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Securing the Nation or Entrenching the Board? The Evolution of CFIUS Review of Corporate Acquisitions

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SECURING THE NATION OR ENTRENCHING THE BOARD? THE EVOLUTION OF CFIUS REVIEW OF CORPORATE ACQUISITIONS

AMY DEEN WESTBROOK*

The Committee on Foreign Investment in the United States (CFIUS), which reviews transactions based on national security concerns, has recently become critical to the operation of the U.S. economy. In March of 2018, CFIUS review led to the prohibition of Broadcom Limited's acquisition of Qualcomm Corp., which would have been the largest technology merger in history. In August of 2018, CFIUS was dramatically expanded with the enactment of the Foreign Investment Risk Review Modernization Act of 2018 (FIRRMA). Major transactions must now reckon with the uncertainties of CFIUS review.

Created over thirty years ago as a reporting and monitoring committee, CFIUS has evolved into a formidable force with the power to review and investigate foreign investments in U.S. businesses, and to recommend that the President prohibit or order divestment of those investments. This Article traces the origins of CFIUS from its establishment in 1975 through the changes made by the 1988 Exon-Florio Amendment, the Foreign Investment and National Security Act of 2007, and now FIRRMA. The Article examines the key transactions CFIUS has considered, and CFIUS's expansive understandings of what constitute U.S. businesses and its authority over foreign investors.

In the Broadcom-Qualcomm transaction, CFIUS review was requested by target company (Qualcomm) board, and the review and resulting Presidential

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order operated as a powerful antitakeover defense. Turning from history to process, this Article looks closely at the ramifications of corporate boards seeking CFIUS review as a defensive measure to ward off hostile takeovers, a kind of “super poison pill.” To that end, the Article looks at mergers and acquisitions, and the longstanding conceptions of both the market for corporate control and the agency problem in corporate governance. The Article then reviews board powers and the traditional antitakeover measures, as well as the jurisprudence developed by state courts to review those defenses.

CFIUS review may be deployed by corporate boards as an antitakeover device. Given the strong global M&A market, and the significant increase in CFIUS’s jurisdiction as a result of the enactment of FIRRMA, CFIUS is expected to review more transactions, including more hostile takeovers. In assessing notifications in this context, CFIUS may benefit from the jurisprudence developed by state courts. Given the amount of global capital being invested across borders, and the intensity of global security concerns, foreign investment transactions are likely to continue, and to continue to need review, for the foreseeable future. A CFIUS review process that can assess target board motivations and measures, with an experienced perspective on blocking or allowing the transaction, will help ensure that CFIUS review achieves its national security goals without doing unnecessary societal harm.

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I. INTRODUCTION

On August 13, 2018, President Trump signed the Foreign Investment Risk Review Modernization Act of 2018 (FIRRMA) into law.¹ FIRRMA vastly expanded the reach of the Committee on Foreign Investment in the United States (CFIUS or the Committee), an interagency committee with the effective power to prohibit a wide range of acquisition transactions with foreign connections.² In early 2018, even before FIRRMA extended CFIUS’s reach, CFIUS made headlines when it recommended that the President block Broadcom Limited’s (Broadcom’s) attempted acquisition of Qualcomm, Inc. (Qualcomm).³ Had it been successful, the takeover would have constituted the

1. John S. McCain National Defense Authorization Act for Fiscal Year 2019, Pub. L. No. 115-232, §§ 1701–28, 132 Stat. 1636, 2174–2207 (2018) (including the Foreign Investment Risk Review Modernization Act of 2018 (FIRRMA) amending 50 U.S.C. § 4565).

2. See Chelsea Naso, *5 Ways CFIUS Will Change with New Law*, LAW360 (Aug. 7, 2018), https://www.law360.com/corporate/articles/1070864/5-ways-cfius-will-change-with-new-law?nl_pk=72e67b2b-a356-4164-9e1a-22d8437314c9&utm_source=newsletter&utm_medium=email&utm_campaign=corporate [https://perma.cc/5EMP-M223] (describing the new law as an “overhaul” and stating that “vast changes are on the horizon” for CFIUS).

3. See *infra* Section II.B.

largest technology deal in history.⁴ Instead, Qualcomm's request for CFIUS review led to the government's prohibition of the deal.

This Article has two interrelated purposes. First, the Article analyzes CFIUS's evolution and provides an overview of its increasing importance. Second, this Article suggests that the power to block acquisition transactions makes CFIUS a sort of "super poison pill," as exemplified by the recent prohibition of Broadcom's effort to acquire Qualcomm. Like other corporate defensive tactics familiar from mergers and acquisitions (M&A) practice, the power of CFIUS may be used for good ends, but may also be abused to entrench incumbent board of directors members who ought to be replaced. This Article suggests that state corporation law guidelines developed in connection with reviews of hostile takeovers can augment CFIUS's consideration of some of the policy interests in acquisition transactions.

The United States historically has maintained an open posture toward foreign investment.⁵ Government regulation of investment has tended to be sector-specific (e.g., shipping, aircraft, mining, energy, lands, communications, and banking⁶) and usually has reflected concerns for national security. In recent years, government review of foreign investment has often been carried out by CFIUS. CFIUS is an interagency committee headed by the Secretary of the Treasury that includes the Secretaries of State, Defense, Homeland Security, Commerce, and Energy, the Attorney General, the U.S. Trade Representative,

4. Alan Rappeport, Cecilia Kang & Chad Bray, *Trump Administration Stalls Largest Tech Merger in New Sign of Protectionism*, N.Y. TIMES (Mar. 5, 2018), <https://www.nytimes.com/2018/03/05/business/dealbook/broadcom-qualcomm-cfius.html> [<https://perma.cc/LRX8-G8LH>].

5. See H.R. REP. NO. 115-874, at 543 (2018) (Conf. Rep.) (expressing Congress' sense that maintaining the U.S. commitment to an "open investment policy" is important, and that the United States should continue its policy of "enthusiastically" welcoming and supporting foreign investment consistent with the protection of national security). In 2016, an estimated 8.5% of the U.S. labor force had jobs resulting from foreign investment, and new foreign direct investment in U.S. manufacturing totaled \$129.4 billion. *Id.* at 542 (setting out Congress' findings with respect to the role of foreign investment in the United States); see also Brandt J.C. Pasco, *United States National Security Reviews of Foreign Direct Investment*, 29 ICSID REV. 350, 352 (2014) (describing the "long-standing policy of the United States . . . to support open investment and national treatment for foreign direct investment").

6. MICHAEL V. SEITZINGER, CONG. RESEARCH SERV., RL31103, FOREIGN INVESTMENT IN THE UNITED STATES: MAJOR FEDERAL STATUTORY RESTRICTIONS 8–12 (2013) (reporting on the restrictions in each of these industries); see also U.S. GOV'T ACCOUNTABILITY OFF., GAO-09-608, SOVEREIGN WEALTH FUNDS: LAWS LIMITING FOREIGN INVESTMENT AFFECT CERTAIN U.S. ASSETS AND AGENCIES HAVE VARIOUS ENFORCEMENT PROCESSES 47–57 (2009) (listing restrictions on foreign investment in agriculture, transportation, communications, natural resources and energy, and banking in Appendix II).

and the Director of the Office of Science and Technology Policy.⁷ Using the CFIUS review process, the President may, for example, block a transaction by or with a foreign person which could result in foreign control of any U.S. business if there is credible evidence that the transaction threatens to impair national security.⁸

More struggles over acquisitions with foreign involvement may be expected. In recent years, the international M&A market has been strong,⁹ and the United States has led the world as the largest recipient of foreign direct investment funds.¹⁰ Over the same period, the linchpin of CFIUS review—what constitutes a threat to U.S. national security posed by foreign investment transactions—has dramatically expanded.¹¹ This expansion was statutorily inscribed in, and further extended by, FIRRMA. In sum, more transactions, with greater economic significance, are likely to be subjected to CFIUS review and potential alteration or prohibition.¹²

Of the foreign investments subject to CFIUS review, unsolicited bids are of particular interest. Although the majority of foreign acquisitions of United States companies are negotiated, a substantial number of foreign acquisitions

7. The Secretary of Labor and the Director of National Intelligence serve in an ex officio capacity, and there may be an additional five Executive Office members (the Director of the Office of Management and Budget, the Chairman of the Council of Economic Advisors, Assistant to the President for National Security Affairs, Assistant to the President for Economic Policy, and Assistant to the President for Homeland Security and Counterterrorism) who “observe and, as appropriate, participate in and report to the President.” Exec. Order No. 13,456, 3 C.F.R. § 171 (2009). The President may also appoint temporary members to CFIUS as he determines necessary.

8. 31 C.F.R. § 800.101 (2017). The President must also conclude that other laws are inadequate or inappropriate to protect the national security.

9. Cross-border M&A was high in 2015 and 2016, although it declined in 2017. U.N. Conference on Trade and Development, *2018 World Investment Report: Investment and New Industrial Policies*, xi, U.N. Doc. UNCTAD/WIR/2018 (June 6, 2018).

10. U.S. GOV’T ACCOUNTABILITY OFF., GAO-18-494, COMMITTEE ON FOREIGN INVESTMENT IN THE UNITED STATES: ACTION NEEDED TO ADDRESS EVOLVING NATIONAL SECURITY CONCERNS FACING THE DEPARTMENT OF DEFENSE 2 (2018).

11. *Id.*

12. Alexei Alexis, *Foreign Deals Reviewed by U.S. Panel to Spike with New Law*, BLOOMBERG (Aug. 14, 2018), https://www.bloomberglaw.com/exp/eyJpZCI6IjAwMDAwMTY1MjVlOGRiMWFhYjZmZjVmZDZmZjYwZjcwMDAwIiwY3R4dCI6IkJCTkEiLCJ1dWlkjoiM2FHZ3puam5WY01oVFluemNWVDZndz09N0ZITU1ZNFlwREZlSjRRE9qdVZZQT09IiwidGltZSI6IjE1MzQyMDEwNzY3MDYiLCJzaWc9IiwiaWF0Ij0iOiJuS2ZlN2hhWXBub20vK2RPa0grMTlwYWwYWFQSm89IiwidWl6IjEifQ==?emc=bnacare:4&service_acronym=CARE [https://perma.cc/RXF6-SLNF] (noting the CFIUS is expected to be “flooded” with additional notifications under FIRRMA).

are hostile takeovers.¹³ As might be expected, hostile takeover attempts tend to be met by any of an array of defensive tactics developed by U.S. corporation law over decades: poison pills, share repurchases, lockups, and so forth.

Such defensive tactics can be used beneficially by corporate boards to protect shareholders from coercive tender offers, or to secure a good price if the company is sold to the acquirer. But defensive tactics may also be used perniciously by corporate boards to entrench themselves and incumbent management in the face of a challenge to their positions. The question becomes how to separate socially positive defensive tactics from negative ones. Delaware and other state courts, in cases like *Unocal Corp. v. Mesa Petroleum Co.*,¹⁴ have created a jurisprudence that seeks to evaluate the propriety of takeover defenses in various circumstances and in light of conflicting considerations.

The antitakeover devices cases recognize that takeovers, or the threat of takeovers, can discipline management, lead to more efficient markets, and benefit shareholders.¹⁵ At the same time, courts have shown great solicitude for the board's authority to direct the affairs of a business corporation in the interests of shareholders. Courts have recognized boards' authority to oppose a takeover deemed inimical to the interests of the corporation and its shareholders, even while remaining mindful of directors' potential self-interested motivations. These competing concerns in the context of entities critical to our society¹⁶ have spawned considerable jurisprudence as courts seek the appropriate balance.

The evolution of CFIUS review, however, has resulted in a powerful defensive tactic that can be used against entities with foreign connections, in some cases slight,¹⁷ that attempt hostile takeovers of U.S. entities with national security implications. Using the CFIUS process, in March of 2018, President

13. For example, in 2015, 11% of total M&A value consisted of hostile and unsolicited bids. The percentage was 9% in 2016 and 15% in 2017 (including Broadcom's bid for Qualcomm). Andrew R. Brownstein et al., *Mergers and Acquisitions: 2018 With a Brief Look Back*, HARV. L. SCH. F. ON CORP. GOVERNANCE & FIN. REG. (Jan. 29, 2018), <https://corpgov.law.harvard.edu/2018/01/29/mergers-and-acquisitions-2018-with-a-brief-look-back/> [https://perma.cc/B6HV-CR7F].

14. 493 A.2d 946 (Del. 1985).

15. See, e.g., *Moran v. Household Int'l*, 500 A.2d 1346, 1350 (Del. 1985) (“[P]re-planning for the contingency of a hostile takeover might reduce the risk that, under the pressure of a takeover bid, management will fail to exercise reasonable judgment.”).

16. Arthur R. Pinto, *An Overview of United States Corporate Governance in Publicly Traded Corporations*, 58 AM. J. COMP. L. 257, 257 (2010).

17. See discussion *infra* Section II.B (noting CFIUS concerns about Chinese competitors benefitting from a change on Qualcomm's research and development prioritization).

Trump blocked the hostile takeover of Qualcomm, a U.S. company traded on the NASDAQ, by Broadcom, at the time a Singaporean company, also traded on the NASDAQ.¹⁸ Based on both the President's explicit and implied power over foreign policy¹⁹ and the substantial authority conferred on him and on CFIUS by Congress,²⁰ a prohibition arising from the CFIUS review process has so far proven impossible to overcome.²¹ The limited reviewability²² of those prohibitions creates a risk that CFIUS can be used as an antitakeover device, but one that is different in kind from the now-familiar array of defensive tactics reviewable under state corporation laws. As one commentator put it, CFIUS is the "ultimate regulatory bazooka."²³

As it has developed, CFIUS has added a substantial amount of uncertainty to the global M&A market. In addition, the growing workload of CFIUS²⁴ and variation among CFIUS reviews have resulted in delays and inconsistencies.²⁵ Although difficult to quantify, the uncertainties and inconsistencies resulting from potential CFIUS review continue to impose costs on potentially beneficial transactions.

Some of those costs are worth bearing. Some foreign investment transactions pose national security risks to the United States. In a globally integrated market with substantial security concerns, governments require the ability to review transactions. Although the President and CFIUS have clear authority to block or demand changes to transactions that implicate national security, however, the emergence of CFIUS review as an antitakeover measure has created new challenges. In this environment, corporate boards' lobbying

18. Presidential Order Regarding the Proposed Takeover of Qualcomm Incorporated by Broadcom Limited, 83 Fed. Reg. 11,631 (Mar. 12, 2018).

19. See U.S. CONST. art. II.

20. Congressional power to regulate commerce under Article I of the Constitution can be conferred on the President in legislation such as the International Emergency Economic Powers Act (1977) and several CFIUS-related statutes, discussed *infra* Parts III, IV, and V.

21. The single case challenging a CFIUS determination was settled. See discussion *infra* Section IV.C.

22. See discussion *infra* Section V.C of review of CFIUS decisions.

23. Kevin Granville, *CFIUS, Powerful and Unseen, Is a Gatekeeper on Major Deals*, N.Y. TIMES (Mar. 5, 2018), <https://www.nytimes.com/2018/03/05/business/what-is-cfius.html> [<https://perma.cc/N9FX-ZDDN>].

24. H.R. REP. NO. 115-874, at 542 (2018) (Conf. Rep.) (noting that CFIUS reviews increased by 55% between 2011 and 2016, while its staffing increased by only 11%).

25. U.S. GOV'T ACCOUNTABILITY OFF., GAO-18-494, COMMITTEE ON FOREIGN INVESTMENT IN THE UNITED STATES: ACTION NEEDED TO ADDRESS EVOLVING NATIONAL SECURITY CONCERNS FACING THE DEPARTMENT OF DEFENSE 15, 20 (2018). FIRRMA is expected to remedy those problems in the future by increasing the staffing and funding available to the Committee. See John S. McCain National Defense Authorization Act for Fiscal Year 2019, Pub. L. No. 115-232, §§ 1717, 1723, 132 Stat. 1636, 2192-93, 2204-06 (2018) (codified as amended at 50 U.S.C. § 4565(k)(4), 4565(p)).

for CFIUS review, in the hopes of being granted a “super poison pill,” may result in negative consequences, rent-seeking of a pure sort.

With FIRRMA’s expansion of CFIUS jurisdiction, more target boards are likely to notify unsolicited foreign offers to the Committee. Depending on the case, blocking such transactions may serve national security, or may simply use the power of the federal government to protect bad management. The jurisprudence developed by state courts to assess corporations’ defensive measures may provide a starting point for CFIUS to craft an approach both offering the necessary deference to national security concerns and still preventing its review from being manipulated by managers seeking to repel hostile acquisitions for self-interested reasons. This Article argues that, with care, CFIUS may safeguard national security while at the same time protecting shareholders and the integrity of some of our most dynamic markets.

Part II analyzes Broadcom’s failed attempt to acquire Qualcomm and CFIUS’s role in that transaction. Parts III, IV, and V examine the history of CFIUS and its steady increase in strength and jurisdiction, culminating in the passage of FIRRMA. These parts explain how the Committee evolved from a simple monitoring committee to a powerful force in the economy and the world. Part VI discusses the M&A environment and the importance of those transactions to corporate governance and the economy. Part VI also reviews the considerable state law jurisprudence developed to review antitakeover devices and their deployment by corporate boards. Part VII analyzes the potential impacts of the intersection of a powerful CFIUS with the global M&A market. The Article concludes by suggesting that as CFIUS receives more notifications by target boards, the Committee and thus U.S. society more generally may benefit from consideration of the corporate governance factors and methodologies already developed by state courts in the antitakeover context.

II. QUALCOMM USES CFIUS TO “POISON” BROADCOM

A. *Broadcom Seeks to Acquire Qualcomm*

CFIUS review gained widespread recognition as a kind of “super poison pill” with Qualcomm’s successful effort to fend off acquisition by Broadcom in 2018. The battle between the giant technology companies captured financial media attention for months.²⁶ The target, Qualcomm, is a semiconductor and telecommunications company that designs and markets wireless products and

26. Had it been successful, the takeover would have constituted the largest technology deal in history. Rappeport et al., *supra* note 4.

services. The company was established in 1985 in California. In 1991, it listed on the NASDAQ, and it was included in the S&P 500 index and the Fortune 500 list in 1999.²⁷ The would-be acquirer was Broadcom Limited (Broadcom),²⁸ another NASDAQ-listed semiconductor technologies company,²⁹ which was domiciled in Singapore at the time. Broadcom Limited had been created in 2016³⁰ when Broadcom Corp., a California company established in 1991,³¹ was acquired by Avago Technologies, a Singaporean company which itself had been founded in 1961 as a division of Hewlett-Packard and later spun off.³² When Broadcom Limited began its takeover effort, it maintained two headquarters, one in California and one in Singapore.³³

On November 6, 2017, Broadcom made a \$70-per-share offer for Qualcomm, \$8.19 per share above Qualcomm's publicly traded price, valuing the company at \$103 billion.³⁴ The offer was unanimously rejected by the

27. QUALCOMM, <https://www.qualcomm.com/company/about/history> [<https://perma.cc/7H8Z-MBDN>] (last visited Aug. 2, 2018).

28. Broadcom Limited became Broadcom Inc. in April 2018. See discussion *infra* Section II.E.

29. The two companies are competitors in the telecommunications industry.

30. Press Release, Avago Technologies, Avago Technologies to Acquire Broadcom for \$37 Billion, BROADCOM (May 28, 2015), <http://investors.broadcom.com/phoenix.zhtml?c=203541&p=irol-newsArticle&ID=2053937> [<https://perma.cc/HHY9-R3WL>]. At the time, the 2016 takeover was a record in the technology industry.

31. Kim Christensen & Andrea Chang, *Broadcom's Co-founders Built a Behemoth as a Formidable Team*, L.A. TIMES (May 28, 2015, 7:41 PM), <http://www.latimes.com/business/la-fi-samueli-nicholas-20150529-story.html> [<https://perma.cc/C5HY-RVDX>].

32. See Paige Tanner, *Broadcom: A Product of Several Mergers and Acquisitions*, MKT. REALIST (Aug. 24, 2016, 3:23 PM), <https://marketrealist.com/2016/08/broadcom-product-several-mergers-acquisitions> [<https://perma.cc/EPE5-ZFM4>]; see also Avago Technologies, Registration Statement (Form S-1) at 12, 15 (Aug. 21, 2008), <https://www.nasdaq.com/markets/ipos/filing.ashx?filingid=6117254> (suggesting that Avago was incorporated under Singaporean law in 2005 to benefit from tax incentives available there).

33. Jill Disis, *Broadcom Moving Legal Headquarters Back to U.S.*, CNN MONEY (Nov. 2, 2017, 4:32 PM), <https://money.cnn.com/2017/11/02/news/companies/broadcom-singapore-us-move-trump/index.html> [<https://perma.cc/HA8A-EPQR>].

34. The proposal was for \$60 in cash and \$10 per share in Broadcom shares, a 28% premium over the closing price of Qualcomm's stock on November 2, 2017. Press Release, Broadcom, Broadcom Proposes to Acquire Qualcomm for \$70.00 per Share in Cash and Stock in Transaction Valued at \$130 Billion (Nov. 6, 2017), <http://investors.broadcom.com/phoenix.zhtml?c=203541&p=irol-newsArticle&ID=2314458> [<https://perma.cc/5FLH-B5JV>]; *Broadcom Bid for Qualcomm: The Saga So Far*, REUTERS (Feb. 27, 2018, 11:30 AM), <https://www.reuters.com/article/us-qualcomm-m-a-broadcom-timeline/broadcom-bid-for-qualcomm-the-saga-so-far-idUSKCN1GB2FR> [<https://perma.cc/K3KE-J3RX>] (noting that the offer valued Qualcomm at \$103 billion).

Qualcomm board of directors on November 13, 2017, which stated that the proposal significantly undervalued Qualcomm.³⁵

Broadcom then launched a proxy contest, proposing board of director candidates with the goal of changing a majority of the Qualcomm board members to facilitate acceptance of its offer. On January 5, 2018, Broadcom announced that it had filed its definitive proxy materials, including a proxy card, with the U.S. Securities and Exchange Commission (SEC).³⁶ Broadcom then commenced mailing proxy materials to Qualcomm stockholders in preparation for the annual stockholder meeting scheduled for March 6, 2018.³⁷

In addition, on November 2, 2017, Broadcom announced that it would redomicile the company in Delaware, in what some reports speculated was an effort to influence its status with respect to CFIUS reviews. Legal experts differed with respect to whether Broadcom, once a Delaware company, nonetheless would be subject to CFIUS review as a “foreign person.”³⁸ Broadcom’s redomiciliation process continued throughout its efforts to acquire Qualcomm.

On February 5, 2018, Broadcom made its “best and final offer” for Qualcomm,³⁹ approximately \$121 billion (\$82-per-share),⁴⁰ conditioned on the consummation of Qualcomm’s then-pending \$38 billion offer for the Dutch

35. Press Release, Qualcomm, Qualcomm Board of Directors Unanimously Rejects Broadcom’s Unsolicited Proposal (Nov. 13, 2017), <https://www.qualcomm.com/news/releases/2017/11/13/qualcomm-board-directors-unanimously-rejects-broadcoms-unsolicited-proposal> [<https://perma.cc/HW8J-Y5ZC>].

36. Broadcom Inc., Schedule 14A Information (Form DFAN14A) (Jan. 5, 2018).

37. Broadcom Ltd., *Broadcom Files Definitive Proxy Materials and Sends Letter to Qualcomm Stockholders*, PR NEWSWIRE (Jan. 5, 2018, 4:21 AM), <https://www.prnewswire.com/news-releases/broadcom-files-definitive-proxy-materials-and-sends-letter-to-qualcomm-stockholders-300578442.html> [<https://perma.cc/5HVR-ZLZ2>]. Broadcom also sought to eliminate changes to Qualcomm’s bylaws relating to the election of directors that had been made by the board the prior year without shareholder approval. Schedule 14A Information (Form DFAN14A), *supra* note 36; *see also* Jacob Rund, *Broadcom Prepares for Hostile Takeover of Qualcomm*, CQ ROLL CALL (Dec. 11, 2017); Qualcomm Inc., Schedule 14A Information (Form DEF 14A) at 36, 40 (Dec. 27, 2017) (specifying that the changes had been made since July 2016).

38. *See* Greg Roumeliotis, *U.S. Has Ordered Broadcom to Give Notice of Steps to Redomicile*, REUTERS (Mar. 9, 2018, 4:33 PM), <https://uk.reuters.com/article/uk-qualcomm-m-a-broadcom-exclusive/us-has-ordered-broadcom-to-give-notice-of-steps-to-redomicile-idUKKCN1GL2XA> [<https://perma.cc/UA9G-QUJ7>] (“Lawyers that specialise in advising companies on CFIUS matters have been debating . . . whether Broadcom’s bid would be subject to a CFIUS review once it redomiciles.”).

39. *Broadcom Bid for Qualcomm: The Saga So Far*, *supra* note 34.

40. Michael J. de la Merced & Don Clark, *Broadcom Raises Its Qualcomm Offer to \$121 Billion*, N.Y. TIMES (Feb. 5, 2018), <https://www.nytimes.com/2018/02/05/business/dealbook/broadcom-qualcomm-deal.html> [<https://perma.cc/QVH9-ZKFS>].

company NXP Semiconductors NV (NXP). Qualcomm rejected the Broadcom offer on February 8, 2018, citing its “serious deficiencies in value and certainty,”⁴¹ and instead increased its offer for NXP to \$44 billion, raising questions regarding the board’s motivations for the increased price.⁴² Nevertheless, Broadcom persisted, and on February 9, 2018, Broadcom filed its Proposed Agreement and Plan of Merger with the SEC.⁴³

B. CFIUS Intervenes

1. Qualcomm Requests CFIUS Review

In addition to its publicly announced defensive tactics, in January 2018 the Qualcomm board secretly availed itself of a different kind of antitakeover measure. Without informing Broadcom, on January 29, 2018, Qualcomm voluntarily filed a unilateral notice with CFIUS to trigger review of Broadcom’s “solicitation of proxies for purposes of electing a majority of the directors of Qualcomm.”⁴⁴ Qualcomm’s request to CFIUS was unusual: normally review is not requested until the parties agree on a deal, and normally it is the acquirer, not the seller, which requests the review.

Political actors also came into play. In February and March of 2018, several U.S. legislators, including Congressman Duncan Hunter (R-CA)⁴⁵ and John Cornyn (R-TX),⁴⁶ and Senator Dianne Feinstein (D-CA),⁴⁷ contacted the administration to express concerns about Broadcom’s attempted takeover and to request CFIUS investigation. On Sunday, March 4, 2018, the Department of

41. *Broadcom Bid for Qualcomm: The Saga So Far*, *supra* note 34.

42. Kate Cox, *US Security Panel Orders Delay on Potential Broadcom Takeover of Qualcomm*, CQ ROLL CALL (Mar. 5, 2018).

43. Broadcom Ltd., Broadcom Cayman L.P., Current Report (Form 8-K) (Feb. 9, 2018).

44. Letter from Aimen N. Mir, Deputy Assistant Sec’y Inv. Sec., Dep’t of Treasury, to Mark Plotkin, Covington & Burling LLP, and Theodore Kassinger, O’Melveny & Myers LLP (Mar. 5, 2018), https://www.sec.gov/Archives/edgar/data/804328/000110465918015036/a18-7296_7ex99d1.htm [<https://perma.cc/EZZ2-F6JH>].

45. *Trump Administration Follows Hunter Lead on Reviewing Qualcomm Deal*, CONGRESSMAN DUNCAN HUNTER (Mar. 19, 2018), <https://hunter.house.gov/press-release/trump-administration-follows-hunter-lead-reviewing-qualcomm-deal> [<https://perma.cc/SBJ4-DPU7>].

46. Diane Bartz, *Exclusive: Secretive U.S. Security Panel Discussing Broadcom’s Qualcomm Bid—Sources*, REUTERS (Feb. 26, 2018, 9:24 PM), <https://www.reuters.com/article/us-qualcomm-m-a-broadcom-exclusive/exclusive-secretive-u-s-security-panel-discussing-broadcoms-qualcomm-bid-sources-idUSKCN1GB09V> [<https://perma.cc/ZMQ2-UYAH>].

47. Alan K. Ota, *Feinstein Joins Push for Security Check of Bid for Qualcomm*, CQ ROLL CALL (Mar. 2, 2018).

the Treasury filed a notice broadening the scope of the CFIUS review to cover the proposed hostile takeover.⁴⁸

2. CFIUS Acts

Confronted with significant pressure regarding its review and Broadcom's pending reincorporation in the United States, CFIUS acted.⁴⁹ On Sunday, March 4, 2018, two days before Qualcomm's scheduled annual stockholder meeting, CFIUS issued an Interim Order announcing both its review of and an investigation into a transaction involving the takeover of Qualcomm by Broadcom.⁵⁰ Citing the fact that Broadcom was "engaged in a concerted effort to complete a hostile takeover of Qualcomm, including acquiring proxies to elect six new directors (a majority) of the Board of Qualcomm in order to approve the [merger],"⁵¹ CFIUS determined that there was a "covered transaction" that posed national security risks to the United States⁵² and ordered a number of interim measures.

CFIUS ordered Qualcomm to delay its annual stockholder meeting, including the election of the Board of Directors, for 30 days.⁵³ Qualcomm was prohibited from accepting, or taking any action in furtherance of accepting, any type of merger, acquisition, or takeover agreement with Broadcom.⁵⁴ CFIUS also ordered Broadcom to provide CFIUS with five business days' notice before taking any action toward redomiciliation in the United States.⁵⁵

48. Order of Steven T. Mnuchin, Sec'y of the U.S. Dep't of Treasury, on Behalf of CFIUS, Interim Order Regarding the Proposed Acquisition of Qualcomm, Inc. by Broadcom Limited (Mar. 4, 2018) (describing the CFIUS's expansion of its review as an "agency notice" filed by the Department of the Treasury).

49. Some experts have speculated that the redomiciliation initiative accounted for the CFIUS's willingness to intervene in the takeover bid before the companies actually reached agreement. Michael E. Leiter et al., *Analysis of Executive Order Prohibiting Broadcom's Acquisition of Qualcomm*, SKADDEN (Mar. 19, 2018), <https://www.skadden.com/insights/publications/2018/03/analysis-of-executive-order-prohibiting> [<https://perma.cc/XZ5Z-BSQ3>] ("Broadcom's move to redomicile added significant complexity to the CFIUS-related issues and undoubtedly led to a hurried consideration of the substantive outcome of CFIUS' response.").

50. Interim Order Regarding the Proposed Acquisition of Qualcomm, Inc. by Broadcom Limited, *supra* note 48. According to Broadcom, it was not informed of the CFIUS review until that day. *See* discussion *infra* Section II.C.

51. Interim Order Regarding the Proposed Acquisition of Qualcomm, Inc. by Broadcom Limited, *supra* note 48.

52. *Id.*

53. *Id.* at Art. 1.1. CFIUS also ordered Qualcomm to hold the acceptance or count of any votes or proxies for directors in abeyance during that period.

54. *Id.* at Art. 1.2.

55. *Id.* at Art. 1.3.

On March 5, 2018, CFIUS wrote to Broadcom's attorneys and detailed the Committee's unclassified concerns⁵⁶ with the proposed takeover and its decision to launch a full investigation.⁵⁷ CFIUS explained that its concerns related to "the risks associated with Broadcom's relationships with third party foreign entities and the national security effects of Broadcom's business intentions with respect to Qualcomm."⁵⁸ In particular, CFIUS noted three areas of particular concern: Qualcomm's technological leadership; security concerns resulting from the loss of such leadership; and security concerns resulting from the disruption of the U.S. government's supply chain.

For the Committee, the first area of concern was maintaining Qualcomm's leadership in technology and standard-setting. Citing Qualcomm's superior technology, CFIUS asserted that "Qualcomm's technological success and innovation is driven [sic] by its unmatched expertise and research and development ('R&D') expenditure."⁵⁹ CFIUS found that Qualcomm's expertise and R&D expenditure drive U.S. leadership in standard-setting bodies and "have positioned Qualcomm as the current leading company in 5G technology development and standard setting."⁶⁰

The Committee identified its second area of concern as the national security risks created by any weakening of Qualcomm's technological leadership. CFIUS claimed that "significant confidence in the integrity of [U.S. telecommunications] infrastructure as it relates to national security" arises from having Qualcomm, a "well-known and trusted company[,] hold the dominant role."⁶¹ Thus, the Committee concluded, a reduction in Qualcomm's long-term technological competitiveness and influence, "a weakening of Qualcomm's position," would leave an opening for Chinese companies "including Huawei"⁶²

56. Presumably the government had concerns that could not be shared with the parties because of their sensitive nature. See discussion of *Ralls*, *infra* Section IV.C (discussing *Ralls*' due process claim based on the fact that the government had not shared its unclassified concerns with the company before ordering that the company divest itself of its investment).

57. Letter from Aimen N. Mir, *supra* note 44.

58. *Id.*

59. *Id.*

60. *Id.*

61. *Id.*

62. *Id.* Huawei Technologies Co., Ltd. is a Chinese telecommunications and consumer electronics company that is politically and economically controversial in the United States. See, e.g., Christopher Crosby, *Huawei Enlists FTC to Fight U.S. National Security Ban*, LAW360 (Aug. 29, 2018), <https://www.law360.com/articles/1078010/huawei-enlists-ftc-to-fight-us-national-security-ban> [<https://perma.cc/MH5U-9G5S>] (reporting that the National Defense Authorization Act for Fiscal Year 2019 prohibited U.S. federal agencies from using Huawei technology); Jody Godoy, *Huawei Exec's Arrest Just the Beginning*, *Attys Say*, LAW 360 (Dec. 6, 2018),

to “compete robustly” in the 5G standard-setting process.⁶³ A resulting shift to Chinese dominance in 5G, CFIUS found, would have substantial negative national security consequences for the United States.

In order to demonstrate that the Broadcom acquisition would cause a reduction in Qualcomm R&D and competitiveness, and create a void to be filled by Chinese competitors, CFIUS cited Broadcom’s statements that it was looking to take a “‘private-equity’-style direction” if it acquired Qualcomm.⁶⁴ CFIUS interpreted this direction as entailing a reduction of long-term investment such as R&D and a focus on short-term profitability.⁶⁵ CFIUS also pointed to the fact that Broadcom had arranged \$106 billion in debt financing to support the Qualcomm acquisition, and claimed that “[t]his debt load could increase pressure for short-term profitability, potentially to the detriment of longer term investments.”⁶⁶ CFIUS claimed that recent Broadcom acquisitions had been followed by reductions in R&D investment, and that “former employees allege that it underinvests in long-term product development.”⁶⁷ Finally, the Committee found that Broadcom’s CEO had criticized Qualcomm’s licensing methodology,⁶⁸ and that “[c]hanges to Qualcomm’s business model would likely negatively impact the core R&D expenditures of national security concern.”⁶⁹

CFIUS identified its third area of particular concern as the national security risk related to the disruption of the trusted supply relationship between Qualcomm and the U.S. government, in particular the Department of Defense. The Committee wrote that “[l]imitation or cessation of supply of Qualcomm

<https://www.law360.com/articles/1108848/huawei-exec-s-arrest-just-the-beginning-attys-say> [<https://perma.cc/XH96-9XJ4>] (reporting on the arrest of Huawei CFO Meng Wanzhou in Canada on U.S. charges).

63. Letter from Aimen N. Mir, *supra* note 44.

64. *Id.*

65. *Id.*

66. *Id.*

67. *Id.*

68. Although the government criticized Broadcom’s suggestion that Qualcomm’s licensing methodology should be changed, it is important to note that smartphone consumers were simultaneously pursuing antitrust litigation over Qualcomm’s patent licensing practices. The Federal Trade Commission and dozens of proposed class actions were consolidated in the Northern District of California in April of 2017 and as of this writing that litigation is still ongoing. *See, e.g.*, *FTC v. Qualcomm Inc.*, No. 17-CV-00220-LHK, 2017 U.S. Dist. LEXIS 98632 (N.D. Cal. June 26, 2017); *see also* Matthew Perlman, *Calif. Law at Issue as Qualcomm Fights Giant Class Cert.*, LAW360 (Dec. 6, 2018), <https://www.law360.com/articles/1108557/calif-law-at-issue-as-qualcomm-fights-giant-class-cert-> [<https://perma.cc/PY9W-QXQ2>] (noting that the class as certified by the California federal court potentially includes nearly every cellphone owner in the United States).

69. Letter from Aimen N. Mir, *supra* note 44.

products or services to the U.S. government could have a detrimental effect on national security.”⁷⁰

C. Broadcom Responds

Broadcom released a statement the same day, objecting strongly to the surprise CFIUS action and the delay in the Qualcomm shareholder meeting:

Broadcom was informed on Sunday night that on January 29, 2018, Qualcomm secretly filed a voluntary request with CFIUS to initiate an investigation, resulting in a delay of Qualcomm’s [a]nnual [m]eeting 48 hours before it was to take place . . . It is critical that Qualcomm stockholders know that Qualcomm did not once mention submitting a voluntary notice to CFIUS in any of its interactions with Broadcom to date, including in the two meetings on February 14, 2018 and on February 23, 2018. This can only be seen as an intentional lack of disclosure—both to Broadcom and to its own stockholders. This brings Qualcomm’s “engagement theater” to a new low.⁷¹

Broadcom argued that the CFIUS review was being used by the Qualcomm board to further its own interests:

This was a blatant, desperate act by Qualcomm to entrench its incumbent board of directors and prevent its own stockholders from voting for Broadcom’s independent director nominees It should be clear to everyone that this is part of an unprecedented effort by Qualcomm to disenfranchise its own stockholders.⁷²

Broadcom emphasized that almost all of its directors and senior management were from the United States.⁷³ In fact, Broadcom pointed out, it was largely owned by the same U.S. institutional investors that own Qualcomm.⁷⁴ Broadcom also explained that it was in the process of redomiciling, and argued that once it was incorporated in Delaware, CFIUS jurisdiction would be eliminated: “Upon completion of the redomiciliation, Broadcom’s proposed acquisition of Qualcomm will not be a CFIUS covered transaction.”⁷⁵

70. *Id.*

71. Press Release, Broadcom, Broadcom Disappointed Will of Qualcomm Stockholders to be Deferred (Mar. 5, 2018), http://investors.broadcom.com/phoenix.zhtml?c=203541&p=irol-newsArticle_Print&ID=2336047 [https://perma.cc/F4V7-995K].

72. *Id.*

73. *Id.*

74. *Id.*

75. *Id.*

In a letter to Congress on March 9, 2018, Broadcom also pledged not to sell sensitive assets to foreign buyers, and to support 5G technology in the United States.⁷⁶ Broadcom asserted that “[a]ny notion that a combined Broadcom–Qualcomm would slash funding or cede leadership in 5G is completely unfounded We have a proven track record of investing in and growing core franchises in the companies we acquire.”⁷⁷

D. *The President Acts*

A week later, before CFIUS had formally completed its review,⁷⁸ President Trump acted. Citing “credible evidence” that Broadcom Limited (at the time still a Singaporean company)⁷⁹ “might take action that threatens to impair the national security of the United States”⁸⁰ through control of Qualcomm, the President prohibited the proposed takeover of Qualcomm as well as “any substantially equivalent merger, acquisition, or takeover, whether effected directly or indirectly.”⁸¹ The March 12, 2018 Executive Order went on to require that Broadcom “immediately and permanently abandon the proposed takeover.”⁸²

In addition to prohibiting the proposed acquisition, the Executive Order “disqualified” “[a]ll 15 individuals listed as potential candidates on the . . . Proxy Card” that Broadcom had filed with the SEC “from standing for election as directors of Qualcomm.”⁸³ It also prohibited Qualcomm from accepting the nomination of or votes for any of those candidates.⁸⁴ Finally, the Executive Order ordered Qualcomm to provide notice of its annual stockholder

76. Press Release, Broadcom, In Letter to Congress, Broadcom Pledges to Make the U.S. the Global Leader in 5G (Mar. 9, 2018), <https://www.broadcom.com/news/product-releases/broadcom-expands-ethernet-switch-software?pid=2337280> [<https://perma.cc/CW34-5S3Q>].

77. Chelsea Naso, *Broadcom Says It Won't Sell Sensitive Qualcomm Assets*, LAW360 (Mar. 9, 2018), <https://www.law360.com/articles/1020409/broadcom-says-it-won-t-sell-sensitive-qualcomm-assets> [<https://perma.cc/4ABT-WMWU>].

78. M.P. McQueen, *How Lawyers Used CFIUS Review to Defeat Broadcom's Takeover of Qualcomm*, AM. LAW. INT'L (Apr. 18, 2018, 3:40 PM), <https://www.law.com/international/2018/04/18/how-lawyers-used-cfius-review-to-defeat-broadcoms-takeover-of-qualcomm-396-2801/?sreturn=20180517145742> [<https://perma.cc/223B-28SN>].

79. The Presidential Order also included Broadcom Limited's affiliates Broadcom Corporation (a California corporation) and Broadcom Cayman L.P. (a Cayman Islands limited partnership).

80. Presidential Order Regarding the Proposed Takeover of Qualcomm Incorporated by Broadcom Limited, *supra* note 18.

81. *Id.*

82. *Id.* The order also required Broadcom to certify to CFIUS when it had done so, and to provide specific weekly reports to CFIUS until the process was completed.

83. *Id.*

84. *Id.*

meeting as soon as possible and to hold the meeting no later than 10 days after that notice.⁸⁵

E. *The Aftermath of the Block*

On March 14, 2018, Broadcom announced that it was withdrawing its offer for Qualcomm.⁸⁶ On March 16, 2018, Qualcomm removed Paul Jacobs, son of the company's founder and a former Chairman of the Board and CEO of the company, from its board after he broached a "long-shot bid" for the company.⁸⁷ The board replaced Jacobs with an independent director. On March 23, 2018, Qualcomm finally held its 2018 annual stockholder meeting, at which all 10 incumbent directors, running unopposed, were reelected.⁸⁸ Also on March 23, 2018, over 99% of the Broadcom shareholders voted to redomicile in Delaware,⁸⁹ and that process was completed on April 4, 2018.⁹⁰

Broadcom's expansion plans have continued since the prohibition of the Qualcomm acquisition. On July 11, 2018, now U.S.-domiciled Broadcom announced an \$18.9 billion agreement to acquire New York-based CA Technologies, Inc., an information technology software company.⁹¹ That

85. *Id.*

86. Press Release, Broadcom, Broadcom Withdraws Offer to Acquire Qualcomm (Mar. 14, 2018), <http://investors.broadcom.com/phoenix.zhtml?ID=2337987&c=203541&p=irol-newsArticle> [<https://perma.cc/5MKP-SEFG>].

87. Dana Cimilluca et al., *Qualcomm Ousts Paul Jacobs from Board as He Chases Long-Shot Bid for Chip Giant*, WALL ST. J. (Mar. 16, 2018), <https://www.wsj.com/articles/ex-qualcomm-chairman-ceo-paul-jacobs-may-step-down-from-board-1521213846> [<https://perma.cc/X9K4-BZEM>]. Recent reports indicate that Jacobs is still considering such a bid, which would present Qualcomm with another takeover battle. *See, e.g.*, Selina Wang, *Paul Jacobs Is Still Thinking About Taking Qualcomm Private*, BLOOMBERG (Nov. 28, 2018, 4:06 PM), <https://www.bloomberg.com/news/articles/2018-11-28/paul-jacobs-is-still-thinking-about-taking-qualcomm-private> [<https://perma.cc/SQ86-DN3D>].

88. Qualcomm Inc., Current Report (Form 8-K) (Mar. 23, 2018); *see also* Press Release, Qualcomm, Qualcomm Announces Preliminary Results of 2018 Annual Meeting of Stockholders (Mar. 23, 2018), <https://www.qualcomm.com/news/releases/2018/03/23/qualcomm-announces-preliminary-results-2018-annual-meeting-stockholders> [<https://perma.cc/M58V-BUD7>]. Qualcomm also announced that the stockholder proposal to undo certain amendments to Qualcomm's bylaws was not approved.

89. Broadcom Ltd., Broadcom Inc., Current Report (Form 8-K) (Mar. 26, 2018). Redomiciliation was still subject to approval by the High Court of the Republic of Singapore.

90. Broadcom Inc., Current Report (Form 8-K) (Apr. 4, 2018). Broadcom's existing co-headquarters in San Jose then became its sole headquarters. *Broadcom Completes Move to U.S. from Singapore*, REUTERS (Apr. 4, 2018, 4:55 PM), <https://www.reuters.com/article/us-broadcom-domicile/broadcom-completes-move-to-u-s-from-singapore-idUSKCN1HB34G> [<https://perma.cc/C5CA-E492>].

91. Press Release, Broadcom to Acquire CA Technologies for \$18.9 Billion in Cash, CA TECHNOLOGIES (July 11, 2018), <https://www.ca.com/us/company/newsroom/press->

acquisition was completed, apparently without CFIUS involvement, on November 5, 2018.⁹²

Qualcomm failed to win approval from Chinese antitrust regulators and was forced to abandon its efforts to acquire NXP in July 2018 and pay a \$2 billion termination fee.⁹³ Qualcomm also faces a number of shareholder suits arising from its actions in connection with the Broadcom takeover effort. Those suits allege, for example, disclosure failures by the company⁹⁴ and improper board behavior,⁹⁵ including its “clandestine action to petition” for CFIUS review.⁹⁶

III. CFIUS ORIGINS

A. A Substantial Evolution

CFIUS’s prohibition of one of the largest takeover attempts in U.S. history demonstrated CFIUS’s power, which was further increased by FIRRMA.⁹⁷ Although the President’s prohibition of Broadcom’s attempted takeover of

releases/2018/broadcom-to-acquire-ca-technologies-for-18-9-billion-in-cash.html [https://perma.cc/M3RE-YA3E]. The transaction represented a new foray into infrastructure software for Broadcom. Eric Platt et al., *Broadcom to Buy CA Technologies for Nearly \$19bn*, FIN. TIMES (July 12, 2018), <https://www.ft.com/content/c34a8a3e-854b-11e8-96dd-fa565ec55929> [https://perma.cc/97N5-AHWE].

92. Press Release, Broadcom, Broadcom Inc. Completes Acquisition of CA Technologies, PR NEWS WIRE (Nov. 5, 2018), <https://www.prnewswire.com/news-releases/broadcom-inc-completes-acquisition-of-ca-technologies-300743810.html> [https://perma.cc/9AMS-P7XZ].

93. Michael Martina & Stephen Nellis, *Qualcomm Ends \$44 Billion NXP Bid After Failing to Win China Approval*, REUTERS (July 25, 2018, 4:59 AM), <https://www.reuters.com/article/us-nxp-semicondtrs-m-a-qualcomm/qualcomm-ends-44-billion-nxp-bid-after-failing-to-win-china-approval-idUSKBN1KF193> [https://perma.cc/6FZY-LTP4].

94. See *Jadhav v. Qualcomm Inc.*, et al., No. 18-cv-01457-AJB-BLM (S.D. Cal. 2018); *Camp v. Qualcomm Inc.*, et al., No. 18-cv-01208-AJB-BLM (S.D. Cal. 2018).

95. *Evans v. Qualcomm, Inc.* alleged:

As the latest in a series of entrenchment measures, the incumbent directors conspired with protectionist politicians to have the Committee on Foreign Investment in the U.S. (“CFIUS”) order the last-minute postponement of the long-scheduled March 6, 2018 annual meeting of Qualcomm stockholders (the “Annual Meeting”), thereby preventing an election of directors that the incumbents knew they were going to lose.

Complaint at ¶ 1, *Evans v. Qualcomm, Inc.*, No. 2018-0164, 2018 WL 1224253 (Del. Ch. Mar. 8, 2018). On April 5, 2018, the court granted the plaintiff’s notice and proposed order of voluntary dismissal. *Evans v. Qualcomm, Inc.*, No. 2018-0164-TMR, 2018 WL 1672995 (Del. Ch. Apr. 5, 2018).

96. Complaint at ¶ 7, *Wilcox v. Henderson*, No. 2018-0576, 2018 WL 3730056 (Del. Ch. Aug. 1, 2018).

97. See Naso, *supra* note 2 (quoting Mario Mancuso, who leads Kirkland and Ellis LLP’s international trade and national security practice as commenting that FIRRMA expanded CFIUS’s “jurisdictional box”).

Qualcomm was only the fifth transaction to be blocked or unraveled using the CFIUS process, the small number of transactions that have reached the point of Presidential action is deceptive. Many other transactions have been deterred by CFIUS, which normally informs the parties when it plans to make a negative recommendation to the President.⁹⁸ For example, the effort by Ant Financial, a subsidiary of Chinese internet powerhouse Alibaba Group Holding Ltd., to acquire U.S. money transfer company MoneyGram International, Inc., collapsed in early 2018 when CFIUS made it clear that it would not approve the transaction.⁹⁹ In other transactions, CFIUS has negotiated compromise arrangements with the parties and addressed national security concerns through security agreements or the divestment of part of the target company. For example, CFIUS required Japan's SoftBank to give up day-to-day control of the private equity business of Fortress Investment Group before approving the acquisition in 2017.¹⁰⁰

Prohibiting Broadcom's attempt to acquire Qualcomm represented the most aggressive action by CFIUS and the President to date. The block occurred despite the fact that CFIUS had previously approved Broadcom's acquisition of California-based Brocade Communications Systems Inc.,¹⁰¹ and despite Broadcom's substantial "charm offensive" at the White House.¹⁰² The

98. Stephen Heifetz & Evan Abrams, *CFIUS History Redux: President Obama Blocks Chinese Purchase of Aixtron, Inc.*, STEPTOE INT'L COMPLIANCE BLOG (Dec. 5, 2016), <https://www.steptoointernationalcomplianceblog.com/2016/12/cfius-history-redux-president-obama-blocks-chinese-purchase-of-aixtron-inc/> [<https://perma.cc/EQN9-RGP2>].

99. Greg Roumeliotis, *U.S. Blocks MoneyGram Sale to China's Ant Financial on National Security Concerns*, REUTERS (Jan. 2, 2018, 3:36 PM), <https://www.reuters.com/article/us-moneygram-intl-m-a-ant-financial/u-s-blocks-moneygram-sale-to-chinas-ant-financial-on-national-security-concerns-idUSKBN1ER1R7> [<https://perma.cc/GR5G-AJ8X>]. The prospect of a negative CFIUS recommendation also scuttled the Dutch company Philipps' plan to sell 80% of its California-based Lumileds lighting division to a consortium of Asian investors. Toby Sterling, *U.S. Blocks Philips' \$3.3 Billion Sale of Lumileds to Asian Buyers*, REUTERS (Jan. 22, 2016, 1:02 PM), <https://www.reuters.com/article/us-philips-lumileds-sale/u-s-blocks-philips-3-3-billion-sale-of-lumileds-to-asian-buyers-idUSKCN0V02D4> [<https://perma.cc/S4LM-23DZ>].

100. Arash Massoudi, *SoftBank Waived Day-to-Day Control of Fortress to Win Deal*, FIN. TIMES (Apr. 4, 2018), <https://www.ft.com/content/f7b3b356-3774-11e8-8b98-2f31af407cc8> [<https://perma.cc/73JT-T785>].

101. On November 17, 2017, Broadcom closed its \$5.5 billion acquisition of California-based Brocade Communications Systems Inc. after receiving CFIUS approval. *Broadcom Closes \$5.5 Billion Brocade Deal*, REUTERS (Nov. 17, 2017, 8:21 AM), <https://www.reuters.com/article/us-brocade-comms-m-a-broadcom/broadcom-closes-5-5-billion-brocade-deal-idUSKBN1DH1T9> [<https://perma.cc/CWQ9-6Z92>].

102. On November 2, 2017, President Trump and Broadcom CEO Hock Tan held a joint press conference at the White House during which President Trump announced Broadcom's decision to relocate to the United States. Associated Press, *Broadcom Will Move Back to the U.S.—and Bring Tax*

Broadcom block reflected important developments in CFIUS's approach and the way its processes may be used.¹⁰³

B. CFIUS's Early Years

Today's CFIUS is very different from the Committee established by President Ford over 30 years ago.¹⁰⁴ At that time, members of Congress were concerned about increased U.S. investments by Organization of the Petroleum Exporting Countries¹⁰⁵ and CFIUS was established by the Executive branch as a way to avoid Congressional imposition of new restrictions¹⁰⁶ on foreign investment. Early CFIUS jurisdiction and activity was limited.¹⁰⁷ A 1980 U.S. House Report complained that the Committee seemed "unable to decide whether it should respond to the political or the economic aspects of foreign direct investment in the United States."¹⁰⁸ CFIUS activity increased somewhat in the 1980s and it investigated a number of foreign investments at the request of the Department of Defense.¹⁰⁹ These investigations were usually resolved by the withdrawal of the foreign acquirer, or the negotiation of changes to the proposed transaction that allayed the Committee's concerns.¹¹⁰

Money With It, Trump Announces, L.A. TIMES (Nov. 2, 2017, 1:50 PM), <http://www.latimes.com/business/technology/la-fi-tn-broadcom-trump-tax-20171102-story.html> [<https://perma.cc/B5E2-3RD4>] (including a picture of President Trump with his arm around Mr. Tan).

103. See Leiter et al., *supra* note 49 ("We believe the [Broadcom] Order is reflective of a significant change in CFIUS' perspective on the national security risk of foreign investment in the United States and the use of CFIUS to advance the economic aspects of the administration's national security policy.").

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

105. JAMES K. JACKSON, CONG. RESEARCH SERV., RL 33388, THE COMMITTEE ON FOREIGN INVESTMENT IN THE UNITED STATES (CFIUS) 1 (2018).

106. *The Operations of Federal Agencies in Monitoring, Reporting on, and Analyzing Foreign Investments in the United States: Hearings Before a Subcomm. of the H. Comm. on Gov't Operations*, 96th Cong. 334 (1979) (citing the need to "maintain our traditional liberal policy" at a time when "the domestic political situation . . . dictated that some positive action be taken").

107. See Exec. Order No. 11,858, *supra* note 104 (setting out the monitoring, coordinating, recommendation, and reporting responsibilities of the Committee).

108. JAMES K. JACKSON, CONG. RESEARCH SERV., RL 33388, THE COMMITTEE ON FOREIGN INVESTMENT IN THE UNITED STATES (CFIUS) 4 (2018) (citing H.R. Rep. No. 96-1216, pt. 10, at 163–84 (1980)). During a Congressional hearing in 1979, one critic said:

[T]he Committee has been reduced over the last four years to a body that only responds to the political aspects or the political questions that foreign investment in the United States poses and not with what we really want to know about foreign investments in the United States, that is: Is it good for the economy?

Id.

109. *Id.*

110. *Id.* at 4–5.

Controversy arose in 1987 with the proposed sale of a U.S. technology company, Fairchild Semiconductor Co. (Fairchild), by Schlumberger Ltd. of France to Fujitsu Ltd of Japan. Congress opposed the sale because of strained trade relations with Japan; Americans were worried that the United States was declining as an international economic power.¹¹¹ In addition, the Department of Defense thought that the transaction would result in foreign control over a major supplier of computer chips for the military and thereby weaken U.S. defense industries.¹¹² Ultimately bowing to pressure from the Reagan Administration, Fujitsu Ltd. and Schlumberger Ltd. called the deal off,¹¹³ and Fairchild was acquired a few months later by National Semiconductor Corp.¹¹⁴ Nevertheless, CFIUS's role had attracted the attention of Congress and the public.¹¹⁵

C. The Exon–Florio Amendment

In 1988, Congress passed the Omnibus Trade and Competitiveness Act of 1988 which, among other things, included the Exon–Florio Amendment to the

111. “An election year coupled with a rising Federal deficit proved to be the perfect formula for starting an avalanche of trade bills in Congress with Japan as the target in many cases.” U.S. Int’l Trade Comm’n, USITC Pub. 1995, Operation of the Trade Agreements Program, at 4-26 (July 1987), https://www.usitc.gov/publications/332/pub1995_0.pdf [<https://perma.cc/7J36-4394>] (discussing President Reagan’s announcement that he was taking retaliatory actions against Japan for failing to fulfill its commitment under the September 1986 semiconductor agreement); U.S. Int’l Trade Comm’n, Operation of the Trade Agreements Program, USITC Pub. 2095, at 4-24 (July 1988), <https://www.usitc.gov/publications/other/2095pub.pdf> [<https://perma.cc/FWF4-CLG5>] (“There were . . . rising concerns about Japanese direct ownership of U.S. companies, buildings, land, and other assets.”).

112. Stuart Auerbach, *Cabinet to Weigh Sale of Chip Firm*, WASH. POST (Mar. 12, 1987), https://www.washingtonpost.com/archive/business/1987/03/12/cabinet-to-weigh-sale-of-chip-firm/63c934e8-0393-43eb-9ca2-a2ccd1d926fe/?utm_term=.6e8bdc9ccd01 [<https://perma.cc/3V6J-CCPH>] (“Pentagon planners, already worried by the increased dependence of the U.S. defense industry on foreign suppliers for sophisticated electronics, are worried that allowing Fairchild’s technology and U.S. distribution network to go to a Japanese company would strengthen that country’s position as a global power in the sale and development of high-technology products.”).

113. SCHLUMBERGER ANNUAL REPORT 34 (1987); David E. Sanger, *Japanese Purchase of Chip Maker Canceled After Objections in US*, N.Y. TIMES, Mar. 17, 1987, at A1 (noting that “[w]hile the [g]overnment had no means of preventing the acquisition, the Pentagon could have denied military contracts to the combined Fairchild–Fujitsu concern.”).

114. Christine Winter, *National Semiconductor to Buy Fairchild*, CHI. TRIB. (Sept. 1, 1987), <https://www.chicagotribune.com/news/ct-xpm-1987-09-01-8703060299-story.html> [<https://perma.cc/5FU9-RHE6>].

115. JAMES K. JACKSON, CONG. RESEARCH SERV., RL 33388, THE COMMITTEE ON FOREIGN INVESTMENT IN THE UNITED STATES (CFIUS) 5 (2018).

Defense Production Act (Exon–Florio).¹¹⁶ The debate over Exon–Florio highlighted Congress’s ambivalence about what should be covered by the law and whether the security protected by CFIUS review was to be understood narrowly, in strictly defense-related terms, or more broadly, to include more economic threats. The original version of Exon–Florio authorized reviews of transactions that threatened “national security and essential commerce,” but it was changed when the Reagan Administration threatened to veto the entire trade act because of the broad language.¹¹⁷ The Administration objected to changing “national security” from a traditional conception of military and defense concerns to an economic concept, and “essential commerce” was eventually deleted from the text.¹¹⁸

CFIUS had been established by President Ford through Executive Order, but Exon–Florio was Congressional action and, as such, delegated considerable additional authority over foreign investment transactions to the President. After Exon–Florio, the President no longer needed to declare a national emergency under the International Emergency Economic Powers Act or to get regulators to invoke federal antitrust, environmental, or securities laws in order to prohibit foreign investment transactions. At the same time, Exon–Florio was intended to keep the commercial nature of investment transactions free from political considerations.¹¹⁹

Exon–Florio granted power to the President and did not mention CFIUS directly, but President Reagan immediately delegated authority to administer its provisions to the Committee.¹²⁰ The Treasury Department issued implementing regulations in 1991 with procedures for voluntary notification to CFIUS by parties to a transaction or by agencies on the Committee, and for CFIUS reviews and investigations.¹²¹ Thus, CFIUS changed from a primarily

116. The Exon–Florio amendment amended the Defense Production Act, Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100-418, 102 Stat. 1107; 50 U.S.C. app. § 2170 (2012). The Exon–Florio amendment was included as Section 5021 of the Omnibus Trade and Competitiveness Act of 1988, Omnibus Trade and Competitiveness Act § 5021, 102 Stat. 1115.

117. EDWARD M. GRAHAM & DAVID M. MARCHICK, U.S. NATIONAL SECURITY AND FOREIGN DIRECT INVESTMENT 46 (2006).

118. JAMES K. JACKSON, CONG. RESEARCH SERV., RL 33388, THE COMMITTEE ON FOREIGN INVESTMENT IN THE UNITED STATES (CFIUS) 6 (2018).

119. *Id.* at 7.

120. Once the Omnibus Act (including the Exon–Florio amendment) was passed, President Reagan issued Executive Order 12,661 delegating his authority to administer the Exon–Florio provisions to CFIUS. Exec. Order. No. 12,661, 3 C.F.R. § 618 (1989). Thus, CFIUS is not an independent body; it operates under authority of the President and reflects the President’s policies.

121. Regulations Pertaining to Mergers, Acquisitions, and Takeovers by Foreign Persons, 31 C.F.R. pt. 800 (2008). These regulations were subsequently changed by FINSA. Regulations

advisory and reporting body into a strategic gatekeeper with power to review, investigate, and make recommendations regarding foreign investment into the United States.¹²²

In hindsight, the battle to restrict Exon–Florio’s grant of authority to “security” as opposed to “commercial” concerns seems idealistic and perhaps somewhat artificial. Before the September 11 attacks raised profound concerns about the international funding of terrorism, and before digital technology became both ubiquitous and understood as a security risk, one might consider national security to be somewhat separate from commerce. These days, as the blocked Broadcom–Qualcomm transaction illustrates, CFIUS operates in an environment in which the economy, and many private commercial actors in the economy, are an essential component of national security.

D. CFIUS Reviews Under Exon–Florio: Aircraft, Ports, and Telecommunications

Two years after the passage of Exon–Florio, CFIUS recommended that President Bush order the China National Aero-Technology Import and Export Corporation (CATIC) to divest its acquisition of MAMCO Manufacturing, Inc., a Washington state aircraft parts producer. CATIC, an agent of the Chinese Ministry of Aerospace Industry, reportedly had a reputation for circumventing trade law to obtain sensitive technologies.¹²³ The President agreed with the Committee, and his 1990 Executive Order required CATIC’s divestiture of MAMCO within three months.¹²⁴

Pertaining to Mergers, Acquisitions, and Takeovers by Foreign Persons, 73 Fed. Reg. 70,702 (Nov. 21, 2008) (codified as amended at 31 C.F.R. pt. 800). The voluntary nature of filing was debatable, even before FIRRMA made certain filings mandatory, because CFIUS member agencies can bring transactions before the Committee, potentially resulting in an order of divestment by the President, for up to three years after the close of an acquisition. 31 C.F.R. § 800.401(c). The possibility of after-the-fact review “introduces an element of business risk that many executives find unacceptable.” Pasco, *supra* note 5, at 356.

122. JAMES K. JACKSON, CONG. RESEARCH SERV., RL 33388, THE COMMITTEE ON FOREIGN INVESTMENT IN THE UNITED STATES (CFIUS) 6 (2018). CFIUS powers were also increased with the 1992 Byrd Amendment which required CFIUS investigation when an acquirer was controlled by or acting on behalf of a foreign government. The Byrd Amendment was Section 837(a) of National Defense Authorization Act for Fiscal Year 1993. Pub. L. No. 102-484, 106 Stat. 2315, 2463–65 (1992).

123. Jim Mendenhall, *Executive Authority to Divest Acquisitions Under the Exon–Florio Amendment—The MAMCO Divestiture*, 32 HARV. INT’L L.J. 286, 290 (1991).

124. George Bush, Message to the Congress on the China National Aero-Technology Import and Export Corporation Divestiture of MAMCO Manufacturing, Incorporated, PRESIDENCY PROJECT (Feb. 1, 1990), <https://www.presidency.ucsb.edu/documents/message-the-congress-the-china-national-aero-technology-import-and-export-corporation> [<https://perma.cc/V6TR-P7K3>].

CFIUS did not find itself in the headlines again, however, until November of 2005 when Dubai Ports World (DP World), a United Arab Emirates state-owned company and one of the largest commercial port operators in the world, proposed to acquire the Peninsular and Oriental Steam Navigation Company (P&O), a British firm that operated a number of U.S. and other global ports.¹²⁵ The proposed transaction would have transferred port operations, although not the ports themselves,¹²⁶ at six U.S. ports.¹²⁷ Even though neither party was a U.S. company, DP World and P&O believed that their transaction might raise U.S. national security concerns and so they voluntarily contacted CFIUS in advance and informed the Committee that they intended to file a notification.¹²⁸ The two companies briefed CFIUS about the transaction, and the Committee got an assessment from the U.S. intelligence community about the potential national security implications of the transfer of operations at the six U.S. ports.¹²⁹

On December 16, 2005, DP World and P&O filed their formal notice with CFIUS requesting a review, and a month later CFIUS approved the transaction.¹³⁰ Nevertheless, the transaction had attracted significant negative U.S. publicity. Members of Congress were reportedly frustrated with the CFIUS approval, and concerned that foreign investment was being pursued by foreign state-owned enterprises for questionable objectives.¹³¹ On December 11, 2006, despite the CFIUS approval, DP World sold the U.S. port operations to U.S.-owned AIG Global Investment Group.¹³²

125. Press Release, U.S. Dept. of Treasury, CFIUS and the Protection of the National Security in the Dubai Ports World Bid for Port Operations (Feb. 24, 2006), <https://www.treasury.gov/press-center/press-releases/Pages/js4071.aspx> [<https://perma.cc/G6SP-PSET>].

126. *Id.*

127. The ports were located in New York/New Jersey, Philadelphia, Baltimore, Miami, Tampa, and New Orleans.

128. Press Release, U.S. Dep't. of Treasury, *supra* note 125.

129. *Id.*

130. *Id.*

131. JAMES K. JACKSON, CONG. RESEARCH SERV., RL 33388, THE COMMITTEE ON FOREIGN INVESTMENT IN THE UNITED STATES (CFIUS) 2 (2018).

132. AIG lacked any experience in port operations. Press Release, DP World, DP World Enters into Agreement to Sell P&O's U.S. Marine Terminal Operations to AIG Global Investment Group (Dec. 11, 2006), http://web.dpworld.com/wp-content/uploads/2014/01/11-December-2006-POPNA_PRESS_RELEASE.pdf (announcing the sale agreement). AIG took control of the six U.S. ports as an investor, with P&O Ports North America still operating them. Robert Malone, *Dubai Sells U.S. Port Facilities to AIG*, FORBES (Dec. 11, 2016, 5:00 PM), https://www.forbes.com/2006/12/11/dubai-ports-aig-purchase-biz-logistics-cx_rm_1211dubai.html#188d65396f7b [<https://perma.cc/GK2Y-AV8Z>].

Also in 2006, CFIUS approved French telecommunications company Alcatel S.A.'s acquisition of U.S. telecommunications company Lucent Technologies Inc.¹³³ CFIUS allowed the parties to consummate the transaction but imposed conditions: Alcatel had to agree to a National Security Agreement and a Special Security Agreement with the U.S. government.¹³⁴ The National Security Agreement restricted Alcatel's access to sensitive work done by Lucent research (Bell Labs) and to the U.S. communications infrastructure.¹³⁵ It also provided that CFIUS could reopen its investigation if Alcatel materially failed to comply with the agreement.¹³⁶ The use of security agreements increases the uncertainty for foreign acquirers, and a number of groups complained.¹³⁷

IV. CFIUS GETS STRONGER: THE FOREIGN INVESTMENT AND NATIONAL SECURITY ACT (FINSA)

A. Congressional Recognition and Increased Jurisdiction

Concerned about the effectiveness of the CFIUS process, in 2007 Congress enacted the Foreign Investment and National Security Act (FINSA).¹³⁸ FINSA granted the President more explicit authority to block or suspend proposed or pending foreign mergers, acquisitions, or takeovers of U.S. businesses that threaten to impair the national security.¹³⁹ In addition, FINSA formally established CFIUS itself, as well as its process for reviewing transactions, in statute.¹⁴⁰

133. Warren G. Lavey, *Telecom Globalization and Deregulation Encounter U.S. National Security and Labor Concerns*, 6 J. TELECOMM. & HIGH TECH. L. 121, 142 (2007).

134. *Id.*

135. *Id.*

136. It is unclear if the government has ever reopened a CFIUS determination on this basis.

137. See Stephanie Kirchgaessner, *US Threat to Reopen Terms of Lucent and Alcatel Deal Mergers*, FIN. TIMES (Dec. 1, 2006); Jeremy Pelofsky, *Businesses Object to US Move on Foreign Investment*, REUTERS (Jan. 20, 2007, 9:38 AM); Lavey, *supra* note 133, at 126 (pointing out the costs of restricting globalization of the telecom industry, and identifying four telecommunications industry policies which conflict with the Alcatel/Lucent security agreement).

138. Foreign Investment and National Security Act of 2007, Pub. L. No. 110-49, 121 Stat. 246. FINSA added to and strengthened the Exon-Florio amendments to Section 721 of the Defense Production Act. On January 23, 2008, President Bush issued Executive Order 13,456 implementing FINSA.

139. *Id.* § 6 (replacing the language in Section 721(d) of the Defense Production Act of 1950 (50 U.S.C. app. § 2170(d)(1) (2012)). See discussion *infra* note 159 for a discussion of the definition of U.S. Business.

140. Previously, CFIUS's existence had been based on President Ford's 1975 Executive Order. Exec. Order No. 11,858, *supra* note 104.

FINSA and the Treasury regulations promulgated under the statute the next year¹⁴¹ required CFIUS to review a notified “covered transaction” and to determine whether (1) the transaction threatens to impair national security; (2) the foreign entity is controlled by a foreign government; or (3) the transaction would result in the control of any critical infrastructure by or on behalf of any foreign person that could impair national security.¹⁴²

FINSA defined a “covered transaction” as any proposed, pending or completed “merger, acquisition, or takeover” which “could result in foreign control of any person engaged in interstate commerce in the United States.”¹⁴³ In its 2008 Guidance, CFIUS insisted that it “focus[ed] solely on any genuine national security concerns raised by a covered transaction, not on other national interests.”¹⁴⁴

Despite Treasury Department regulations with safe harbors for investment transactions by persons owning less than 10% of a company’s voting securities,¹⁴⁵ the “control” that triggers a covered transaction was and is both uncertain and expansive.¹⁴⁶ Under FINSA, control was defined as the power, direct or indirect, whether or not exercised, to determine, direct or decide matters affecting an entity.¹⁴⁷ As practitioners have noted, this control can be

141. Regulations Pertaining to Mergers, Acquisitions, and Takeovers by Foreign Persons, 73 Fed. Reg. 70,702 (Nov. 21, 2008) (codified as amended at 31 C.F.R. pt. 800 (2017)). As the Treasury Department explained in its summary of the final rule, the 2008 regulations retained many of the basic features of the existing regulations, which were adopted after the enactment of Exon–Florio. *Id.*

142. Foreign Investment and National Security Act § 2, 121 Stat. at 248–52; 50 U.S.C. app. § 2170(b)(2)(B)(i) (2012).

143. Foreign Investment and National Security Act § 2, 121 Stat. at 246–52; 50 U.S.C. app. § 2170(a)(3); 31 C.F.R. § 800.207.

144. 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, 74,568 (Dec. 8, 2008).

145. 31 C.F.R. § 800.302 (also providing a safe harbor for transactions undertaken directly by certain financial companies in the ordinary course of business for their own accounts).

146. The term is not defined in FINSA itself. 50 U.S.C. app. § 2170(a)(2). However, it is explained, with examples, in the Treasury Department Regulations. 31 C.F.R. § 800.204. Nevertheless, questions remain. See *M&A Guide to CFIUS: How the Review Process Can Impact Your Transaction*, COOLEY (Oct. 10, 2017), <https://www.cooley.com/news/insight/2017/2017-10-06-ma-guide-to-cfius-article-1-of-4> [<https://perma.cc/5JJ3-TEUF>].

147. 31 C.F.R. § 800.204 (listing a number of decisions which are included, such as the transfer of the entity’s principal assets; reorganization of the entity; substantial alteration of the entity’s facilities; major expenditures by the entity; selection of new business ventures for the entity; entry into termination or nonfulfillment by the entity of significant contracts; the entity’s policies governing the treatment of its nonpublic information; appointment or dismissal of officers or senior managers; appointment or dismissal of employees with access to sensitive technology or classified information; or amendment of the entity’s organizational documents).

achieved by acquisition of a minority ownership interest, board representation, or formal or informal voting and other shareholder arrangements.¹⁴⁸ Arguably, FINSA's broad conception of control would be achieved early in almost any hostile takeover effort. In the blocked Broadcom attempt to take over Qualcomm, for example, CFIUS's interim order was issued even though Broadcom was not a controlling shareholder, and the mostly U.S. board nominees Broadcom put forward in its proxy card could only be elected with the support of Qualcomm's mostly U.S. stockholders.¹⁴⁹ Although presumably Broadcom expected those nominees to promote Qualcomm's acceptance of Broadcom's offer, the proxy fight itself seemed a stretch for the definition of a "covered transaction," and CFIUS jurisdiction is limited to covered transactions.

Another area of uncertainty is related to "national security."¹⁵⁰ FINSA did not define the term, but did clarify that it should be construed to include homeland security,¹⁵¹ and added the concepts of "critical infrastructure"¹⁵² and

148. See *M&A Guide to CFIUS: How the Review Process Can Impact Your Transaction*, *supra* note 146.

149. *In Letter to Congress, Broadcom Pledges to Make the U.S. the Global Leader in 5G*, *supra* note 76 (arguing that Broadcom had extensive U.S. connections).

150. The term has not been defined by FINSA, FIRRMA or any of the other CFIUS-related measures. During a review or investigation, each CFIUS member uses the definition consistent with that agency's specific legislative mandate. *Briefing by Representatives from the Departments and Agencies Represented on the Committee on Foreign Investment in the United States (CFIUS) to Discuss the National Security Implications of the Acquisition of Peninsular and Oriental Steamship Navigation Company by Dubai Ports World Ports, a Government-Owned and -Controlled Firm of the United Arab Emirates: Hearing Before the Comm. on Armed Services*, 109th Cong. 10 (2008) (statement of Robert Kimmitt, Deputy Secretary of Treasury) <https://www.gpo.gov/fdsys/pkg/CHRG-109shrg32744/html/CHRG-109shrg32744.htm> [<https://perma.cc/X3DF-4CDG>].

151. Foreign Investment and National Security Act of 2007, Pub. L. No. 110-49, § 2, 121 Stat. 246, 247 (2007); 50 U.S.C. app. § 2170(a)(5) (including its application to "critical infrastructure").

152. Under FINSA there were sixteen "critical infrastructure" sectors: chemical, commercial facilities, communications, critical manufacturing, dams, defense industrial base, emergency services, energy, financial services, food and agriculture, government facilities, healthcare and public health, information technology, nuclear reactors, materials and waste, transportation systems, water and wastewater systems. *Critical Infrastructure Sectors*, U.S. DEP'T HOMELAND SECURITY, <https://www.dhs.gov/critical-infrastructure-sectors> [<https://perma.cc/JD64-H94C>] (listing the sixteen sectors in place after the 2013 Presidential Policy Directive 21 (PPD-21): Critical Infrastructure Security and Resilience) (last visited July 17, 2018). FINSA also added the concepts of critical industries and key resources to broaden what constitutes critical infrastructure for CFIUS review purposes. Using definitions from the USA PATRIOT Act of 2001 and the Homeland Security Act of 2002, critical industries are "systems and assets, whether physical or virtual, so vital to the United States that the incapacity or destruction of such systems and assets would have a debilitating impact on security, national economic security, national public health or safety, or any combination of those matters." *Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept*

“critical technologies” to the extensive list of matters CFIUS and the President should consider.¹⁵³ The Treasury Department regulations under FINSA defined “critical infrastructure” as “a system or asset, whether physical or virtual, so vital to the United States that the incapacity or destruction of the particular system or asset of the entity over which control is acquired pursuant to the transaction would have a debilitating impact on national security.”¹⁵⁴ “Critical technologies” were defined as particular defense articles or services covered by U.S. munitions or arms control measures, dual-use items whose export requires licensing by the export regulations, nuclear materials or technology, and particular agents or toxins.¹⁵⁵

“National security” is a flexible concept that adapts to the changing international and national architecture, and in recent CFIUS practice it has been unsettled. In the case of Broadcom’s attempted acquisition of Qualcomm, for example, CFIUS identified the possibility that Broadcom’s investment strategy would reduce Qualcomm’s research and development spending as a national security risk.¹⁵⁶

The pool of parties deemed significant to a transaction also expanded under FINSA and its implementing regulations. A “foreign person” included any foreign national, foreign government, foreign entity,¹⁵⁷ or any “entity over which control is exercised or exercisable by a foreign national, foreign government, or foreign entity.”¹⁵⁸ Under this definition, a U.S. company could

and Obstruct Terrorism (USA PATRIOT Act) Act of 2001, Pub. L. No. 107-56, § 1016, 115 Stat. 272, 401; 42 U.S.C. § 5195c(e) (2012). Key resources are “publicly or privately controlled resources essential to the minimal operations of the economy and government.” Homeland Security Act of 2002, Pub. L. No. 107-296, § 2, 116 Stat. 2135, 2141; 6 U.S.C. § 101(12) (2012).

153. After FINSA, the list included, for example, domestic production and industries needed for national defense requirements; effects on the sales of military goods, equipment, or technology to a country that supports terrorism; effects on U.S. technological leadership; impacts on U.S. critical infrastructure; effects on U.S. critical technologies; whether the transaction is a foreign government-controlled transaction; and long-term U.S. energy and resource requirements. 50 U.S.C. app. § 2170(a)(6) (2012); 31 C.F.R. § 800.208 (2017).

154. 31 C.F.R. § 800.208.

155. *Id.* § 800.209.

156. Interim Order Regarding the Proposed Acquisition of Qualcomm, Inc. by Broadcom Limited, *supra* note 48.

157. A “foreign entity” primarily includes entities organized under the laws of another country if their principal place of business is abroad or their securities are primarily traded on foreign exchanges. Although the Treasury Regulations excluded entities that are majority-owned by U.S. nationals, that exclusion is not available if the entity is controlled by a foreign person. 31 C.F.R. § 800.212.

158. *Id.* § 800.216.

be a foreign person if a foreign entity or person has the power (even if unused) to control the company.

FINSA also adopted a broad approach to the U.S. business over which foreign control might be exercised.¹⁵⁹ Such a person could include, for example, a branch or sub-group, or just assets, whether or not organized as a separate legal entity.¹⁶⁰ Thus the ownership, or country of organization, or location of the target company's headquarters may be disregarded. If a transaction involves target assets that are engaged in U.S. interstate commerce, then CFIUS has authority to review the investment.¹⁶¹ There have been a number of transactions investigated by CFIUS as impacting U.S. commerce even though neither the buyer nor the seller were U.S. companies.¹⁶²

Under FINSA, CFIUS review moved beyond the narrow defense-related orientation of its first three decades. By increasing the factors to be considered, and adding "critical infrastructure" and a number of more economic considerations, FINSA dramatically expanded the scope of transactions to be considered by CFIUS. The consideration of technology-related issues was particularly significant in light of the significance of digital technology, and data acquisition and manipulation, in almost every sector of the economy.

B. *A Process for Review, Investigation, and Recommendation*

In many cases (e.g., DP World), parties contact CFIUS informally before making a notification in order to get feedback and have their transaction privately screened. Once they notify their transaction to the Committee, the formal process begins. FINSA specified procedures for CFIUS consideration of transactions, dividing it into three stages: review, investigation, and Presidential determination.¹⁶³

159. Referred to in the statute as a person engaged in interstate commerce in the United States. Under current CFIUS practice, the government limits its consideration of an entity engaged in interstate commerce in the United States to the extent of its activities here. Although FIRRMA did not specifically include that limitation, practitioners believe that it will continue to be respected by the Committee in practice. *Congress Passes CFIUS Reform Bill*, CLEARY GOTTlieb STEEN & HAMILTON LLP (Aug. 7, 2018), <https://www.clearygottlieb.com/-/media/files/alert-memos-2018/congress-passes-cfius-reform-bill.pdf> [https://perma.cc/3KVM-7LVP].

160. 31 C.F.R. § 800.226.

161. *M&A Guide to CFIUS: How the Review Process Can Impact Your Transaction*, *supra* note 146 (noting that, in the Aixtron transaction, the Executive Order included patent interests in the scope of Aixtron's activities in interstate commerce).

162. See discussion *supra* Section III.B of Fairchild Semiconductors; Discussion *infra* Section IV.C of Aixtron.

163. 31 C.F.R. §§ 800.501–509.

The National Security Review can be triggered by voluntary notification by the parties, or by the President, or by any member of CFIUS.¹⁶⁴ If, during the National Security Review, CFIUS determines that the transaction threatens to impair the national security of the United States; that the foreign person is controlled by a foreign government; or that the transaction would result in control of any critical infrastructure by a foreign person thus impairing national security, then CFIUS proceeds to an investigation.¹⁶⁵

During the National Security Investigation, CFIUS and the parties continue to work to resolve outstanding issues, and can negotiate mitigation measures and develop interim protections. If CFIUS is satisfied by the investigation and/or the measures undertaken by the parties, it may make no recommendation to the President. If, however, the Committee's concerns are not resolved during the investigation, then the Committee may send a negative recommendation to the President.¹⁶⁶

The final stage of the CFIUS process is the Presidential Determination. The President may suspend or prohibit proposed or pending foreign acquisitions of U.S. businesses that threaten to impair national security.¹⁶⁷ The President is not obligated to follow a CFIUS recommendation.¹⁶⁸

The parties can withdraw and resubmit their notification anytime during the review or investigation, restarting the clock, to obtain extra time to address CFIUS's concerns.¹⁶⁹ This withdrawal and resubmission strategy has been frequently used by parties and the Committee, although it is expected to abate somewhat under FIRRMA's expanded timetable.

164. Before the passage of FINSA, the CFIUS review system was based only on voluntary notices to CFIUS by parties to the transactions. FINSA authorized CFIUS to review a transaction that has not voluntarily been notified. *See id.* § 800.401.

165. *Id.* § 800.503.

166. *Id.* § 800.506(b).

167. *Id.* § 800.101.

168. The President's determination is virtually unreviewable, although the Committee's process and actions may be subject to a limited judicial review. *See discussion infra* Section V.C of *Ralls* and the reviewability of CFIUS decisions.

169. However, resubmission will trigger additional requirements, and CFIUS has power to develop interim protections to address specific concerns pending resubmission; specific time frames for resubmitting the notice; or a process for tracking any actions taken by the parties to the transaction. 31 C.F.R. § 800.507 (fleshing out the provisions of Section 5 of FINSA).

C. CFIUS Reviews Under FINSA: Wind Farms, Hogs, Semiconductors, and More Semiconductors

After the Global Financial Crisis, there were significant consolidations in a number of sectors and substantial cross-border M&A activity. CFIUS notifications, investigations, and jurisdiction generally increased.¹⁷⁰ Exon-Florio specifically rejected economic concerns as a basis for CFIUS review but, after FINSA, CFIUS seemed to consider a broader range of concerns, including economic security.¹⁷¹ The result was a substantial number of transactions undergoing CFIUS review. The Committee fielded 143 notices in 2015; 172 in 2016;¹⁷² and 240 in 2017.¹⁷³ CFIUS now occupies a significant position in the U.S. economy and foreign policy and has attracted increasing attention with several of its reviews.

For example, in March 2012, Ralls Corporation (Ralls), a U.S. company incorporated in Delaware but owned by two Chinese nationals, purchased several other U.S. companies in order to develop wind farms on the land owned by the target companies.¹⁷⁴ The sites of the proposed wind farms were located near a U.S. Navy facility in Oregon.¹⁷⁵ Ralls did not file a CFIUS notice before purchasing the U.S. companies but, prompted by the U.S. Navy, made the filing afterwards. CFIUS found that the transaction threatened to impair national security and, in September 2012, President Obama gave Ralls 90 days to divest all its interests in the U.S. companies it had purchased,¹⁷⁶ an order that was expected to cost Ralls at least \$20 million.¹⁷⁷

170. COMM. ON FOREIGN INV. U.S. ANN. REP. 3 (2015) [https://www.treasury.gov/resource-center/international/foreign-investment/Documents/Unclassified%20CFIUS%20Annual%20Report%20-%20\(report%20period%20CY%202015\).pdf](https://www.treasury.gov/resource-center/international/foreign-investment/Documents/Unclassified%20CFIUS%20Annual%20Report%20-%20(report%20period%20CY%202015).pdf) [<https://perma.cc/ULV7-R7G8>] (showing that the number of notifications more than doubled between 2009 and 2015).

171. JAMES K. JACKSON, CONG. RESEARCH SERV., RL 33388, THE COMMITTEE ON FOREIGN INVESTMENT IN THE UNITED STATES (CFIUS) 19 (2018).

172. U.S. DEPT. OF TREASURY, CFIUS: COVERED TRANSACTIONS, WITHDRAWALS, AND PRESIDENTIAL DECISIONS 2014–2016, https://www.treasury.gov/resource-center/international/foreign-investment/Documents/CFIUS_Stats_2014-2016.pdf [<https://perma.cc/BJ29-V7LU>] (last visited July 21, 2018).

173. Jonathan Masters & James McBride, *Foreign Investment and U.S. National Security*, COUNCIL ON FOREIGN REL. (Aug. 28, 2018), <https://www.cfr.org/backgrounder/foreign-investment-and-us-national-security> [<https://perma.cc/GCU3-GEYU>].

174. *Ralls Corp. v. Comm. on Foreign Inv. in the U.S.*, 758 F.3d 296, 304 (D.C. Cir. 2014).

175. *Id.*

176. *Ralls Corp. v. Comm. on Foreign Inv. in the U.S.*, 987 F. Supp. 2d 18, 25 (D.D.C. 2013), rev'd and remanded, 758 F.3d 296 (D.C. Cir. 2014).

177. Ji Li, *Investing Near the National Security Black Hole*, 14 BERKELEY BUS. L.J. 1, 8 (2017).

This second use of the CFIUS process to prohibit a transaction also triggered the only CFIUS lawsuit to date.¹⁷⁸ Ralls challenged the order on Constitutional due process grounds, arguing that CFIUS failed to provide Ralls an opportunity to rebut even unclassified, non-privileged information, and thereby violated Ralls' due process rights.¹⁷⁹ Ralls lost at the district court level, but in July 2014 the U.S. Court of Appeals for the D.C. Court ruled in its favor on the due process claim in *Ralls Corp. v. Committee on Foreign Investment in the United States*.¹⁸⁰ The decision was a procedural victory for Ralls, although it notably did not review the national security issue, so the U.S. government's position on the merits (that national security required divestment) was unreviewed.¹⁸¹

The case was subsequently settled, and some commentators have speculated that the U.S. government settled because continuing litigation might have jeopardized the Committee's asserted power to issue orders directing parties to take actions during the review process.¹⁸² Although CFIUS took the position that it could issue orders itself, without Presidential backing, FINSA had not specifically conferred that authority. Practitioners questioned CFIUS's authority to issue such orders during the review process, and argued that by using this "power," CFIUS could simply impose its own will during mitigation agreement negotiations with parties.¹⁸³

In 2013, CFIUS attracted attention again, this time for approving a transaction. The Committee's swift approval of the purchase of U.S. hog supplier Smithfield Foods, Inc., by China's largest pork producer, Shuanghui International,¹⁸⁴ again raised the question of what constitutes "security." It was,

178. Stephen Heifetz, *Ralls and U.S. Government Settle Only CFIUS Suit in History*, STEPTOE INT'L COMPLIANCE BLOG (Oct. 14, 2015), <https://www.steptoecomplianceblog.com/2015/10/ralls-and-u-s-government-settle-only-cfius-suit-in-history/> [<https://perma.cc/W397-NC8D>].

179. *Id.*

180. 758 F.3d at 296.

181. Heifetz, *supra* note 178 (noting that "[n]either the district court nor the appeals court indicated any interest in second-guessing the [government's] national security views.").

182. 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, 54 (2016) ("Settling . . . was a tactical decision that benefited both parties. CFIUS, realizing that its core powers to issue orders stood to be diluted, feared a district court's judgment of the issues on the merits.").

183. Heifetz, *supra* note 178 (arguing that if CFIUS has this power, these are no longer real negotiations).

184. See Press Release, Smithfield Foods, Shuanghui International and Smithfield Foods Receive CFIUS Clearance (Sept. 6, 2013), <https://www.smithfieldfoods.com/newsroom/press-releases-and-news/shuanghui-international-and-smithfield-foods-receive-cfius-clearance> [<https://perma.cc/Y48N-FQZ9>].

at the time, the largest acquisition in history by a Chinese company of a U.S. counterpart,¹⁸⁵ and a number of U.S. Senators from midwestern farming states asserted that the transaction would endanger U.S. food security.¹⁸⁶ Nevertheless, CFIUS maintained a narrower conception of security.

The third prohibition of a foreign investment transaction using the CFIUS review process came in 2016, when President Obama prevented the acquisition of Aixtron SE.¹⁸⁷ Although Aixtron SE was a German technology company, it had a U.S. subsidiary, Aixtron Inc., that would have been acquired as part of the deal.¹⁸⁸ CFIUS objected only to the acquisition of the U.S. subsidiary, but it was clear that the transaction could not proceed without that subsidiary, which accounted for about 20% of the German parent company's value.¹⁸⁹ The acquirer in the transaction was another German company, Grand Chip Investment GMBH, but CFIUS found that Grand Chip was ultimately controlled by GC Investment of Luxembourg and Fujian Grand Chip Investment Fund, a Chinese limited partnership.¹⁹⁰ The President highlighted the control exercised by Fujian Grand Chip and its partners in his Executive Order prohibiting the transaction.¹⁹¹

The Aixtron block reflected a broad view of CFIUS's jurisdiction. To begin with, CFIUS blocked a non-U.S. company's acquisition of another non-U.S. company. In addition, CFIUS focused on the (Chinese) identity of the upstream ownership of the potential acquirer.¹⁹² In October 2017, CFIUS approved the sale of part of Aixtron's semiconductor business to Eugene Technology Co., a South Korean company.¹⁹³ Finally, the President's Executive Order included

185. Michael J. de la Merced & David Barboza, *Needing Pork, China Is to Buy a U.S. Supplier*, N.Y. TIMES: DEALBOOK (May 29, 2013, 7:51 AM), <https://dealbook.nytimes.com/2013/05/29/smithfield-to-be-sold-to-shuanghui-group-of-china/> [<https://perma.cc/U3L5-M665>].

186. Ros Krasny & Rachelle Younglai, *U.S. Lawmakers Air Concerns About Smithfield-Shuanghui Deal*, REUTERS (June 5, 2013, 10:20 AM), <https://www.reuters.com/article/us-smithfield-shuanghui-congress/u-s-lawmakers-air-concerns-about-smithfield-shuanghui-deal-idUSBRE9540YN20130605> [<https://perma.cc/8FC8-CN2J>].

187. Order of December 2, 2016 Regarding the Proposed Acquisition of a Controlling Interest in Aixtron SE by Grand Chip Investment GmbH, 81 Fed. Reg. 88,607 (Dec. 7, 2016).

188. *Id.*

189. Heifetz & Abrams, *supra* note 98.

190. *Id.*

191. Order of December 2, 2016 Regarding the Proposed Acquisition of a Controlling Interest in Aixtron SE by Grand Chip Investment GmbH, *supra* note 187.

192. *Id.*

193. See *M&A Guide to CFIUS: Deciding Whether to Submit Voluntarily to CFIUS Review*, COOLEY (Feb. 27, 2018), <https://www.cooley.com/news/insight/2018/2018-02-27-ma-guide-to-cfius> [<https://perma.cc/46BQ-HMAN>].

interests in patents issued by or pending with the U.S. Patent and Trademark Office as part of Aixtron, Inc.'s U.S. business.¹⁹⁴ An expansion to intellectual property could sweep a large number of foreign company acquisitions of other foreign companies into the CFIUS net based on U.S. subsidiaries or sales offices, although proposed provisions allowing CFIUS to review certain transfers of U.S. intellectual property were not included in the final version of FIRRMA.¹⁹⁵

The fourth time a U.S. President prohibited an acquisition based on CFIUS national security concerns came in 2017, when President Trump blocked the acquisition of a U.S. company, Lattice Semiconductor Corp., by the Chinese-backed investment fund Canyon Bridge Capital Partners.¹⁹⁶ On September 1, 2017, the parties announced that CFIUS had informed them that it intended to make a negative recommendation regarding the transaction,¹⁹⁷ but the two parties made a direct appeal to the President anyway.¹⁹⁸ The President blocked the transaction on September 13, 2017.¹⁹⁹

D. CFIUS Stretches Under FINSA: Broadcom and Qualcomm

In comparison to prior practice, the years up to the prohibition of Broadcom's attempted takeover of Qualcomm and the passage of FIRRMA featured a greater number of CFIUS filings, longer review periods for most

194. Order of December 2, 2016 Regarding the Proposed Acquisition of a Controlling Interest in Aixtron SE by Grand Chip Investment GmbH, *supra* note 187.

195. See Naso, *supra* note 2 (explaining that the application to intellectual property was a point of disagreement in negotiations over FIRRMA, and intellectual property was ultimately removed from the legislation); see also David J. Levine et al., *Expected Legislation Amending CFIUS Will Affect a Broad Range of Foreign Investments in US Businesses*, MCDERMOTT WILL & EMERY (July 11, 2018), <https://www.mwe.com/insights/legislation-amend-cifus-foreign-invest-is-business/> [<https://perma.cc/DKK8-YG8M>] (previewing the FIRRMA legislation).

196. Kate O'Keeffe, *Trump Blocks China-Backed Fund from Buying Lattice Semiconductor*, WALL ST. J. (Sept. 13, 2017, 7:38 PM), <https://www.wsj.com/articles/trump-blocks-china-backed-fund-from-buying-u-s-chip-maker-lattice-1505335670> [<https://perma.cc/7S5P-X8U4>].

197. Lattice Semiconductor Corp., Current Report (Form 8-K) (Sept. 1, 2017) (disclosing that CFIUS had indicated that it would recommend that the President suspend or prohibit the proposed merger with Canyon Bridge).

198. O'Keeffe, *supra* note 196.

199. Order of September 13, 2017 Regarding the Proposed Acquisition of Lattice Semiconductor Corporation by China Venture Capital Fun Corporation Limited, 82 Fed. Reg. 43,665 (Sept. 18, 2017).

transactions,²⁰⁰ and increased risks.²⁰¹ Practitioners noted that CFIUS routinely looked at transactions that, although they did not qualify for the under-10% ownership safe harbor, still did not seem to involve “control” by a foreign person.²⁰² A number of transactions, especially those involving technology, were withdrawn or abandoned when it became clear that CFIUS approval would not be forthcoming. In 2017, for example, China-based NavInfo Co., Ltd. abandoned its acquisition of Netherlands-based International B.V., a digital mapping company; Hong Kong and China-based T.C.L. Industries Holdings (H.K.) Limited and Jade Ocean Global Limited gave up their acquisition of U.S.-based Inseego Corp.’s Novatel Wireless MiFi business; and a subsidiary of China-based HNA Group abandoned its acquisition of 9.9% of the stock of Global Eagle Entertainment, a U.S. media connectivity company.²⁰³ As mentioned above, in early 2018 Ant Financial gave up its \$1.2 billion effort to purchase MoneyGram when it became clear that CFIUS approval would not be forthcoming.²⁰⁴

The actions of CFIUS and the President in connection with Broadcom’s attempted Qualcomm acquisition, however, demonstrated an even more aggressive approach. The Broadcom block established that CFIUS reviews can be used for more than the government’s defense-related foreign policy or national security purposes. The CFIUS process was clearly available to target companies as an antitakeover device in the global M&A marketplace.²⁰⁵

Without CFIUS, the Broadcom–Qualcomm situation was simple: two large high-technology companies, both publicly traded in the U.S. markets, engaged in the familiar M&A ritual of the hostile takeover attempt. Hostile takeovers and proxy fights have long been a part of the U.S. economy, and we have developed extensive legal doctrines to manage such struggles for control in ways that are both fair to the participants and in society’s interest. The deployment of CFIUS review as an antitakeover device by Qualcomm

200. Adam O. Emmerich & Robin Panovka, *Wachtell Offers 2018 Checklist for Cross-Border M&A Involving U.S. Targets*, CLS BLUE SKY BLOG (Jan. 10, 2018), <http://clsbluesky.law.columbia.edu/2018/01/10/wachtell-offers-2018-checklist-for-cross-border-ma-of-u-s-targets/> [https://perma.cc/6U4V-MWDE].

201. Chuck Comey & Mike O’Bryan, *Assessing Acquisition Offers from Chinese Buyers*, DIRECTORS & BOARDS (July 25, 2016), <https://www.directorsandboards.com/articles/singleassessing-acquisition-offers-chinese-buyers> [https://perma.cc/ZK55-HF2H].

202. *Congress Passes CFIUS Reform Bill*, *supra* note 159.

203. *Foreign Investment and Acquisitions: CFIUS Considerations for Deals in 2018*, WINSTON & STRAWN LLP (Jan. 4, 2018), <https://www.winston.com/en/thought-leadership/foreign-investment-and-acquisitions-cfius-considerations-for.html> [https://perma.cc/5XGJ-VTBK].

204. Granville, *supra* note 23.

205. *Id.*

constituted a new weapon in merger battles, and with the passage of FIRRMA that weapon became very powerful.

V. CFIUS GETS EVEN STRONGER: FIRRMA

A. *Cementing the Aggressive Approach*

On August 13, 2018, President Trump signed the John S. McCain National Defense Authorization Act for Fiscal Year 2019 (NDAA) which included FIRRMA.²⁰⁶ FIRRMA codified many of the expansions of CFIUS jurisdiction that had developed since the passage of FINSA, and cemented the government's "relatively aggressive approach"²⁰⁷ to reviews of foreign investment.

Significantly, FIRRMA expanded the universe of "covered transactions" over which CFIUS has jurisdiction beyond mergers, acquisitions, or takeovers which result in foreign control of U.S. businesses.²⁰⁸ Partially in recognition of CFIUS's existing practice of reviewing investments that fall short of majority control, FIRRMA added a variety of non-controlling foreign investments to the covered transactions subject to CFIUS review.

FIRRMA expanded covered transactions to include "other investments" by a foreign person in any unaffiliated U.S. business²⁰⁹ that operates in the critical infrastructure or critical technologies spaces, or that maintains or collects sensitive personal data of U.S. citizens that may be exploited in a manner that threatens national security.²¹⁰ FIRRMA defined an "other investment" as a direct or indirect investment by a foreign person in a U.S. business that does

206. John S. McCain National Defense Authorization Act for Fiscal Year 2019, Pub. L. No. 115-232, §§ 1701–28, 132 Stat. 1636–2207 (2018). Much of FIRRMA was effective immediately, but the legislation delayed applicability of several key provisions relating to, for example, the expansion of covered transactions to non-controlling and real estate investments until the earlier of eighteen months or thirty days after the Treasury Department issues implementing regulations. *See id.* § 1727, 132 Stat. at 2206–07 (specifying which provisions take effect immediately, and which are delayed).

207. *Congress Passes CFIUS Reform Bill*, *supra* note 159.

208. The FINSA approach to "persons engaged in interstate commerce in the United States" was adopted in FIRRMA. 50 U.S.C. app. § 2170(a)(3) (2012); 31 C.F.R. § 800.207 (2017). Although FIRRMA does not explicitly restrict the definition of a person "engaged in interstate commerce in the United States" to the extent of the person's activities in the United States, that understanding of the limitation of CFIUS jurisdiction is considered to be still applicable. *Congress Passes CFIUS Reform Bill*, *supra* note 159.

209. U.S. business is defined in FIRRMA as a person engaged in interstate commerce in the United States. John S. McCain National Defense Authorization Act for Fiscal Year 2019 § 1703, 132 Stat. at 2183 (codified as amended at 50 U.S.C. § 4565(a)(13)).

210. *Id.* § 1703, 132 Stat. at 2178 (codified as amended at 50 U.S.C. § 4565(a)(4)(B)(iii)).

not constitute foreign control, but that affords the foreign person (1) access to material non-public technical information²¹¹ in possession of the U.S. business; (2) membership or observer rights on the board of directors, or the right to nominate a board member, of the U.S. business; or (3) any involvement (other than voting shares) in the substantive decision making of the U.S. business regarding sensitive personal data, critical technologies, or critical infrastructure.²¹²

In addition, FIRRMA broadened the definition of “covered transactions” by adding acquisitions of interests in real estate parcels that are either part of U.S. ports, or close to U.S. military or other government facilities that are sensitive for national security reasons.²¹³ FIRRMA also expanded “covered transactions” to include changes in rights that a foreign person has with respect to a U.S. business²¹⁴ and transactions structured in ways to circumvent the application of CFIUS’s review process.²¹⁵

Despite the expansion of CFIUS jurisdiction to an array of non-controlling investments, FIRRMA clarified that foreign investors may still have certain consultation rights with respect to their passive indirect investments through funds managed by a U.S. general partner without falling under the new “other investment” rules.²¹⁶ A foreign investor may participate on an advisory board or committee of such a fund as long as the board or committee does not control the investment decisions of the fund, and as long as the foreign investor cannot control investment decisions of the fund, determine the appointment or compensation of the general partner, or obtain access to material nonpublic technical information via the board or committee.²¹⁷

211. FIRRMA defined “material non-public technical information” as information about critical infrastructure or critical technologies that is not in the public domain. Financial information regarding the performance of a U.S. business was excluded from the definition. *Id.* § 1703, 132 Stat. at 2179 (codified as amended at 50 U.S.C. § 4565(a)(4)(D)(ii)).

212. *Id.* (codified as amended at 50 U.S.C. § 4565(a)(4)(D)(i)).

213. *Id.* § 1703, 132 Stat. at 2177–78 (codified as amended at 50 U.S.C. § 4565(a)(4)(B)(ii)).

214. *Id.* § 1703, 132 Stat. at 2178 (codified as amended at 50 U.S.C. § 4565(a)(4)(B)(iv)).

215. *Id.* (codified as amended at 50 U.S.C. § 4565(a)(4)(B)(v)). FIRRMA also included certain transfers pursuant to bankruptcy proceedings. *Id.* § 1703, 132 Stat. at 2181 (codified as amended at 50 U.S.C. § 4565 (a)(4)(F)).

216. *Id.* § 1703, 132 Stat. at 2180–81 (codified as amended at 50 U.S.C. § 4565(a)(4)(D)(iv)).

217. *Id.* (codified as amended at 50 U.S.C. § 4565(a)(4)(D)(iv)). The scope of the passive investment exemptions in FIRRMA are very narrow. Jeffrey Bialos & Mark Herlach, *How FIRRMA Will Change National Security Reviews: Part 1*, LAW360 (Aug. 16, 2018, 3:14 PM), <https://www.law360.com/articles/1073822/how-firrma-will-change-national-security-reviews-part-1> [<https://perma.cc/862T-N77L>]. Any role beyond simple financial rights is likely to trigger the “other investment” rules. *Id.*

FIRRMA also continued the trend of focusing on critical technology and infrastructure. Most importantly, it expanded the definition of “critical technologies” to include new categories of “emerging and foundational technologies” that are essential to U.S. national security.²¹⁸ Emerging and foundational technologies are controlled pursuant to the Export Control Reform Act of 2018, a companion law to FIRRMA that was passed at the same time.²¹⁹

In its explanation of the “Sense of Congress on Consideration of Covered Transactions,” FIRRMA stated that CFIUS may consider a number of other factors. That list includes, for example, whether the transaction involves a country of possible concern; the potential national security implications of cumulative control of or a pattern of recent transactions involving a type of critical infrastructure or technology by a foreign government or person; and the extent to which a covered transaction is likely to expose personally identifiable information or other sensitive data of U.S. citizens to access by foreign governments or persons in a manner that threatens national security.²²⁰

B. Expanding the Process and Enforcement

Procedurally, FIRRMA added a Declaration process, pursuant to which parties may file a short-form notice with “basic information”²²¹ before a full notification. Based on the Declaration, CFIUS may request that the parties file a full notice; inform the parties that it cannot make a determination based on the information it has received; initiate a unilateral review of the transaction; or clear the transaction.²²²

218. John S. McCain National Defense Authorization Act § 1703, 132 Stat. at 2181–82 (codified as amended at 50 U.S.C. § 4565(a)(6)) (referring to the technologies controlled pursuant to Section 1758 of the Export Control Reform Act of 2018, which was also included in the NDAA).

219. *Id.* § 1758, 132 Stat. at 2218–23 (codified as amended at 50 U.S.C.A § 4817 (West 2018)) (setting up an interagency process to identify emerging and foundational technologies that are essential for U.S. national security).

220. H.R. REP. NO. 115-874, at 540–608 (2018) (Conf. Rep.).

221. John S. McCain National Defense Authorization Act § 1706, 132 Stat. at 2184 (codified as amended at 50 U.S.C. § 4565(b)(1)(C)(v)(I)). Practitioners have pointed out, however, that the amount of information requested by the Committee in such Declarations will produce filings much longer than five pages. See *CFIUS Introduces Pilot Program for Mandatory Declarations of Critical Technology Investments*, CLEARY GOTTlieb STEEN & HAMILTON LLP (Oct. 16, 2018), <https://www.clearygottlieb.com/news-and-insights/publication-listing/cfius-introduces-pilot-program-for-mandatory-declarations-of-critical-technology-investments> [https://perma.cc/82Y8-UPS5].

222. John S. McCain National Defense Authorization Act § 1706, 132 Stat. at 2184 (codified as amended at 50 U.S.C. § 4565(b)(1)(C)(v)(III)).

FIRRMA made some Declaration filings mandatory, a change from the prior system which relied on either voluntary party notification or initiation by CFIUS itself. Filing a Declaration is mandatory when a foreign person in which a foreign government owns a substantial interest acquires a substantial interest in a U.S. business that is associated with critical infrastructure, critical technologies, or sensitive personal data of U.S. persons.²²³

FIRRMA also provided for future regulations mandating filing of Declarations when transactions involve critical technologies, regardless of whether a foreign government is involved.²²⁴ Less than three months later, CFIUS introduced a Pilot Program for such critical technologies-related Declarations.²²⁵ Interim Regulations issued on October 11, 2018 mandated Declarations for certain non-controlling investments by foreign persons in U.S. businesses in any of 27 industries involved in critical technologies.²²⁶ The 27 industries, included in an annex to the rule, range from “Aircraft Manufacturing” to “Turbine and Turbine Generator Set Units Manufacturing,” and also include industries relating to semiconductors, telephone apparatus manufacturing, navigation systems, and communication equipment.²²⁷

These Declarations, added to FIRRMA’s extension of the timetables for reviews and investigations may help alleviate the need for the withdrawal and refiling practice common in more complex cases.²²⁸

FIRRMA updated CFIUS’s enforcement powers, codifying many of the Committee’s existing practices and providing some additional tools. For example, FIRRMA authorized CFIUS to suspend a proposed or pending covered transaction while it is undergoing the National Security Review or National Security Investigation process.²²⁹ It also authorized CFIUS to refer a

223. *Id.* § 1706, 132 Stat. at 2185 (codified as amended at 50 U.S.C. § 4565(b)(1)(C)(v)(IV)(bb)).

224. *Id.* (codified as amended at 50 U.S.C. § 4565(b)(1)(C)(v)(IV)(cc)).

225. For a basic summary of the Pilot Program from a practitioner’s perspective, see *CFIUS Introduces Pilot Program for Mandatory Declarations of Critical Technology Investments*, *supra* note 221.

226. Determination and Temporary Provisions Pertaining to a Pilot Program to Review Certain Transactions Involving Foreign Persons and Critical Technologies, 83 Fed. Reg. 51,322, 51,322–23 (Oct. 11, 2018) (codified as amended at 31 C.F.R. pt. 801 *et seq.* (2017)). The pilot program took effect a month later, on November 10, 2018. *Id.* at 51,322.

227. *Id.* at 51,333 (codified at 31 C.F.R. pt. 801, Annex A).

228. National Security Reviews are extended to forty-five days (instead of thirty) and a fifteen-day extension possibility has been added to the forty-five-day National Security Investigations. John S. McCain National Defense Authorization Act § 1709, 132 Stat. at 2187–88 (codified as amended at 50 U.S.C. §§ 4565(b)(1)(F), (b)(2)(C)).

229. *Id.* § 1718, 132 Stat. at 2193 (codified as amended at 50 U.S.C. § 4565(l)(1)).

transaction to the President at any time during the process.²³⁰ If a party to a covered transaction voluntarily abandons the transaction, CFIUS may negotiate, enter into or impose, and enforce any agreement or condition with a party in order to effectuate the abandonment and mitigate the risk to national security that arises as a result of the transaction.²³¹ FIRRMA increased CFIUS's ability to negotiate, enter into or impose, and enforce mitigation agreements with parties to completed transactions.²³² In recognition of the growing docket of prior mitigation agreements, FIRRMA clarified CFIUS's power to impose measures when parties do not comply, and required periodic review of past agreements.²³³

C. Review of CFIUS Decisions

In FINSA, Congress specified that the actions and findings of the President under the review process "shall not be subject to judicial review."²³⁴ FIRRMA did not disturb that statutory prohibition, but added that CFIUS actions or findings may only be challenged in the U.S. Court of Appeals for the D.C. Circuit.²³⁵ The contrast with other statutes and administrative actions is sharp. If a foreign investment is prevented using, for example, the Export Administration Act²³⁶ or the Department of the Treasury's sanctions

230. *Id.* (codified as amended at 50 U.S.C. § 4565(1)(2)).

231. *Id.* (codified as amended at 50 U.S.C. § 4565(1)(3)(A)(ii)).

232. *Id.* § 1718, 132 Stat. at 2194 (codified as amended at 50 U.S.C. § 4565(1)(3)(A)(iii)).

233. *Id.* (codified as amended at 50 U.S.C. § 4565(1)(3)(B)).

234. Foreign Investment and National Security Act of 2007, Pub. L. No. 110-49, § 6, 121 Stat. 246, 256 (replacing the language in Section 721(d) of the Defense Production Act of 1950) (codified as amended at 50 U.S.C. app. § 2170(e)) (slightly amended to add a heading and new numbering by FIRRMA).

235. John S. McCain National Defense Authorization Act § 1715, 132 Stat. at 2191 (codified as amended at 50 U.S.C. § 4565(e)(2)).

236. The Export Administration Act authorizes the President to restrict exports of goods and technologies that have both civilian and military (so-called dual use) applications. 50 U.S.C. § 2405(a)(1) (2012). Under the Export Administration Regulations, the Department of Commerce has established an extensive licensing regime to prevent the transfer of sensitive technologies to certain foreign parties. 15 C.F.R. §§ 730-74 (2018).

programs,²³⁷ both of which entail national security issues, there are clear methods for substantive judicial review.²³⁸

The CFIUS process, however, differs substantially from these other mechanisms for controlling acquisition transactions, and from traditional takeover defenses. A party's ability to challenge or appeal the CFIUS decision is limited. Even post-*Ralls*, companies have little hope of challenging the substantive determination of CFIUS and the President. And shareholders may have even less success. As demonstrated by shareholder litigation in response to collapse of the Broadcom–Qualcomm deal,²³⁹ shareholders have the option to file securities lawsuits based on disclosure violations or derivative suits alleging board fiduciary duty violations, but their remedies against the target corporation may be slim and those suits have no impact on the fundamental outcome: prohibition of the acquisition. This lack of reviewability may exacerbate the challenges posed by managers' use of the CFIUS process to ward off unsolicited takeover offers.

As a result, the target company board may only need to persuade CFIUS of the possibility of national security concerns. Judging from the government's

237. The United States Department of the Treasury, through its Office of Foreign Assets Control (OFAC) in its Office of Terrorism and Financial Intelligence, promulgates and enforces measures that prohibit transactions with particular countries or individuals. See *OFAC FAQs: General Questions*, U.S. DEP'T TREASURY, https://www.treasury.gov/resource-center/faqs/Sanctions/Pages/faq_general.aspx#basic [https://perma.cc/QM5R-B6DK] (last visited July 21, 2018). These "sanctions" include licensing requirements and asset freezes and are primarily imposed through the President's authority under the International Emergency Economic Powers Act, 50 U.S.C. §§ 1701–06 (2012). OFAC sanctions have been occasionally supplemented by direct Congressional action. See, e.g., Cuban Liberty and Democratic Solidarity (Libertad) Act of 1996, Pub. L. No. 104-114, 110 Stat. 785 (codified as amended at 22 U.S.C. § 6021 (2012)); Comprehensive Iran Sanctions, Accountability, and Divestment Act of 2010, Pub. L. No. 111-195, 124 Stat. 1312 (2010) (codified as amended in scattered sections of the U.S. Code).

238. For example, the Export Control Regulations are enforced by the Department of Commerce's Bureau of Industry and Security, and their determinations are reviewable first administratively and then to federal court when the appeals process is exhausted. 15 C.F.R. § 756.1 (2018); 50 U.S.C. app. § 2412(c) (2012). OFAC licensing decisions and sanctions violation determinations are also reviewable by federal courts. See, e.g., *Epsilon Elecs., Inc. v. U.S. Dep't of the Treasury*, 857 F.3d 913, 916 (D.C. Cir. 2017) (appealing OFAC's decision to impose a penalty on Epsilon Electronics for violation of the Iran sanctions). Antitrust enforcement decisions by the Department of Justice or the Federal Trade Commission may be challenged by parties in federal courts. See, e.g., *Standard Oil Co. v. United States*, 221 U.S. 1, 81 (1911) (finding that Standard Oil Company had violated the Sherman Act). Decisions made by the Securities and Exchange Commission (SEC) relating to proxy fights may also be reviewed by federal courts. See, e.g., *Lovenheim v. Iroquois Brands, Ltd.*, 618 F. Supp. 554, 554–55 (D.D.C. 1985) (evaluating a company's decision to exclude a shareholder's proposal from the proxy materials).

239. See discussion *supra* Section II.E.

boosterish presentation of Qualcomm and its incumbent management in its March 5, 2018 letter to Broadcom's attorneys, and the government's willingness to attribute the most negative motivations to Broadcom, an acquirer with foreign connections may be at a considerable disadvantage. If they were to become common, such government prohibitions might reallocate considerable power to incumbent management in cases with international connections. The current volume of cross-border M&A renders that shift in power broadly significant. And with the limited judicial review of CFIUS/Presidential determinations, there is little third-party assurance that a decision to protect incumbent management is in the interests of either shareholders or the public.

VI. MERGERS, ACQUISITIONS, AND CFIUS

A. Context: A Strong Global Merger Market

Even without Broadcom's attempted takeover of Qualcomm, 2018 was a very strong year for mergers and acquisitions.²⁴⁰ Unsurprisingly, many large transactions were seen as "technology" deals.²⁴¹ For example, 2018 deals included the Sprint Corp.-T-Mobile merger agreement,²⁴² Walt Disney's agreement to purchase entertainment assets from 21st Century Fox;²⁴³ Cigna's

240. Eric Platt, *Global M&A Activity Hits New High*, FIN. TIMES (Sept. 28, 2018), <https://www.ft.com/content/b7e67ba4-c28f-11e8-95b1-d36dfef1b89a> [https://perma.cc/AM87-SWZE] (noting that global activity in the first nine months of 2018 set a new record).

241. Dana Mattioli & Dana Cimilluca, *Hot M&A Market Is on Pace for a Record*, WALL ST. J., July 2, 2018, at R1; DELOITTE, *THE STATE OF THE DEAL: M&A TRENDS 2018*, at 2 (2017), <https://www2.deloitte.com/content/dam/Deloitte/us/Documents/mergers-acquisitions/us-mergers-acquisitions-2018-trends-report.pdf> [https://perma.cc/MN8Y-G4B7] (identifying technology acquisition as "the No. 1 driver of M&A pursuits" in 2018).

242. Press Release, T-Mobile, T-Mobile and Sprint to Combine, Accelerating 5G Innovation & Increasing Competition (Apr. 29, 2018), <https://www.t-mobile.com/news/5gforall> [https://perma.cc/EHJ2-82F5]. There is currently an effort in the U.S. House of Representatives to trigger a CFIUS review of the transaction, based on the ties between Sprint's owner, SoftBank Group Corp., and the Chinese company Huawei Technologies Co. Ltd. Elise Reuter, *Sprint/T-Mobile Merger May Face Obstacle with SoftBank's Chinese Ties*, KAN. CITY BUS. J. (July 7, 2018, 2:17 PM), <https://www.bizjournals.com/kansascity/news/2018/07/07/sprint-t-mobile-committee-on-foreign-investment.html> [https://perma.cc/5REC-QTME]. CFIUS approved SoftBank's purchase of Sprint in 2013. *Id.* T-Mobile is primarily owned by German companies. *Id.*

243. Press Release, The Walt Disney Company, The Walt Disney Company Signs Amended Acquisition Agreement to Acquire Twenty-First Century Fox, Inc., for \$71.3 Billion in Cash and Stock (June 20, 2018), <https://www.thewaltdisneycompany.com/the-walt-disney-company-signs-amended-acquisition-agreement-to-acquire-twenty-first-century-fox-inc-for-71-3-billion-in-cash-and-stock> [https://perma.cc/7NMH-XWCZ]. The acquisition is reportedly to meet the competitive threat from streaming video services from Amazon.com Inc. and Netflix. Cynthia Littleton & Brian Steinberg,

agreement to buy pharmacy-benefit manager Express Scripts Holding Co.;²⁴⁴ CVS Health Corp.'s efforts to acquire Aetna;²⁴⁵ Japan's Takeda Pharmaceutical's purchase of Irish pharmaceutical company Shire Plc;²⁴⁶ and AT&T's agreement to purchase Time Warner.²⁴⁷

A substantial portion of contemporary M&A transactions also involve hostile or unsolicited bids.²⁴⁸ In 2017, 15% of total global M&A volume resulted from unsolicited offers.²⁴⁹ Although many transactions were successful, many targets besides Qualcomm successfully defended themselves, or used defenses to negotiate better terms.²⁵⁰ The impact of such defensive

Disney to Buy 21st Century Fox Assets for \$52.4 Billion in Historic Hollywood Merger, VARIETY (Dec. 14, 2017, 4:04 AM), <https://variety.com/2017/biz/news/disney-fox-merger-deal-52-4-billion-merger-1202631242/> [<https://perma.cc/D548-BWSP>] (discussing the fact that the deal will include 21st Century Fox's "innovative distribution platforms").

244. Press Release, Cigna, Cigna to Acquire Express Scripts for \$67 Billion (Mar. 8, 2018), <https://www.cigna.com/newsroom/news-releases/2018/cigna-to-acquire-express-scripts-for-67-billion> [<https://perma.cc/7AGY-W7YC>] (discussing the fact that Express Scripts is a leader in "technology-powered clinical solutions").

245. Press Release, CVS Health, CVS Health to Acquire Aetna; Combination to Provide Consumers with a Better Experience, Reduced Costs and Improved Access to Health Care Experts in Homes and Communities Across the Country (Dec. 3, 2017), <https://cvshhealth.com/newsroom/press-releases/cvs-health-acquire-aetna-combination-provide-consumers-better-experience> [<https://perma.cc/BZ5Y-ESPY>] (praising the combination of the CVS human touch with Aetna's "analytics").

246. David Meyer, *Takeda Finally Inks a Deal to Buy Shire in One of the Biggest Pharma Takeovers Ever*, FORTUNE (May 8, 2018), <http://fortune.com/2018/05/08/takeda-buys-shire-62-billion-pharma/> [<https://perma.cc/RLK9-CQMF>] (making Takeda a major player in the biopharmaceutical industry).

247. The AT&T–Time Warner transaction was approved by the D.C. District Court in June 2018. *United States v. AT&T Inc.*, No. 17-2511, 2018 U.S. Dist. LEXIS 100023, at *1 (D.D.C. June 12, 2018). The Department of Justice filed a notice of appeal with the D.C. Circuit on July 12, 2018. Notice of Appeal, *United States v. AT&T Inc.*, No. 1:17-cv-02511-RJL (D.D.C. July 12, 2018).

248. Brownstein et al., *supra* note 13.

249. *Id.* (including the Broadcom offer).

250. One example of a successful defense was Rockwell Automation's resistance to Emerson Electric's unsolicited bids. Arguing that the Emerson offers undervalued the company and would create problems for the company's customers, the Rockwell board rejected three offers from Emerson during the course of 2017, and in November 2017 Emerson abandoned its pursuit. See Greg Roumeliotis, *Rockwell Automation Rebuffs Emerson's Latest \$29 Billion Bid*, REUTERS (Nov. 22, 2017, 6:22 AM), <https://www.reuters.com/article/us-rockwell-automat-m-a-emerson-electric/rockwell-automation-rebuffs-emersons-latest-bid-idUSKBN1DM1EY> [<https://perma.cc/77JA-C3AP>]; Arunima Banerjee & Sanjana Shivdas, *Emerson Electric Pulls Rockwell Automation Bid Off Table*, REUTERS (Nov. 28, 2017, 6:06 AM), <https://www.reuters.com/article/us-rockwell-automat-m-a-emerson-electric/emerson-electric-pulls-rockwell-automation-bid-off-table-idUSKBN1DS1EO> [<https://perma.cc/BK9G-G2XJ>].

tactics, and the terms under which they should be deployed, is often the subject of debate and litigation.

B. *The Market for Corporate Control and the Agency Problem*

1. The Market for Corporate Control

In a series of articles published in the 1960s, Henry Manne argued that mergers, acquisitions and takeovers, including hostile ones, can have important benefits both for corporate governance and for society as a whole.²⁵¹ The idea behind Manne's "market for corporate control"²⁵² is that a poorly managed corporation will have a lower share price. A potential acquirer that believes (perhaps correctly) that it can better manage the target corporation will have an incentive to purchase stock and gain control of the target corporation. The acquirer will then have the power to institute changes that improve management and increase the value (and thus share price) of the target corporation.²⁵³

At that point, Manne argued, shareholders benefit from the increase in the target company's value and the concomitant increase in either the value of the shares they hold, if they are not bought out, or the above-market cash payment, if they are bought out. In addition, society gains from the improved performance of the target company.²⁵⁴ The acquirer also benefits from its more valuable investment which it can, if it chooses, then resell at a profit.

Even more importantly from the perspective of political economy, Manne noted that the market for corporate control functions even when acquisitions

251. See generally Henry G. Manne, "Higher Criticism" of the Modern Corporation, 62 COLUM. L. REV. 399 (1962); Henry G. Manne, *Some Theoretical Aspects of Share Voting: An Essay in Honor of Adolf A. Berle*, 64 COLUM. L. REV. 1427 (1964); Henry G. Manne, *Mergers and the Market for Corporate Control*, 73 J. POL. ECON. 110 (1965); Henry G. Manne, *Our Two Corporation Systems: Law and Economics*, 53 VA. L. REV. 259 (1967); Henry G. Manne, *Cash Tender Offers for Shares—A Reply to Chairman Cohen*, 1967 DUKE L.J. 231. For a comprehensive treatment of Professor Manne's impact on legal scholarship, see William J. Carney, *The Legacy of "The Market for Corporate Control" and the Origins of the Theory of the Firm*, 50 CASE W. RES. L. REV. 215 (1999) (discussing all five of Professor Manne's articles published during this period, and providing anecdotal, doctrinal, and empirical evidence of their impact).

252. See Manne, *Mergers and the Market for Corporate Control*, *supra* note 251, at 112 (most commonly associated with the phrase); Manne, "Higher Criticism" of the Modern Corporation, *supra* note 251, at 412 (actually introducing the phrase).

253. See Manne, "Higher Criticism" of the Modern Corporation, *supra* note 251, at 412; Manne, *Mergers and the Market for Corporate Control*, *supra* note 251, at 114–15.

254. But see Caleb N. Griffin, *The Hidden Cost of M&A*, 2018 COLUM. BUS. L. REV. 70, 72–73 (arguing that most of the gains from M&A can be attributed to market power increases which may raise costs and ultimately harm consumers and society, not from efficiency increases).

are not made, through deterrence.²⁵⁵ The potential for takeover disciplines the target managers and incentivizes them to act in the best interests of the corporation and its shareholders, and by extension (assuming one believes in markets) for society as a whole.

2. The Agency Problem

The “market for corporate control” via the buying and selling of voting shares, however, is not a free market. The incumbent managers of the target company have significant capacity and incentives to defend the company and themselves. Managers are often assured of adverse personal repercussions from a successful hostile bid (which, after all, is premised on the assumption that management can be improved with new control), and so managers’ interest in maintaining the status quo is both clear and potentially antithetical to that of shareholders seeking to benefit from a profitable opportunity/sale. “Directors may reject a merger offer out of concern for the terms of the offer or out of concerns that a new majority shareholder will negatively impact the directors’ own positions or those of management,” at which time the potential acquirer may seek to make a hostile tender offer directly to the shareholders.²⁵⁶

The hostile acquisition of a company thus illustrates what has come to be called the “agency problem” in corporate law. Since Adolf Berle and Gardiner Means published *The Modern Corporation and Private Property* in 1932,²⁵⁷ corporation law has focused on the problems created by the separation of ownership (by shareholders) and control (by managers) in the corporation. As one commentator has explained, “[b]ecause of the vacuum created by the separation of ownership from control, management of many large corporations has become self-perpetuating.”²⁵⁸ Since managers are in control, they can thwart takeovers by adopting measures that might not be in the interests of shareholders. On the other hand, and to make matters more complex, the power of the corporate form stems in large part from the centralization of management. Therefore, state corporation law, particularly Delaware, tends to be strongly

255. See Manne, *Mergers and the Market for Corporate Control*, *supra* note 251, at 112–13.

256. Christine Hurt, *The Hostile Poison Pill*, 50 U.C. DAVIS L. REV. 137, 145 (2016) (citing *Unitrin, Inc. v. Am. Gen. Corp.*, 651 A.2d 1361, 1373 (Del. 1995) (pointing out directors’ inherent conflict of interests in contests of corporate control)); *see also* *eBay Domestic Holdings, Inc. v. Newmark*, 16 A.3d 1, 30 (Del. Ch. 2010) (noting the factors that may cloud human judgment in the context of a bid).

257. ADOLPH A. BERLE & GARDINER C. MEANS, *THE MODERN CORPORATION AND PRIVATE PROPERTY* (Transaction Publishers 1991).

258. Pinto, *supra* note 16, at 259.

committed to management's control over the "business and affairs"²⁵⁹ of a corporation.

In order to balance the power of managers in the context of a hostile takeover and elsewhere, corporation law responds both substantively, e.g., by imposing fiduciary duties on managers,²⁶⁰ and procedurally, e.g., by giving shareholders rights to file suit to vindicate their own and the corporation's rights.²⁶¹ These doctrines and mechanisms exist to police management and to prevent directors and officers from, for example, repelling fair but unsolicited takeover offers thereby entrenching and enriching themselves at shareholders' expense. The balance between corporate management and shareholders is a subject of extensive scholarship and debate,²⁶² but it is well established that the ability and appetite of state corporation law to police management has decreased over the years.²⁶³ Doctrines such as the business judgment rule, statutory innovations such as director exculpation laws, and procedural hurdles to shareholder litigation have eroded shareholder power to address management's flaws.²⁶⁴ What may be left for shareholders is the market for corporate control, although its strength is unclear.²⁶⁵

C. Board Powers and Traditional Takeover Defenses

Delaware courts have maintained that although the board has power over the corporation, at its core, "the board's power to act derives from its fundamental duty and obligation to protect the corporate enterprise, which

259. DEL. CODE ANN. tit. 8, § 141 (2001).

260. Frank H. Easterbrook & Daniel R. Fischel, *Corporate Control Transactions*, 91 YALE L.J. 698, 702 (1982) (describing fiduciary duty as an alternative to direct monitoring).

261. Amy Deen Westbrook, *Does Banking Law Have Something to Teach Corporations Law About Directors' Duties?*, 55 WASHBURN L.J. 397, 402 (2016).

262. Alan R. Palmiter, *Corporate Governance as Moral Psychology*, 74 WASH. & LEE L. REV. 1119, 1119 (2017) (arguing that corporate governance is best seen as a subset of moral psychology). See generally, e.g., Westbrook, *supra* note 261 (arguing that the weakening of director fiduciary duties has been unfortunate for corporate governance).

263. State courts are consistently deferential to managers, notably through the elaboration of the business judgment rule, arguing that robust judicial involvement in business might chill risk-taking, and thereby stifle the entrepreneurial spirit. See, e.g., *In re Walt Disney Co. Derivative Litig.*, 907 A.2d 693, 698 (Del. Ch. 2005) *aff'd* 906 A.2d 27 (Del. 2006) (declining to impose liability on a corporate director).

264. See Amy Deen Westbrook, *Double Trouble: Collateral Shareholder Litigation Following Foreign Corrupt Practices Act Investigations*, 73 OHIO ST. L.J. 1217, 1229–32 (2012) (detailing hurdles to shareholder suits to enforce director fiduciary duties).

265. See, e.g., Amy Deen Westbrook & David A. Westbrook, *Snapchat's Gift: Equity Culture in High-Tech Firms*, FLA. ST. U. L. REV. (forthcoming 2019) (exploring ways in which the "market for corporate control" does not in fact protect shareholders).

includes stockholders, from harm reasonably perceived, irrespective of its source.”²⁶⁶ The board’s actions in the face of a takeover bid must reflect its fiduciary duties to the corporation and its shareholders.

If the board determines that it has reasonable grounds to believe a takeover effort poses a danger to corporate policy and effectiveness, then the board may itself, without shareholder action, employ devices to defend the corporation.²⁶⁷ Some of the most common of these devices are classified board structures, share repurchases, lockups, supermajority requirements, and shareholder rights plans (so-called poison pills).

A corporation with a classified or staggered board²⁶⁸ elects only a subset of its board of directors at each annual meeting, typically only a third of its directors in any year. As a result, it takes even a majority shareholder at least two cycles to establish control of the board, a time frame that is usually longer than a company cares to wait to accomplish an acquisition or change of control.²⁶⁹

A board may also choose to have the corporation repurchase some of its own shares to repel a hostile offer. The repurchase will presumably raise the share price, and reduce the amount of cash held by the company, both of which may make the corporation a less attractive target. In some cases, the board may repurchase shares selectively in order to disadvantage a particular, acquisitive shareholder.²⁷⁰

266. *Unocal Corp. v. Mesa Petroleum Co.*, 493 A.2d 946, 954 (Del. 1985).

267. *Cheff v. Mathes*, 199 A.2d 548, 554–57 (Del. 1964).

268. Provisions imposing a classified board structure may be found in the bylaws of corporations, and so therefore they may be removable by shareholder vote, though if the provisions are included in the articles of incorporation board approval may also be needed.

269. Empirical evidence suggests that classified boards are effective in reducing the likelihood of takeovers. See, e.g., Lucian A. Bebchuk et al., *The Powerful Antitakeover Force of Staggered Boards: Theory, Evidence, and Policy*, 54 STAN. L. REV. 887, 887 (2002) (finding classified boards to be successful: between 1996 and 2000, not a single hostile bid won a ballot box victory against an effective staggered board).

270. For example, in 2015, over-the-counter healthcare products and infant formula maker Perrigo Company Plc announced a \$2 billion share repurchase plan as part of its defense against an offer from the global healthcare company Mylan N.V. Press Release, Perrigo, Perrigo Taking Actions to Deliver Shareholder Value Far Superior to Mylan Offer (Oct. 22, 2015), <http://perrigo.investorroom.com/2015-10-22-Perrigo-Taking-Actions-To-Deliver-Shareholder-Value-Far-Superior-To-Mylan-Offer> [<https://perma.cc/NGZ3-RVH2>]. Perrigo’s defense was ultimately successful, although it weakened the company substantially. Robert Cyran, *Hostile Takeover Battle Can Weaken a Company’s Defenses*, N.Y. TIMES (Sept. 13, 2016), <https://www.nytimes.com/2016/09/14/business/dealbook/hostile-takeover-battle-can-weaken-a-companys-defenses.html> [<https://perma.cc/WZB9-FM8R>]. Perrigo shareholders also later sued the company over alleged misleading statements made during the takeover attempt. Michael Greene,

Another technique that target corporations deploy to repel hostile acquirers is the lockup, through which the corporation encumbers some asset or assets that make it attractive. Boards may also impose supermajority voting requirements for charter amendments, bylaws, amendments, or mergers, although courts tend to be cautious of such requirements.²⁷¹

In addition, a corporation may adopt a shareholder rights plan,²⁷² known as a poison pill. Although shareholder rights plans vary, they typically provide additional “rights” to shareholders which become valuable when a triggering event, such as someone acquiring 20% of the corporation’s shares, takes place. If triggered, the rights plan then enables the existing shareholders, but not the shareholder who or which triggered the plan, to purchase additional shares at a steep discount. The result is dilution of the triggering shareholder’s interest. In practice, shareholder rights plans are seldom actually triggered,²⁷³ and they function more as a deterrent to would-be acquirers. They arguably provide the board with the leverage to extract a higher price from the potential acquirer, and can be redeemed or reset as negotiations require. Shareholder rights plans, although permitted, have been criticized for providing excessive protection to incumbent management.²⁷⁴

D. Judicial Review of Antitakeover Defenses

Although antitakeover defenses are generally permissible, they may also be abused. Corporation law therefore has worked to provide limits and a standard of review for their use. In doing so, courts have balanced traditional (if increasing) deference to the board as the body controlling the business and affairs of corporations, with the need to provide shareholders with a remedy when the board’s actions prevent the operation of Manne’s market for corporate control. Board entrenchment is often equated with bad governance, and

Investor Sues Perrigo Over Disclosures in Mylan Hostile Bid, BLOOMBERG (May 25, 2016), <https://www.bna.com/investor-sues-perrigo-n57982072957/> [<https://perma.cc/PE4U-NH72>].

271. See *Frechter v. Zier*, No. 12038-VCG, 2017 WL 345142, at *3 (Del. Ch. Jan. 24, 2017) (invalidating bylaw language that required supermajority stockholder approval for the removal of directors and noting that the measure was intended as a takeover defense and unrelated to any board classification).

272. E.g., DEL. CODE ANN., tit. 8, § 157 (2001) (Rights and Options Respecting Stock).

273. *But see* *Versata Enters. v. Selectica, Inc.*, 5 A.3d 586, 586 (Del. 2010).

274. John S. Strong & John R. Meyer, *An Analysis of Shareholder Rights Plans*, 11 *MANAGERIAL & DECISION ECON.* 73, 73 (1990) (“[o]pponents argue that poison pills are designed to entrench existing board and management control and to prevent any takeover that does not have the support of the board of directors.”).

considered detrimental to shareholders and the markets.²⁷⁵ In the context of takeovers, this struggle for balance is often played out in judicial review of board decisions to deploy various antitakeover measures.

A merger, acquisition, or takeover involves managers' power to maintain the status quo (including their continued employment), conversely denying the shareholders a profitable opportunity. The transactions have generally been understood to raise potential conflicts of interest, implicating the fiduciary duty of loyalty.²⁷⁶ As a matter of contemporary legal history, the erosion of shareholders' power to constrain management, or even to assert their interests, has been less pronounced when the managers' misbehavior implicates their duty of loyalty. Nevertheless, the emergence of a bidder, even a hostile "raider," does not directly benefit incumbent directors. Nor, as discussed below, does the adoption of defensive measures necessarily constitute self-dealing. Courts therefore have not adopted the intrinsic fairness standard of review used when a director has a clear conflict of interest and the duty of loyalty is implicated.²⁷⁷

Instead, courts have developed a specific jurisprudence to assess board actions in the takeover context. "When a board addresses a pending takeover bid it has an obligation to determine whether the offer is in the best interests of the corporation and its shareholders."²⁷⁸ Courts may be more cautious of board decisions in the takeover context than in the context of other decisions because they have the potential to deny shareholders the opportunity to vote on sale of the company at the premium being offered. Courts have long recognized "the omnipresent specter that a board may be acting primarily in its own interests, rather than those of the corporation and its shareholders."²⁷⁹

Thus, state courts typically deny board decisions in the takeover context the near-automatic deference of the business judgment rule, though courts also spare them the more thorough intrinsic fairness examination. Board decisions,

275. See, e.g., Lucian Bebchuk et al., *What Matters in Corporate Governance?*, 22 REV. FIN. STUD. 783, 784–85 (2004) (introducing the entrenchment index or "E-Index"). But see K.J. Martijn Cremers et al., *Commitment and Entrenchment in Corporate Governance*, 110 NW. U. L. REV. 727, 727 (2016) (arguing that limiting some shareholder rights may increase firm value).

276. *Unocal Corp. v. Mesa Petroleum Co.*, 493 A.2d 946, 954 (Del. 1985) (explaining that the risk of the board acting in its own interests necessitates judicial examination before the board can claim the protections of the business judgment rule).

277. Stephen M. Bainbridge, *Unocal at 20: Director Primacy in Corporate Takeovers*, 31 DEL. J. CORP. L. 769, 795–96 (2006) (noting that if the intrinsic fairness test were used, then takeover defenses would seldom be approved).

278. *Unocal*, 493 A.2d at 954.

279. *Id.*

including those related to the adoption of antitakeover devices, are subject instead to an “intermediate” level of scrutiny,²⁸⁰ “an enhanced duty which calls for judicial examination at the threshold before the protections of the business judgment rule may be conferred.”²⁸¹ Courts review the measures implemented by the board to make sure the board is operating in the long-term interests of the shareholders and not just protecting its members and the executive officers. “A reasonable use of a defensive tactic will encourage the original bidder to increase its premium or invite higher bidders; an unreasonable use will thwart all bidders and entrench management.”²⁸²

A key articulation of the standard of review for defensive measures was the Delaware Supreme Court’s 1985 decision in *Unocal v. Mesa Petroleum Corp.*²⁸³ In the *Unocal* decision, the court considered the effort of Mesa Petroleum Corp. (Mesa), led by T. Boone Pickens, to take over Union Oil Company of California (Unocal).²⁸⁴ The Mesa offer featured a two-tiered pricing mechanism: Mesa offered a \$54/share cash tender at the “front-end” to obtain ownership of 51% of Unocal at a premium, and then a securities exchange offer, later found to be worth considerably less, to the slower-tender, remaining shareholders.²⁸⁵ The Unocal board, with the advice of Peter Sachs of Goldman Sachs & Co. decided that the Mesa offer was inadequate and coercive.²⁸⁶ In response, the board came up with a \$72/share repurchase offer that excluded Mesa.²⁸⁷ Mesa challenged Unocal’s defensive self-tender tactic as a breach of the board’s fiduciary duties.²⁸⁸

In upholding Unocal’s selective self-tender tactic, the Delaware Supreme Court created the “*Unocal* test” with which to analyze defensive board tactics. The test, which was refined later that year in *Moran v. Household International Inc.*,²⁸⁹ creates a two-pronged review for a corporation’s antitakeover tactics. First, did the board have reasonable grounds to believe a threat to the corporation existed?²⁹⁰ Second, were the defensive measures taken reasonable

280. Bainbridge, *supra* note 277, at 796 (also calling the level of review an “enhanced business judgment” standard).

281. *Unocal*, 493 A.2d at 954.

282. Hurt, *supra* note 256, at 146.

283. 493 A.2d at 946.

284. *Id.* at 949.

285. *Id.* at 949–50.

286. *Id.* at 950.

287. *Id.* at 951.

288. *Id.*

289. 500 A.2d 1346, 1356 (Del. 1985).

290. *Id.*

in relation to the perceived threat?²⁹¹ As later cases have noted, the *Unocal* test is intended to detect “self-interest and pretext”²⁹² when directors make clearly self-interested decisions in a takeover context. Using the test, the *Unocal* court found that the Mesa offer was coercive due to the two-tiered structure and inadequate in terms of amount, and that the board’s adoption of its poison pill (the self-tender) was reasonable because of Pickens’ reputation and the two-tiered structure.²⁹³

But, the *Unocal* court stressed, the question of whether a given defensive measure is permissible in a particular case requires balanced judgement. Permissible antitakeover mechanisms are supposed to “forestall tender offers, but they may not preclude them.”²⁹⁴ As the court explained, “[a] corporation does not have unbridled discretion to defeat any perceived threat by any Draconian means available.”²⁹⁵ Antitakeover devices cannot be used as an indefinite mechanism for the board to avoid challenges to its control. Directors may not act “solely or primarily out of a desire to perpetuate themselves in office.”²⁹⁶ The board cannot “just say no” to corporate takeovers.²⁹⁷

Thus courts, even in Delaware, may reject the use of takeover devices. As the court observed that same year in *Revlon, Inc. v MacAndrews & Forbes Holdings Inc.*,²⁹⁸ directors do not have unlimited power to defend the corporation against threats to their policies. If at some point the corporation is for sale (perhaps because the corporation seeks to sell itself to another, more palatable acquirer), then the board’s obligation changes to allowing market forces to operate freely to bring the target’s shareholders the best price available for their shares.²⁹⁹ As the Delaware Chancery Court pointed out in 2010 in *eBay Domestic Holdings, Inc. v Newmark*: “[I]ike any strong medicine . . . a [poison] pill can be misused.”³⁰⁰

291. *Id.*

292. *Kallick v. Sandridge Energy, Inc.*, 68 A.3d 242, 258–59 (Del. Ch. 2013).

293. *Unocal*, 493 A.2d at 959.

294. *Hurt*, *supra* note 256, at 150.

295. *Unocal*, 493 A.2d at 955.

296. *Id.* (citing *Cheff v. Mathes*, 199 A.2d 548, 556 (Del. 1964)).

297. See Robert B. Thompson & D. Gordon Smith, *Toward a New Theory of the Shareholder Role: “Sacred Space” in Corporate Takeovers*, 80 TEX. L. REV. 261, 315 (2001) (reviewing courts’ willingness to allow boards to adopt preclusive measures).

298. 506 A.2d 173, 185 (Del. 1986) (rejecting the Revlon board’s excessive resistance to Pantry Pride’s hostile tender offer).

299. *Id.* at 184.

300. 16 A.3d 1, 29–30 (Del. Ch. 2010) (assessing the shareholders rights plan and staggered board adopted by two shareholder directors of Craigslist to disenfranchise the third shareholder, eBay).

Despite the complex legal judgements, however, courts are generally not anxious to invalidate boards' antitakeover measures. If the board can demonstrate that its measures or tactics "are reasonable and proportionate, and designed to protect [its] long-term corporate strategy,"³⁰¹ a challenge to the board actions will likely fail.³⁰² Nevertheless, although there has been an overall decrease in M&A litigation in the last few years, 85% of public company mergers were the subject of lawsuits in either state or federal court in 2017.³⁰³ Courts actively review board actions in the context of both friendly and unsolicited acquisitions. This review, or even the discipline produced by the possibility of such review, however, is unavailable in takeovers which may be referred to CFIUS.

VII. CONSEQUENCES AND CONCLUSION

A. CFIUS, Uncertainty, and Risk

Corporation law has decades of decisions dedicated to assessment of boards' use of defensive measures. Market participants, therefore, have some sense of what a hostile takeover is likely to require, and consequently, a basis for negotiation. CFIUS review, in contrast, offers boards a defensive device, a weapon in the battle for corporate control, that is outside of that jurisprudence when the acquisition is in sensitive sectors and has foreign connections. Before a court can assess the board's behavior, and consider the opportunity offered to the target company shareholders, CFIUS review can result in the immediate and total prohibition of the proposed transaction. The effect of that weapon is magnified by the booming M&A market and, especially post-FIRREA, CFIUS's own expansive understandings of what constitute U.S. businesses and its authority over foreign investors.

301. Hurt, *supra* note 256, at 141.

302. In fact, several relatively recent decisions have seemed to expand the devices that the courts will accept using the *Unocal* test. In its 2010 decision in *Versata Enterprises v. Selectica, Inc.*, the Delaware Supreme Court upheld a poison pill with a very low trigger (4.99%) adopted by Selectica, Inc., to protect its ability to carry its net operating losses forward. 5 A.3d 586, 599–607 (Del. 2010). The plan, which featured a very low (4.99%) ownership threshold, was triggered when Selectica's rival and its parent company acquired 6.7% of Selectica's common stock. In its 2011 decision in *Air Products and Chemicals Inc. v. Airgas, Inc.*, the Delaware Chancery Court upheld a board's use of the threat of a poison pill to hold off an open tender offer for twelve months. 16 A.3d 48, 48–49 (Del. Ch. 2011).

303. Lauren C. Bellerjeau et al., 8 *Key M&A Trends in 2018*, MORRISON FOERSTER (Jan. 31, 2018), <https://www.mofo.com/resources/publications/180131-8-key-ma-trends-in-2018.html> [<https://perma.cc/EK4Y-5MRJ>] (noting that this was down from 2013, when 96% of mergers triggered litigation).

For example, the “U.S. business” at issue may be a U.S. branch or subsidiary of a non-U.S. target of an acquisition (e.g., Aixtron). A “foreign person” may be incorporated in the United States, but have foreign shareholders or management connections that can exercise control over it (e.g., Ralls). Alternatively, the “foreign person” seeking to acquire the U.S. business may be a company incorporated in a tax haven jurisdiction but based in the U.S. and owned and controlled by U.S. persons (e.g., Broadcom). Particularly if the non-U.S. interests are from non-NATO countries such as China, this broad understanding and willingness to look upstream impacts a potentially large number of transactions.³⁰⁴

In addition, because CFIUS’s understanding of national security, especially post-FIRRMA, encompasses critical infrastructure, critical technology and access to sensitive information on U.S. persons,³⁰⁵ the number of transactions that may be understood to implicate national security and are therefore subject to CFIUS review is very large. According to a Deloitte report at the end of 2017, acquiring technology assets was the number one strategic driver of M&A deals³⁰⁶ and there was “no sign of cross-sector convergence abating amid increasingly innovative investment strategies.”³⁰⁷ As KPMG explained in its *2018 M&A Predictor* report, “[a]mong financial services firms, consumer, industrial, healthcare, automotive companies—you name it, including agriculture—the race is on for transformational technology and game-changing digital capabilities.”³⁰⁸ KPMG noted that industrial businesses have been purchasing technology companies and, in the reverse direction, technology sector companies have been seeking consumer-oriented acquisitions.³⁰⁹ Technology is everywhere, hence the 27 industries in the Pilot Program Annex. Therefore, a great number of acquisitions will implicate national security. And if Chinese or other non-NATO country investors are the acquirer, or somewhere upstream in the acquirer, or perhaps even likely to benefit from the acquisition

304. *M&A Guide to CFIUS: Deciding Whether to Submit Voluntarily to CFIUS Review*, *supra* note 193.

305. *Id.* (noting that such access was rumored to have been the reason for Ant Financial’s failure to receive CFIUS clearance for its acquisition of MoneyGram).

306. *The State of the Deal: M&A Trends 2018*, *supra* note 241, at 7; Naso, *supra* note 2.

307. *M&A Predictor 2018 Annual Report*, KPMG (May 2018), <https://assets.kpmg.com/content/dam/kpmg/xx/pdf/2018/05/m-and-a-predictor-2018-annual-report.pdf> [<https://perma.cc/AQC4-6UMP>]; *The State of the Deal: M&A Trends 2018*, *supra* note 241, at 12 (highlighting industry convergence).

308. *M&A Predictor 2018 Annual Report*, *supra* note 307.

309. *Id.*

to the detriment of U.S. national security, CFIUS review is potentially available to an unwilling target's board.

The prospect of CFIUS review has created uncertainty, and various efforts to structure and price transactions involving foreign parties and sensitive industries in ways that accommodate the increased regulatory risk.³¹⁰ Foreign investors are disadvantaged because they face risks and delays, and increased public scrutiny, that domestic investors do not.³¹¹ Some practitioners even cite a CFIUS “discount” in certain transactions.³¹² Although FIRRMA provides for increased CFIUS staffing and funding,³¹³ uncertainty and delays are still expected to increase because FIRRMA triggers more notifications.³¹⁴ Thus, the expansion of CFIUS review, at a minimum, has made the corporate governance benefits of the market for corporate control more expensive. The deployment of CFIUS review at the discretion of the target board, moreover, can wipe out shareholders' rights to consider an unsolicited offer or vote for insurgent directors sponsored by certain would-be acquirers.

B. CFIUS and the Federalization of Corporation Law

The expansion of CFIUS review into the realm of takeover defenses and corporate governance may also be seen as yet another instance of the creeping federalization of corporation law.³¹⁵ Most countries have national company law, but the United States has traditionally left the creation and regulation of

310. See *Comey & O'Bryan*, *supra* note 201; *Emmerich & Panovka*, *supra* note 200 (explaining the rise of “reverse break fees” and insurance coverage for “CFIUS-related non-consummation risk”).

311. *Comey & O'Bryan*, *supra* note 201.

312. *After Broadcom/Qualcomm: Where Does Cross-Border M&A Go Now?*, 22 M&A LAW., Apr. 2018, at 2 (quoting Robert Townsend, Co-Chair of Morrison & Foerster's national security and global risk & crisis management practices) (identifying a “discount” placed on bids coming from foreign buyers because of the uncertainty of CFIUS review).

313. John S. McCain National Defense Authorization Act for Fiscal Year 2019, Pub. L. No. 115-232, §§ 1717, 1723, 132 Stat. 1636, 2192, 2204 (codified as amended at 50 U.S.C. §§ 4565(k)(4), 4565(p) (2018)).

314. David McLaughlin & Erik Wasson, *Congress Toughens Foreign Deal Reviews with China in Crosshairs*, BLOOMBERG (Aug. 1, 2018, 1:38 PM), <https://www.bloomberg.com/news/articles/2018-08-01/congress-toughens-foreign-deal-reviews-with-china-in-crosshairs> [<https://perma.cc/VUF3-XAWS>].

315. In fact, the plaintiffs in the shareholder suit against Qualcomm described the Qualcomm board's successful resort to CFIUS thus: “In complete disregard of the U.S. federal-state structure, the incumbent Board seeks a federal takeover of Delaware corporation law to ensure their continuation in office.” Complaint at ¶ 6, *Evans v. Qualcomm, Inc.*, No. 2018-0164, 2018 WL 1224253 (Del. Ch. Mar. 8, 2018).

business forms to the laws of the individual states.³¹⁶ The lack of an articulated, national approach to how companies should act may at some point do more harm than good, especially in the antitakeover context when states may have an incentive to avoid antitakeover restrictions.³¹⁷

Of course, this idea of state corporation law may be a thing of the past. Although a variety of approaches to corporation law in an atmosphere of legal experimentation has undeniable appeal, the preeminence of Delaware law may have ended that vision of corporation law federalism already. And Delaware and other state courts have arguably been increasingly (and possibly excessively) deferential to board actions. In addition, with regard to the construction of a national company law, the federal government's willingness to intervene in Qualcomm's corporate formalities and its analysis of Broadcom's business strategies may seem relatively insignificant in comparison with the intercession of federal securities laws³¹⁸ such as the Dodd-Frank Act³¹⁹ and the Sarbanes-Oxley Act.³²⁰ And some of CFIUS's actions displace a sibling agency's (the SEC's) actions under federal securities laws governing proxy fights, not state action.

In light of the potential breadth of CFIUS review, however, CFIUS may offer an opportunity for a national approach to the role of the corporation in national security and by extension, the overall economy.³²¹ Are there some deals that we, as a nation, think should or should not happen? What reasons are acceptable for that kind of decision? This type of normativity is not a feature of contemporary state corporation, or even federal securities, laws. But the expansion of CFIUS review and its deployment by the Qualcomm board to

316. Pinto, *supra* note 16, at 262 (noting that the federal government could have provided corporation law to publicly traded companies but has traditionally opted to allow the states to develop that law).

317. David. J. Marchitelli, *Construction and Application of State Antitakeover Statutes*, 37 A.L.R. 6th 1, 1 (2008) (surveying a variety of state statutes).

318. Federal securities laws, which deal primarily with disclosure by publicly traded companies, and state corporate laws, which more directly address their corporate governance, overlap. Pinto, *supra* note 16, at 264. The overlap, however, is beyond the scope of this Article.

319. Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (codified as amended in scattered sections of the U.S. Code).

320. Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745 (codified as amended in sections 15, 18, and 28 of the U.S. Code).

321. "Some policymakers also argue that the CFIUS review process should have a more robust economic component, possibly even to the extent of an industrial policy-type approach that uses the CFIUS national security process to promote certain industrial sectors in the economy." JAMES K. JACKSON, CONG. RESEARCH SERV., RL 33388, THE COMMITTEE ON FOREIGN INVESTMENT IN THE UNITED STATES (CFIUS) 1 (2018).

prevent a takeover brings the issue back for consideration in the United States. Other countries have these kinds of policies.³²² Should we?

C. CFIUS, Shareholders, and Society

Post-FIRREA, CFIUS's importance continues to expand. CFIUS now acts near the heart of corporation law, in particular with respect to corporate governance in the context of hostile takeovers (rescheduling shareholder meetings, for example). CFIUS review, however, is different from other takeover defenses. There is no mechanism to determine if a board decision to notify an unsolicited foreign bid to the Committee is reasonable and proportionate, or whether that notification protects the long-term corporate strategy. Thus, CFIUS review may insulate management decisions from many of the procedural or substantive protections that have traditionally maintained a balance between management and shareholders, not to mention market structure, and so civil society generally.³²³

Perhaps the emergence of CFIUS review as a super poison pill is not all that significant. Maybe traditional understandings of the limitations imposed by corporation and securities law on management have already failed. It is less and less credible to rely on fiduciary duty or shareholder derivative suits or even securities law to protect shareholder interests given the deeply entrenched management at our largest firms. And in a world of vote-less stock³²⁴ and the concentration of ownership and control of our equity markets,³²⁵ a "just say no" option for incumbent management confronted with an unwanted acquirer may not be that dramatic a development.

But more than corporation law is at issue here. Corporations are not merely matters of concern to shareholders, boards, and managers who contest governance, or even the broader society of stakeholders. Corporations are deeply enmeshed in the economy and society, and therefore the relationship between ownership and management has implications that extend beyond stakeholders. In particular, corporate transactions can raise national security concerns, which is why the federal government has various mechanisms with

322. In fact, the United Kingdom is considering a new national security and investment regime designed to protect strategically important UK businesses from foreign takeovers. See *UK Government Proposes National Security and Investment Regime*, CLEARY GOTTlieb STEEN & HAMILTON LLP (Aug. 10, 2018), <https://client.clearygottlieb.com/63/891/uploads/2018-08-09-uk-government-proposes-national-security-and-investment-regime.pdf> [<https://perma.cc/FHS6-AAFZ>].

323. See Pinto, *supra* note 16, at 257 (asserting the importance of publicly traded corporations in society as the reason for significant issues regarding the focus of corporate governance).

324. See Westbrook & Westbrook, *supra* note 265.

325. See Amy Deen Westbrook & David A. Westbrook, *Unicorns, Guardians, and the Concentration of the U.S. Equity Markets*, 96 NEB. L. REV. 688, 690 (2018).

which to regulate commerce in the interest of security, and why CFIUS was established in the first place.

In addressing national security concerns, however, the law also needs to take account of other societal concerns, including the traditional “economic” concerns for market structure, investors, the discipline of managers, and the evolution of business. In other words, “national security,” especially when premised on something as ubiquitous as “technology,” should not be some sort of trump card that obviates all other concerns for commercial, and hence social, welfare.

D. Conclusion

As illustrated by the prohibition of Broadcom’s attempted takeover of Qualcomm, CFIUS review is broad and powerful. The Committee and the President are looking at an increasing number of acquisitions involving foreign persons, and operating at the heart of corporation law. At the same time, the volume of global mergers, and CFIUS’s jurisdiction, are on the upswing. The result is the potential use of CFIUS review as a powerful defensive tactic by target company boards.

In assessing notices in this context, CFIUS may benefit from the jurisprudence developed by state courts in the 1980s takeover boom. Corporation law has been working to articulate standards for board defensive tactics and shareholders’ rights for over 30 years, and may provide an approach for the Committee to use to weigh the actions and motivations of target boards that request review. For example, tools such as the *Unocal* test may help the Committee identify clearly self-interested board notifications in the takeover context. Such an evaluation can be implemented by CFIUS without compromising its own or the President’s national security authority, and may in fact provide an opportunity for the federal government to articulate norms for our largest and most critical corporations. CFIUS has considerable latitude when presented with a party notification of a transaction, and may be in the best position to avert board actions that damage shareholders, and the economy in general, using a foreign investor or connection as a pretext.

Given the amount of global capital being deployed across borders, and the intensity of global security concerns, foreign investment transactions are likely to continue, and to continue to need review, for the foreseeable future. A CFIUS review process with a standard to assess target company board motivation and measures, with an experienced perspective on the broader effects of blocking or allowing the transaction, will help ensure that CFIUS review achieves its national security goals without doing unnecessary societal harm.