a focus of CFIUS reform, particularly following Congress's recent expansion of CFIUS through FIRRMA.

By adopting the IEEPA framework and incorporating accountability mechanisms at key points throughout the CFIUS process, reformers can respond to accountability and transparency criticisms of CFIUS as it currently stands, even while taking steps to expand CFIUS beyond its traditional scope. In doing so, legislators can better preserve the balance between economic prosperity and national security, ensuring that the United States effectively protects against national security threats while remaining a destination for profitable foreign investment.

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230. See supra notes 220–221.

231. With the adoption of this reform, CFIUS could focus on its reviews rather than its obligations under *Ralls*. See supra note 155 and accompanying text. Additionally, this sifting of information would not be a regular occurrence, as transactions have been blocked only a handful of times in CFIUS's multidecade history. See supra note 64 and accompanying text (explaining why deals are seldom blocked).