

XV. *The Committee on Foreign Investment in the United States and Mandatory Disclosure Requirements for Investment in Critical Technologies under 31 C.F.R. 800*

A. **Introduction**

In August of 2020, the Trump Administration decreed that TikTok, a popular app for teens showing off their dance moves and dispensing wisdom to some several hundred million active users, needed to sell its U.S. based assets.¹ This move was made in response to growing concerns that the firm's Chinese parent company, ByteDance Ltd., presented a possible national security risk in that it could pass American consumer data to Chinese government officials and spread propaganda amongst the public.² Lurking behind this decision was the Committee on Foreign Investment in the United States (CFIUS), a Treasury Department-led interagency body tasked with evaluating the national security implications of foreign investment in U.S. corporations.³ CFIUS's *raison d'être* is to support the federal government's general policy that international investment in the United States supports "economic growth, productivity, competitiveness, and job creation," while ensuring that such support is consistent with national security policy.⁴ Ultimately, CFIUS has the authority to stall certain transactions or refer them to the President for further review of the potential national security concerns.⁵ The

¹ See Anat Alon-Beck, *TikTok, Your Time Is Up*, FORBES, (Dec. 8, 2020), <https://www.forbes.com/sites/anatalonbeck/2020/12/08/tiktok-your-time-is-up/?sh=4cc3d67d7179> [<https://perma.cc/J8N2-N4X9>]; Maryam Mohsin, *10 TikTok Statistics That You Need to Know in 2021 [Infographic]*, OBERLO (Sep. 3, 2020), <https://www.oberlo.com/blog/tiktok-statistics> [<https://perma.cc/SYX8-7HPJ>].

² Katy Stech Ferek, *Treasury to Make TikTok Recommendations to Trump This Week*, WALL ST. J. (July 29, 2020), https://www.wsj.com/articles/treasury-to-make-tiktok-recommendations-to-trump-this-week-11596043389?mod=article_inline.

³ *Id.* ("[Treasury Secretary] Mnuchin confirmed ... that the TikTok review was being conducted by the Treasury-led Committee on Foreign Investment in the U.S.").

⁴ Exec. Order No. 13,456, 3 C.F.R. 13,456 (Jan. 23, 2008).

⁵ *CFIUS Overview*, U.S. DEPARTMENT OF TREASURY, <https://home.treasury.gov/policy-issues/international/the-committee-on-foreign-investment-in-the-united-states-cfius/cfius-overview> [<https://perma.cc/JVA8-QUMQ>].

President can then block the pending transaction if she determines a threat to national security exists.⁶ As of February of 2020, Presidents have used CFIUS to block five foreign investment transactions.⁷

With the enactment of the Foreign Investment Risk Review Modernization Act of 2018 (FIRRMA), Congress mandated that foreign investors disclose to CFIUS certain investments in companies that produce, design, manufacture, or develop select “critical technologies.”⁸ Following FIRRMA, the Treasury Department established an analysis of covered investments based on their connection to technologies associated with a particular set of industries (the Interim Rule), which would determine whether or not a disclosure was necessary based on the findings.⁹ In May of 2020, the Treasury Department proposed a new rule for analysis for mandatory disclosure (the Final Rule), which became effective on October 15, 2020.¹⁰ Under the Final Rule, CFIUS would instead determine the necessity of a mandatory disclosure based on a thorough review of a governing regulatory authority’s export controls for that particular transaction and technology.¹¹ If the transaction is covered by both CFIUS and one of the enumerated regulatory authorities, then the investor generally

⁶ MICHAEL H. CECIRE & HEIDI M. PETERS, CONG. RESEARCH SERV., THE DEFENSE PRODUCTION ACT OF 1950: HISTORY, AUTHORITIES, AND CONSIDERATIONS FOR CONGRESS 18 (2020) (“The President has the authority to block proposed or pending foreign investment transactions that threaten to impair the national security.”).

⁷ JAMES K. JACKSON & CATHLEEN D. CIMINO-ISAACS, CONG. RESEARCH SERV., CFIUS REFORM UNDER FIRRMA (2020).

⁸ H.R. 5841, 115th Cong. (2018).

⁹ 85 Fed. Reg. 30,893, 30,894 (May 21, 2020).

¹⁰ *Id.* (May 21, 2020) (“Specifically, this proposed rule would modify the mandatory declaration provision for certain foreign investment transactions involving a U.S. business that produces, designs, tests, manufactures, fabricates, or develops one or more critical technologies.”); see Carl A. Valenstein & Christian Kozlowski, *Final CFIUS Mandatory Declaration Rule Shifts Focus to Export Control Requirements*, MORGAN LEWIS (Oct. 14, 2020), <https://www.morganlewis.com/pubs/2020/10/final-cfius-mandatory-declaration-rule-shifts-focus-to-export-control-requirements> [<https://perma.cc/LZR6-R3BR>].

¹¹ Provisions Pertaining to Certain Investments in the States by Foreign Persons, 85 Fed. Reg. 57,124, 57,124 (Sept. 15, 2020) (codified at 31 C.F.R. § 800) (“[P]rimarily reorienting it ... to one based on whether certain U.S. government authorizations would be required to export, reexport, transfer (in-country), or retransfer the critical technology or technologies”).

would need to make their mandatory declaration to CFIUS and await the committee's go-ahead.¹²

This article will examine the particular mechanisms that trigger the new mandatory disclosure requirement for foreign investment in critical technologies under the Final Rule, with a focus on the transition from the industrial classification analysis of FIRRMA to the regulatory authorization analysis promulgated by the Treasury Department in 2020. This discussion will include a brief mention of the policy arguments for implementing FIRRMA and the updated Final Rule in 2020. In addition, this article will explore some of the arguments around the Final Rule that express the struggle between CFIUS's dueling foundational policy objectives: the facilitation of economic growth and the protection of U.S. national security interests. That discussion will conclude with a brief examination of the foreign responses to the expansion of CFIUS' mandate, along with the Biden Administration's plans for its use.

B. History of CFIUS and the Final Rule

CFIUS was formed in 1975 by President Ford and the release of his Executive Order 11858 under the authority of the Defense Production Act of 1950 (DPA).¹³ The President was later given authority to "review certain corporate mergers, acquisitions, and takeovers" under the "Exon-Florio" amendment in 1988, and could determine whether such a transaction came with risks for national security.¹⁴ It was only in 2007, with the enactment of the Foreign Investment and National Security Act (FISIA), that Congress statutorily created CFIUS and thus gained additional oversight and authority over what had up until then been mostly a product of the executive.¹⁵ Currently, CFIUS consists of nine cabinet members, two *ex officio* members, five additional executive officials, along with any other members that the President appoints on an *ad hoc* basis.¹⁶

¹² *See id.* at 57,124.

¹³ Exec. Order No. 11,858, 40 Fed. Reg. 20,263 (May 7, 1975).

¹⁴ CECIRE & PETERS, *supra* note 6, at 18.

¹⁵ JAMES K. JACKSON, CONG. RESEARCH SERV., THE COMMITTEE ON FOREIGN INVESTMENT IN THE UNITED STATES 1, 5 (2020).

¹⁶ *Id.* at 22 ("[I]ncluding the secretaries of State, the Treasury, Defense, Homeland Security, Commerce and Energy; the Attorney General; the United States Trade Representative; and the Director of the Office of Science and Technology Policy.").

Leading up to the 2018 enactment of FIRRMA, CFIUS had established a three-to-four step process: (1) receipt of a Declaration or notice, (2) the National Security Review, (3) the National Security Investigation, and (4) the possibility of a final Presidential Determination.¹⁷ As a part of this process, CFIUS was given authority to review certain covered transactions, namely “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.”¹⁸ After receiving a recommendation, the President could exercise their authority to suspend or prohibit a transaction only on finding that there is “credible evidence” of a national security threat and that no other legal provisions beyond these powers can provide for the protection of these national security interests.¹⁹ Under FINSAs, the definition of critical technologies included “critical technology, critical components, or critical technology items essential to national defense ...”²⁰ Such technologies were to be an additional factor in CFIUS’ and the President’s analysis, but there was no explicit requirement for a mandatory declaration.²¹

In 2018, largely in response to growing concern from officials and the public over potential threats of Chinese investment in U.S. companies, Congress and the Trump Administration enacted FIRRMA.²² The Congressional Report concerning FIRRMA shows the fine line that policy makers had to walk in order to balance competing concerns of protecting national security interests and spurring economic growth from foreign investment.²³ Noting “[t]he unambiguous ‘civil-military integration’ China’s leaders have articulated”

¹⁷ *See id.* at 12.

¹⁸ Foreign Investment and National Security Act of 2007, Pub. L. No. 110-49, 121 Stat. 246, 246 (2007).

¹⁹ *Id.* at 256.

²⁰ *Id.* at 247.

²¹ *See generally id.* (identifying “critical technologies” as one factor in the overall national security analysis, and offering specific instructions on how to report such findings to Congress).

²² *See* JACKSON & CIMINO-ISAACS, *supra* note 7, at 1 (“Some Members of Congress, the Trump Administration, and some U.S. businesses have raised concerns over the risks to continued U.S. technological leadership to support national defense and economic security due to growing foreign direct investment (FDI), primarily by Chinese firms, in U.S. high tech companies.”).

²³ H.R. Rep. No. 115-784, pt. 1, 39–41 (2018) (describing different Congressional testimony weighing in on either side of the balance).

that may threaten continued technological dominance for the U.S.,²⁴ Congress still recognized that the U.S. needs foreign investment to “fuel the research and development, capital equipment, and expansion needed to keep the economy healthy, which itself is an element of national security.”²⁵

One of the reforms that FIRRMA pushed through to secure these dueling interests was an expansion of CFIUS’ authority to propagate rules mandating that foreign investors disclose to CFIUS their investments involving certain critical technologies.²⁶ However, Congress was circumspect in their promulgation of a mandatory declaration requirement, and limited it based on a fear that CFIUS would begin to improperly dictate U.S. economic policy.²⁷ Before these reforms, CFIUS generally only required voluntary notice filings from investors.²⁸ In a further expansion, Congress broadened the scope of covered transactions beyond the standard mergers and acquisitions that had been CFIUS’ long-time focus. This addition focused on certain “non-‘controlling’ [sic] investments” in any businesses whose “involvement with critical technologies, critical infrastructure, or sensitive personal data ... pose vulnerabilities” that CFIUS could not otherwise address.²⁹

Shortly after FIRRMA’s enactment, CFIUS and the Trump administration blocked the acquisition of Qualcomm Inc. by the Singapore-based Broadcom Ltd.³⁰ National security concerns trumped

²⁴ *Id.* at 39.

²⁵ *Id.* at 40.

²⁶ *Id.* at 48.

²⁷ *Id.* at 42 (“[T]he bill does not permit CFIUS to mandate additional declarations based on industries and economic sectors. Such discretion could facilitate an ill-advised industrial policy with no demonstrable link to national security.”).

²⁸ COMMITTEE ON FOREIGN INVESTMENT IN THE UNITED STATES, ANNUAL REPORT TO CONGRESS, REPORT PERIOD: CY 2016 AND CY 2017 iii (2019) (“Generally, prior to FIRRMA, parties voluntarily submitted notices of transactions to CFIUS”).

²⁹ James Brower et al., GOODWIN PROCTER LLP, *When Your Investment Is Rockin’ and CFIUS Comes A-Knockin’: The CFIUS Non-Notified Process*, JD SUPRA (Feb. 4, 2021) <https://www.jdsupra.com/legalnews/when-your-investment-is-rockin-and-8379385/> [<https://perma.cc/5SSDR-LM5W>].

³⁰ *Timeline: Broadcom-Qualcomm saga comes to an abrupt end*, REUTERS (Mar. 14, 2018) <https://www.reuters.com/article/us-qualcomm-m-a-broadcom-timeline/timeline-broadcom-qualcomm-saga-comes-to-an-abrupt-end-idUSKCN1GQ22N> [<https://perma.cc/XB9C-46Z4>].

what was, at the time, “the technology industry’s biggest deal ever”³¹ Central to CFIUS’s recommendation that the transaction be suspended was a mixed concern that Broadcom could starve Qualcomm of funds, thus stymieing competition with Chinese tech-giant Huawei Technologies Co., and that Broadcom maintained relationships with “third party foreign entities” that presented a possible threat to U.S. national security interests.³² This was the fifth time that a President had acted on CFIUS’s objections to stop a deal, and appears to be in line with the policies articulated by Congress when they expanded CFIUS’s remit.³³ Interestingly, President Trump had stopped another deal on the recommendation of CFIUS less than a year prior and before FIRRMA’s enactment, citing national security risks in the potential transfer of superconductor intellectual property and “the Chinese government’s role in supporting this transaction”³⁴

C. Mandatory Disclosure Analysis: Interim Rule vs. Final Rule

Between the enactment of FIRRMA and now, the Treasury Department has announced two different rules for CFIUS’ analysis of the mandatory disclosure of foreign investments involving critical technologies. The quick adoption of the Interim Rule on October 11, 2018, was driven by concerns that foreign entities had an “ability and willingness” to invest in U.S. companies in order to obtain access to critical technologies, which was further compounded by the “rapid pace of technological change in certain U.S. industries.”³⁵ The Treasury Department argued that, “[p]rior to FIRRMA, CFIUS’s authorities did not sufficiently address the new and emerging risks that

³¹ *President Trump halts Broadcom takeover of Qualcomm*, REUTERS (Mar. 12, 2018) <https://www.reuters.com/article/us-qualcomm-m-a-broadcom-merger/president-trump-halts-broadcom-takeover-of-qualcomm-idUSKCN1GO1Q4> [<https://perma.cc/CV97-3BLW>].

³² *Id.*

³³ *Id.* (“This is the fifth time a U.S. president has blocked a deal based on CFIUS objections and the second deal Trump has stopped since assuming office slightly over a year ago.”).

³⁴ Press Release, Dep’t of the Treasury, Statement on the President’s Decision Regarding Lattice Semiconductor Corporation (Sept. 13, 2017) <https://www.treasury.gov/press-center/press-releases/Pages/sm0157.aspx> [<https://perma.cc/8RN4-PPHA>].

³⁵ 83 Fed. Reg. 51,322, 51,324 (Oct. 11, 2018).

foreign direct investment can pose to U.S. technological superiority.”³⁶ Thus, the expansion of authority to any firm seeking to gain access to critical technologies, whether or not such investment was through a controlling interest in a U.S. firm, better served the challenges of an ever-quicken pace of technological competition.³⁷

Under the Interim Rule, CFIUS would require a mandatory disclosure from a foreign investor if they engaged in a transaction with U.S. firms that “produce, design, test, manufacture, fabricate, or develop one or more critical technologies in connection with any of 27 industries identified by reference to the North American Industry Classification System (NAICS).”³⁸ These industries ranged from Ball and Roller Bearing Manufacturing (NAICS Code: 334112) to Guided Missile and Space Vehicle Manufacturing (NAICS Code: 336414).³⁹ The type of investments covered by the Interim Rule include those that allow access to nonpublic technical information, membership or observer rights on a corporate governing body, and any other involvement in “substantive decision making ... regarding the use, development, acquisition, or release of critical technology.”⁴⁰ This was in line with the expansion of CFIUS’s covered transactions to those including firms involved with critical technologies, without regard to the level of voting interest in the company.⁴¹ Failing to comply with the mandatory declaration requirement could result in a fine of up to the value of the transaction in question.⁴²

On May 21, 2020, the Treasury Department proposed the Final Rule, shifting the requirements for mandatory disclosure away from the NAICS code analysis articulated in the Interim Rule and replacing it with a new analysis based on the regulatory authority that would govern the transaction.⁴³ This change was partially in response to a bevy of public comments. The Final Rule is instead based “on whether certain U.S. government authorizations would be required to export, re-export, transfer (in country), or retransfer critical

³⁶ *Id.* at 51,324.

³⁷ *See id.* at 51,324.

³⁸ *See* 85 Fed. Reg., *supra* note 9, at 30,894.

³⁹ 83 Fed. Reg., *supra* note 35, at 51,333–34.

⁴⁰ *Id.* at 51,328.

⁴¹ *See id.* at 51,328 (“Transactions that are pilot program covered transactions include ... [a] transaction that meets the requirements of § 801.209, irrespective of the percentage of voting interest acquired.”).

⁴² *Id.* at 51,332–33.

⁴³ *See* 85 Fed. Reg., *supra* note 9, at 30,894.

technology”⁴⁴ The regulatory authorizations included in the Final Rule are Department of State approvals under the International Traffic in Arms Regulations; Department of Commerce licenses under the Export Administration Regulations; Department of Energy authorizations under the “regulations governing assistance to foreign atomic energy activities at 10 CFR part 810”; and the Nuclear Regulatory Commission’s regulations governing “the export or import of nuclear equipment and material at 10 CFR part 110.”⁴⁵ Thus, the Final Rule utilizes the existing regulatory framework of export controls to pinpoint the exact types of transactions of concern. This simultaneously focuses the analysis’s aim to particular transactions already tied to U.S. policy, yet broadens the net beyond the 27 enumerated industries.⁴⁶ Interestingly, while the expansion of the net will certainly catch more transactions, the shift to a regime based on current export controls will benefit investors from those nations that have looser restrictions than others, with close U.S. allies being the most obvious beneficiaries.⁴⁷

The Treasury Department stated its belief that the adjustment to the Final Rule will not create substantial burdens for U.S. firms and their investors beyond what was already in place under the Interim Rule.⁴⁸ In response to the solicitation for public input, some commen-

⁴⁴ *Id.* at 30,894.

⁴⁵ 31 C.F.R. § 800.254 (2020).

⁴⁶ See Jeffery Gerrish et al., *Treasury Department Issues Final Rule for Mandatory CFIUS Filing Requirements Based on ‘Critical Technology*, SKADDEN (Sept. 22, 2020), <https://www.skadden.com/insights/publications/2020/09/treasury-department-issues-final-rule> [<https://perma.cc/ZZ27-K33J>] (“Considering the final rule as a whole, we anticipate that removing the existing NAICS test and replacing it with an export control-based rule will capture more transaction and lead to more mandatory filings over all. At the same time, the new approach will provide [the] industry with greater investment certainty by adopting more administrable, objective criteria”).

⁴⁷ See Christian Kozlowski & Carl Valenstein, MORGAN LEWIS, *CFIUS Says Farewell to NAICS, Hello to Export Licensing in mandatory Declarations*, JDSUPRA (June 4, 2020), <https://www.jdsupra.com/legalnews/cfius-says-farewell-to-naics-hello-to-41238/> [<https://perma.cc/T3EZ-6QPX>] (“[T]his new emphasis on the applicable export controls may benefit foreign persons from countries not subject to the same level of export controls”).

⁴⁸ See 85 Fed. Reg., *supra* note 9, at 30,897 (“U.S. businesses with critical technologies are already aware, or should be aware, of the application of export controls to their items and regularly analyze export authorization requirements particularly when considering a foreign investment”).

tators like the Biotechnology Innovation Organization a large biotechnology trade organization offered their support for the Final Rule, stating that it better aligns with CFIUS's current definition of critical technologies, "which is already based on U.S. export control laws," and also casts a wider reach for those companies that may be dealing in critical technologies that fall outside of NAICS codification.⁴⁹ In a related vein, it may be that the Final Rule is more in line with Congress's concern that CFIUS could impose poor economic guidance with an over broad declaration requirement into while industries.⁵⁰ By limiting the mandatory declaration requirement under the regulatory authority analysis, CFIUS is focusing on truly relevant critical technology transactions, rather than the broad range of industries that would catch many unneeded declarations.

Despite Treasury Department assertions, a frequent comment cutting against the Final Rule is that it adds "complexity to assessments of mandatory CFIUS filing requirements—particularly with respect to the requisite export control/regulatory authorization analysis"⁵¹ This is a byproduct of the changing focus of the analysis, because as the target of the declaration requirement becomes narrower, potential investors will have to be more circumspect in their own considerations of whether or not to file.

D. The Situation Now and Going Forward

CFIUS has always been caught in the conflict between the needs for both strong national security protections and critical foreign investments to boost the economy. Since the introduction of critical technologies as a key focus, some have taken a position against the FIRMMA reforms. On the economic side of the calculus, one criticism is that the requirements are overly broad, and that the federal govern-

⁴⁹ Tom DiLenge, Biotechnology Innovation Organization, Biotechnology Innovation Organization Comments on the Department of Treasury's Proposed Rule on Provisions Pertaining to Certain Investments in the United States by Foreign Persons (June 22, 2010), <https://www.regulations.gov/comment/TREAS-DO-2020-0008-0010>.

⁵⁰ See H.R. Rep. No. 115-784, *supra* note 23, at 42 (discussing concerns of an over-broad declaration requirement).

⁵¹ *CFIUS Final Rule Leverages Export Control Principles to Redefine Mandatory Filing Requirements*, COOLEY (Oct. 7, 2020), <https://www.cooley.com/news/insight/2020/2020-10-07-cfius-final-rule-leverages-export-control-principles> [<https://perma.cc/V6SG-4ZG8>].

ment would be overly influential in determining the flow of foreign investment, acting as a protectionist and thus negatively restricting U.S. firms and stymieing free market competition.⁵² However, others have recognized that while the measure may be broad enough to capture more transactions and thus require more mandatory disclosures, the move to regulatory authority analysis provides more clarity for investors as the analysis, while broader, is also more precise.⁵³ Under this view, the FIRMMA reforms' clarity is a boon for investors and ultimately services to facilitate more transactions.

In response to the Congressional reforms of CFIUS, other nations have adopted different models for considering the implications of foreign investment to their own national security as well.⁵⁴ In January of 2021, China implemented a CFIUS-style review mechanism for potential foreign investments.⁵⁵ Included on the list of reviewable investments is “critical technologies,” and the level of investment necessary to trigger review is similar, though not quite as wide, as that considered by CFIUS.⁵⁶ Many U.S. allies have updated their review of foreign investment as well. At the end of 2019, France expanded the scope of their process to include certain critical technologies and reduced the amount of voting power a foreign investor may purchase

⁵² See Theodore H. Moran, *Proposed changes to foreign investment committee damaging to the U.S.*, BROOKINGS (Nov. 22, 2017), <https://www.brookings.edu/blog/future-development/2017/11/22/proposed-changes-to-foreign-investment-committee-are-damaging-to-the-us/> [https://perma.cc/MJN2-EDYG] (“This new broader approach would unavoidably put the U.S. government in the business of designing a national industrial policy by picking and choosing which areas to protect”).

⁵³ Gerrish et al., *supra* note 46.

⁵⁴ See JACKSON & CIMINO-ISAACS, *supra* note 7, at 2 (“FIRMMA also recommends that CFIUS establish a process for exchanging information with U.S. allies and partners to facilitate coordinated action with respect to trends in FDI and technology that pose national security risks. The United States is not alone in adopting new regulations governing the review of foreign investment for national security”).

⁵⁵ Zhaohui Li et al., DECHERT LLP, *China Issues New National Security Rules on Foreign Investment Effective January 18, 2020*, JD SUPRA (Jan. 25, 2021) <https://www.jdsupra.com/legalnews/china-issues-new-national-security-8723-795/> [https://perma.cc/S9DS-TQPC] (“The Review Measures go beyond these prior rules in both authority and scope, and detail a review mechanism headed by NDRC and MOFCOM not dissimilar to [CFIUS]”).

⁵⁶ See *id.* (discussing the requirements of “actual control” under the Review Measures used for evaluating foreign investment).

in a French company before falling under government review.⁵⁷ With the National Security and Investment Bill, the U.K. revealed plans to create the Investment Security Unit to review foreign investment for national security risks, along with a requirement that mandatory declarations be made by certain investors involved with 17 industries ranging from quantum technologies to data infrastructure.⁵⁸ Across the world, it appears that countries are muscling-up their foreign investment review policies to keep pace with those of the U.S.

CFIUS is positioned to take an active role in the Biden administration. Under the powers gathered under the Trump administration and moving forward, CFIUS will set “its sights on venture capital investments, even small-dollar deals, where the money can be traced back to China”⁵⁹ This has led some firms and investors to try and head off a negative CFIUS review stalling possible funds by seeking approval before moving forward with the deal.⁶⁰ Such a move would bypass the mandatory disclosure requirement and shows a more collaborative process than the Final Rule might suggest, thus indicating that the fear of a CFIUS crackdown might better serve the policy behind the Final Rule than the mandatory disclosures. However, the Biden Administration and those with knowledge of CFIUS’ work have made it clear that the more aggressive stance of the Trump Administration and new powers granted by Congress are here to stay.⁶¹

⁵⁷ John Adebisi et al., *France Completes Major Foreign Investment Reform*, SKADDEN (Mar. 30, 2020), <https://www.skadden.com/insights/publications/2020/03/france-completes-major-foreign-investment-reform> [<https://perma.cc/5YTA-42US>].

⁵⁸ Ashmi Bhagani & James Campbell, *The UK Proposes New CFIUS-Style National Security and Investment Bill*, JD SUPRA (Nov. 17, 2020), <https://www.jdsupra.com/legalnews/the-uk-proposes-new-cfius-style-48861/> [<https://perma.cc/4CLG-5BHB>] (discussing the purview of the NSI bill and its aims).

⁵⁹ Heather Somerville, *Government ‘SWAT Team’ Is Reviewing Past Startup Deals Tied to Chinese Investors*, WALL ST. J. (Jan. 31, 2021), <https://www.wsj.com/articles/government-swat-team-is-reviewing-past-startup-deals-tied-to-chinese-investors-11612094401>.

⁶⁰ *Id.* (“Cfius’s willingness to unravel a venture investment has changed the calculus for some startups. More companies are seeking Cfius approval ahead of completing deals and agreeing to concessions to win government approval, which ensures they won’t be targeted in a future probe”).

⁶¹ See Samuel Horti, *Biden is reportedly beefing up the national security panel CFIUS to scrutinize Chinese investment in US startups*, BUSINESSINSIDER (Jan. 31, 2021), <https://www.businessinsider.com/biden-china-policy-cfius-investors-national-security-tech-startups-wsj-2021-1>.

E. Conclusion

The expansion of CFIUS's mandate has already seen an explosion of filings by foreign investors, with CFIUS reviewing 94 deals submitted through the mandatory declaration process in 2019 alone.⁶² By comparison, in 2016, prior to FIRMMA's enactment, CFIUS reviewed a total of 172 notices.⁶³ Many of these deals involve smaller dollar amounts, which grant investors less than full control of a company but still allow access to critical technologies.⁶⁴ However, large companies remain on the plate, with the White House recently commenting that TikTok and the "risks to U.S. data" it and other firms accepting foreign investment present are still being reviewed by CFIUS.⁶⁵ However, the mandatory declaration requirements proposed in the Final Rule are still only making their initial impact.

If one thing is clear, the shift to critical technologies and the requirement to disclose foreign investments has shown just how seriously Congress, the President, and the Treasury Department consider the threat to U.S. technological dominance, both militarily and in terms of consumer protection. Only time will tell if these measures will truly continue the decades old policy of encouraging foreign investment while ensuring the protection of the national security.

Owen Chandler Marks⁶⁶

⁶² Katy Stech Ferek, *U.S. Panel Expands Review of Business Deals with Foreign Money*, WALL ST. J. (July 30, 2020), www.wsj.com/articles/u-s-panel-expands-review-of-business-deals-with-foreign-money-11596146350.

⁶³ COMMITTEE ON FOREIGN INVESTMENT IN THE UNITED STATES, *supra* note 28, at 2 (discussing the number of cases reviewed, investigated, and acted on in 2016 and 2017). Interestingly, the amount of voluntary filing increased in the years leading up to FIRMMA. *See id.* at 2–3 (comparing the number of filings between 2016 and 2017).

⁶⁴ *See* Somerville, *supra* note 59 ("The total dollar amount has shrunk, however, an indication that deals are mostly smaller investments that don't grant the Chinese investor control").

⁶⁵ Press Briefing by Press Secretary Jen Psaki (Feb. 10, 2021), www.whitehouse.gov/briefing-room/press-briefings/2021/02/10/press-briefing-by-press-secretary-jen-psaki-february-10-2021/ [<https://perma.cc/G64D-FF44>] (statement by Press Secretary Jen Psaki).

⁶⁶ Student, Boston University School of Law (J.D. 2022).