INVESTING IN SECURITY: CFIUS AND CHINA AFTER FIRRMA

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I. INTRODUCTION

Since 1975, the Committee on Foreign Investment in the United States (CFIUS) has existed to advise the President on foreign investment in critical economic sectors that may jeopardize the national security of the United States.[1] Congress and the President have repeatedly updated CFIUS's structure and function to adapt it to an ever-evolving international political climate.[2] Most recently, Congress passed the Foreign Investment Risk Review Management Act of 2018 (FIRRMA).[3] FIRRMA augmented CFIUS's authority in response to heightened congressional awareness of the looming political and economic threat posed by China. This annotation will examine CFIUS's history, statutory authority, and impact on foreign investment efforts in light of recent statutory reforms and concerns over Chinese investment.

As this annotation will show, CFIUS has been successful in limiting Chinese investments in economic sectors deemed critical to the national security of the United States. However, as China and the United States become ever more economically intertwined, CFIUS's capacity to address the national security concerns posed by Chinese investment may be limited by private economic forces and a judiciary wary of unmitigated presidential power. Ultimately, the extent of CFIUS's authority will rest on how Congress, the executive branch, and reviewing courts balance national security interests with the promotion of economic growth and constitutional fidelity. Part I of this annotation furnishes the statutory background on CFIUS and the ways in which it has been reformed in response to perceived national security threats from abroad. Part II evaluates the impact of FIRRMA on Chinese investment. Finally, Part III identifies several challenges that may constrain CFIUS's ability to check Chinese national security threats going forward.

II. BACKGROUND: THE EVOLUTION OF CFIUS AND TRENDS IN CHINESE INVESTMENT

CFIUS is comprised of the heads of the U.S. Departments of Treasury, Justice, Homeland Security, Defense, Commerce, State, and Energy,

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1 JAMES K. JACKSON, CONG. RESEARCH SERV., RL33388, THE COMMITTEE ON FOREIGN INVESTMENT IN THE UNITED STATES (CFIUS) 1, 4 (2019).

2 *See id.* at 1–2 (providing a detailed history of the evolution of CFIUS).

3 Foreign Investment Risk Review Modernization Act of 2018, Pub. L. No. 115-232, 132 Stat. 1653 (2019).

together with the heads of the Office of the U.S. Trade Representative and the Office of Science & Technology Policy.[4] The Director of National Intelligence and the Secretary of Labor serve as non-voting members.[5] Executive Order 11858 of President Ford first established CFIUS in 1975 to "[monitor] the impact of foreign investment in the United States . . . [and coordinate] the implementation of United States policy on such investment."[6] The Executive Order was issued in response to an increase in investment in the United States by members of the Organization of Petroleum Exporting Countries (OPEC), a change perceived as politically motivated.[7] The Committee's process for reviewing foreign investments was codified in 1988 by the Exon-Florio Amendment to the Defense Production Act, which granted the President the authority to block pending foreign investment transactions that threatened to undermine U.S. national security.[8] Though the Amendment did not mention CFIUS, President Reagan delegated his authority to review investment transactions to the Committee, increasing and formalizing its authority.[9] In order to better restrict investment in the United States by states with connections to terrorist organizations, Congress further empowered CFIUS with the enactment of the Foreign Investment and National Security Act of 2007 (FINSA). FINSA further defined CFIUS's role by codifying its previous de facto authority and allowing the President to consider more factors in his or her review of foreign investment transactions, such as a transaction's national security effects on critical infrastructure and technology, and the investing country's "adherence . . . to nonproliferation control regimes" and its "relationship . . . with the United States, specifically . . . in counter-terrorism efforts."[10]

FIRRMA, the most recent reform to CFIUS, represented another significant expansion of CFIUS's authority to regulate foreign investment in the United States.[11] FIRRMA widened CFIUS's jurisdiction by expanding the universe of covered transactions to include: the "purchase or lease by foreign persons of certain U.S. real estate" near ports, military facilities, and certain other government property; investments in companies dealing in "critical technology," "critical infrastructure," or "sensitive personal data of United States citizens"; changes in ownership

4 *Composition of CFIUS*, U.S. DEP'T TREASURY, https://www.treasury.gov/resource-center/international/foreign-investment/Pages/cfius-members.aspx (last updated Dec. 1, 2010).

5 *Id.*

6 Exec. Order No. 11,858, 3 C.F.R. § 990 (1971–1975).

7 JACKSON, *supra* note 1, at 4.

8 Authority to Review Certain Mergers, Acquisitions, and Takeovers, Pub. L. No. 100-418, § 5021, 102 Stat. 1425 (1988).

9 Exec. Order No. 12,661, 3 C.F.R. § 618 (1988); JACKSON, *supra* note 1, at 7.

10 50 U.S.C. §§ 4565(a)(4), 4565(f)(9) (2018).

11 Foreign Investment Risk Review Modernization Act of 2018, Pub. L. No. 115-232, 132 Stat. 1653 (2019).

rights that could result in foreign control or ownership of U.S. businesses; and any other transactions structured to evade CFIUS review.[12] FIRRMA also expanded the definition of foreign "control" of a U.S. entity to include the capacity to make important decisions, whether the capacity is exercised or not.[13] Furthermore, the Act extended the timeline for transactions to be reviewed, and allowed CFIUS to initiate more unilateral reviews.[14]

Just as the creation of CFIUS was driven by concerns over OPEC, and the enactment of FINSA motivated by concern over terrorism, so too was FIRRMA a response to a perceived threat from abroad—this time, the rapid growth of Chinese investment in the United States. From 2007 to 2016, Chinese foreign direct investment in the United States grew from $356 million to $45.2 billion per year.[15] Correspondingly, from 2012 through 2015 (the last year for which CFIUS's report to Congress is publicly available), Chinese companies filed more transactions with CFIUS than any other country.[16]

In addition to the increased volume of Chinese investment in the United States, FIRRMA's sponsors also expressed special concern that the Chinese government's investment strategy posed a distinct national security threat.[17] China's "Made in China 2025" plan targets high technologies including artificial intelligence, robotics, and semiconductors.[18] While these investment targets are justifiable as areas of serious commercial value in an increasingly high-tech economy, they are also the sectors that, in the view of the U.S. Department of Defense, are foundational to new military innovations.[19] Chinese investment in these sectors of the U.S. economy creates concern that the Chinese government may gain access to private U.S. data, and that the United States may lose technological advantages over China as Chinese companies invest in and learn from U.S. manufacturers. These fears were on full display when the United States decided to prohibit U.S. companies from using networking equipment from Huawei, a Chinese telecommunications giant, citing concerns that the Chinese government would use the equipment to spy on U.S. companies and individuals.[20]

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12 Stephanie Zable, *The Foreign Investment Risk Review Modernization Act of 2018*, LAWFARE (Aug. 2, 2018), https://www.lawfareblog.com/foreign-investment-risk-review-modernization-act-2018.

13 *Id.*

14 *Id.*

15 Jonathan Wakely & Andrew Indorf, *Managing National Security Risk in an Open Economy: Reforming the Committee on Foreign Investment in the United States*, 9 HARV. NAT'L SECURITY J. 1, 22–23 (2018).

16 *Id.* at 23.

17 *Id.* at 9 (citing OFFICE OF SEN. JOHN CORNYN, BACKGROUND ON FOREIGN INVESTMENT RISK REVIEW MODERNIZATION ACT (FIRRMA) 1 (Nov. 7, 2017)).

18 *Id.* at 24.

19 *Id.*

20 Sean Keane, *Huawei Ban: Full Timeline As Trump's Tech Chief Slams Countries Working with Chinese Company*, CNET (Nov. 13, 2019),

FIRRMA was the result of these brewing anxieties and Congress' determination that more government oversight was necessary to check the increased influence of Chinese companies over critical technologies.

III. THE EFFECT OF FIRRMA REFORMS

Chinese investment in the United States dropped precipitously following President Trump's inauguration, falling to $5.4 billion in 2018 from its peak of $46.5 billion in 2016.[21] CFIUS has taken full advantage of its post-FIRRMA regulatory authority by compelling several Chinese investors to divest themselves of their U.S. holdings, which have included a multimillion-dollar Manhattan high rise and Grindr, a popular dating app.[22] These and other CFIUS actions no doubt contributed to Chinese reluctance to invest in the United States, but they must be considered alongside the President's trade sanctions and the generally hostile tone the current administration has taken towards China. Investment flows from China have also been curbed by the Chinese government's imposition of tighter capital controls and a slowing Chinese economy.[23] Amidst this confluence of factors, it is difficult to measure the extent to which the passage of FIRRMA itself deterred additional investments that Chinese investors might otherwise have sought. Nevertheless, CFIUS has shown a great willingness to challenge a variety of investment transactions following the passage of the Act.

IV. POTENTIAL CHALLENGES TO CFIUS AS AN INSTRUMENT OF NATIONAL SECURITY

FIRRMA cemented CFIUS's efficacy as a means of regulating foreign influence in the United States, and the Trump administration has not hesitated to use all means at its disposal to check the rise of Chinese

https://www.cnet.com/news/huawei-ban-full-timeline-fcc-carriers-china-trump-ban-security-threat-mate-x/.

[21] Alan Rappeport, *Chinese Money in the U.S. Dries Up As Trade War Drags On*, N.Y. TIMES (July 21, 2019), https://www.nytimes.com/2019/07/21/us/politics/china-investment-trade-war.html.

[22] Gillian Tan, *China's HNA Group Sells Manhattan Building Near Trump Tower*, BLOOMBERG (Jan. 9, 2019), https://www.bloomberg.com/news/articles/2019-01-09/china-s-hna-group-sells-manhattan-building-near-trump-tower; Echo Wang, *China's Kunlun Tech Agrees to U.S. Demand to Sell Grindr Gay Dating App*, REUTERS, May 13, 2019, https://www.reuters.com/article/us-grindr-m-a-beijingkunlun/chinas-kunlun-tech-agrees-to-u-s-demand-to-sell-grindr-gay-dating-app-idUSKCN1SJ28N.

[23] *See, e.g.*, Takeshi Kihara, *China Inc.'s Overseas Shopping Spree Fizzles in First Half of 2019*, NIKKEI ASIAN REV. (Sept. 9, 2019), https://asia.nikkei.com/Business/Business-deals/China-Inc.-s-overseas-shopping-spree-fizzles-in-first-half-of-2019 ("Overseas acquisitions by Chinese companies plummeted in the first half of 2019, as tighter capital controls at home . . . stifled such activity."); Alexandra Stevenson, *China Injects $126 Billion into Its Slowing Economy*, N.Y. TIMES (Sept. 6, 2019), https://www.nytimes.com/2019/09/06/business/china-economy-reserve.html?auth=login-email&login=email (highlighting China's "slowing economy").

influence in particular. However, CFIUS is subject to several restrictions that may limit its capacity to mitigate security threats emanating from China. One such restriction is judicial review of CFIUS proceedings.

The U.S. Court of International Trade's review of President Trump's national security tariff policies may help illustrate this potential limitation on CFIUS's capabilities. The President's invocation of national security tariffs under Section 232 of the Trade Expansion Act of 1962 raised questions of excessive delegation of authority to the executive and impermissible ad hoc application of such authority. In its rejection of a nondelegation challenge to the President's allegedly ad hoc use of Section 232, the U.S. Court of International Trade noted that the "virtually unbridled discretion" the President gained over trade policy suggested a reason to reconsider Supreme Court precedent upholding Section 232's constitutionality.[24] However, the Supreme Court denied a petition for writ of certiorari in the case, which is now on appeal to the Federal Circuit.[25] A subsequent challenge to Section 232 grounded in the Equal Protection Clause and Due Process Clause is also pending before the U.S. Court of International Trade.[26]

These challenges to Section 232 provide a blueprint for challenges to CFIUS actions, as the powers granted to CFIUS are similar to the powers granted under Section 232. Both delegations allow the President to unilaterally regulate foreign transactions with very limited judicial oversight.[27] Judicial challenges against CFIUS actions may be more successful, as Congress appeared to implement safeguards in FIRRMA against arbitrary application of CFIUS authority. The Act provides for the review of certain CFIUS actions (excluding those of the President on referral from CFIUS) by the U.S. Court of Appeals for the D.C. Circuit, and the Act's "Sense of Congress" section warns against arbitrary use of the President's authority to reverse penalties "for reasons unrelated to the national security of the United States."[28] It remains to be seen whether the Trump administration will test the limits of its newly augmented authority to block investments, and whether the judiciary will move to limit CFIUS's discretion in such a case.

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[24] American Institute for International Steel, Inc. v. United States, 376 F. Supp. 3d 1335, 1344–46 (Ct. Int'l Trade 2019).

[25] Alex Lawson, *Bid to Limit Trump's Tariff Power Lands in Fed. Cir.*, LAW360 (Aug. 9, 2019), https://www.law360.com/articles/1187365.

[26] Complaint at 3, Transpacific Steel LLC v. United States, No. 19-00009 (Ct. Int'l Trade Jan. 17, 2019).

[27] *See* Geoffrey Manne & Seth Weinberger, *Time to Rehabilitate the Legislative Veto: How Congress Should Rein in Presidents' "National Emergency" Powers*, JUST SECURITY (Mar. 13, 2019), https://www.justsecurity.org/63201/congress-rein-presidents-national-emergency-power-rehabilitating-legislative-veto (identifying CFIUS as an example of an overly broad delegation of power to the President).

[28] Foreign Investment Risk Review Modernization Act of 2018, Pub. L. No. 115-232, §§ 1702, 1718, 132 Stat. 1653 (2019).

CFIUS may also need to contend with the private economic interests of U.S. companies and consumers. While Chinese investment in U.S. economic sectors of national security concern has declined sharply during the Trump administration, U.S. investment in China has remained relatively steady despite the President's call for U.S. companies to "start looking for an alternative to China."[29] The value of U.S. direct investment in China in the first half of 2019 was higher than in the first halves of 2017 or 2018, and was nearly at 2016 levels.[30] CFIUS regulation of inbound investment cannot prevent U.S. companies from sharing their intellectual property with China in exchange for access to the Chinese market. Whether U.S. companies are cognizant of national security concerns or not, they remain enthralled by the Chinese market and the profit it produces. Recent trade policy decisions suggest that U.S. consumers feel similarly to U.S. investors. President Trump acknowledged that he delayed new tariffs on Chinese imports of phones, computers, and video game consoles until December 15, 2019 in order to protect the interests of American consumers during the holiday shopping season.[31] Even with a newly empowered CFIUS, the President may face an uphill battle to keep China out of the U.S. technology sector if free market incentives continue to drive U.S. companies and consumers toward Chinese capital, goods, and market access.

Finally, though FIRRMA affords CFIUS more procedural channels to investigate investment transactions, including the ability to perform more sua sponte investigations, those procedures must still comport with due process. In *Ralls Corp. v. Committee on Foreign Investment*, the U.S. Court of Appeals for the D.C. Circuit held that the President's invalidation of a Chinese company's acquisition of wind farms located near a Navy air base violated the company's due process.[32] Although FIRRMA provides that the President's determination is not itself reviewable, the court held that CFIUS's procedures were subject to judicial review.[33] Ralls petitioned CFIUS to investigate the acquisition after the transaction had been completed, by which time the court found that Ralls had a constitutionally

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[29] Andrea Shalal et al., *Explainer: What Tools Could Trump Use to Get U.S. Firms to Quit China?*, REUTERS, Aug. 23, 2019, https://www.reuters.com/article/us-usa-china-trade-options-explainer/explainer-what-tools-could-trump-use-to-get-u-s-firms-to-quit-china-idUSKCN1VE00X.

[30] THILO HANEMANN ET AL., US-CHINA INV. PROJECT, SIDELINED: US-CHINA INVESTMENT IN 1H 2019, at 6 (2019), https://arraysproduction-0dot22.s3.amazonaws.com/rhodiumgroup/assets/icon/RHG_TWS-2019-1H_Report.pdf.

[31] Damian Paletta & Heather Long, *Trump Delays Some China Tariffs to Limit Impact on Holiday Shopping*, WASH. POST (Aug. 13, 2019), https://www.washingtonpost.com/business/economy/white-house-delays-some-new-china-tariffs-until-dec-15/2019/08/13/be21e812-bdd1-11e9-b873-63ace636af08_story.html?noredirect=on.

[32] Ralls Corp. v. Comm. on Foreign Inv., 758 F.3d 296, 304, 325 (D.C. Cir. 2014).

[33] *Id.* at 308–12.

protected property interest in the wind farms.[34] CFIUS failed to inform Ralls of the action against it and the evidence supporting its decision, and the court found that the Committee's lack of disclosure was constitutionally inadequate.[35] FIRRMA compels CFIUS to investigate transactions in a broader set of circumstances, but does not abrogate the due process owed to subject investors—especially when a property interest has already been established. Due process review will therefore continue to limit the President's ability to invalidate foreign investments.

V. CONCLUSION

The passage of FIRRMA bolstered the capacity of the executive branch to guard against foreign investments, particularly from China, that undermine U.S. national security. Though it is difficult to determine with specificity the extent to which CFIUS has contributed to the recent decline in Chinese investment amidst a flurry of protectionist policies from the Trump administration, CFIUS has no doubt played an important role and will continue to do so as the competition for power, influence, and technological advantage between two of the world's most powerful states continues to play out in the economic arena. However, CFIUS's efficacy as an instrument of national security may be limited by the private interests of U.S. individuals and corporations, and by constitutional limitations imposed on the President and CFIUS by U.S. courts. Time will tell how Congress, the executive, and reviewing courts choose to balance the national security concerns CFIUS protects with the countervailing goals of economic growth and an appropriate separation of powers.

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[34] *Id.* at 315.
[35] *Id.* at 319–320.