

Changing Mechanism of the National Security Review for Foreign Investment – A Perspective from the Foreign Investment Risk Review Modernization Act

*Lu Ding Liang¹ & Shan Yi Fei²

¹ Law School, Beijing Normal University, Beijing, CHINA

² Hillary Rodham Clinton School of Law, Swansea University, Swansea Wales, the UNITED KINGDOM

Email Address: ludingliang@126.com

To Cite This Article:

Liang, L. D. ., & Fei, S. Y. . (2023). Changing Mechanism of the National Security Review for Foreign Investment – A Perspective from the Foreign Investment Risk Review Modernization Act. *CMU Academy Journal of Management and Business Education*, 2(1), 1–10. <https://doi.org/10.53797/cjmbe.v2i1.1.2023>

Abstract: As the host country with the largest capital inflow, the United States has always been highly concerned about its foreign investment access and review policy. Facing the uncertainty of Sino-US trade friction development, China must also pay close attention to the United States' foreign investment national security review policy. The Foreign Investment Risk Review Modernization Act (FIRRMA), signed into law in 2018, expanded the scope and revamped the process of CFIUS' review of foreign investment and is bound to introduce even more changes to the national security review of foreign investment in the United States. Against the background of the rapid increase in the scale of Chinese outbound investment, the strict national security review by the Committee on Foreign Investment in the United States (CFIUS) conducted by Chinese-funded enterprises especially those based in the digital economy for their acquisitions of U.S. companies in recent years. The article discusses the new trends and new ideas in the national security review of foreign investment in the United States as well as the effective responses of Chinese-funded enterprises in light of the signing and implementation of FIRRMA.

Keywords: CFIUS, FIRRMA, national security review, and data security

United States has always received close global attention regarding foreign investment access and review policies. In recent years, Chinese enterprises have also attached great importance to the security review policies of the United States. Although China's outward investment started relatively late, with the implementation of the strategies of "going global" and "One Belt, One Road" by Chinese enterprises, the investment volume has been increasing rapidly, especially in the United States. However, with the enactment of the Foreign Investment Risk Review Modernization Act 2018 (FIRRMA), and its pilot program and implementing regulations, the CFIUS has been paying particular attention and scrutiny to the acquisition of Musically by Tik Tok owned by ByteDance, the acquisition of social networking company Grindr by Kunlun Tech, and the termination of the acquisition of MoneyGram by Alibaba's Ant Financial Services Ltd. All of these have created uncertainty in the future of Chinese M&A business in the United States, especially when it comes to data security.

1. The Scale of China's Outward Foreign Direct Investment (FDI) Requires That Chinese Investors Must Pay Close Attention to The Us National Security Review System

According to the Statistical Bulletin of China's Outward Foreign Direct Investment 2017 jointly released in 2018 by the Ministry of Commerce, the National Bureau of Statistics,¹ and the State Administration of Foreign Exchange, China's outward foreign direct investment reached USD158.29 billion in 2017, a decrease of 19.3% year-on-year. This is the first

¹ <http://www.mofcom.gov.cn/article/tongjiziliao/dgzz/201809/20180902791492.shtml> accessed by 3rd September 2022

time that China's outward FDI experienced negative growth since the publication of annual outward FDI statistics in 2003. However, the investment size is still the second highest in history (second only to 2016), and its global proportion of outward investment has exceeded 10% for two consecutive years. The scale of investment flows is only behind the US \$342.27 billion and Japan's \$160.45 billion, down one place from last year and ranking third in the world. From the perspective of two-way investment, China's outward FDI flows have been higher than the inward FDI flows for three years in a row.

In 2017, Chinese enterprises conducted outbound investments and mergers and acquisitions in 56 countries and regions around the world. In terms of the actual value of mergers and acquisitions, Switzerland, the United States, Germany, Brazil, the United Kingdom, Indonesia, Hong Kong China, Australia, the United Arab Emirates, and Singapore were the top ten countries. The United States ranked second (see Chart 1), being the top country in terms of the actual value of mergers and acquisitions.



Chart 1: Top Ten Destinations of Outbound Investment and M&A by Chinese Enterprises in 2017 (Amount)²

From an investment perspective, there are 42 projects for the information transmission/software and information technology service industry, with investment in a foreign country of 6.12 billion US dollars, accounting for 5.1% of the total investment value, ranking 6th among all investment sectors. In a word, the information transmission/software and information technology service industry is a very important part of China's foreign investment. (see Chart 2)

行业类别	数量 (起)	金额 (亿美元)	金额占比 (%)
制造业	163	607.2	50.8
采矿业	22	114.1	9.5
电力 / 热力 / 燃气及水的生产和供应业	30	101.9	8.5
住宿和餐饮业	1	65.0	5.4
租赁和商务服务业	38	63.1	5.3
信息传输 / 软件和信息技术服务业	42	61.2	5.1
交通运输 / 仓储和邮政业	13	55.8	4.7
金融业	4	34.2	2.9
批发和零售业	45	31.2	2.6
房地产业	9	25.2	2.1
卫生和社会工作	5	11.7	1.0
科学研究和技术服务业	28	11.2	0.9
农 / 林 / 牧 / 渔业	13	8.1	0.7
文化 / 体育和娱乐业	5	5.8	0.5
水利 / 环境和公共设施管理业	3	0.3	--
建筑业	3	0.2	--
居民服务 / 修理和其他服务业	4	0.1	--
教育	3	0.1	--
总计	431	1196.2	100.0

Chart 2: Composition of China's Investment in Mergers and Acquisitions Industry in 2017³

In addition, according to the Statistical Bulletin of China's Outward Foreign Direct Investment in 2018 jointly released by the Ministry of Commerce, the National Bureau of Statistics, and the State Administration of Foreign Exchange on

² The chart is cited from Page 10 of the Statistical Bulletin of China's Outward Foreign Direct Investment 2017 <http://www.mofcom.gov.cn/article/tongjiziliao/dgz/201809/20180902791492.shtml>, accessed by 3rd September 2022

³ This chart cited from Page 10 of Statistical Bulletin of China's Outward Foreign Direct Investment 2017, accessed by 3rd February 2022

September 12, 2019,⁴ China's outward foreign direct investment in 2018 reached USD143.04 billion, a year-on-year decrease of 9.6%. Against the backdrop of the total global outward foreign direct investment outflow decreasing by 29% year-on-year and declining for three consecutive years, it was only slightly less than Japan's outflow of USD143.16 billion, China became the second largest foreign investor. At the end of 2018, China's stock of outward FDI reached the US \$1.98 trillion, 66.3 times the stock at the end of 2002, rising from 25th to 3rd in the world in terms of stock of outward FDI by country or region, behind only the United States and the Netherlands. Chinese FDI in the United States in 2017 and 2018 was significant, with more and more investments in the software and information services industries. However, investment by Chinese companies in the United States has been subject to stricter scrutiny in recent years, especially when it comes to data security.

2. National Security Reviews by Cfius of Investment In U.S. Businesses by Chinese Companies in Recent Years, Cases, and Latest Legislative Developments

According to a report published by CFIUS, after President Trump took office, foreign companies abandoned about 14% of the investments in the United States in 2017 and 11% in 2018. From 2014 to 2016, only 4% to 5% of the transactions investigated by CFIUS each year were ultimately abandoned. The report cannot identify the country or origin of those renouncing investors. But attorneys working on these cases say that many of the transactions are likely to be from Chinese companies. That means CFIUS is a barrier to foreign direct investment in the United States, says Josh Gruenspecht, an attorney at Wilson & Wilson who specializes in CFIUS cases. He notes that the increase in foregone investments reflects a shift in CFIUS's mindset toward Chinese investment.⁵

The report shows that, in the period from 2016 to 2017, before FIRRMA was passed, China accounted for more than one-fifth of all investments in US key technologies, ahead of Canada, the UK, and France. At the end of 2018, China surpassed the United Kingdom as the country with the most US security reviews for the fifth consecutive year. According to the 2018 report of the Committee on Foreign Investment in the United States, China accounted for 32 of the 153 deals that were subject to preliminary review in 2017, or 20.9%.⁶ It is evident from the above data that M&A by Chinese multinationals has become an important target country in the area of national security review by CFIUS.

In the area of data security, CFIUS has for several years continuously paid particular attention to acquisitions by PRC background enterprises of companies with data in the United States. For instance, three years after Kunlun Tech acquires Grindr, a social networking company, CFIUS initiates a review process, and Kunlun Group, Grindr, and CFIUS Monitoring Agencies entered into Agreement. Subsequently, Grindr, the acquired enterprise, may be required to be entrusted or sold. Another example is the CFIUS, which reviewed the \$1 billion acquisition of Musical.ly by TikTok (ByteDance) 2017, Douyin's overseas version, and raised questions about the way it stores personal data. In addition, due to the concern of data leakage of American consumers, the acquisition of MoneyGram by Ant Financial, owned by Alibaba, was also subject to the security review by the CFIUS. As a result, the acquisition was suspended and Ant Financial was required to pay MoneyGram a transaction suspension fee of \$30 million.

Meanwhile, the Foreign Investment Risk Review Modernization Act is part of the National Defense Authorization Act 2019 (NDAA), which was signed into enforceable law by President Trump on August 13, 2018. FIRRMA further strengthens the U.S. national security review regime, expands CFIUS's national security review powers, limits judicial constraints on national security review powers, and redefines the industries included in the term "critical technologies." In addition to traditional defense and military-industrial sectors, the "critical technologies" as defined in the Act also include semiconductor chips, civil nuclear technology, artificial intelligence, Internet, and other industries, and China is listed as a country of particular concern in the Act, which requires the U.S. government to strengthen the security review of mergers and acquisitions conducted by Chinese-funded companies in the U.S. Less than two months after passage of FIRRMA, the U.S. Department of the Treasury took the lead in issuing interim regulations known as the FIRRMA Pilot Program. FIRRMA provided CFIUS with the authority to establish a pilot program to implement provisions of the law that did not take effect immediately. The pilot program expanded the scope of transactions subject to CFIUS review to include non-controlled investments in certain U.S. businesses involving critical technologies in specific industries. In addition to the companion FIRRMA-related measures listed above, The National Security and Personal Data Protection Act was also proposed by US Senator Josh Hawley on November 18, 2019, which is another noteworthy new trend in US national security reviews. The draft National Security and Personal Data Protection Act proposed changes to the merger rules such that prior approval from the Committee on Foreign Investment in the United States (CFIUS) would be required if a Chinese company sought to acquire a US company, which holds bulk volumes of data.

⁴ <http://www.mofcom.gov.cn/article/ae/ai/201909/20190902898777.shtml>, accessed by 3rd February 2022

⁵ <http://news.ifeng.com/c/7rpZMtxhZBY>, accessed by 4th February 2022

⁶ Teng Tao and Xu Xuefeng: "The Status Quo, Trends and Countermeasures of Security Review: New Developments in US Investment Security Review Mechanism", Foreign Trade Practice, No.09, 2019, p 42.

The above-mentioned fields and size of investments by Chinese enterprises into the United States, cases reviewed by the CFIUS, and the latest legislations on national security review of foreign investments in the United States all demand that Chinese enterprises must pay due attention to the national security review system during their investment in the United States.

On September 15, 2022, U.S. President Joe Biden signed an executive order requesting CFIUS to strengthen its review of certain transactions that affect the national security of the United States, in particular funds from "competitive or adversarial countries," and listing five new national security factors for future review of foreign investment. Although the executive order did not name China directly, its intention is obvious. The White House issued a statement saying that "certain investments by foreign persons, particularly those from competing or adversarial countries, can pose risks to U.S. national security." The Executive Order will maintain a robust foreign investment review process and address risks, within CFIUS's statutory authority. The statement also said that current foreign and individual behavior that seeks to undermine U.S. national security continues to evolve and that CFIUS's review process needs to keep up. In the executive order, Biden asked CFIUS to consider five specific groups of factors when reviewing foreign investment in the future: first, the impact of specific transactions on the toughness of the U.S. critical supply chain, meaning industries that may have an impact on national security, not limited to the defense industry; second, the national security risks posed by specific transactions to the United States in terms of technological leadership, including but not limited to microelectronics, artificial intelligence, biotechnology and biomanufacturing, quantum computing, advanced clean energy, and climate adaptation technology industries; third, the impact of specific transactions on investment trends in industries related to U.S. national security; fourth, cybersecurity risks that threaten national security; and fifth, the risks posed to sensitive data of U.S. people. Another White House statement noted that the new executive order will look not at the size of the investment, but at the characteristics of the technology itself, including "technological advances and applications that could undermine national security." CFIUS members do not have to prove that technology is currently critical to national security, as long as it has the potential to do so. The Biden administration is considering closing off several other channels that could give China access to U.S. capital and technology, such as screening U.S. foreign investments in semiconductors and other technologies. In response, some U.S. business groups and technology investors, such as the National Chamber of Commerce, have argued that such a move could prove inconvenient or too broad and could weaken U.S. economic clout and competitiveness. The executive order, which aims to strengthen the U.S. government's efforts to block Chinese technology investment in the United States, is bound to increase tensions between Washington and Beijing.

A. "America Invented the Semiconductor. It's Time to Bring It Home."- Joe Biden' S Legislative Strategy Following Firrma

On July 25, 2022, U.S. President Biden, who had yet to recover from COVID-19 infection, participated in an online conference and spoke boldly, urging the House and Senate to quickly pass the Chips and Science Act (CHIPS PLUS), which had been proposed for more than a year. On July 27, the U.S. Congress approved the CHIPS PLUS by a vote of 64 to 33. The Chip Act is specifically designed to use hundreds of billions of dollars to stimulate innovation and development of U.S. technology. This Act is intended to impose a bottom-up blockade on foreign countries, led primarily by China, that is vigorously developing basic science.

B. Predicaments of Relevant Industries in China

The U.S. Bureau of Economic Analysis and Information once conducted a systematic division and dismantling of the digital economy into three layers: the underlying foundation + platform economy midstage + expansion layer. In China's development history in recent years, the development of the consumer Internet sector in the platform economy middle stage is clearly at the forefront of the world, and several excellent enterprises such as Ali, Tencent, and other middle stage have emerged, and can even be compared to some head enterprises in the United States. The expansion layer refers to the transformation and upgrading of thousands of industries through digitalization, to complete the digitalization of industry, and finally build a modern industrial system, forming a decision-making role in the form of participation in the very rich, ecological more complete digital economic system. The chip is the underlying foundation of the digital economy. In this regard, China is relatively quite weak. The importance of the chip needs no elaboration, but if the most basic and core underlying technology base, need to rely on other countries, those cutting-edge industries such as artificial intelligence, Internet of Things, etc. are undoubtedly a pavilion in the air, as long as the other side slightly hold, the whole industry shaky. So whether it is for China or the United States, or even the global countries, the development of the underlying foundation is crucial. China's semiconductor industry can be held back, on the one hand, the overall security consciousness is not strong enough, and the optimal innovation system for chip research and development attacks in China has not been fundamentally built, on the other hand, also related to the difficulty of the chip manufacturing itself.

C. The Impact of The Chip Act on The Global Chip Industry

To ensure that manufacturing incentives enhance U.S. technology leadership and supply chain security, the bill would require recipients of federal financial assistance to enter into an agreement that would prohibit the certain substantial expansion of semiconductor manufacturing in China or other relevant countries. These restrictions would apply to any new facility unless it produces "traditional semiconductors" primarily for that country's market, although existing facilities that manufacture traditional semiconductors would not be affected. These restrictions will apply for 10 years after the receipt of financial assistance to ensure that semiconductor manufacturers focus their investments in the next cycle on the United States and partner countries. At the same time, to ensure that these restrictions are consistent with the current state of semiconductor technology and U.S. export control regulations, the U.S. Secretary of Commerce, in coordination with the Secretary of Defense and the Director of National Intelligence, will periodically reconsider which technologies are subject to this ban with industry input. To put it in obvious terms: companies that receive funds, do not export high-end chip equipment to China, nor can they put in high-end chip production lines in China, as to which technologies, which types of equipment, the United States itself said. After the implementation of this measure, the United States may interrupt part of the electronic information industry or a new generation of information technology industry chain, the entire industry can not form the previous long-tail effect, which gradually evolved into a short-tail effect. In addition, to promote the implementation of the policy, the United States put forward the concept of a 'flexible supply chain', that is, the entire link of the supply chain as short as possible so that it becomes more flexible, more flexible so that it can cope with a variety of things happen. Whether it is an epidemic, external policy changes, international conflicts and other kinds of factors change, can not affect the stability of the entire supply chain, because the entire supply chain links less, relatively short. For example, the United States and Japan and South Korea, and other countries of close cooperation, is to link several countries together, constituting a small closed circle, in this closed circle inside the internal cycle finally completes the entire chip from design to manufacturing to packaging the whole chain process, this model whether called re-industrialization back or reverse globalization, in the short term, it will indeed form certain security, but once the formation of a regional closed supply chain, many sources of innovation and innovation models will be limited. In the diversified semiconductor industry, the U.S. attempts to control the entire chain or through collusion with other countries to control the entire world supply chain pattern, the impact is only regional, the United States can not change the majority of the trend. The final and worst result of this move may be the semiconductor industry pyramid on about 15% of the high value-added link will be the United States, Japan, and South Korea, these countries monopolies, the remaining 85% of the medium value-added in the low, basic end of the link will also be a large number of layout in the hands of emerging countries in China. The United States to completely divest isolation of China, the unilateral development of the semiconductor industry does not have a reality, or even if so developed, the application value is not great.

D. Implementation of Additional Export Controls: Certain Advanced Computing and Semiconductor Manufacturing Items; Supercomputer and Semiconductor End Use; Entity List Modification

On October 7, 2022, the Bureau of Industrial Security (BIS) of the U.S. Department of Treasury issued a pilot rule entitled Implementation of Additional Export Controls: Certain Advanced Computing and Semiconductor Manufacturing Items; Supercomputer and Semiconductor End Use; Entity List Modification (referred to as "new semiconductor regulations"), which provides a few new patches to the Export Administration Regulations (EAR) on China-related export controls. Several new patches have been added to the Export Administration Regulations (EAR) relating to China. The new rules will take effect in October. Depending on public comments and adjustments to the multilateral export control mechanism, the above new patches may be amended accordingly.

Previously, the Biden Administration signed the Chip and Science Act of 2022 in August 2022 intending to drive semiconductor companies back to U.S. soil and reduce China's share of the global semiconductor supply chain through financial incentives and 25% tax credit treatment. The new BIS semiconductor regulations directly restrict the export of advanced process semiconductor products and technologies to China in an attempt to crack down on the semiconductor-related supply chain of Chinese companies. The new semiconductor regulations contain various export control patches, which can be described as a great deal of effort, around advanced computing chips, supercomputers and semiconductor manufacturing equipment, and other related products and technologies, not only using the new CCL item control, for specific entities on the list of entities in China to expand the "foreign manufacturing products" (FDP) re-export, re-transfer of In addition to the usual means of controlling the scope and intensity of products, adding FDP rules for advanced computing and supercomputers, and adding end-user/use controls, licensing controls are specifically required for "U.S. personnel" who support the development and production of semiconductors in China.

3. Possible New Changes To The U.S. National Security Review Process Introduced By Firrma And Its Companion Documents

I. The Legislative Evolution of The National Security Review of Foreign Investment in The United States

A. Trading with The Enemy Act Of 1917 Is More Politically Oriented Than Economically Minded

The national security review of foreign investment in the United States has its roots in the Trading With the Enemy Act of 1917, or TWEA, in the early 20th century. The main purpose of TWEA is to provide the president with the power to prohibit the conduct of fiscal, financial and commercial transactions with an adversary during a national war or emergency. The measures include economic blockades, trade embargoes, and cessation of commercial commerce. To better implement the Trading With the Enemy Act of 1917, in 1950 the United States Department of the Treasury issued the Foreign Assets Control Regulations, which gave the United States government the power to freeze the assets of a country and to freeze transactions under certain conditions. Both the Trading With the Enemy Act of 1917 and the Foreign Assets Control Regulations of 1950 was created in a special wartime context. As they gave the United States government the right of review to deal with assets and transactions involving hostile nations under certain conditions.

B. Exon-Florio Amendment & Byrd Amendment

The Trading with the Enemy Act of 1917 and the Foreign Assets Control Regulations of 1950 was legislated in a special context, with political rather than economic considerations. Thus, the 1988 Exon-Florio Amendment and its enactment can be regarded as the beginning of the national security review of foreign investment in the United States. This Amendment was introduced against the background of a large number of acquisitions of U.S. companies by Japanese companies. A similar transaction, in which Fujitsu purchased 80% of U.S. Fairchild shares in 1987, was taken as a turning point. The United States Congress passed section 5021 of the Omnibus Trade and Competitiveness Act of 1988, amending section 721 of the Defense Production Act of 1950, known as the Exon-Florio Amendment. The amendments authorize the president or other individuals authorized by the president to review foreign investment mergers and acquisitions, and the president or other individuals authorized by the president may immediately terminate the transaction if the president or other individuals so authorized are deemed to have an impact on the national security, and such decision shall not be subject to domestic judicial review. Strictly speaking, the amendments establish the national security review system for foreign mergers and acquisitions in the United States and provide five criteria for determining whether an acquisition will be a threat to national security.

Based on the Exon-Florio Amendment, in 1993 the US Congress discussed a new amendment- the Byrd Amendment. The Byrd Amendment expanded the review scope and powers of the Exon-Florio Amendment, added mandatory investigation requirements, proposed a standard of "likely to affect national security", and provided for heightened investigation of acquisitions by foreign government-controlled companies extending beyond national defense security to economic security.⁷

C. The Foreign Investment and National Security Act Triggered by The Dp World's Acquisition in The Post-911 Era

The events of 9/11 brought national security issues to the forefront of intense American attention. In 2006, Dubai Ports Worldwide, a company controlled by the government of the United Arab Emirates, initiated a full-price takeover of the UK-based P&O Shipping Company, a case that led to the enactment of the Foreign Investment and National Security Act (FINSa). P&O Shipping's assets include six ports in the U.S. Before the formal commencement of the M&A transaction, DHP conducted consultations and discussions with the U.S. Department of Treasury and the U.S. Department of Homeland Security and CFIUS, and finally obtained formal approval from CFIUS; however, after the transaction was discussed by the Congress, some members of Congress raised objections to the transaction on the basis that it might threaten the security of the United States. The transaction had to be terminated due to the subsequent significant impact on society in the United States. Therefore, the U.S. Congress passed the Foreign Investment and National Security Act (2007) based on the Byrd Amendment. The Foreign Investment and National Security Law adds the ex post facto review procedure based on the Byrd Amendment, expands the industries that may be subject to review, and specifically draws the "experience and lesson" from the DPW case, believing that more careful and strict examination is required when the initiator of a foreign merger or acquisition is involved with the government of a country where the foreign investor is located. In April 2008, the U.S. Department of the Treasury issued Regulations on Mergers, Acquisitions, and Takeovers

⁷ See Shao Shaping and Wang Xiaocheng, "An Analysis of the National Security Review System for Mergers and Acquisitions by Foreign Investors in the United States — — and Construction of a National Security Review System for Mergers and Acquisitions by Foreign Investors in China", *The Jurist*, 3 (2008), p.154.

by Foreign Persons to implement the Foreign Investment and National Security Act. Under the new rule, the U.S. government may impose more stringent and detailed requirements on the criteria, scope, and procedure of security review on foreign companies' acquisition of U.S. companies.⁸

II. Drafting, Signing, And Implementation Of FIRRMA And Its Ancillary Documents

A. On August 13, 2018, U.S. Congress Passes the Foreign Investment Risk Review Modernization Act

Eleven years after the passage of the Foreign Investment and National Security Act (FINSA) in 2007 and its implementation in the United States, new issues have arisen regarding the application of FINSA in the United States. Especially in the aspects of funding, staffing, network platform, and workflow, we hope to improve the existing Foreign Investment Security Review Act to make it more "modern".⁹ Against this background, on November 8, 2017, Senator Dianne Feinstein, Democrat of California, and Senator John Cornyn, Republican of Texas, introduced legislation to reform the Committee on Foreign Investment in the United States (CFIUS), the Foreign Investment Risk Review Modernization Act (FIRRMA).¹⁰

The FIRRMA helps to improve the inefficient situation of CFIUS review. With the rapid increase of investment and M&A in the US, the US national security judgment, the influence factors becoming more and more complex, and the staffing and organization of CFIUS have been difficult to meet the current increases and complex demands. In the aspects of greenfield investment and joint investment, CFIUS appears regulatory obstacle. Moreover, even after Trump took office, CFIUS's budget was cut and CFIUS staff positions remained vacant, resulting in inefficient reviews. The delayed publication of the 2015 annual review report until September 2017 has become a typical example of the public criticizing for its low efficiency. Influenced by a variety of factors, several Trump administration officials, including Director of National Intelligence Dan Coats, Secretary of Defense James Mattis, and NSA Director Mike Rogers, have called for CFIUS reform.

Before FIRRMA, CFIUS's jurisdiction was limited to transactions that could result in "control" of a US business. The Foreign Investment and National Security Act of 2007 gave CFIUS the authority to review specific transactions and to review transactions that could seriously harm national security, order rectification, or request a presidential veto. FIRRMA is believed to be the most significant reform of CFIUS's functions since the FINSA was enacted. It substantially expands CFIUS's review authority, with broad implications for foreign investment in the United States. FIRRMA expands the scope of the CFIUS review, introduces or imposes stricter provisions on the CFIUS review period, suspension authority, settlement, rehearing, fees, etc., and updates the review process, to modernize the CFIUS review process.

B. The U.S. Department Of The Treasury Released The Interim Regulations For The FIRRMA Pilot Program On October 10, 2018

Less than two months after the passage of FIRRMA, the US Department of the Treasury initiated the so-called Pilot Program for the FIRRMA-proposed foreign investment security review involving critical technologies. On October 10, 2018, the US Department of the Treasury issued the Interim Regulations for the FIRRMA "Pilot Program". In its capacity as chairman of CFIUS, the U.S. Treasury issued the Pilot Program to protect critical U.S. technologies and intellectual property against potentially harmful foreign acquisitions. The Pilot Program adopts some of the tools outlined in the 2018 FIRRMA. That's why US Treasury Secretary Steven Mnuchin said, "We are pleased to take this first step in implementing the important bipartisan FIRRMA legislation. These interim regulations address specific risks to critical US technologies and will inform final regulations that fully implement FIRRMA." FIRRMA authorizes CFIUS to conduct a pilot program to implement provisions of the Act that do not take effect immediately. The deadline for full implementation of FIRRMA is February 2020. The authority implementing the Pilot Program expanded the transactions subject to CFIUS review to include non-controlled investments in certain U.S. businesses involving critical technologies in specific industries. It also causes FIRRMA's mandatory notification provisions to apply immediately as long as the transaction falls within the scope of the Pilot Program. The Pilot Program will end before the full implementation of the final FIRRMA supporting regulations. In addition to the Pilot Program, Treasury has also issued Temporary Regulations providing limited updates to existing CFIUS rules primarily to implement the provisions of FIRRMA, which have immediate effect. This will ensure consistency between the CFIUS rules and the statute.¹¹

Under the Pilot Program, in cases involving 'Covered Transactions', the notifying party must make a notification to CFIUS at least 45 days before the closing of such transactions. As such, when the Pilot Program goes into effect, the

⁸ Fang Zhiyin: An Analysis of Censorship and Restrictions on Foreign Mergers and Acquisitions in the United States, *Oriental Law*, No. 2, 2011, p.134.

⁹ Hu Zhenhu and Jia Yingzi: "The US FIRRMA Pilot Program Has a Profound Impact on Global Foreign Mergers and Acquisitions", *Foreign Investment in China*, No. 12, 2018, p.46.

¹⁰ S.2098 - Foreign Investment Risk Review Modernization Act of 2018

¹¹ <http://www.mofcom.gov.cn/article/i/jyjl/201810/20181002795610.shtml>, accessed by 3rd February 2022

"mandatory notification" under FIRRMA will officially take effect, which will be a change from the previous "voluntary notification" principle followed by U.S. national security reviews. Notifying parties may be subject to penalties for failure to report, which may amount to the entire amount of money involved in the Covered Transactions. For purposes of the Pilot Program, the term "covered transactions" is defined as:

transactions through which a foreign investor acquires a controlling interest in a sensitive high-tech enterprise; or transactions through which a foreign investor gains access to important and key nonpublic high-tech information or holds a seat on the board of directors of such high-tech enterprise or has the right to participate in the decision-making of such high-tech enterprise.

In particular, the sensitive high-tech products produced, designed, tested, assembled, and developed by the sensitive high-tech enterprises involved in the transactions must be used in the specified 27 industries, or the sensitive high-tech enterprises involved in the transactions must design such sensitive high-tech technologies especially for the specified 27 industries. The 27 industries named in the Pilot Program include semiconductors, batteries, biotechnology, and computer storage, all high-tech sectors that CFIUS has focused on in its review process in recent years.

C. The U.S. Department Of The Treasury Released The Draft FIRRMA Implementing Rules On September 17, 2019

On September 17, 2019, the U.S. Department of the Treasury issued two sets of the draft implementing rules, one covering real estate transactions and the other covering all other transactions (the "Draft Implementing Rules"), to implement the changes introduced by FIRRMA to CFIUS and strengthen CFIUS' authority to review the national security implications of foreign investment in the United States. 31 C.F.R. Part 800 is a redrafted version of former CFIUS Part 800, which incorporates provisions of former CFIUS Part 800 that may result in a controlling acquisition of a U.S. business and new provisions relating to certain non-controlling investments by foreign persons in the U.S.; and provisions dealing with foreign persons' transactions involving U.S. real estate. The Department of Treasury also released a fact list and frequently asked questions to accompany the draft Implementing Rules. Despite the supplement provided in the draft Implementing Rules, the definition and scope of such terms as "emerging technologies" and "excepted countries" remain unclear.

D. On November 18, 2019, U.S. Senator Josh Hawley Proposed The National Security And Personal Data Protection Act

In addition to the FIRRMA-related supporting measures mentioned above, U.S. Senator Josh Hawley proposed the National Security and Personal Data Protection Act ("NSA") on November 18, 2019, which is also noteworthy in the new trend of the U.S. national security review. The legislation was introduced during a Senate Judiciary Subcommittee on Crime and Terrorism hearing chaired by Hawley on the U. S. technology industry's relationship with China. At the hearing, some U.S. experts argued that Apple's storage of iCloud encryption keys in China and TikTok's ties to the Chinese government pose a threat to U.S. national security. Hawley believes that some U.S. companies are agreeing to provide sensitive data to China in exchange for access to the Chinese market. Hawley, a Republican senator, proposed the NSA based on concerns about the data security of TikTok and Apple. In connection with M&A, the National Security and Personal Data Protection Act states that the following change will be made to the rules for companies to merge: if a Chinese company attempts to acquire a US company, which holds bulk volumes of data, prior approval from CFIUS will be required.¹²

4. America's New National Security Concept in The Background of FIRRMA

The text of FIRRMA consists of 27 sections, far more than the 12 sections of FINSA. FIRRMA modernizes the scope, procedures, and enforcement measures of national security review.¹³

The Act expands the scope, duration, and actions of the CFIUS concerning national security reviews of transactions by foreign investors and requires mandatory notification by foreign investors of transactions with U.S. businesses relating to 27 pilot programs, as well as transactions with U.S. businesses in certain "critical technology" sectors. Taken together with FIRRMA, the FIRRMA Pilot Program, and the FIRRMA Draft Implementing Rules, the national security review of foreign investment in the United States has taken on new features and directions, and new trends have emerged in the U.S. national security concept under the national security review regime.

¹² https://www.sohu.com/a/355055836_465914, accessed by 8th February 2022

¹³ Gui Changni, "Trends in the Reform of the National Security Review System for Foreign Investment in the US and Its Impact on China", Information Security and Communication Confidentiality, Issue 7, 2017, Pages 50-52

I. Comprehensive Expansion of Transactions Subject to The National Security Review of Foreign Investment

Under the original FINSA statute, CFIUS's coverage of covered transactions included only "mergers, acquisitions, takeovers, or other non-passive investments by a foreign person in any business engaged in interstate commerce in the United States" if such control could affect U.S. national security. Furthermore, CFIUS does not require any of the transaction parties to voluntarily make a notification for national security review. Therefore, CFIUS approval is not a prerequisite for the closing of a foreign investment transaction. However, if CFIUS initiates a review and decides after the closing of a transaction, the parties to the transaction shall comply with the rectification requirements issued by CFIUS at that time. Under FINSA, the key feature of CFIUS is that it only focuses on the acquisition of "control" by foreign investment in U.S. business entities. Under FINSA, the review will be initiated primarily by way of voluntary filing by the parties to the transaction, while retaining the right to initiate the review on its initiative. Under FIRRMA, however, CFIUS expands its jurisdiction to cover some non-controlling investments. According to FIRRMA and its implementing draft regulations, non-controlling investments are subject to CFIUS jurisdiction if they involve a US business in certain industries and confer certain rights on the foreign person.

A. United States Businesses From Certain Designated Industries Involved

FIRRMA broadens CFIUS's review of U.S. companies and businesses from its original focus only on transactions that result in foreign control of U.S. companies and businesses to certain "other investments," primarily TIDs (TID enterprises are defined below concerning critical technologies, critical infrastructure, and sensitive personal data.), that does not result in foreign control of a U.S. company. These include the businesses that own, operate, produce, or provide services for critical infrastructure; manufacture, design, test or develop critical technologies; and maintain and collect sensitive personal data of U.S. citizens that could, subject to misuse, result in threats to U.S. national security.

B. Specific Rights Conferred On Foreigners By Non-Control Investments

Under FIRRMA, CFIUS-governed non-controlling investments in U.S. TIDs must provide the foreign investor with at least one of the following rights:

- (1) Has access to any important non-public technical information; or
- (2) Obtains membership in or observer rights on the board of directors (or body performing similar management functions) of a United States business entity or nominates a person to serve on the board of directors (or body performing similar management functions); or
- (3) in addition to voting by shares, being able to participate in significant decisions of a U.S. business entity including:
 - A) the use, development, acquisition, protection, or disclosure of sensitive personal information of U.S. citizens.
 - B) the use, development, acquisition, or disclosure of critical technology.
 - C) the management, operation, manufacturing, or supply of critical infrastructure.

II. Mandatory Notice and Greater Flexibility in Cfius's National Security Determinations

Mandatory filing and notice are required under specific conditions. One of the more significant changes in filing under FIRRMA, as compared to the FINSA framework, is the establishment of mandatory filing notices. First, FIRRMA empowers CFIUS to compel any foreign person to file a notice in respect of certain transactions involving "critical technologies." Furthermore, FIRRMA grants CFIUS the authority to force filing notice of certain transactions in which the foreign government (i.e., any government or agency exercising governmental functions) has a "substantial interest" in the transaction.

A. The Pilot Program for Critical Technologies

CFIUS adopted a "Pilot Program" launched on October 11, 2018, under which CFIUS issued a mandatory filing requirement for non-control investments involving "critical technologies" in 27 listed industries. The Implementation Regulation has not amended the Scheme, which means it remains in effect.

B. Transaction of "Substantial Interest" to A Foreign Government

A mandatory filing notice would be required for any transaction that results in a foreign government having a "substantial interest" in a U.S. TID business, according to the proposed Regulation. CFIUS defines a "substantial interest" as one in which a foreign government, directly or indirectly, owns 25 percent or more of the voting power in a U.S. business, and 49 percent or more of the voting power in the foreign entity.

In a limited partnership, a foreign government will be considered to have a "substantial interest" if it (i) holds 49% or more of the voting power of the general partner or (ii) holds 49% or more of the voting power of the limited partners. The parties are required to file the mandatory filings within 30 days of the completion of the relevant transaction.

III. Special Treatment For Specific Foreign Investors and The Country Exception

The FIRRMA directs CFIUS to develop criteria and procedures for applying the newly expanded FIRRMA exclusions to certain foreigners. In the Draft Implementing Regulation, CFIUS achieves this exclusion by creating exceptions for certain foreign nationals, for example by defining "exceptional investor". CFIUS has begun to create a list of friendly countries that would give special treatment to certain foreign investors in U.S. TID companies. Under the Draft Implementing Regulation, the designation of an exceptional investor would be based on several criteria, including the venue of incorporation's affiliation with a particular country of incorporation, ownership, principal place of business, history of compliance with CFIUS and also the history of compliance with particular laws, orders, and rules, such as export control and embargo laws. In turn, the investor must be associated with an "exceptional foreign country." The Implementing Regulation does not identify these exceptional foreign countries, but CFIUS has identified the indicators and factors it would consider in creating such a list, including whether the country has a robust foreign investment review system and is coordinating with the United States on investment security matters.

It is important to note that even "exceptional" investors would not be exempt from CFIUS' jurisdiction, only from a relatively narrow set of mandatory filing filings; CFIUS' jurisdiction over voluntary filings would remain for exceptional and non-exceptional investors alike. Moreover, CFIUS is likely to include only America's closest allies in its "exceptional foreign countries" list.¹⁴

5. Conclusion

It can be concluded from the above changes that, under the background of FIRRMA and relevant supporting documents, the national security review regime for foreign investment in the United States has expanded the scope of regulated transactions, highlighted the review of non-control transactions of TIDs, and granted greater discretion in respect of national security review by making the CFIUS review more mandatory and flexible. FIRRMA expands CFIUS's powers by extending the scope of Critical Technologies and Critical Infrastructure; linking foreign investment reviews to the export control regime; providing country-specific exceptions under certain circumstances; authorizing to re-open national security reviews of closed investment transactions; and providing no redress procedures or space for redress. The framework and content of FIRRMA reflect an unprecedented intensification of the national security review of foreign investment in the United States. National security is being assessed from multiple perspectives, including traditional military security and national defense security, as well as industrial security, information security, cyber security, data security, and other factors. Since 2021, Chinese investment in the United States has decreased significantly. The main reason is that the United States pursues absolute security and decouples the concept of security from development. The restrictions set up by CFIUS greatly affect the convenience of investors from all countries, including Chinese investors, to invest in the United States, which will inevitably affect the economic development of the United States and make American producers and consumers suffer losses. Chinese enterprises, especially those in which the state holds 49% or more shares or those in which the state has a significant interest, have a very obvious relationship with the capital intensity and technology advantages of the information industry as well as its connection with the state interest. When making an outbound investment, especially investment in the US, it is imperative that Chinese enterprises fully understand the new trend in the national security review of foreign investment in the US and grasp the comprehensive judgment of the US on national security in the context of the new legislation, to ensure the legality, stability, and security of cross-border transactions.

¹⁴ See the Bill of Foreign Investment Risk Review Modernization Act of 2018