### Suggesting a Better Administrative Framework for the CFIUS: How Recent Huawei Mergers Demonstrate Room for Improvement

NIKUL PATEL†

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### I. Introduction

September 11, 2001 is a day that will be etched in the hearts of Americans forever. From 8:14 A.M., when the first plane was hijacked, until 10:28 A.M., when the North Tower of the World Trade Center collapsed, America was under attack. Addressing the nation, President Bush described the target of the attack as "[the American] way of life, our very freedom." The President told the American people, "Our country is strong. A great people has been

<sup>†</sup> B.A. Psychology, University of North Carolina, 2010; J.D. Candidate, University of North Carolina School of Law, 2013.

<sup>&</sup>lt;sup>1</sup> President George W. Bush, Address to the Nation on the Terrorist Attacks (Sept. 11, 2001) (transcript available at http://www.gpo.gov/fdsys/pkg/WCPD-2001-09-17/pdf/WCPD-2001-09-17-Pg1301-2.pdf).

moved to defend a great nation." While the attack lasted only a few hours, nearly 3,000 lives were lost, leaving wounds that would take years to heal.

The attacks had a psychological effect on Americans; 9/11 shaped the American perception of national security for years to come, causing many to view national security as the country's greatest concern.<sup>4</sup> Soon after 9/11, the United States responded by invading Afghanistan in search of Osama bin Laden.<sup>5</sup>

For the last decade, the paradigm of national security has been shaped by a fear of another similar attack from an enemy abroad.<sup>6</sup> At the same time, however, another decades old national security threat was gaining prominence:<sup>7</sup> a threat that does not fit into the traditional national security paradigm of the last decade.<sup>8</sup>

- <sup>5</sup> See Interactive: U.S. War in Afghanistan: Tracking a War, COUNCIL ON FOREIGN RELATIONS, http://www.cfr.org/afghanistan/us-war-afghanistan/p20018 (click to begin, then click "next" until the heading reads October 07, 2001) (last visited Jan. 17, 2013) (stating that on October 7, 2001, the U.S. in alliance with few European countries began bombing Afghanistan).
- <sup>6</sup> See CIA, NATIONAL STRATEGY FOR COMBATING TERRORISM 4-10 (2003) (describing the structure of global terrorist groups, their functioning, and their respective threats), available at https://www.cia.gov/news-information/cia-the-war-on-terrorism/Counter\_Terrorism\_Strategy.pdf.
- <sup>7</sup> See, e.g., OFFICE OF NAT'L COUNTER INTELLIGENCE EXEC., FOREIGN SPIES STEALING U.S. ECONOMIC SECRETS IN CYBERSPACE: REPORT TO CONGRESS ON FOREIGN ECONOMIC COLLECTION AND INDUSTRIAL ESPIONAGE, 2009-2011 6-11 (2011) [hereinafter OFFICE OF NAT'L COUNTER INTELLIGENCE EXEC.], available at http://www.ncix.gov/publications/reports/fecie\_all/Foreign\_Economic\_Collection\_2011.pdf (describing the evolving cyber environment, the emergence of new threats to the United States, and the role private parties play in the cyberspace environment).
- <sup>8</sup> See G. John Ikenberry & Anne-Marie Slaughter, Forging A World of Liberty under Law: U.S. National Security in the 21st Century: Final Report of the Princeton Project on National Security 2 (The Princeton Project Papers, The Woodrow Wilson Sch. of Pub. & Int'l Affairs, Princeton Univ. 2006), available at http://www.princeton.edu/~ppns/report/FinalReport.pdf.

<sup>&</sup>lt;sup>2</sup> *Id*.

<sup>&</sup>lt;sup>3</sup> See Official 9/11 Death Toll Climbs by One, CBSNEWS (Sept. 10, 2009), http://www.cbsnews.com/stories/2008/07/10/national/main4250100.shtml.

<sup>&</sup>lt;sup>4</sup> See Clem Brooks, Kyle Dodson & Nikole Hotchkiss, National Security Issues and US Presidential Elections, 1992–2008, 39 Soc. Sci. Res. 518, 519 (2010) (stating that, according to the linkage thesis, in the "2004 presidential election.... national security-related issues mattered considerably, giving the incumbent president a considerable advantage from the start of the campaign through the general election"); id. at 525 ("National security-related issues were central to voter choice in 2008.").

Curiously, it is a threat many Americans often overlook. The threat jeopardizes the *informational security* of the nation. <sup>10</sup>

In the last few years, newspapers have exposed many foreign nationals hacking U.S. companies and government offices to obtain private information and government secrets.<sup>11</sup> In similar fashion, foreign governments and foreign companies, through the use of mergers and buyouts of American companies, have gained access to private information and government secrets.<sup>12</sup> To protect the United States against such threats, Congress established the Committee on Foreign Direct Investment (CFIUS) in the 1970s.<sup>13</sup>

Most recently, Huawei, a Chinese telecommunications equipment company, has tested CFIUS through two mergers, one attempted and one actualized. In 2008, Huawei, alleged to have close ties with the People's Liberation Army, attempted to buy out 3Com, a company that supplies technology that protects the Pentagon from cyber attacks.<sup>14</sup> More recently, Huawei was

<sup>&</sup>lt;sup>9</sup> See, e.g., Sean M. Condron, Getting It Right: Protecting American Critical Infrastructure in Cyberspace, 20 HARV. J.L. & TECH. 403, 407 (2007) ("Despite the magnitude of this threat, the United States currently operates under the presumption that a cyber attack constitutes a criminal activity, not a threat to national security.").

OFFICE OF NAT'L COUNTER INTELLIGENCE EXEC., supra note 7, at 1-2, 7-10 (emphasis added).

<sup>11</sup> E.g., Siobhan Gorman, China Hackers Hit U.S. Chamber, WALL ST. J., Dec. 21, 2011, at A1, A4 (detailing how Chinese nationals, potentially having close ties to the Chinese government, hacked the U.S. Chamber); Kenneth Rapoza, On China and Russia Hacking Into U.S., "No Hard Feelings," FORBES, Nov. 8, 2011, http://www.forbes.com/sites/kenrapoza/2011/11/08/on-china-and-russia-hacking-into-usno-hard-feelings/ (discussing China and Russia's incentive to hack U.S. companies for their intellectual property).

<sup>&</sup>lt;sup>12</sup> See Joel Slawotsky, Sovereign Wealth Funds and Jurisdiction Under the FSIA, 11 U. PA. J. Bus. L. 967, 984 (2009) (""[O]ne of the nation's largest unions, SEIU (Service Employees International Union), calls for stronger federal oversight of arrangements where foreign government-controlled investment funds, known as "sovereign wealth funds (SWFs)," buy into private firms that own or invest in American companies responsible for defense, energy, and homeland security."" (quoting Press Release, Service Employees International Union, America for Sale? (July 23, 2008), available at http://www.seiu.org/2008/07/america-for-sale.php)).

<sup>&</sup>lt;sup>13</sup> JAMES K. JACKSON, CONG. RESEARCH SERV., RL 33388, THE COMMITTEE ON FOREIGN INVESTMENT IN THE UNITED STATES (CFIUS) 4 (2012), available at http://www.fas.org/sgp/crs/natsec/RL33388.pdf (stating that CFIUS was created to assist the President in overseeing the "national security implications of foreign investment on the economy" (citing Exec. Order No. 11,858(b), 40 Fed. Reg. 20263 (May 7, 1975))).

Bruce Einhorn, *Huawei's 3Com Deal Flops*, Bloomberg Bus. WK. (Feb. 21, 2008), http://www.businessweek.com/globalbiz/blog/eyeonasia/archives/2008/02/hua

scrutinized for its acquisition of 3Leaf, a company that services internet servers in the United States.<sup>15</sup> Huawei boldly acquired 3Leaf in the face of much government opposition and was asked ex post facto to divest from the assets it had already purchased.<sup>16</sup>

With companies like Huawei bravely challenging the effectiveness of the U.S. national security system, one has to question if the regulatory framework of CFIUS is effective to combat mergers that jeopardize national security. The goal of this note is to analyze how Huawei's recent merger illustrates potential flaws in CFIUS.<sup>17</sup> Ultimately, this note recommends the incorporation of a "list method." This method would require preapproval and early notification to certain private sector companies vital to national security and would serve as a more efficient and effective system of governance for CFIUS.<sup>18</sup>

Part I of this note outlines the controversial history that shaped the evolution of CFIUS; Part II discusses Huawei's recent attempts to acquire U.S. companies; Part III analyzes how Huawei's merger attempts to illustrate flaws in CFIUS's function and suggests solutions for these flaws.

### **II. History of CFIUS**

### A. Origin of the Fujistu-Fairchild Incident

CFIUS was created in the 1970s in reaction to the increased foreign direct investment (FDI) in the United States by oil rich nations. <sup>19</sup> Congress grew weary of the large amounts of capital flowing into the country, and in response, President Gerald Ford, via Executive Order 11, 858 established CFIUS to "monitor[] the

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weis\_3com\_de.html; Richard Mcgregor et al., *Huawei-3Com Deal Finally Collapses Amid U.S. Opposition*, Fin. TIMES, (March 22, 2008), http://www.ft.com/intl/cms/s/0/c2091814-f6b5-11dc-bda1-000077b07658.html#axzz1mW0TDXvL (subscription required).

John Leyden, *Huawei Drops 3Leaf Buy: Capitol Hill Says No*, THE REG., (Feb. 21, 2011), http://www.theregister.co.uk/2011/02/21/huawei\_3leaf\_deal\_dropped/.

<sup>&</sup>lt;sup>16</sup> Stephanie Kirchgaessner, *Huawei U-turn on U.S. Deal Saves Blushes*, FIN. TIMES (Feb. 21, 2011), http://www.ft.com/cms/s/2/28c1e442-3d20-11e0-bbff-00144fea bdc0.html.

<sup>17</sup> See infra Part III.

<sup>&</sup>lt;sup>18</sup> See infra Part III.

<sup>&</sup>lt;sup>19</sup> See Jose E. Alvarez, Political Protectionism and United States Investment Obligations in Conflict: The Hazards of Exon-Florio, 30 VA. J. INT'L L. 1, 3 (1989).

impact of foreign investment in the United States."<sup>20</sup> Chaired by the Secretary of Treasury, the eight-member CFIUS committee was tasked with "review[ing] investments in the United States . . . that might have major implications for United States national interests."<sup>21</sup> As originally created, CFIUS had no power to block investments even if the investments presented a national security threat to the United States.<sup>22</sup>

In the five years after its inception, the CFIUS committee met only ten times.<sup>23</sup> Political pressure—mainly the Executive Branch's inability to prove that FDI did not present a threat to the United States—may have contributed to the general lack of action taken by the committee.<sup>24</sup> A combination of Reaganomics, which encouraged FDI,<sup>25</sup> and the lack of regulation controlling FDI, led to a five-fold increase in these types of investments from 1980 to 1989.<sup>26</sup>

CFIUS drew national attention in 1986, ending its passive approach towards enforcing its own goals.<sup>27</sup> In 1986, Fujitsu Ltd., a Japanese computer manufacturer, sought to buy Fairchild Semiconductor Corp., a company that had supply contracts with U.S. defense contractors.<sup>28</sup> Many "feared losing the technological

<sup>&</sup>lt;sup>20</sup> Exec. Order No. 11,858, §1(b) 3 C.F.R. 990 (1971-1975), amended by Exec. Order No. 12,188, 3 C.F.R. 131 (1981).

<sup>21</sup> *Id* 

<sup>&</sup>lt;sup>22</sup> See Paul I. Djuristic, Comment, The Exon-Florio Amendment: National Security Legislation Hampered by Political and Economic Forces, 3 DEPAUL BUS. L.J. 179, 183 (1991).

<sup>&</sup>lt;sup>23</sup> See Matthew C. Sullivan, CFIUS and Congress Reconsidered: Fire Alarms, Police Patrols, and a New Oversight Regime, 17 WILLAMETTE J. INT'L L. & DISP. RESOL. 199, 211 (2009).

<sup>&</sup>lt;sup>24</sup> *Id.* at 211-12.

<sup>&</sup>lt;sup>25</sup> See Edward M. Graham & David M. Marchick, U.S. National Security and Foreign Direct Investment 20 (Institute for International Economics, 2006), available at <a href="http://www.piie.com/publications/chapters\_preview/3918/01iie3918.pdf">http://www.piie.com/publications/chapters\_preview/3918/01iie3918.pdf</a> (recalling that President Reagan, as compared to President Carter, welcomed direct investment in the United States as a part of his economic strategy).

<sup>&</sup>lt;sup>26</sup> See Djuristic, supra note 22, at 183.

<sup>&</sup>lt;sup>27</sup> *Id.* at 183-84.

<sup>28</sup> See Jackson, supra note 13, at 4 ("The proposed Fairchild acquisition generated intense concern in Congress in part because of general difficulties in trade relations with Japan at that time and because some Americans felt that the United States was declining as an international economic power as well as a world power. The Defense Department opposed the acquisition because some officials believed that the deal would give Japan control over a major supplier of computer chips for the military and would make U.S.

edge to the Japanese" and feared that the United States would have no other comparable microchip manufacturers if a Japanese company purchased Fairchild Semiconductor. <sup>29</sup> If Fairchild Semiconductor Corp. were acquired, U.S. defense manufacturers would be dependent on a foreign company to acquire quality computer chips. <sup>30</sup> In response to those fears, CFIUS initiated a review of the potential acquisition. In the face of intense national attention, Fujitsu Ltd. withdrew its offer. <sup>31</sup>

This purported acquisition highlighted a major weakness with CFIUS and the President's power: while the Executive branch could review transactions under CFIUS, it had no power to stop them.<sup>32</sup> The Fujistu-Fairchild incident signaled to Congress that CFIUS needed to change in order to protect the United States; thus, the incident inspired the passage of the Exon-Florio Amendment, discussed below.

#### B. From Exon-Florio to the Byrd Amendment

Section 5021 of the Omnibus Trade and Competitiveness Act of 1988, commonly known as the Exon-Florio Amendment, significantly expanded presidential power to regulate foreign investments in the United States.<sup>33</sup> The amendment gave the President the express power to block any investment where "there is credible evidence" leading him to believe that the investing company may "take action that threatens to impair... national security."<sup>34</sup> The amendment also required the President to explain to Congress whenever he determined that a particular transaction should be stopped pursuant to the power granted in the

defense industries more dependent on foreign suppliers for sophisticated high-technology products.").

 $^{33}$   $\it See$  Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100-418, §5021, 102 Stat. 1107 (codified as amended at 50 U.S.C. app. §2170).

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Djuristic, *supra* note 22, at 184; *see* Edward Graham & Michael Ebert, *Foreign Direct Investment and U.S. National Security: Fixing Exon-Florio*, 14 THE WORLD ECON. 245, 249 (1991) ("[S]urging foreign acquisitions . . . were steadily eroding the US defence industrial base if not non-defence American 'competitiveness.'").

<sup>&</sup>lt;sup>30</sup> See Jackson, supra note 13, at 4 (explaining this dependency as a feared result).

<sup>31</sup> See Stephen K. Pudner, Comment, Moving Forward From Dubai Ports World-The Foreign Investment and National Security Act of 2007, 59 ALA. L. REV. 1277, 1279 (2007-2008).

<sup>32</sup> See id.

Omnibus Trade and Competitiveness Act of 1988, § 2170(d)(4) (2007).

amendment.<sup>35</sup> Following the amendment, President Reagan delegated the authority invested in him by the amendment to CFIUS through Executive Order 12,661.<sup>36</sup>

The Exon-Florio Amendment that passed was not as strong as the original proposal.<sup>37</sup> While the Exon-Florio Amendment was intended to repair CFIUS and increase Presidential power, it did not go far enough. The flaws and holes of CFIUS were revealed within a year of the enactment of Exon-Florio during the Thomson-LTV incident.<sup>38</sup>

In 1992, a French government-owned corporation, Thomson-CSF, sought to acquire LTV Steel's Missile Division, a U.S. company that had defense contracts with the Department of Defense.<sup>39</sup> In this case, a large portion of the transaction was completed prior to seeking CFIUS approval.<sup>40</sup> After CFIUS initiated the investigation, Thomson-CSF and the Department of Defense failed to reach terms on how the United States could be protected by the merger, resulting in the Department of Defense recommending that the transaction not occur.<sup>41</sup> As pressure mounted from the Department of Defense and Capitol Hill,<sup>42</sup> Thompson-CSF withdrew its bid for LTV's Missile Division.<sup>43</sup>

Despite Thomson-CSF's withdrawal, many were concerned with how this situation was handled and desired to make sure

<sup>35</sup> See id. at §2170(b)(3).

<sup>&</sup>lt;sup>36</sup> See Exec. Order No. 12,661, 3 C.F.R. 618 (1988); Matthew R. Byrne, Note, Protecting National Security and Promoting Foreign Investment: Maintaining the Exon-Florio Balance, 67 Ohio St. L.J. 849, 865 & n.95 (2006).

<sup>&</sup>lt;sup>37</sup> See Graham & Ebert, supra note 29, at 248 (stating that the Amendment introduced by Rep. James Florio granted the President power to block any transaction threaten to U.S. "national security and essential commerce."); see also Alvarez, supra note 19, at 64-68 (noting that the original bill faced much criticism, with many citing the bill as too broad and far reaching).

<sup>&</sup>lt;sup>38</sup> See Byrne, supra note 36, at 872-73.

<sup>&</sup>lt;sup>39</sup> See id.

<sup>&</sup>lt;sup>40</sup> See id. at 873.

<sup>&</sup>lt;sup>41</sup> See id. at 873-74 (citing Robert N. Cappucci, Note, Amending the Treatment of Defense Production Enterprise Under the U.S. Exon-Florio Provision: A Move Toward Protectionism or Globalism?, 16 FORDHAM INT'L L.J. 653, 667-68 (1993)).

<sup>&</sup>lt;sup>42</sup> See id. at 873-74 (stating that pressure accumulated from Thomson's competitors and hearings on Capitol Hill; opposition was also induced because "Thompson had provided Iraq with radar equipment for use during the Persian Gulf War").

<sup>&</sup>lt;sup>43</sup> See id. at 874.

"such deals were properly vetted in the future." The Thomson-LTV incident was managed in a cloud of secrecy, with CFIUS denying access to information due to confidentiality agreements. The covert nature of the CFIUS review process created many conflicting reports regarding Thomson-CSF's withdrawal. Thus, the Thomson-LTV incident inspired Congress to pass the Byrd Amendment.

### C. From the Byrd Amendment to the Foreign Investment and National Security Act of 2007

The Byrd Amendment, Section 837(a) of the National Defense Authorization Act for the Fiscal Year 1993, 47 sought to strengthen CFIUS by expanding its reach. 48 Unlike the Exon-Florio Amendment, which allowed CFIUS to opt out of an investigation, the Byrd Amendment *required* CFIUS to investigate in virtually all circumstances. 49 More specifically, the Byrd Amendment mandated investigation "in any instance in which an entity controlled by or acting on behalf of a foreign government seeks to engage in any merger, acquisition, or takeover" that affects national security. 50

Additionally, the amendment increased the President's reporting requirements. Under the Exon-Florio Amendment, the President only had to report to Congress when he rejected a deal.<sup>51</sup> However, the Byrd Amendment required the President to send a report to Congress in any instance CFIUS completed a full investigation and to the parties who did not withdraw from the transaction.<sup>52</sup> Consequently, Congress would have more information regarding the CFIUS committee's actions, which

<sup>44</sup> See Pudner, supra note 31, at 1281.

<sup>45</sup> See Bryne, supra note 36, at 873-74.

<sup>46</sup> See id.

<sup>47</sup> See Pudner, supra note 31, at 1281.

<sup>&</sup>lt;sup>48</sup> See National Defense Authorization Act for Fiscal Year 1993, Pub. L. No. 102-484, § 837, 106 Stat. 2315 (1992) (codified as amended at 50 U.S.C. app. § 2170 (2007)).

<sup>&</sup>lt;sup>49</sup> See id.

<sup>&</sup>lt;sup>50</sup> *Id*.

<sup>51</sup> See Omnibus Trade and Competitiveness Act of 1988, § 2170(b)(3), (d)(2) (2007) (requiring the President to report to Congress upon taking such action).

<sup>&</sup>lt;sup>52</sup> See National Defense Authorization Act for Fiscal Year 1993, § 837 (1992) (amending 50 U.S.C. app. § 2170(g) (2007)).

reduces some of the concern created by the Thomson-LTV situation.

The law stood still for almost fourteen years before the next set of amendments regulating CFIUS came into effect.<sup>53</sup> The amendments were inspired by two proposed takeovers: CNOOC's bid of Unocal and Dubai Ports World's bid for Peninsular and Oriental Steam Navigation Co. (P&O).<sup>54</sup>

### 1. CNOOC-UNOCAL Deal

CNOOC is one of China's largest oil producers, with much of its business engaging in the "exploration, development, production and sales of oil and natural gas."55 Similar to CNOOC, Unocal was in the business of energy exploration, having a multinational business model.<sup>56</sup> Seeing a good fit for its growth strategy, CNOOC made a \$18.5 billion bid for Unocal in June of 2005.<sup>57</sup> Many in the United States did not welcome the proposed bid, and Congress soon passed resolutions to cut funding to departments that would recommend approving the transaction.<sup>58</sup> Many feared that if the acquisition went through, communist China would gain control of an American company with large oil reserves.<sup>59</sup> Much of the opposition to this transaction stemmed from three key facts: "CNOOC is a foreign company; the Chinese government controls it; and it has the unfair advantage of financial support from the Chinese government."60 "[C]iting unprecedented political opposition . . . creating a level of uncertainty that present[ed] an

<sup>53</sup> See, e.g., infra Part II.D (detailing the amendments enacted in 2007).

<sup>54</sup> See infra Part II.C.1.

<sup>55</sup> CNOOC LIMITED, http://www.cnoocltd.com/encnoocltd/aboutus/default.shtml (last visited Jan 24, 2013).

<sup>&</sup>lt;sup>56</sup> Douglas Sun, *Gale Directory of Company Histories: Unocal Corporation*, ANSWERS, http://www.answers.com/topic/unocal-corporation-1?cat=biz-fin (last visited Jan. 24, 2013).

<sup>&</sup>lt;sup>57</sup> David Barboza & Andrew Ross Sorkin, *Chinese Oil Giant in Takeover Bid for U.S. Company*, N.Y. TIMES, June 23, 2005, at A1.

<sup>&</sup>lt;sup>58</sup> See Sullivan, supra note 23, at 220-21; see also GARY CLYDE HUFBAUER, YEE WONG & KETKI SHETH, US-CHINA TRADE DISPUTES: RISING TIDE, RISING STAKES 47-48 (Institute for International Economics, 2006), available at http://www.piie.com/publications/chapters\_preview/3942/05iie3942.pdf (describing the United States governments reaction to the proposed CNOOC-Unocal transaction).

<sup>&</sup>lt;sup>59</sup> See Byrne, supra note 36, at 874-75 (describing concerns "[n]umerous members of Congress" had with a Chinese company taking control of Unocal).

<sup>60</sup> HUFBAUER ET AL., *supra* note 58, at 47.

unacceptable risk to our ability to secure this transaction,"<sup>61</sup> CNOOC withdrew its bid for Unocal.<sup>62</sup>

Notably, CNOOC's withdrawal came from congressional pressure rather than CFIUS's review. Due to CFIUS's inaction, Congress passed some legislation calling for

a one-time study "of the growing energy requirements of the People's Republic of China and the implications of such growth on the political, strategic, economic, or national security interests of the United States." The legislation allowed for 120 days for the report to be completed and presented to the president and Congress. Not until 21 days after the report was presented could a US [sic] organization that reviews investment in a domestic corporation "conclude a national security review related to an investment in the energy assets of a United States domestic corporation by an entity owned or controlled by the government of the People's Republic of China," thereby immobilizing the review process under way in the Committee on Foreign Investment in the United States (CFIUS) with respect to the proposed CNOOC-Unocal deal for a potential 141 additional days. 63

Thus, with a combination of legislation and congressional scrutiny, CFIUS and the President were spared from making a decision on "a politically unpopular deal." <sup>64</sup>

# 2. Dubai Ports-Peninsular and Oriental Steam Navigation Co. (P&O) Deal

Soon after the CNOOC-Unocal incident, CFIUS was once again put under scrutiny in October of 2005. Dubai Ports World (DPW), a United Arab Emirates government-owned company, sought to buy Peninsular and Oriental Steam Navigation Co. (P&O), a London based company. <sup>65</sup> P&O managed six major U.S.

<sup>61</sup> *Id.* at 48 (alteration in original).

<sup>62</sup> See id.; see also Press Release, CNOOC Ltd., CNOOC Limited to Withdraw Unocal Bid (Aug. 2, 2005) available at http://www.cnoocltd.com/encnoocltd/newszx/news/2005/961.shtml.

<sup>63</sup> HUFBAUER ET AL., supra note 58, at 47-48.

<sup>64</sup> See Sullivan, supra note 23, at 222.

<sup>65</sup> See Eben Kaplan, The UAE purchase of American port facilities, COUNCIL ON FOREIGN RELATIONS (Feb. 21, 2006), http://www.cfr.org/port-security/uae-purchase-american-port-facilities/p9918; see also Maria Goes de Moraes Gavioli, National Security or Xenophobia: The Impact of the Foreign Investment and National Security Act

ports, most famously the port of New York.<sup>66</sup> When the two companies filed for CFIUS review, "CFIUS did not identify national security issues in this transaction because DPW would neither be in charge of the ports themselves nor port security.<sup>67</sup> Rather, it would manage terminal port operations without acquiring the ports themselves."<sup>68</sup>

The rapid review of the transaction raised questions about CFIUS's diligence in the review process, with some accusing that it had overlooked some national security considerations. Others questioned the reliability of the DPW, questioning its national ties with the United Arab Emirates which had a "history as an operational and financial base for hijackers who carried out the 9/11 attacks." While DPW remained committed to working on the deal, it eventually succumbed to the political pressure and negative publicity after several weeks of scrutiny. Notably, the Dubai Ports incident brought out the weakness of CFIUS. It showed how port security, even after 9/11, could be compromised by a lackluster CFIUS review. Furthermore, it pitted a President who supported the transaction against a Congress that overtly opposed it. The Dubai Ports incident made national security a political football, pitting the President and Congress against one

("FINSA") in Foreign Investment in the U.S., 2 WM. MITCHELL L. RAZA J. 1, 20 (2011) (explaining that P&O was a London-based company).

- 67 Gavioli, supra note 65, at 20.
- 68 *Id*

<sup>69</sup> See Deborah M. Mostaghel, *Dubai Ports World under Exon-Florio: A Threat to National Security or a Tempest in a Seaport*?, 70 ALB. L. REV. 583, 606 (2007) (explaining that members of Congress expressed concerns).

- <sup>70</sup> Gavioli, *supra* note 65, at 21.
- $^{71}$  See id. (explaining DPW's response given the threatened legislative action from Congress).
- <sup>72</sup> See id. ("After the DPW incident Congress deemed the CFIUS review under Exon-Florio inadequate to protect national security under the current state of affairs of terrorist threats.").
- $^{73}$  See id. ("[Critics] further argued that DPW could be influenced by Al-Qaeda into weakening ports' security.").
- 74 See id. ("President George W. Bush supported the deal and threatened to veto any congressional action blocking it.").

<sup>66</sup> See Associated Press, Bush Backs Transfer of U.S. Ports to Dubai Firm, MSNBC (Feb. 21, 2006, 11:30 PM), <a href="http://www.msnbc.msn.com/id/11474440/ns/us\_news-security/t/bush-backs-transfer-us-ports-dubai-firm/#.UHzuScWdDjK">http://www.msnbc.msn.com/id/11474440/ns/us\_news-security/t/bush-backs-transfer-us-ports-dubai-firm/#.UHzuScWdDjK</a> (listing New York, New Jersey, Baltimore, New Orleans, Miami, and Philadelphia as "Dubai ports").

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Recognizing the weakness of CFIUS as illuminated by the Dubai Ports and CNOOC incidents, Congress once again needed to strengthen CFIUS, and it did so through the Foreign Investment and National Security Act of 2007 (FINSA).<sup>76</sup>

# D. Foreign Investment and National Security Act of 2007 (FINSA)

With the primary goal of broadening the reach of CFIUS by expanding the types of transactions covered and by expanding the definition of national security, President Bush signed FINSA into law on July 26, 2007.<sup>77</sup> Interestingly, this was the first time Congress brought CFIUS directly under a statutory framework, thus making CIFUS more accountable.<sup>78</sup>

Maira Gavioli summarized the effects of FINSA as:

(1) it expands the concept of national security to include issues relating to "homeland security"; (2) expands "covered transaction" to include transactions involving "critical infrastructure"; (3) includes additional factors that CFIUS might consider in its assessment of national security threats; (4) expressly authorizes CFIUS to require mitigation agreements and monitor compliance; (5) prohibits notice withdrawals without CFIUS prior approval; (7) [sic] expands Congressional access to CFIUS transaction's specific information; and (8) provides for civil penalties if parties to a transaction violate FINSA and/or mitigation agreements. The additional factors that CFIUS can consider in its national security analysis under FINSA specifically target, *inter alia*, situations that involve terrorist-related parties or countries.<sup>79</sup>

Under FINSA, CFIUS could investigate matters affecting

<sup>76</sup> See Foreign Investment & National Security Act of 2007, Pub. L. No. 110-49, 121 Stat. 246 (codified as amended in 50 U.S.C. app. § 2170) (describing powers granted to CFIUS).

<sup>&</sup>lt;sup>75</sup> See id.

<sup>&</sup>lt;sup>77</sup> See id.; see also Gavioli, supra note 65, at 22 ("FINSA represents a victory for congress in the long-running struggle to expand covered transactions, broaden the national security concept and increase congressional oversight.").

<sup>&</sup>lt;sup>78</sup> See Pudner, supra note 31, at 1282 ("[T]he passage of the Act in 2007 was the first time that Congress brought CFIUS explicitly under a statutory framework, therefore adding a measure of stability and accountability previously missing from CFIUS.").

<sup>&</sup>lt;sup>79</sup> See Gavioli, supra note 65, at 22-23 (citations omitted).

"homeland security', [sic] including its application to critical infrastructure" under the term "national security." FINSA defines "critical infrastructure" broadly as "systems and assets, whether physical or virtual, so vital... that the incapacity or destruction of such systems or assets would have a debilitating impact on national security." To ensure that CFIUS would review more transactions, Congress specifically listed additional areas, such as: (1) critical technology, (2) energy, (3) materials, (4) infrastructure, (5) military goods, and (6) export controls could be affected by the transaction at issue. 82

Additionally, FINSA's definition of covered transactions, in conjunction with the statutory definition of covered transactions, expanded CFIUS's power. Post-FINSA, CFIUS can investigate any transaction that "could result in foreign control of any person engaged in interstate commerce in the United States." Furthermore, since "control" is broadly defined by statute as including any form of "direct or indirect power, through ownership of voting interests, or any formal or informal contractual arrangements that would otherwise allow the acquiring company to decide important matters affecting the target entity," CFIUS can target interest gained by foreign entities through stock purchases as well as mergers and acquisitions.

As of 2007, CFIUS is the broadest, most transparent, structured, and regulated that it has ever been. The strengthened CFIUS robustness has been tested, yet little analysis exists to how CFIUS faired in handling the national security matters. After 2007, CFIUS has been tested by two major incidents, each

<sup>80 50</sup> U.S.C. app. § 2170(a)(5) (2007).

<sup>81</sup> Id. § 2170(a)(6) (2007); see also 31 C.F.R. § 800.208 (2008) ("The term critical infrastructure means, in the context of a particular covered transaction, 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 that covered transaction would have a debilitating impact on national security.").

<sup>&</sup>lt;sup>82</sup> See Guidance Concerning the National Security Review Conducted by the Commission on Foreign Investment in the U.S., 73 Fed. Reg. 236, 569-70 (Dec. 8, 2008); see also Gavioli, supra note 65, at 24-25 (referencing the same factors).

<sup>83 50</sup> U.S.C. app. § 2170(a)(3).

 $<sup>^{84}</sup>$  See 31 C.F.R. § 800.204(a)(1)-(10) (2008) (listing factors CFIUS considers when determining "control").

<sup>85</sup> See Gavioli, supra note 65, at 26 ("This means that not only mergers and acquisitions are subject to analysis, but also the acquisition of stock interests with voting rights, forming a joint venture, and the conversion of convertible voting securities.").

presenting different challenges to CFIUS: the Huawei-3Com Deal and the Huawei-3Leaf Deal.

## III.A Modern Test of CFIUS: Huawei-3Com and Huawei-3Leaf Deals

#### A. Huawei-3Com

In 2008, Huawei, a Chinese telecommunication equipment company, partnered with Bain Capital, a U.S. company, to buy 3Com, an American company that built internet routers and advanced networking materials. However, unlike previously discussed transactions, Huawei would only get a minority share of the company. Issues arose with the transaction because 3Com made anti-hacking software for the U.S. military, and with Huawei having strong ties with the Chinese military, U.S. officials feared that the software falling into Chinese hands would jeopardize the U.S. military. Even with this fear, Huawei pursued a mitigation agreement to satisfy CFIUS in order to help Huawei obtain approval of the transaction. In the end, Huawei and CFIUS failed to reach mutual terms, causing Huawei to back out of the transaction.

### B. Huawei-3Leaf

In 2011, Huawei once again attempted to obtain a U.S. computer technology company; this time, Huawei proposed a \$2 million acquisition of 3Leaf Systems. Interestingly, Huawei attempted to bypass CFIUS altogether with this transaction – clearly learning from its previous experience during the 3Com

<sup>86</sup> Steven R. Weisman, *Sale of 3Com is Derailed by U.S. Security Concerns*, N.Y. TIMES (Feb. 21, 2008), http://www.nytimes.com/2008/02/21/business/worldbusiness/21iht-3com.1.10258216.html?pagewanted=all.

<sup>87</sup> See id.

<sup>&</sup>lt;sup>88</sup> See id.; see also Jamie S. Gorelick et al., Wilmer Cutler Pickering Hale and Dorr LLP, The CFIUS Review Process: A Regime in Flux 3-5 (2008) (providing more details of the threat presented).

<sup>89</sup> See Weisman, supra note 86.

<sup>&</sup>lt;sup>90</sup> *Id*.

<sup>91</sup> See Scott M. Flicker & Dana M. Parsons, Huawei – CFIUS Redux: Now It Gets Interesting 1 (2011), available at http://www.paulhastings.com/assets/ publications/1868.pdf.

deal.<sup>92</sup> However, upon learning of the transaction and determining that it fell within its jurisdiction, CFIUS quickly initiated a review of the proposed acquisition.<sup>93</sup>

Within a short period after initiating review, the CFIUS recommended that Huawei voluntarily divest from 3Leaf. 94 Unfortunately, by the time of this recommendation, Huawei had already completed the transaction, "hired 15 3Leaf employees, own[ed] several former 3Leaf patents and purchased the start-up's servers out of bankruptcy." Upon receiving CFIUS's recommendation, Huawei refused to back out of the transaction and intended to force President Obama to decide the matter. 96 Huawei's boldness was unprecedented, placing the President in a very difficult position because he would have had to go "to great lengths to avoid offending the Chinese government." Fortunately for the President, Huawei decided to divest from 3Com before his involvement became necessary. 98

<sup>92</sup> *Id.* at 1-2 ("Huawei and its advisors reasoned that the purchase of discrete technology (including patents) and the assumption of less than a third of 3Leaf's employees did not constitute the acquisition of an ongoing 'U.S. Business,' and, therefore, the acquisition fell outside CFIUS's jurisdiction under the Defense Production Act."); *see also* DavisPolk, Committee on Foreign Investment in the United States Rejects Huawei Deal; Third Recent Chinese Transaction Scuttled by National Security Review 1 (2011). Filings with CFIUS are not mandatory, and Huawei and 3Leaf did not notify CFIUS before the acquisition in May and July 2010. *Id.* Huawei reportedly acquired intellectual property and key personnel from 3Leaf, but no equity or physical assets, and the parties concluded that the transaction was not covered because Huawei did not acquire all of the target's assets. *Id.* 

<sup>93</sup> See FLICKER & PARSONS, supra note 91, at 1.

<sup>&</sup>lt;sup>94</sup> Shayndi Raice, Panel Likely to Recommend Reversing Huawei Deal, WALL ST. J. (Feb. 11, 2011), http://online.wsj.com/article/SB10001424052748704629004576 136340771329706.html.

<sup>&</sup>lt;sup>95</sup> See id.

<sup>&</sup>lt;sup>96</sup> See Timothy J. Keeler & Simeon M. Kriesberg, US National Security Review Disapproves Completed Chinese Acquisition — Huawei Agrees to Withdraw from 3Leaf Deal, MAYER BROWN (Feb. 23, 2011), http://www.mayerbrown.com/publications/article.asp?id=10499.

<sup>97</sup> See FLICKER & PARSONS, supra note 91, at 2 (noting that "China's Ministry of Commerce has repeatedly complained that the U.S. government is using the CFIUS process as a pretext for dampening Chinese investment in the United States").

<sup>98</sup> Shayndi Raice & Andrew Dowell, *Huawei Drops U.S. Deal Amid Opposition*, WALL St. J. (Feb. 22, 2011), http://online.wsj.com/article/SB100014240527487034073 04576154121951088478.html (noting that "[i]n a brief statement, Huawei said the controversy surrounding the issue led it to change its mind. 'This was a difficult decision, however we have decided to accept the recommendation of CFIUS to withdraw

### IV. Analysis of FINSA and Solutions

If there is any take-away from the Huawei-3Leaf situation, it is that the factor method does not provide enough guidance as to who will be subject to CFIUS review. <sup>99</sup> Just as Huawei argued that its take-over of 3Leaf is not within the jurisdiction of CFIUS as they interpreted the U.S. code, many other companies in the future may try to bypass the voluntary CFIUS application process. <sup>100</sup>

Additionally, the voluntary application review process is not ideal for national security concerns. As companies become more aggressive, and if sensitive data is at risk, an ex post facto divestment approach does little to protect national security. With hackers having the ability to steal thousands of files in single breach incidents, sensitive U.S. technology can easily be accessed within a few days after acquisition; the divestment remedy as requested in the 3Leaf situation does little to secure this sensitive data. 103

To resolve this issue, as some scholars have suggested, one could simply add more factors to be considered under the current list.<sup>104</sup> Such a method puts more foreign investors on notice that

our application to acquire specific assets of 3Leaf,' the company said").

<sup>&</sup>lt;sup>99</sup> See Gavioli, supra note 65, at 29-30.

<sup>100</sup> See supra note 92 and accompanying text; see also FLICKER & PARSONS, supra note 91, at 2 (stating that CFIUS staff "had to take the unusual (though not unprecedented) step of 'inviting' Huawei to file a notice of the transaction after the fact"); Gavioli, supra note 65, at 37.

<sup>101</sup> See DERRICK SPOONER ET AL., CARNEGIE MELLON UNIV, SPOTLIGHT ON: INSIDER THEFT OF INTELLECTUAL PROPERTY INSIDE THE U.S. INVOLVING FOREIGN GOVERNMENTS OR ORGANIZATION 4, 7-9 (2009), available at www.cert.org/archive/pdf/CyLabForeignTheftIP.pdf (describing how corporate insiders can steal information and expressing the difficulty of retrieving that information once it goes abroad),

<sup>102</sup> See Hackers Steal French Ministry Information, VOANEWS, March 6, 2011, http://www.voanews.com/english/news/economy-and-business/Hackers-Steal-French-Finance-Ministry-Information-117521708.html.

<sup>103</sup> See Lolita C. Baldor & Robert Burns, Pentagon Says Hackers Accessed 24,000 Files, Associated Press, July 15, 2011, http://articles.boston.com/2011-07-15/news/29778211\_1\_pentagon-data-terrorist-group-defense-industry; see also Michael Riley & John Walcott, China-Based Hacking of 760 Companies Shows Cyber Cold War, Bloomberg (Dec. 14, 2011), http://www.bloomberg.com/news/2011-12-13/china-based-hacking-of-760-companies-reflects-undeclared-global-cyber-war.html (describing how China based hackers broke into 760 U.S. companies and acquired sensitive information).

<sup>104</sup> See Gavioli, supra note 65, at 40.

CFIUS could potentially step in on the transaction by making more factors applicable to a particular transaction. However, as exhibited by the 3Leaf incident, such a proposal does not go far enough because it remains fallible to lawyer's interpretations as what transaction falls within the scope of the enumerated factors. 106

Moreover, by analyzing the various businesses in which CFIUS has taken interest, for example, 3Leaf and 3Com (server technology), Dubai Ports (shipping port management), Fujistu-Fairchild (semiconductor industry), it is difficult for foreign investors to determine what industry falls within "national security." While the factor method enables CFIUS to have an expansive reach, with some criticizing the factors as giving CFIUS too broad of a reach, 108 FINSA, along with the lack of congressional guidance, allows CFIUS to declare almost every sector of U.S. commerce as being vital to "national security." 109 As currently regulated, CFIUS can potentially presume that "every critical sector of the U.S. industry should be kept in the hands of home-country citizens or business,"110 giving potential foreign investors no guidance on whether their investment will be subject to CFIUS review.

Lastly, both the 3Leaf and the 3Com incidents illuminate the polar ends of the spectrum of political threat CFIUS can present. The 3Com incident demonstrates how political pressure can bring national attention to such a transaction, which can ultimately serve as a positive force to augment national security. However, as companies grow bolder and challenge the authority of CFIUS determinations, the President may become pitted against both Congress and foreign governments. As shown by the 3Leaf deal, the President had to be cautious in protecting U.S. trade relations with China, while at the same time protecting relations

<sup>105</sup> See id. at 40.

<sup>106</sup> See Weisman, supra note 86.

<sup>107</sup> See Gavioli, supra note 65, at 29.

<sup>108</sup> See id. at 29-30.

<sup>109</sup> See id.

<sup>110</sup> See id.

<sup>111</sup> See FLICKER & PARSONS, supra note 91, at 1.

<sup>112</sup> See id. at 2.

with Congress.<sup>113</sup> If Huawei had not agreed to divest, the President would have had two options: (1) force divestment, thus pleasing Congress and displeasing China, or (2) approve the transaction, pleasing China, but displeasing Congress and exposing himself to political criticism regarding his national security policy.<sup>114</sup> As exemplified by the boldness of Huawei in the 3Leaf transaction, national security can become a politicized issue outside the context of congressional attention under CFIUS.

### V. Proposed Solution

Prior to presenting a solution to some of the problems exposed by the 3Com and 3Leaf incidents, several concessions must be noted. First, CFIUS is undoubtedly influenced by politics; many have criticized it as being over politicized. However, under the current framework, such an unpoliticized solution is not possible since both Congress and the President play a vital role in regulating CFIUS. Second, the historical discussion of CFIUS shows that CFIUS is an evolving organization. Keeping in mind these two factors, the proposal below is not intended to be an end all solution, nor is it meant to be seen as a complete solution to all the problems illuminated by the 3Com and 3Leaf deals. However, given the potential impact of a solution, warding off danger and increasing national security, even a small step forward is a worthwhile consideration.

Broadly speaking, the proposal here suggests that to address the issues exposed by the 3Com and 3Leaf deals, CFIUS should adopt a "list" approach. The list method is conceptually simple.

<sup>113</sup> *Id.* (noting that presidential review of the 3Leaf transaction would have "presented a thorny political problem for the White house, which would likely have gone to great lengths to avoid offending the Chinese government"). The article also noted that

China's Ministry of Commerce has repeatedly complained that the U.S. government is using the CFIUS process as a pretext for damping Chinese investment in the United States. And China has recently unveiled, to significant press and industry attention, its own foreign investment review process, part of a new wave of such measures also recently proposed or enacted in other countries, including Frances and Italy.

*Id.* Thus, because of worldwide attention on these transaction, a country's determination of a particular transaction could have future trade consequences.

<sup>114</sup> See supra Part III.B.

See Gavioli, supra note 65, at 33-36.

<sup>&</sup>lt;sup>116</sup> See, e.g., id.

Under this approach, the CFIUS committee, using the factors outlined by statute, would create a list of companies it deems as being vital to national security. Thereafter, these companies would be notified of their status on the list. Once a company has been notified, the CEO of the company must notify CFIUS any time that company is engaged in a transaction that might subject the company to foreign control.

In creating this list, the Committee must take steps to assure that the list method is not abused. First, the Committee must be as specific as possible when putting companies on the list. Second, the Committee must be able to point to a statutory element or category of industry to which the company belongs. Third, the Committee may create additional categories of industry that are vital to national security, but must do so with great discretion. Fourth, the Committee must be as specific as possible in creating these categories and must justify the creation of each one.

A possible criticism of the list method is the stigma attached to being on the list. Companies might be concerned that being on this list renders them less desirable and thus less likely to receive other buyout bids. However, the list method does not functionally alter anything; if companies are deemed vital to national security, they would be subject to CFIUS review regardless. Furthermore, while being put on the list may repel buyout offers, it does not entirely preclude them. Lastly, a secretive ex ante approach to the list could help avoid any negative publicity caused by the CFIUS review, thus helping the U.S. company preserve its image.

With such principles to guide the Committee, a list method alleviates some of the problems CFIUS currently faces. Primarily, by requiring the CFIUS committee to create a list of vital companies or national security activities, the Committee is forced to flesh out the concept of "national security" and "homeland security" to a much greater extent than is currently required. Additionally, the Committee is forced to apply the factors listed in

<sup>117</sup> See Foreign Investment and National Security Act of 2007, Pub. L. No. 110-49, 121 Stat. 246 (codified as amended in 50 U.S.C. app. § 2170).

This means that the Committee cannot put all of IBM on the list; rather, it must list a particular division of IBM that it deems vital.

<sup>119</sup> See supra Part II.C.1.

<sup>120</sup> See id.

the statutes prior to any transaction, ensuring the Committee's understanding of the reach and importance of each factor will increase.

The list method further gives greater notice to companies about their importance to U.S. national security. Because any company on the list is required to notify CFIUS of the proposed merger transaction, CFIUS will have appropriate time to review the proposal. If 3Leaf had been on the list, it would not have completed the transaction with Huawei prior to seeking CFIUS review. As noted above, while it only takes a few minutes to acquire information that could jeopardize national security, this method would reduce the likelihood that companies could acquire sensitive information through the divestment remedy to a rejected transaction.

By no means is the list meant to be determinative of whether or not a company is vital to national security, nor is it meant to supplant CFIUS's current functioning method. Rather the list method is only meant to supplement the current framework; CFIUS will still have flexibility in its jurisdiction by retaining discretion to interpret "national security" and "homeland security" concerning overlooked or newly formed industries. Therefore, using the list method with a combination of the current framework will curb the criticism of CFIUS as being too erratic due to a lack of guidance.

Additionally, the list approach seems more politically neutral than the current approach for two primary reasons. First, since the regulation would apply to all foreign countries, it would be difficult for foreign countries to claim the United States is specifically targeting any particular nation's companies. Secondly, the list method reduces any potential bias of the Committee because, in the ex ante approach, the Committee's decision to deem an entity or technology as vital to national security will not be influenced by the nature of the acquiring company and its national affiliation. Consequently, rather than targeting certain transactions by companies associated with certain

<sup>121</sup> See supra Part II.B.

<sup>&</sup>lt;sup>122</sup> See FLICKER & PARSONS, supra note 91, at 2 (noting "China's Ministry of Commerce has repeatedly complained that the U.S. government is using the CFIUS process as a pretext for damping Chinese investment in the United States.").

<sup>123</sup> But see id. (noting skepticism of this impartiality).

foreign countries, this method appears more politically appropriate, at least on the face of it. Practically, if a president is ever asked to make a determination on the approval or rejection of a transaction, his decision would appear to be less politically motivated, instead appearing as justified by the neutral operating mechanism of CFIUS.

However, one of the most frequent criticisms of CFIUS under the current statutory scheme has been that CFIUS's transaction review has been highly politicized. <sup>124</sup> Undoubtedly, Congress has brought much attention to particular transactions through public criticism, which some refer as the fire-alarm method. <sup>125</sup> However, that method can often lead to false alarms, especially when legislators sounding the alarms do not have as much information as the agencies. <sup>126</sup> The solution proposed above does not address this criticism, and serves as a clear limitation. Nevertheless, as noted above, there always will be an inherent political process in CFIUS due to the involvement of the President and the Congressional Reporting requirement. <sup>127</sup> Because *completely* depoliticizing the CFIUS process is not feasible, any proposed solution, even one which directly addresses political influence on the CFIUS process, will suffer this same infirmity.

Any proposal for change must be viewed within the larger framework of government functioning. CFIUS has been a system in evolution for more than four decades, <sup>128</sup> and the system has strived to fit modern security concerns. <sup>129</sup> Admittedly, the system is not perfect. However, a proposal for a more drastic overhaul of CFIUS would have difficulty garnering political approval, whereas a proposal for small changes to the administration of the CFIUS is

<sup>124</sup> See Gavioli, supra note 65, at 33-36.

<sup>&</sup>lt;sup>125</sup> Sullivan, *supra* note 23, at 203-33.

<sup>126</sup> Id. at 204.

<sup>&</sup>lt;sup>127</sup> Jonathan C. Stagg, Scrutinizing Foreign Investment: How Much Congressional Involvement Is Too Much, 93 IOWA L. REV. 325, 352 (2007).

See Exec. Order No. 11,858, 3 C.F.R. 990 (1971-1975), reprinted as note under
U.S.C. §78b (2000) (as amended by Exec. Order No. 12,188, 3 C.F.R. 131 (1981)).

<sup>129</sup> See Foreign Investment & National Security Act of 2007, Pub. L. No. 110-49, §§2-7(b), 8-10, 121 Stat. 246, 259 (2007) (amending 50 U.S.C. app. §2170 (2000)); Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100-418, §5021, 102 Stat. 1107 (codified as amended at 50 U.S.C. app. §2070(a)(2000)) at 2170(g); Exec. Order No. 12,661, 3 C.F.R. 618 (1988).

not likely to encounter this difficulty.<sup>130</sup> Furthermore, small administrative changes such as the list method proposed in this paper may not have to get political approval at all so long as they fit within the current statutory framework.<sup>131</sup> Thus, the list method proposal would be more politically practical than a proposal suggesting a large overhaul of the CFIUS framework.

#### VI. Conclusion

The events of September 11th have made the United States cognizant of the need to ensure national security. However, the mechanism developed to protect the United States from informational security threats has been evolving since the 1980s. 132 The latest incidents involving the Huawei-3Com<sup>133</sup> and Huawei-3Leaf<sup>134</sup> transactions illustrate that there is room for improvement. As currently designed, CFIUS can be undermined by a foreign investor that fails to notify CFIUS of its pending transaction. CFIUS's reach and jurisdiction can be questioned by foreign investors, and the ex post divestment fails to protect the nations information security. 135 However, with the use of a list method, CFIUS can address some of these concerns by ex ante notifying companies that CFIUS considers them vital to national security, thus ensuring that CFIUS can review transactions prior to giving the foreign company a chance to acquire sensitive information. 136 Furthermore, with a more ex ante approach, the targeting method is arguable more neutral and less influenced by bias, making the President's decision seem slightly less political. While the list

<sup>&</sup>lt;sup>130</sup> See generally Gavioli, supra note 65, at 33-36 (noting that CFIUS is inherently politicized).

Based on my interpretation of the statutory framework, the list method proposal would not require legislative approval and could be initiated as an administrative procedure unilaterally enacted by the CFIUS Committee.

<sup>&</sup>lt;sup>132</sup> See Foreign Investment & National Security Act of 2007, Pub. L. No. 110-49, §§2-7(b), 8-10, 121 Stat. 246, 259 (2007) (amending 50 U.S.C. app. §2170 (2000)); Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100-418, §5021, 102 Stat. 1107 (codified as amended at 50 U.S.C. app. §2070(a)(2000)) at 2170(g); Exec. Order No. 12,661, 3 C.F.R. 618 (1988).

<sup>133</sup> See supra Part III.A.

<sup>134</sup> See supra Part III.B.

<sup>&</sup>lt;sup>135</sup> See Spooner et al., supra note 101, at 2-5; Flicker & Parsons, supra note 91, at 1; Hufbauer et al., supra note 58, at 48.

<sup>136</sup> See supra Part III.

method is not a complete fix to CFIUS—it does not present a solution to the criticism that the CFIUS method is overly political—the list approach is a progressive step toward securing the nation against threats from foreign investors.