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THE EXPANDING REACH OF THE EXECUTIVE IN FOREIGN DIRECT INVESTMENT: HOW RALLS V. CFIUS WILL ALTER THE FDI LANDSCAPE IN THE UNITED STATES

HUNTER DEELEY

The Committee on Foreign Investment in the United States ("CFIUS" or the "Committee") is a little known regulatory body in the Treasury Department with an almost limitless mandate: protect the nation's security from threats arising from Foreign Direct Investment ("FDI"). CFIUS began through Presidential Order as a tiny interagency body that would monitor investment trends and advise on related policy decisions. Despite objections from the Committee, Congress increased CFIUS's power over the years in response to growing concerns over the influx of foreign capital. At various points, the President attempted to head off a Legislative fix with an Executive Order that reflected a concern for remaining open to foreign investment. It wasn't enough. This Comment discusses the evolution of CFIUS from its role as a monitoring body to its present day position as a gatekeeper to the U.S. economy. With the recent Ralls v. CFIUS court ruling affirming the President's broad authority to suspend or prohibit certain transactions for national security reasons, the Committee will only grow stronger as more companies submit proposed investments for review out of an abundance of caution. Following the Ralls ruling, if the Committee hopes to promote a climate of open investment, it will need to adapt and provide a more clarified position on what is subject to review. "We might as well face the situation. We cannot supply all the required capital in the United States. We must look to European countries for assistance, and while this demand for capital continues, we should be most careful not to frighten that capital from our shores."

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1. MIRA WILKINS, THE HISTORY OF FOREIGN INVESTMENT IN THE UNITED STATES
INTRODUCTION

In 1914, the total stock of foreign investments in the U.S. economy made up about one-fifth of annual Gross Domestic Product (GDP). That same year, foreign direct investment (FDI) in the United States reached $1.3 billion in nominal terms. Since the turn of the twentieth century, FDI has played a vital role in the development and modernization of the United States economy.

According to the White House, foreign firms in the United States currently employ 5.6 million people, totaling 4.1 percent of the private-

TO 1914 190 (1989) (quoting Address of W. W. Miller of Hornblower, Miller & Potter to the first Annual Meeting of the Investment Banker’s Association of America, Report of Meeting, 48 (1912)).

2. See EDWARD M. GRAHAM & DAVID M. MARCHICK, U.S. NATIONAL SECURITY AND FOREIGN DIRECT INVESTMENT 3 (2006) (clarifying that this percentage represents portfolio investments, which are defined as an equity investor who exerts no managerial control over the investment).

3. See, e.g., id. at 1 (discussing the early emergence of national security concerns by the U.S. government over the large presence of foreign investment in the U.S. economy).

4. See id. at 2–3 (noting Carnegie Steel began as a foreign investment until Andrew Carnegie became a U.S. citizen and mentioning the role FDI played in the development of industries such as telecommunications and transportation); see also WILKINS, supra note 1, at 190 (discussing the role of foreign investment in the development of the railroad and how this opened up new markets for foreign investment including land and mining).
sector workforce.\(^5\) Compensation at these U.S.-based foreign affiliates is consistently higher than the economic average.\(^6\) Additionally, these firms account for almost a third of all U.S. imports.\(^7\) In an effort to highlight the benefits of FDI, the administration released a study in October 2013 breaking down the essential role foreign capital plays in the U.S. economy.\(^8\) The White House commissioned study is part of the administration’s broader initiative to buck the recent downward trend in FDI and make sure the U.S. remains an attractive location for foreign investors.\(^9\)

FDI dropped sharply in 2012 after a slow climb following the Great Recession of 2008.\(^10\) Foreign companies invested $166 billion in the U.S. economy in 2012; this represents a 28 percent drop, or $66 billion decrease, compared to 2011.\(^11\) While numbers have been down since 2008, the United States continues to be the world’s largest recipient of FDI, a title it has held since 2006.\(^12\) However, America’s place at the top is not as secure when looking at the latest trends.\(^13\) The United States saw a 22 percent


\(^6\) See U.S. DEP’T OF COMMERCE & PRESIDENT’S COUNCIL OF ECON. ADVISERS, FOREIGN DIRECT INVESTMENT IN THE UNITED STATES 8 (2013) (specifying pay averaged around $77,000 per employee in 2011 at U.S. based affiliates compared to $58,000 for the economy as a whole).

\(^7\) See id. (highlighting how these firms connect the United States to the global economy and contribute to the negative trade balance by importing 28.4 percent of total U.S. imports).

\(^8\) See id. (explaining that FDI strengthens the economy by supporting jobs, expanding exports, and funding research and development); see also TAZEEM PASHA & RACHEL CRABTREE, FOREIGN DIRECT INVESTMENT IN THE UNITED STATES: DRIVERS OF U.S. ECONOMIC COMPETITIVENESS 1, (2013), available at http://www.selectusa.commerce.gov/.

\(^9\) See James Politi, Barack Obama Mounts Big Push to Bolster FDI in US, FIN. TIMES (Oct. 27, 2013, 5:21 PM), available at http://www.ft.com/intl/cms/s/0/c5119344-3f0a-11e3-b665-00144feabdc0.html#axzz2pa87zrGt (mentioning President Obama attending the Commerce Department’s first ever conference aimed at bringing together foreign investors, US economic development agencies, and state and local officials).

\(^10\) See JAMES K. JACKSON, CONG. RESEARCH SERV., RS 21857, FOREIGN DIRECT INVESTMENT IN THE UNITED STATES: AN ECONOMIC ANALYSIS ii–I (2013) (noting global FDI inflows in 2012 were down 18 percent from 2011 as well).

\(^11\) See id. at 3 (“Foreign Direct Investment in the United States dropped sharply in 2012 after rebound[ing] slowly in 2010 and 2011 after falling from the $310 billion recorded in 2008.”).

\(^12\) See, e.g., Press Release, The White House, supra note 5 (citing, among other reasons, the world’s largest consumer market, a skilled workforce, and desirable legal protections).

\(^13\) See Brenda Cronin, Shrinking Share of Overseas Cash Headed to U.S., WALL
drop in FDI during the first two quarters of 2013 compared with the same time in 2012. Whether this drop is a reflection of a global downward trend in FDI or evidence of investor uncertainty in the U.S. market (or a combination) is unclear.

Regardless, the trend was enough to force a reaction from the Obama Administration. The new initiative is recognition that the United States needs to do more if it wishes to remain competitive for global capital. In the past, the reasons for investing in America may have been “self-evident,” but the study calls for an effort to build upon what has historically made the United States a popular destination for investors, including “an open investment regime” and a “predictable and stable regulatory” landscape.

Nestled away in the Treasury Department is a little known interagency committee that has the potential to complicate this “open” and “predictable” investment landscape. The Committee on Foreign Investment in the United States (hereinafter “CFIUS” or “the Committee”), is charged with keeping the United States secure from threats to national

St. J. (Dec. 8, 2013, 5:00 PM), http://online.wsj.com/news/articles/SB10001424052702303722104579242302568186732 (noting while the United States remains the largest recipient of FDI, trends show the United States is losing out to developing economies).


15. See Cronin, supra note 13 (“America’s smaller slice of global FDI ‘is a worrying indicator that our policy environment is . . . unattractive,’ said Matthew Slaughter, a professor at Dartmouth’s Tuck School of Business. It also reflects that companies have ‘multiple opportunities around the world.’”).

16. See James Politi & Russell Birkett, US FDI: The Numbers the White House Wishes Were Bigger, Fin. Times (Oct. 30, 2013, 6:16 PM), http://www.ft.com/cms/s/0/fc754c20-4187-11e3-9073-00144feabdc0.html#slide0 (describing President Obama as a salesman for “brand USA” at a conference designed to attract more investment from abroad).

17. Cf Politi, supra note 9 (mentioning the involvement of three Cabinet level Secretaries and the United States Trade Representative in the Commerce Department’s event, which shows a coordinated approach between various governmental agencies designed to spur investment). But see Eli Lehrer, Actions, Not Obama Rhetoric, Will Lure FDI Back to the U.S., Real Clear Mkt.s. (Nov. 11, 2013), http://www1.realeclearmarkets.com/printpage/?url=http://www.realeclearmarkets.com/articles/2013/11/11/actions_not_obama_rhetoric_will_lure_fdi_back_to_the_us_100722.html (arguing there is a disconnect between the President’s attempts to attract more FDI and certain policies including a proposed tariff on the insurance industry).

18. See Politi, supra note 9 (noting the self-evident reason for investors was America’s status as the world’s largest economy); see also U.S Dep’t of Commerce & President’s Council of Econ. Advisers, supra note 6, at 8.
security masked as legitimate inward bound investment. CFIUS has the statutory authority "to review transactions that could result in control of a U.S. business by a foreign person, in order to determine the effect of such transactions on the national security of the United States." Whether the parties submit to a review voluntarily is immaterial; the Committee possesses the power to unilaterally initiate proceedings for any covered transaction.

Under 50 U.S.C. § 2170, the Defense Production Act, CFIUS can take up to thirty days to review a covered transaction in order to determine its effects on national security. If it finds that the covered transaction threatens to impair the national security of the U.S., that any concerns have not been mitigated during the review period, or that the deal would result in foreign control of critical infrastructure, CFIUS can then take another 45 days to investigate the matter. Following the end of this period, the Committee can recommend to the President that he take action on the covered transaction. The President must decide within fifteen days

19. See Holly Shulman, CFIUS at a Glance, TREASURY NOTES (Feb. 19, 2013), http://www.treasury.gov/connect/blog/Pages/CFIUS-at-a-Glance.aspx ("The Committee on Foreign Investment in the United States (CFIUS) has only one purpose: to review the potential national security effects of transactions in which a foreign company obtains control of a U.S. company.").


21. See 50 U.S.C. app. § 2170(b)(1)(D)(i) (2012) ("[T]he President or the Committee may initiate a review under subparagraph (A) of— (i) any covered transaction); see also 31 C.F.R. § 800.207 (2008) (defining a covered transaction as "any transaction . . . by or with any foreign person, which could result in control of a U.S. business by a foreign person.").

22. See 50 U.S.C. app. § 2170(b)(1)(E) (2012) (noting the thirty day timeline begins at the time written notice from a party is accepted by the chairperson or the initiation of a unilateral review); see also 50 U.S.C. app. § 2170(f) (2012) (listing factors for consideration when determining a transaction’s impact on national security including “domestic production needed for national defense;” “the capability and capacity of domestic industries to meet national defense requirements;” the transactions effects on “major energy assets;” and “potential national security-related effects on . . . critical infrastructure”).

23. See 50 U.S.C. app. § 2170(b)(2)(A)-(B) (2012) (requiring the Committee to immediately conduct an investigation when any a covered transaction meets any one factor); see also 31 C.F.R. § 800.503(b) (2008) (“The Committee shall also undertake, after review of a covered transaction . . . an investigation . . . that: (2) Would result in control by a foreign person of critical infrastructure of or within the United States[,]”).

24. Exec. Order No. 13,456, Sec. 6(c) (2008) (stating the Committee will send a report to the President requesting his action); see also 31 C.F.R. § 800.506(c) (2008) (requiring CFIUS include in the report information stating there is credible evidence that the foreign interest exercising control might take action to impair the nation’s security).
whether or not to suspend or prohibit the transaction.25

Despite publicity over recent high-profile acquisitions, CFIUS remains hidden in the shadows of the government’s national security apparatus.26 It is not the weak Committee President Gerald Ford established forty years ago.27 Today, CFIUS is a strong, secretive regulatory body with the potential to undermine the economic policies that the Obama administration claims makes the United States the number one destination for FDI. Until CIFUS adopts clear policies, foreign companies looking to acquire U.S. businesses will be forced to navigate an opaque regulatory landscape scattered with loosely defined terms, determinations based on classified information, and decisions that offer little to no redress.28

This Comment argues that the District Court for the District of Columbia, in a case of first impression, inadvertently strengthened CFIUS’s reach beyond its historical scope. By affirming the President’s expanded authority to limit FDI for the sake of national security, the District Court all but mandated that foreign companies interested in securing a foothold within the U.S. market submit for review under CFIUS prior to any potential deal. While submitting to a review does not automatically mean the Committee will investigate, more submissions grant the Committee the appearance of precedential authority, which creates a snowball effect and elicits more submissions from the private sector. It was never intended for CFIUS to be a catch-all for foreign acquisitions of U.S. companies; it has always been a body designed to review the exceptional. However, with this latest ruling, ordinary transactions are subject to higher scrutiny, requiring parties to a deal to exercise extreme caution.

This Comment begins in Section II by exploring the evolution of the Committee from a body charged with making policy recommendations to an opaque regulator with authority to review and railroad investments on

25. See 50 U.S.C. app. § 2170(d)(2) (2012) (specifying the President shall announce his decision no later than fifteen days after an investigation is completed).

26. See 50 U.S.C. app. § 2170(c) (2012) (exempting any information or materials filed in a CFIUS review from disclosure under the Freedom of Information Act, 5 U.S.C. § 552, and stating no materials will be made public unless required for an administrative or judicial action).


28. Compare 50 U.S.C. app. § 2170 (2012) (noting the involvement of intelligence assessments from the Director of National Intelligence and Congress’s decision that actions by the President shall not be subject to judicial review), with 31 C.F.R. § 800.208 (2008) (leaving the essential term “critical infrastructure” broadly defined), and 50 U.S.C. § 2170(f)(11) (2012) (listing factors to consider for determining impacts on national security including an open ended category of “such other factors” deemed to be appropriate in the eyes of the President and Committee).
behalf of foreign nationals. It highlights the Executive’s desire to limit the scope and review the power of CFIUS through Executive Orders and policy shifts. It shows how Congress responded each time by further empowering the Committee through legislation. Section III looks at the Court’s affirmation of the President’s broad authority under FINSA in the Rails ruling. It argues the Rails ruling increases the unpredictability of government action for covered transactions and shows that investors have little choice but to submit for a review. Section III also explores the expanding definition of “critical infrastructure,” a result of parties to non-traditional and high value covered transactions filing with CFIUS. It also argues foreign investors are on an uneven playing field in deals where a domestic competitor might show interest. Finally, Section IV offers ways the Committee could make itself appear more open to FDI while maintaining the requisite national security balance needed to keep the nation’s critical infrastructure safe.

I. THE DEVELOPMENT OF THE CFIUS REVIEW PROCESS

CFIUS today is a far cry from the Committee’s initial mandate over forty years ago; it did not transform into a boundless regulatory body overnight. In order to understand the surprising nature of the Committee’s newly acquired powers, it is necessary to first trace its evolution from a passive advisor on investment policies to an active gatekeeper, suspicious of foreign individuals, entities, and governments looking to enter the U.S. market.

A. The Reviewer Becomes a Regulator

Under President Gerald Ford, Executive Order No. 11858 founded CFIUS in 1975. Worried that Congress would create a body with excessive power to regulate FDI from OPEC countries, Ford’s Executive Order preempted the Legislative Branch and created a Committee with limited powers. The directive charged the Committee with “monitoring”

29. Compare Exec. Order No. 11,858, 3 C.F.R. 990 (1971–1975) (using passive language such as “monitoring” and “coordinating”), with 31 C.F.R. § 800.801 (2013) (using active language such as “suspend[ing],” “prohibit[ing],” and “mitigat[ing]).”

30. Exec. Order No. 11,858, supra note 27 at section 1 (stating membership would consist of representatives at the Assistant Secretary level or above from the Departments of State, Treasury, Commerce, Defense, the Assistant to the President for Economic Affairs, and the Executive Director of the Council on International Economic Policy).

FDI and "coordinating" related policy in the U.S. 32

For much of its early life, the Committee embraced its limited role. 33 The Treasury Department, prior to CFIUS’s first meeting, commissioned a study to look at policy implications of the growing level of FDI within U.S. borders. 34 Among the key issues addressed were whether recent OPEC investments within the U.S. could impact U.S. foreign and domestic policy, and whether regulations in place at the time could address concerns over "undesirable behavior by foreign investors or undesirable foreign investment." 35 From the beginning, the Committee recognized the impact on public perception caused by reviews of specific transactions. 36 The Committee also noted that it never intended to review transactions as a matter of course simply because the proposed deal involved a foreign government or a company in the defense sector. 37 Accordingly, the Committee only met six times over the first four years of its existence. 38

It was not until the late 1980s that a growing concern among members of Congress pushed the Committee into uncharted territory. 39 Prior to this point, the Committee continually touted the importance of the Executive’s

32. See Exec. Order No. 11,858, supra note 27 at section 1(b)(3) (stating in order to effectuate these responsibilities, the Committee would review investments with major implications for United States national interests).


35. See id. at 248 (clarifying that undesirable foreign investment includes investment concentrated in a particular industry of great importance to the nation’s security).

36. See id. at 283 (highlighting that a review might suggest the U.S. Government is less than neutral on the particular transaction or on FDI in general).

37. See id. at 281 (making note that existing safeguards were thought adequate to deal with transactions involving companies in the defense sector).

38. See id. (stating two of those meetings involved foreign government backed investments by Romania and Iran, investments that the Committee ultimately did not find problematic).

39. See Zaring, supra note 31, at 93 (discussing Congressional concerns over the growing level of FDI originating from Japan in the 1980s and frustration with CFIUS and the infrequency of the Committee’s meetings).
policy toward open investment in the United States and pointed to other regulatory tools capable of addressing concerns related to controversial FDI. In the event a proposed transaction caused legitimate concerns, the Justice Department could block it on antitrust grounds; the Department of Defense could sever sensitive contracts or withhold security clearances from the foreign acquirer; and the Department of Commerce could use export control laws to prevent the transfer of sensitive technology into foreign hands.

In 1988, Congress passed the Exon-Florio provision to the Defense Production Act. Congress gave the President the authority, which it presumably wished the Executive had back when President Ford issued Executive Order No. 11858 in 1975. The amendment granted the President the power to take “such action for such time as the President considers appropriate to suspend or prohibit any covered transaction that threatens to impair the national security of the United States.” That same year, President Reagan delegated administration of the authority vested in the President under Exon-Florio to CFIUS. After thirteen years, CFIUS finally had statutory power to suspend or prohibit, by recommendation to the President, a deal which threatened national security. It was a power the Committee previously felt was unnecessary and now felt should not expand. Congress disagreed.

40. See Foreign Takeovers and National Security: Hearing Before the Subcomm. on Commerce, Consumer Prot., & Competitiveness of the H. Comm. on Energy & Commerce, 100th Cong. 16–17 (1987) (statement of J. Michael Farren, Deputy Under Secretary for International Trade, U.S. Department of Commerce) [hereinafter Foreign Takeovers and National Security] (testifying the CFIUS system in place at the time was working and warning that further regulatory action would have a negative economic impact on FDI and possibly on U.S. investment abroad).

41. See, e.g., id. (discussing prior instances where transactions with potential national security concerns were adequately addressed through existing control regimes under the Departments of Justice and Defense).


43. 50 U.S.C. app. § 2170(d)(1) (2012); see also 50 U.S.C. app. § 2170(d)(3) (2012) (granting the President the power to use the Attorney General to implement his order under § 2170(d)(1)).

44. See Exec. Order No. 12,661, 3 C.F.R. 618 (1988) (delegating duties to CFIUS in order to better achieve the economic, foreign policy, and national security objectives of the United States).

45. See id. pt. III § 3-201 (instructing CFIUS to present the President with a unanimous recommendation for action following the completion of an investigation and requiring a report detailing differing views in the event unanimity cannot be reached).

46. Compare Foreign Takeovers and National Security, supra note 40, at 17–18 (noting the pre Exon-Florio review system was designed to review transactions and then recommend other USG regulatory regimes take action and stating these existing regulatory regimes were sufficient to address any national security problems); with
B. Unwanted Empowerment

In May 1992, Senator Robert Byrd criticized what he believed to be CFIUS inaction under Exon-Florio. He introduced S. 2704 “to prevent any foreign person from purchasing or otherwise acquiring the LTV Aerospace and Defense Co.” He argued the proposed sale of the company’s missile division to a French company amounted to “the French Government nationaliz[ing]” the United States’ defense industry. While the proposed legislation failed, Senator Byrd succeeded in passing a later version requiring CFIUS to investigate proposed deals when “the acquirer is controlled by or acting on behalf of a foreign government; and the acquisition results in the control of a person engaged in interstate commerce in the United States that could affect the national security of the United States.” It was the first time the Committee was required to investigate a proposed deal.

C. Dubai and FINSA

From 1992 until December 2007, CFIUS investigated twenty-four potential deals out of 1,176 notifications filed with the Committee. Its decision not to investigate the acquisition of the Peninsula and Oriental Steamship Navigation Company (“P&O”) by Dubai Ports (“DP”) World, however, drew harsh Congressional criticism spurring further changes.

Oversight of the Exon-Florio Amendment: Hearing Before S. Comm. on Commerce, Sci., and Transp., 102d Cong. 6 (1991) (statement of Olin Wethington, Assistant Secretary for International Affairs, U.S. Department of the Treasury) (noting Exon-Florio’s effective implementation and concerns that further restrictions and “burdensome regulations” in the name of national security interests might deter FDI).

47. See 138 CONG. REC. S6599 (daily ed. May 13, 1992) (statement of Sen. Byrd) (criticizing CFIUS for reviewing just 13 of 700 foreign acquisitions in the four years following Exon-Florio and highlighting the President’s decision not to use his broad authority afforded to him under the statute).

48. See S. 2704, 102d Cong. (as referred to the Committee on Banking, May 13, 1992) (defining “foreign person” very broadly to include organizations, corporations, or individuals of a foreign country).

49. 138 CONG. REC. S6599, supra note 47 (expressing worries that U.S. investors could not outbid foreign governments looking to invest in ailing defense firms in a contracting industry).


51. See cf. Zaring, supra note 31, at 103 (table) (showing a correlation between a change in the CFIUS process and an increase in the number of notifications submitted to CFIUS).

52. See Briefing by Representatives from the Departments and Agencies Represented on the Committee on Foreign Investment in the United States (CFIUS) to Discuss the National Security Implications of the Acquisition of Peninsular and Oriental Steamship Navigation Company by Dubai Ports World, A Government-Owned and Controlled Firm of the United Arab Emirates (UAE): Hearing Before the S.
CFIUS took the 30-day review period to look into DP World's acquisition of U.K. based P&O, a company operating many of the ports in the United States. It ultimately decided not to investigate the deal, finding that although DP World was a state-backed company, it posed no unresolved threat to national security.

President George W. Bush, in another attempt by the Executive to preempt legislative action, instituted a policy leaving open the opportunity for CFIUS to review previously closed transactions for national security purposes. However, Congress acted the following year to pass the Foreign Investment and National Security Act of 2007, commonly known as FINSA. FINSA represented the latest legislative “fix” to CFIUS and ushered in the regulatory process facing overseas investors today.

FINSA left in place many of the past Congressional adjustments under the Exon-Florio amendment; however, it also empowered the Committee by broadening definitions and extending the Committee’s reach into new industries.

FINSA widened the definition of “national security” to

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Comm. on Armed Services, 109th Cong. 6 (2006) [hereinafter Dubai Ports World Briefing] (remarks by Sen. Hilary Clinton) (expressing concerns that the statutory requirements necessitating a 45 day investigation were not followed despite port security concerning the nation’s security and the Dubai government controlling DP World).

53. See Jessica Holzer, Was the Law Followed on Dubai Ports Deal OK?, FORBES, (Feb. 23, 2006, 6:00 AM), http://www.forbes.com/2006/02/22/logistics-ports-dubai-ex_jh_0223cfius.html (describing the Committee’s thirty day review of the transaction as a rubber stamp). But see Dubai Ports World Briefing, supra note 52 at 11–12 (statement of Robert Kimmit, Deputy Secretary, U.S. Department of the Treasury) (testifying the DP World review was not rushed and noting that the parties and CFIUS engaged in almost two months of informal talks prior to the start of the thirty day statutory review period).

54. See Holzer, supra note 53 (pointing to the statutory provision allowing CFIUS to sign off on a deal after thirty days when the Committee determines the deal does not threaten national security); see also Press Release, The White House, Fact Sheet: The CFIUS Process and the DP World Transaction (Feb. 22, 2006), available at http://georgewbush-whitehouse.archives.gov/news/releases/2006/02/20060222-11.html (announcing the President firmly stood behind the review and the decision to allow the deal to proceed).

55. See Jeremy Pelofsky, UPDATE 1- Businesses Object to US Move on Foreign Investment, REUTERS (Dec. 6, 2006, 12:49 AM), http://uk.reuters.com/article/2006/12/06/usa-investment-idUKN0534982920061206 (describing private sector concerns over CFIUS requiring French based Alcatel SA to sign a national security agreement (NSA) prior to its acquisition of US-based Lucent Technologies, a telecommunications company, permitting the government to undo the deal if the parties failed to comply at any time with the NSA).


58. See 50 U.S.C. app. § 2170(a)(5)-(7) (2012) (expanding the definition of
include homeland security and inserted a new “trigger” for when the Committee must investigate: when a deal will result in foreign “control of any critical infrastructure.” See Foreign Investment and National Security Act of 2007, Pub. L. No. 110-49 at Sec. 2(a)(5), (b)(2)(B)(i)(I); see also 50 U.S.C. app. §§ 2170(a)(5)-(6), (b)(2)(B) (2012) (defining critical infrastructure as “systems and assets, whether physical or virtual, so vital to the United States that the incapacity or destruction of such systems or assets would have a debilitating impact on national security”).

Furthermore, Congress ordered the Director of National Intelligence (“DNI”) to conduct his own analysis of any potential threats to national security posed by a covered transaction. See 50 U.S.C. app. § 2170(b)(4) (2012) (limiting the DNI’s review to no longer than twenty days after the Committee has accepted notice of the transaction and directing the DNI to include any relevant intelligence agencies in its assessment).

On September 28, 2012, President Obama, citing national security concerns and acting under the statutory authority vested in him through 50 U.S.C. § 2170(d)(1), ordered Ralls Corporation to divest all interests in four wind farm project companies in Oregon. See Rails Corp. v. Comm. on Foreign Inv. in the United States, 926 F. Supp. 2d 71, 78 (D.D.C. 2013) (stating Terna owned four separate limited liability companies, each of which was associated with a particular five-turbine wind farm project in north-central Oregon).

D. Wind Farms Are National Security Interests

On September 28, 2012, President Obama, citing national security concerns and acting under the statutory authority vested in him through 50 U.S.C. § 2170(d)(1), ordered Ralls Corporation to divest all interests in four wind farm project companies in Oregon. It was the first time a president took such action in twenty-two years.

Ralls, owned by two Chinese Nationals who also were officers in the Chinese manufacturing company Sany Group, purchased the wind farm project companies from Terna Energy USA Holding Corporation in March of 2012. The four wind farms were in close proximity to restricted airspace used by the U.S. Navy for drone test flights and other electronic warfare aircraft. Ralls did not submit the deal to CFIUS for review prior to the purchase and did so only after members of the Committee contacted

national security to include homeland security and broadly defining critical infrastructure and critical technologies).
Ralls and invited the company to file a voluntary notice.\textsuperscript{65} As a result, Ralls invested substantial amounts of time and money into the project prior to the Committee’s recommendation that the President issue the Executive Order.\textsuperscript{66} Following the end of the forty-five day investigation period, President Obama issued his directive ordering the divestiture.\textsuperscript{67}

Ralls filed suit challenging the Presidential Order arguing the President exceeded the statutory authority granted to him under Section 721 of the Defense Production Act.\textsuperscript{68} Specifically, Ralls argued the President could not: (1) order the company to remove items from the wind farms, (2) block access by foreign nationals to the wind farms, (3) prohibit the sale of the property to a third party until removal of the items, and (4) authorize CFIUS to implement burdensome measures ‘that would allegedly protect United States’ national security interests.\textsuperscript{69}

The District Court for the District of Columbia disagreed. According to the ruling, Ralls’ interpretation of Section 721(d)(1) of the Defense Production Act does not limit the President only to the “suspen[sion]” or

\textsuperscript{65} Compare Defendants’ Memorandum in Support of Motion to Dismiss, Rails Corp. v. Obama, No. 1:12-CV-015130-ABJ, 2013 WL 1334728 at *3 (D.D.C. Mar. 21, 2013) (describing a phone call from Deputy Assistant Secretary Mark Jaskowiak and Ralls’s representatives stating the Department of Defense would file an agency notice if Ralls decided not to voluntarily submit for a review), with Amended Complaint at ¶ 74, Rails Corp. v. Obama, No. 1:12-CV-01513-ABJ (D.D.C. Oct. 1, 2013) (stating Ralls had one opportunity to meet with CFIUS when the review began and were not provided with any information or notice of any potential national security concerns).

\textsuperscript{66} See Plaintiff’s Response to Defendant’s Motion to Dismiss at 3–4, Rails Corp. v. Obama, No. 1:12-CV-01513-ABJ (D.D.C. Apr. 8, 2013) (stating Ralls engaged in direct talks with the U.S. Navy and agreed to move one windfarm at its own expense in order to reduce conflicts with low level aircraft training and noting Ralls secured local land use permits with the Navy’s support); see also Amended Complaint at ¶¶ 63–65, Rails Corp. v. Obama, No. 1:12-CV-01513-ABJ (D.D.C. Oct. 01, 2012). (stating the US Navy appreciated Ralls’s “cooperation and consideration” in moving certain windfarms).

\textsuperscript{67} See Regarding the Acquisition of Four U.S. Wind Farm Project Companies by Rails Corporation, 77 Fed. Reg. 60,281, 60,282 (Oct. 3, 2012); cf. Cooper, supra note 62 (basing her discussion on the reasons for the President’s decision on speculation from industry analysts and prior U.S. government intelligence activities). But see Plaintiff’s Response to Defendants’ Motion to Dismiss, supra note 66, at 19–23 (discussing the governmental interest in neither disclosing the reasons for the President’s decision nor the evidence upon which it is based).

\textsuperscript{68} See generally Rails Corp., 926 F. Supp. 2d at 82; see also Amended Complaint, supra note 65, at ¶¶ 133–39 (arguing Ultra Vires action facially violating the statute and regulations).

\textsuperscript{69} See Rails Corp., 926 F. Supp. 2d at 82–83 (noting Ralls contested the legality of government inspections and reviews of financial data, equipment, and employees); see also Regarding the Acquisition of Four U.S. Wind Farm Project Companies by Rails Corporation, 77 Fed. Reg. at 60,281, 60,282.
"prohibit[ion]" of a transaction. Rather, "the statute expressly authorizes the President to do what he deems necessary to accomplish or implement the prohibition – not merely issue it." Furthermore, since the President’s actions “fell] well within the scope” of the statutory language, “their imposition was a Presidential action under subsection (d)(1) of the statute, and those actions have been declared unreviewable by Congress.”

On July 15, 2014, the U.S. Court of Appeals for the District of Columbia ruled that Congress did not intend to preclude Ralls’ constitutional due process claim from judicial review. While this ruling overturned the lower court, in dicta, the Court of Appeals noted the statute bars courts from reviewing the President’s actions taken to suspend or prohibit a transaction. A constitutional challenge to the process leading up to these actions is reviewable by the courts, however.

E. Pork: Smells Like a Threat

Shuanghui International, a Chinese company, and Smithfield Food, Inc., a U.S. based pork producer, announced in May 2013 that Shuanghui would acquire all outstanding shares of Smithfield in a deal valued around $4.7 billion. On the same day of the announcement, Smithfield CEO Larry Pope announced the parties’ intentions to voluntarily file for review by CFIUS stating the decision was motivated by “an abundance of caution.” Pope’s voluntary submission was a chance to take advantage of what CFIUS experts refer to as the “safe harbor” provision. CFIUS regulations

70. See Ralls Corp., 926 F. Supp. 2d at 88–89 (stating Ralls’s interpretation is flawed because statutes are never to be interpreted in a manner where the interpretation renders any part meaningless); see also 50 U.S.C. app. § 2170(d)(1) (2012).
71. Ralls Corp., 926 F. Supp. 2d at 88–89 (describing the President’s authority as “extremely broad”); see also 50 U.S.C. app. § 2170(d)(1) (2012).
72. Ralls Corp., 926 F. Supp. 2d at 89 (stating the challenged action is the type that is shielded from review); see also 50 U.S.C. app. § 2170(d)(1) (2012).
74. See, e.g., Raymond Barrett & David Baumann, US Regulators to Examine Whether Smithfield Foods Sale is Kosher, FORBES (May 29, 2013, 4:29 PM), available at http://www.forbes.com/sites/mergermarket/2013/05/29/us-regulators-to-examine-whether-smithfield-foods-sale-is-kosher/ (quoting Smithfield CEO Larry Pope as saying he was not worried about the review, but filed with CFIUS anyway).
prevent the Committee or President from taking any further action on a covered transaction after the Committee has reviewed and approved the deal.\textsuperscript{76} The deal was the largest Chinese takeover of an American company following the \textit{Ralls} decision, and the largest Chinese takeover of an American company in history.\textsuperscript{77} CFIUS ultimately cleared the deal without any mitigation measures; however, the Committee took the full forty-five day timeline to investigate any potential national security concerns.\textsuperscript{78} Unlike the Ralls transaction, which caught the public eye because it involved a case of first impression, CFIUS practitioners watched the Smithfield deal closely because it represented the first time the Committee concerned itself with food safety.\textsuperscript{79}

## II. REGULATOR TO RAILROADER: HOW A POST-\textit{RALLS} CFIUS WILL IMPACT FDI

Until 2012, no party subject to a CFIUS review, investigation, or Presidential order based on Section 721 of the Defense Production Act elected to challenge the scope of the Committee or President’s authority.\textsuperscript{80} The last time the President and CFIUS faced intense backlash from a decision related to a covered transaction was in 2006 when they required Alcatel SA and Lucent technologies to sign onto a National Security Agreement (“NSA”), which could unwind the deal if the two parties failed at any point to comply with specific terms laid out in the NSA with

\begin{itemize}
\item \textsuperscript{76} See 31 C.F.R. § 800.601 (2008) (stating the Committee will not exercise its power to block transactions if the Committee has notified parties that the transaction is not a covered transaction, that the Committee has concluded a review, or the President has announced that he will not act to block the transaction).
\item \textsuperscript{77} Louise Gong, \textit{Could the Smithfield Deal Evidence a New Trend in Chinese Investment in the US?}, LEXOLOGY (July 25, 2013), http://www.lexology.com/library/detail.aspx?g=85dd98ae-708c-46ab-b035-ae9f59e5b022 (noting the deal may have received less scrutiny because Shuanghui is not a State Owned Enterprise (SOE) unlike other Chinese investments).
\item \textsuperscript{78} See Bill McConnell, \textit{The Deal: No CFIUS Strings Attached to Smithfield Deal}, STREET (Sept. 9, 2013, 5:02 PM), http://www.thestreet.com/story/12031338/1/the-deal-no-cfius-strings-attached-to-smithfield-deal.html (“CFIUS experts picked up through the grapevine over recent days that mitigation was indeed absent from the Smithfield approval.”).
\item \textsuperscript{80} Daniel B. Pickard, Nova J. Daly, & Usha Neelakantan, \textit{Ralls Case Affirms President’s Broad CFIUS Authority}, WILEY REIN LLP (Mar. 14, 2013), http://www.wileyrein.com/publications.cfm?sp=articles&Id=8720#_ftn4 (characterizing Ralls’ decision to sue as “unprecedented”).
\end{itemize}
CFIUS. Ralls’ decision to sue, rather than lobby the administration like the business community following Alcatel-Lucent, triggered a series of decisions which has unwittingly strengthened the Executive’s discretionary authority to stifle FDI, whether the Executive wishes to or not.

A. Post Ralls: Submit for a review or face limitless Executive Authority

Ralls argued in Count III of its suit against CFIUS and President Obama that, “[n]either any other provision of Section 721, nor the implementing regulations, nor any Executive Order grants the President any powers beyond ‘suspend[ing] or prohibit[ing]’ a ‘covered transaction.’” Since the parties had already completed the transaction at the time of the order, Ralls’s argument carried more weight. Section 721(d)(1) states “the President may take such action for such time as the President considers appropriate to suspend or prohibit any covered transaction . . . .” Prior readings and prior Presidential action under this Section presumed it to mean that the President was limited only to suspending or prohibiting a deal, completed or pending. In 1990, the last time a president acted under this authority, President Bush limited the scope of his order by requiring China National Aero Technology Import and Export Corporation (CATIC) to divest all interests in MAMCO Manufacturing, Inc.

81. JAMES K. JACKSON, CONG. RESEARCH SERV., RL 33388, THE COMMITTEE ON FOREIGN INVESTMENT IN THE UNITED STATES 6-7 (CFIUS) (2013) (describing the arrangement as “controversial”).

82. Pelofsky, supra note 55 (describing a number of U.S. and international business groups objecting to the Bush administration’s policy decision).

83. Amended Complaint, supra note 65 at ¶ 133 (arguing in Count III that the President’s action was ultra vires and violated the statute and regulations).

84. 50 U.S.C. app. § 2170(d)(1) (emphasizing the specific options laid out in the statutory language).

85. Compare Amended Complaint, supra note 64, at ¶ 133 (“The President may only ‘take such action for such time as the President considers appropriate to suspend or prohibit any covered transaction.’” Neither any other provision of Section 721, nor the implementing regulations, nor any Executive Order grants the President any powers beyond ‘suspend[ing] or prohibit[ing]’ a ‘covered transaction.’”) with MEREDITH M. BROWN, ET. AL., TAKEOVERS: A STRATEGIC GUIDE TO MERGERS AND ACQUISITIONS, 13-33 (3d ed. 2013) (limiting the discussion of options open to the President at the end of the fifteen day timeline to suspension or prohibition of a covered transaction).

86. See Message to Congress on the China National Aero-Technology Import and Export Corporation Divestiture of MAMCO Manufacturing, Incorporated, 26 WEEKLY COMP. PRES. DOC. 164 (Feb. 2, 1990) [hereinafter Message on CNATI & MAMCO] (noting there are limited exceptions to when the U.S. government will act contrary to its policy of maintaining an open investment landscape); see also Harriet King, China Ends Silence on Deal U.S. Rescinded, N.Y. TIMES (February 20, 1990), http://www.nytimes.com/1990/02/20/business/china-ends-silence-on-deal-us-rescinded.html (noting the deal closed on November 30 and President Bush issued his order on February 2 following a recommendation from eight agencies (CFIUS) that the purchase be rescinded).
While the Executive Orders pertaining to CATIC and Ralls constituted presidential action on finalized deals, Ralls faced numerous other burdensome requirements that CATIC did not. The Court determined the President’s right to exercise this power came from the expressed statutory language in front of the words, “suspend” and “prohibit,” specifically the clause “take such action for such time as the President considers appropriate.” This adds a new level of uncertainty to an already secretive and vague process. There are statutory limitations for the allotted time the Committee has to review and investigate a transaction, thirty and forty five days, respectively. Additionally, Section 721 limits the President’s decision to announce whether he will take action pursuant to the Committee’s recommendation to fifteen days following the end of an investigation. “Such time,” however, has no limit under the Court’s interpretation, which permits the President to retroactively unwind deals. By prefacing subsequent action with “in order to effectuate” the suspension or prohibition, the President can invoke the statutory power of “such action for such time” that is necessary to effectuate his Order. This gives the President broad latitude to engage in retroactive review of closed deals and require and restrict action by the parties—action that is difficult, if not impossible, to predict. Furthermore, in the context of suspending a deal, the President could conceivably require that parties to a transaction remain

87. Compare Regarding the Acquisition of Four U.S. Wind Farm Project Companies by Ralls Corporation, 77 Fed. Reg. 60,281, 60,282 (Oct. 3, 2012) (preventing Ralls from selling the property to a third party until it complied with provisions in subsection (f)(i)-(iii)) with Message on CNATI and MAMCO, supra note 86 (limiting the order to divestiture and not imposing more burdensome restrictions on the parties).

88. See Ralls Corp. v. Comm. on Foreign Inv. In the United States, 925 F. Supp. 2d 71, 89 (D.D.C. 2013) (emphasis added) (stating “for such time” is an open ended temporal phrase granting the President an unlimited period of time to take action necessary to accomplish or implement the prohibition of a deal).

89. See 50 U.S.C. app. § 2170(c) (2012) (“Any information or documentary material filed with the President or the President’s designee pursuant to this section shall be exempt from disclosure[,]”).


91. 50 U.S.C. app. § 2170(d)(2) (2012) (“Not later than 15 days after the date on which an investigation . . . is completed.”).

92. See Ralls Corp., 926 F. Supp. 2d at 88 (stating if the President were limited to just a decision on whether to prohibit or permit a deal prior to its closing, he would not need an unlimited period of time granted to him with the phrase, “for such time”).

93. See id. (describing the sequence of Presidential action to include a declaration that a transaction is prohibited even it the deal has closed, then classifying further action as steps necessary to prohibit the transaction).

94. See id. (discussing the President’s order, which called for a removal of Chinese turbines, prevention of their use in the future, and restrictions on foreign nationals accessing the wind farm).
in some type of perpetual limbo because he “consider[ed] [such action] appropriate to suspend” a covered transaction.\textsuperscript{95} It is conceivable that the President could require the divestiture of any transactions deemed to threaten national security that occurred after FINSA, but were not reviewed by CFIUS.

Under the court’s interpretation, “such action” is also an open-ended term that increases unpredictability.\textsuperscript{96} The Presidential Order, in Section 2, subsection (b) ordered Ralls to divest all interests in the wind farms, a move comparable to President Bush’s requirements for Alcatel.\textsuperscript{97} However, President Obama went far beyond Alcatel by blocking or prohibiting: (1) access to the properties by anyone from or acting on behalf of Ralls, (2) the sale of the property to a third party without meeting certain conditions, and (3) the use of any items made by a particular Chinese firm for use at the location.\textsuperscript{98} The court did not elaborate on its reasoning, simply declaring these orders as “such action” necessary to prohibit the Ralls transaction.\textsuperscript{99} Furthermore, the court did not clarify a standard for determining when a particular action is sufficiently related to the prohibition of a transaction to be classified as “such action . . . the President considers appropriate.”\textsuperscript{100} Therefore, the court takes a very broad and permissive stance on the statutory language surrounding the limits (or lack thereof) of the President’s authority.

As long as the President’s actions fall within the undefined “such action at such time” category, parties to a covered transaction face no other option than to take advantage of the “safe harbor” provision.\textsuperscript{101} The affirmation that the President’s ruling is not subject to judicial redress underscores the

\textsuperscript{95} See id. (stating “the statute expressly authorizes the President to do what he deems necessary to accomplish or implement the prohibition.” Since Ralls dealt with the prohibition of a deal, the discussion in this sense stops there; however, it is fair to assume the same interpretation applies to the President’s ability to do whatever is necessary to effectuate a “suspension” of the deal.).

\textsuperscript{96} See id. at 89 (noting what the President deems necessary is up to his judgment).

\textsuperscript{97} Regarding the Acquisition of Four U.S. Wind Farm Project Companies by Ralls Corporation, 77 Fed. Reg. 60,281, 60,282 (Oct. 3, 2012).

\textsuperscript{98} \textit{Id.}

\textsuperscript{99} \textit{Ralls Corp.}, 926 F. Supp. 2d at 89 (stating the additional restrictions fell within the scope of the President’s authority but failing to elaborate how or why).

\textsuperscript{100} See id. (noting the Defense Production Act affords the President broad authority but providing no explanation or reasoning why certain actions are necessary in order to effectuate the prohibition of the transaction instead highlighting that the actions are not reviewable).

\textsuperscript{101} See 31 C.F.R. § 800.601 (2008) (discussing when the President’s divestment authority will not be available).
importance of submitting to a review.\textsuperscript{102} If the Committee, during the review period, determines not to undertake an investigation of a covered transaction or the Committee determines, at the end of an investigation, not to take further action, then the President “shall not” exercise his authority available to him under Section 721(d).\textsuperscript{103} It offers the only sense of predictability in an otherwise unpredictable process.

B. Ham is Critical Infrastructure So Your Deal Is Probably Covered Too

Since CFIUS reviews each case on a fact specific basis, it follows that there is no precedential value for the Committee’s past rulings when compared with future rulings.\textsuperscript{104} While this holds true for the decisions the Committee makes when it reviews covered transactions, it is still valuable for companies to know which transactions are chosen for review.\textsuperscript{105} Companies can only guess whether their deal will be a covered transaction based on a variety of statutory factors and prior reviews within their respective industry.\textsuperscript{106} The perception among investors is that CFIUS reviewing one deal means it is likely to review similar transactions.

The Smithfield-Shuanghui deal represented the first time CFIUS reviewed a merger dealing with food supply.\textsuperscript{107} The deal likely fell within the reach of CFIUS because Smithfield is the largest pork producer in the United States and “has a significant impact on U.S. food supply.”\textsuperscript{108} While

\begin{itemize}
\item \textsuperscript{102} Ralls Corp., 926 F. Supp. 2d at 89 (“[T]his Court finds that the challenged action ‘is of the sort shielded from review.’”).
\item \textsuperscript{103} See 31 C.F.R. §§ 800.601(a), (a)(2).
\item \textsuperscript{104} Comm. on Foreign Inv. in the United States, Annual Report to Congress 3 (2013), available at http://www.treasury.gov/resource-center/international/foreign-investment/Documents/2013\%20CFIUS\%20Annual\%20Report\%20PUBLIC.pdf (“Apart from the general correlation of the number of notices with macroeconomic conditions, the information in the table . . . is not indicative of discernable trends. CFIUS considers each transaction on a case-by-case basis[.]”).
\item \textsuperscript{105} Cf. Committee on Foreign Investment in the United States Filing Instructions, U.S. Department of the Treasury, available at http://www.treasury.gov/resource-center/international/foreign-investment/Pages/cfius-filing-instructions.aspx (“CFIUS does not issue advisory opinions as to whether a transaction might raise national security concerns or be considered a covered transaction subject to review.”).
\item \textsuperscript{106} See 31 C.F.R. § 800.208 (2008) (defining “critical infrastructure” broadly with general terms like “system” and “asset” forcing companies to look to previous deals within a specific industry to determine whether the deal fell into this category in order to make a determination of whether this definition applies).
\item \textsuperscript{107} See McConnell, supra note 78 (stating CFIUS experts believe the Committee’s review for food safety concerns would be a first).
\item \textsuperscript{108} See “Re: Shuanghui’s International Holdings, Ltd. proposed purchase of Smithfield Foods,” Letter from Concerned Industry Players (July 9, 2013) [hereinafter “Letter to Cabinet Members Expressing Opposition of Smithfield Deal”] available at http://www.chinaustradelawblog.com/wp-content/uploads/sites/164/2013/07/farm-
most would agree that the domestic food supply should fall within the definition of critical infrastructure, especially because “the incapacity or destruction of the particular system ... would have a debilitating impact on national security,” it is the companies’ stated reason for filing, “an abundance of caution,” and the subsequent precedent it sets for potential deals within the industry that is a troubling indicator of a widening CFIUS net.109

As noted before, the deal emerged without mitigation.110 The President cannot suspend or prohibit a transaction where other provisions of law “provide adequate and appropriate authority” to protect the nation’s security.111 Since the food industry is already highly regulated, the Committee may have felt any mitigation efforts on their part would be unnecessary, if not illegal, because of U.S. Department of Agriculture oversight.112 But the damage is done.

CFIUS sent a signal to foreign companies contemplating investing in the U.S. domestic food market when it accepted the Smithfield-Shuanghui filing and conducted a forty-five day investigation: food is on our list.113 Smithfield shows the problems associated with leaving an ambiguous definition for what constitutes critical infrastructure. By failing to define

letter-on-cfius.pdf (calling for CFIUS to block the merger because the deal threatens the security of the nation’s food supply); see also Smithfield and Beyond—Examining Foreign Purchases of American Food Companies: Hearing Before S. Comm. on Agric., Nutrition, and Forestry, 112th Cong. (2013) (statement of Sen. Debbie Stabenow, Chairman, S. Comm. on Agric., Nutrition, and Forestry) (describing food security as essential to the national security and declaring it essential to examine the impact of the deal on the nation’s food supply).

109. See 31 C.F.R. § 800.208 (2008) (defining critical infrastructure broadly to include physical and virtual assets); Press Release, Smithfield Int’l Holdings, supra note 73 (describing the companies’ motives to submit as “out of an abundance of caution”).

110. See e.g., McConnell, supra note 78 (stating CFIUS cleared the deal with no strings attached).

111. Cf. 50 U.S.C. app. § 2170(d)(4)(B) (2012) (stating whether a particular provision of law adequately protects the nation’s security is up to the judgment of the President).

112. See 31 CFR § 800.101 (2008) (limiting the scope of the President’s authority by prohibiting action when other provisions of law can adequately protect the nation’s security).

113. See Louise Gong & Amanda Forsythe, CFIUS and Chinese Investments: Lessons from the Smithfield Deal, LEXOLOGY (November 26, 2013), http://www.lexology.com/library/detail.aspx?g=8d72c8a1-d89b-4d95-83a2-9e5143d66f37 (“A 45 day investigation was undertaken by CFIUS against a highly political backdrop, with CFIUS being asked to look into how food safety and food security threats may affect national security[.]”); see also Smithfield and Beyond—Examining Foreign Purchases of American Food Companies, supra note 108 (describing Shuanghui’s acquisition as the first, but not the last and calling for an examination of the approval process because of the case’s precedent setting nature).
the category more thoroughly, any foreign company looking to enter into a broad array of industries will feel forced to submit for a review "out of an abundance of caution."\(^{114}\)

The Smithfield review sent another sign to investors: the loose definition of critical infrastructure can be a political tool.\(^{115}\) The events surrounding the review support this notion. Numerous agricultural organizations opposed the purchase in a letter to Cabinet members who sit on CFIUS.\(^{116}\) Additionally, the U.S. Senate Committee on Agriculture held a hearing in July 2013 to examine the deal.\(^{117}\) Nowhere in the CFIUS mandate does it permit the Committee to examine a deal for the economic impact it might have on competition.\(^{118}\) Examining the deal under the guise of food security, however, helped placate the interests of the industry and of members of Congress. As a result, foreign investors party to large acquisitions in industries not traditionally covered by CFIUS may feel forced to submit for review because political and industry pressure could push CFIUS to initiate a non-notified review after a deal has begun.\(^{119}\)

If Smithfield-Shuanghui's "abundance of caution" included submitting the deal because of its unprecedented value, this is the sign of another disturbing trend, particularly because CFIUS is not charged with looking into these economic impacts.\(^{120}\) In 2012, CFIUS reviewed, and ultimately cleared, the acquisition of AMC Entertainment by Dalian Wanda Group for

\(^{114}\) See Press Release, Smithfield Int'l Holdings, \textit{supra} note 73.

\(^{115}\) See Black, \textit{supra} note 79 (stating CFIUS is not authorized to look at the economic impact of a deal and arguing a U.S. Senate Hearing held during the review period was aimed at putting pressure on CFIUS to conduct a very close review).

\(^{116}\) See Letter to Cabinet Members Expressing Opposition of Smithfield Deal, \textit{supra} note 108 (arguing the nation's food supply should fall into the definition of critical infrastructure and noting the extensive contracts Smithfield has with the U.S. military and arguing the deal would threaten the ability of the military to feed troops).

\(^{117}\) See, e.g., Edward Wyatt, \textit{Senators Question Chinese Takeover of Smithfield}, \textit{N.Y. Times}, B7, July 10, 2013, available at http://dealbook.nytimes.com/2013/07/10/lawmakers-have-concerns-over-chinese-takeover-of-smithfield/?_php=true&_type=blogs&_r=0 (discussing lawmakers' concerns and over the deal and noting sixteen members of the Agriculture Committee sent a letter to the Treasury Department asking Treasury to include the Department of Agriculture and the Food and Drug Administration in the CFIUS review process for the deal).

\(^{118}\) See 50 U.S.C. app. § 2170(f) (2012) (listing various factors the President and Committee can consider including the impact on the nation's defense apparatus and international leadership in technology but not mentioning economic impacts). But see \textit{Smithfield and Beyond - Examining Foreign Purchases of American Food Companies}, \textit{supra} note 108 (encouraging CFIUS to factor in the nation's economic security when reviewing a transaction for national security implications).

\(^{119}\) Cf. Barrett & Baumann, \textit{supra} note 74 (discussing the ways in which industry competitors can use political tools such as lobbyists to interfere with pending transactions).

\(^{120}\) See 50 U.S.C. app. § 2170(f) (2012).
$2.6 billion. The transaction fell under the “covered transaction” requirement; however, its impact on national security is questionable. Is AMC’s ownership and operation of 338 movie theaters around the United States considered “so vital” that the incapacitation of the business would “have a debilitating impact on national security?” Like Smithfield, AMC was an acquisition by a Chinese firm of large stakeholders in an industry symbolic of American culture: entertainment. It is more likely that the parties submitted the transaction for review because of the deal’s large value; at the time, it was the largest completed Chinese-US acquisition in history. Since CFIUS does not have a mandate to review transactions for economic impacts, the idea that companies are submitting for review because of the value of a deal rather than the potential that it falls within the CFIUS mandate is disturbing. As a result of this review, China-based investors entering into high valued deals in the entertainment industry, and investors from other countries with sensitive diplomatic ties, may feel pressured to submit for review.


There were 155 notices filed with CFIUS in 2008, up from 138 the previous year. During that same time, Congress passed FINSA and President Bush implemented the law at the beginning of 2008, the last
major change and clarification related to the CFIUS process. The jump represents a precautionary reaction by the private sector attempting to adjust to new, broader regulations for FDI. Of those 155 notices, eighteen were withdrawn during review, twenty-three were investigated, and five were withdrawn during the investigation period. The companies associated with all 155 acquisitions were forced to wait a minimum of thirty additional days to close on a deal. Twenty-three out of these 155 transactions, which is fourteen percent of all notices, had to wait an additional forty-five days for clearance from the investigation phase.

These excess delays represent a minor inconvenience for most transactions; however, in a post-Ralls environment, where firms are filing out of fear and uncertainty, the delays are an unnecessary impediment for most who will submit for review. In 2012, there were 114 notices and forty-five investigations. Forty percent of covered transactions filed in 2012 were stalled for seventy-five days of regulatory review.

Companies facing a regulatory delay are often subject to very public and politicized scrutiny. One deal, the acquisition of Sprint-Nextel Corp. by Japan’s SoftBank Corp, highlights how a regulatory delay in a system filled with ambiguity could be disastrous to international investors. DISH Network, a competitor with SoftBank in the deal, launched a lobbying campaign arguing outstanding national security concerns. Leaving a

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128. See Comm. on Foreign Inv. in the United States, supra note 104 at 3 (stating the increase in withdrawals in 2012 is a result of specific facts and circumstances of the particular transaction).

129. See Amanda Forsythe, “But I’m Canadian!” and Other CFIUS Dilemmas, Chadbourne & Parke LLP (Dec. 2013), http://www.chadboume.com/files/Publication/3785538d-ff78-42e4-a84d-3f65bdc01bda/Presentation/PublicationAttachment/8f284480-8084-45e6-bced-445635e89eeec/CanadianCFIUSDilemmas_Dec13.PDF. (“Although there are statutory deadlines for certain phases of the process, the exact timing of the process is hard to predict.”).

130. See Comm. on Foreign Inv. in the United States, supra note 104 at 3 (stating the increase in number of notices filed from 2010 to 2012 coincides with the continued recovery from the financial crisis of 2008-2009).


132. See Alina Selyukh, Spring, Softbank agree to U.S. National Security Deal, Reuters (May 29, 2013, 6:27 PM), http://www.reuters.com/article/2013/05/29/us-sprint-offer-idUSBRE94S0IG20130529 (describing as aggressive DISH Network’s attempts to convince lawmakers that the transaction would threaten the nation’s security).

133. See, e.g., DISH Statement on Softbank and CFIUS, DISH Network Corp.
deal open for seventy-five days gives a leg-up to domestic companies looking to acquire target companies. They are not subject to the same delay and may be more appealing to shareholders should CFIUS find it needs to further investigate, or ultimately mitigate, a deal. Hormel Foods Corporation, a domestic competitor of Smithfield, declined to say whether it would lobby against Shuanghui when the deal was under review. Hormel did not act and DISH was unsuccessful in its attempts; however, the threat is real. Shell Gas successfully lobbied Congress to introduce legislation in 2005 that would have stifled the bid by China National Offshore Oil Corporation (“CNOOC”) to acquire the U.S. based oil company, Unocal. CNOOC eventually abandoned the transaction amid public backlash.

It would be imprudent to say these reviews served no purpose; however, as more companies subject themselves to CFIUS review because of endless uncertainty, international investors remain at a severe disadvantage when they challenge U.S.-based companies in a bidding war. “There is a concern about the length of time that the deals are taking and whether or not [the companies] feel like they are at a disadvantage.” When companies feel like they must self-report out of caution and due diligence, the United States presents itself as a protectionist investment market suspicious of outsiders.

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134. See Barrett & Baumann, supra note 74 (highlighting the risks Smithfield would face if Hormel attempted to lobby Congress to block the transaction).

135. See id. (comparing what Shell did to the CNOOC – Unocal deal to what Hormel could do to the Smithfield-Shuanghui deal).


137. Cf. Smithfield and Beyond – Examining Foreign Purchases of American Food Companies, supra note 108, at 6 (statement of Daniel M. Slane, US-China Econ. and Sec. Review Comm’n) (stating Congress should expect a wave of Chinese investment in the U.S. food and agriculture industry, which means these parties will feel obligated to submit for CFIUS reviews regardless of whether the deal is covered under the statutory guidelines).


139. See, cf. 50 U.S.C. app. § 2170(b)(2)(B)(i)(II) (2012) (requiring CFIUS to investigate covered transactions when the acquirer is or is backed by a foreign government which means the acquiring company has the burden of proof to show it is not a threat to the security of the nation).
III. THE NEED FOR CLARITY

Following the Ralls decisions, CFIUS faces an identity crisis. On the one hand, the Committee must remain vigilant in its mandate to ensure its first priority, the nation’s security, when reviewing covered transactions. This is all the more important when viewed amidst the backdrop of the Committee’s inclusion in its public annual report of a U.S. Intelligence Community Assessment stating “that foreign governments are extremely likely to continue to use a range of collection methods to obtain critical U.S. technologies.” On the other hand, it is the Obama Administration’s stated goal that it wishes to encourage FDI, a goal traditionally left to the states, but which the administration deems important enough to bring under the umbrella of the Federal Government. The question is how CFIUS can conform to the goal of promoting what historically has made America an attractive investment landscape, specifically an “open investment” climate and a “predictable and stable regulatory regime.”

In order to reconcile this split, CFIUS and the Executive must increase transparency and predictability in the review process by changing the policy on advisory opinions. Asking the Committee to definitively state what “national security” entails would be impossible. Furthermore, it is in the interest of the nation not to limit the meaning of national security because of the ever-changing domestic and international milieu. But the Committee could issue advisory opinions following a determination that a particular transaction is not covered if that particular transaction does not fall within the purview of “critical infrastructure.” The Committee can determine a transaction is not covered or that there are no outstanding national security concerns under sections 800.504 or 800.506 of its

140. See Comm. on Foreign Inv. in the United States, supra note 104, at 29 (answering the question of whether foreign governments used espionage activities to obtain commercial secrets related to critical technologies).

141. See Politi, supra note 9 (stating, in the past, the federal government has avoided large scale initiatives targeting foreign investment and leaving this to state governments).

142. See U.S. Dep’t of Commerce & President’s Council of Econ. Advisers, supra note 6, at 11 (noting most investments originate from industrialized countries, but highlighting the role emerging markets will play as those countries continue to grow economically).

regulations.

The finality of the action should permit the Committee to issue a public opinion describing why it chose not to review a transaction.144 This would require acquiescence on behalf of members to the particular transaction; however, achieving this likely would not be difficult, especially because the publicized opinion would involve a transaction that is not covered. Currently, parties that submit to a review may withdraw a notice prior "to conclusion of all action under section 721."145 Doing so helps avoid an unfavorable ruling and parties can resubmit at a later time.146 Parties to a transaction understandably may wish to avoid public knowledge of a withdrawal because of financial implications; however, publication of a decision by CFIUS not to review, investigate, or rule on a transaction would not carry the same negative consequences. It would require an adjustment of the regulations under 31 C.F.R. § 800.702, which prohibit the Committee from disclosing information filed even after a "determin[ation] that a notified transaction is not a covered transaction."147 Accordingly, it would be in the interest of the business community to acquiesce to this change in regulation.

The Committee could shed more light on its decision-making process by explaining its justification for negative rulings. National security concerns make it difficult, and likely illegal, for a full debrief of why the Committee ultimately recommended the suspension or prohibition of a deal. This would involve a breakdown of rulings into broad categories, which would provide guidance without giving specific reasons that might involve decisions based on classified material.

Currently, the Committee, in its annual report to Congress, breaks down notified covered transactions by sector.148 Among the sectors included are Manufacturing; Finance, Information and Services; and Mining, Utilities, and Transportation. The categories are further broken down into subcategories that give a general idea of the sub-industry in which the deal originated; however, the information is not enough to garner specifics

144. See 31 C.F.R. §§ 800.504, 800.506(d), & 800.601 (2008) (describing the various points in the CFIUS process where finality provisions kick in).

145. See § 800.507(a) (2008) (stating requests to withdrawal from a review will ordinarily be granted, but reserving the Committee’s right to deny the withdrawal request).

146. See § 800.507(c)(2) (2008) (stating the Committee will specify a time frame for a resubmission).

147. See § 800.702(b)(3) (2008) (stating the regulation covering confidentiality will continue to apply even though a decision has been reached).

148. COMM. ON FOREIGN INV. IN THE UNITED STATES, supra note 104, at 4 (noting the greatest number of filings in 2012 occurred in the manufacturing and finance sectors).
about the “critical technology” involved, as might be the case for Manufacturing’s “semiconductor” subsector. The Committee could create similar categories to reflect negative rulings. It was reported that the wind farms purchased by Ralls were within or adjacent to U.S. military installations. The Committee could classify this ruling under a category entitled “situational concerns.” This gives guidance to future investors who might attempt to acquire property in proximity to sensitive locations. Citing “situational concerns” as a reason for a negative ruling would do little to threaten or reveal sensitive information related to national security.

Although CFIUS cleared the SoftBank-Sprint deal last spring, it placed conditions on the clearance in order to mitigate outstanding concerns related to SoftBank’s use of equipment made by a Chinese company. In this instance, the Committee could site “technological concerns” as its reason for requiring the mitigation measures. This makes potential investors aware that mergers and acquisitions resulting in foreign control of telecommunication companies likely fall under the “critical infrastructure” or “critical technology” rubric. The importance is to develop guidance and clarity, not specifics and pinpointed answers for those looking to invest.

Further clarification for rulings provides guidance for foreign investors, something that supports the administration’s goal of remaining an open marketplace with a predictable regulatory landscape. It also prevents misperception, a worry that should be at the forefront of the Committee’s mind. Guidance on negative rulings or rulings involving mitigation could help reduce unnecessary filings, which would reduce the misperception from investors who might reside in countries with less than ideal diplomatic relations with the United States.

CONCLUSION

The Committee reviews a small fraction of total deals involving foreign acquisition of U.S.-based companies. The direct economic impact of CFIUS’ review of transactions is difficult to measure; however, unless the Committee clarifies its policies in light of its new power and reach, it risks alienating certain foreign companies from investing in the United States.

Ralls has shown the world the dangers of what may happen when parties forge ahead with an acquisition without submitting first for clearance by CFIUS. Not only can the President block a deal, but he can undo a deal and require seemingly boundless actions and restrictions in order to

149. See Defendants’ Memorandum in Support of Motion to Dismiss, supra note 65, at 4.
150. See Selyukh, supra note 132 (citing sources who stated SoftBank agreed to remove equipment from Sprint and Clearwire Corp’s networks made by Huawei Technologies Co Ltd., a Chinese company, if the deal was completed by 2016).
effectuate the order. The heavy-handed action chips away at the open, predictable, and stable economy that draws in foreign capital.

*Smithfield-Shuanghui* is an example of what to expect unless CFIUS can provide more guidance and transparency in its review process. Foreign firms will submit for review because the cost-benefit analysis post-*Ralls* demands it. The current administration risks driving the U.S. economy down a path where FDI is presumptively suspect. When companies feel the need, as a default, to submit for a review, the Committee risks entering the territory where companies feel as though they must show they are not a threat. New industries will fall under the “critical infrastructure” umbrella, which will drive more investors to self-report to CFIUS. Whether the deal is actually covered under the “critical infrastructure” definition is immaterial without transparency, advisory opinions, or further clarification.