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ANALYSIS: IT'S TIME TO CREATE 'THE COMMISSION ON FOREIGN INVESTMENT AND NATIONAL SECURITY'

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Given its existing limitations, the Committee on Foreign Investment in the United States is ready for its next evolution—not a tweaking around the edges of an existing process that continues to perpetuate limitations to the flexibility and certainty essential to managing a range of interests, but a foundational shift from a "committee" to a statutorily established "commission" comparable to others operating at the federal level, such as the Federal Communications Commission, International Trade Commission, and US Securities and Exchange Commission.

Since it was conceived almost 50 years ago, the Committee on Foreign Investment in the United States (CFIUS or the Committee), has passed several important milestones. What began as an ad hoc body tasked with monitoring the impact of foreign investment in the United States and coordinating the implementation of US policy on such investment, developed into a substantial apparatus, established by statute and managed by the US Department of Treasury. From its inception in 1975, Congress amended the underlying CFIUS statute in 1988, 1993, 2007, and 2018, primarily to address geopolitical circumstances and to enhance the Committee's authority and reach. In each instance, the Executive branch and Congress reacted to perceived threats to US interests. Today, the Committee functions under the most recent legislation, the Foreign Investment Risk Review Modernization Act of 2018, a statute that enhanced various CFIUS authorities, expanded some jurisdiction, and established more granular factors to consider when evaluating the national security implications of cross-border investments.[1]

Despite these efforts, the Committee's ability to identify, evaluate, and manage national security risks has consistently lagged behind the threats presented by foreign direct investment (FDI). Changes in the Committee's authority have arisen almost exclusively as a reaction to perceived crises, and even then, CFIUS has been slow to evolve to keep pace. Most legislative changes related to CFIUS have addressed the composition of the Committee, the manner in which its reviews occur, and the factors considered during the review process. However, how CFIUS works—as an "inter-agency" committee that requires consensus among many federal agencies, each with differing priorities or "equities"—limits a unified federal approach to protect vital national security interests. Despite almost 50 years to resolve these challenges, CFIUS FDI review remains reactive and the process itself requires extensive and sometimes contentious interagency and intergovernmental engagement.

In a fast-moving world with tens of thousands of cross-border transactions every year, the process is not ideal to manage national security risks. Moreover, this approach does not achieve the countervailing purpose of providing greater investment certainty and transparency that allows investors to understand where national security issues may arise in their transactions. A process lacking consistent analytical structure and operating as a multilevel black box appears to fall short of adequately identifying, assessing, and protecting US national security interests.

Given these and other limitations noted throughout the literature,[2] we posit that CFIUS is ready for its next evolution—not a tweaking around the edges of an existing process that continues to perpetuate

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[1] 50 USC §§ 4565, et seq. (as amended).

[2] *See, e.g.*, Xingxing Li, National Security Review in Foreign Investments: A Comparative and Critical Assessment on China and US Laws and Practices, 13 Berk. Bus. L. J. 255 (2016); E. Maddy Berg, A Tale of Two Statute: Using IEEPA's Accountability Safeguards to Inspire CFIUS Reform, 118 Colum. L. Rev. No.6 (2018).

limitations to the flexibility and certainty essential to manage a range of interests, but a foundational shift from a "committee" to a statutorily established "commission" comparable to others operating at the federal level, such as the Federal Communications Commission (FCC) and US Securities and Exchange Commission (SEC).[3] These commissions arose in response to identified strategic concerns, where the existing government structure was viewed as ineffective or inefficient, or suffered from other shortcomings. In these circumstances, as with CFIUS today, a lack of transparency and objectivity, as well as a degree of uncertainty for both the regulated and administrative participants, compelled action to reform the how the federal government operated.

Robust Foundation

When it created many of the existing commissions, Congress considered the legal gaps and public and private interests involved when fashioning broad enabling statutes designed to prevent continuous reactive approaches to consistent issues and transcend the "politics" of "regulation." Of the various commissions that have been established since the 1930s, the Securities Exchange Act of 1934 (as amended) and the Communications Act of 1934 (as amended)[4] provide examples of how a Commission on Foreign Investment and National Security might operate. Each act established independent commissions and subjected those bodies to strong congressional oversight, including Senate confirmation for appointed commissioners. These legislative actions and the long history of both commissions, provide a robust foundation to develop a similar commission to review foreign investments, both inbound and outbound.

Some may argue that the current system works as best it can in a fast-paced environment, or that establishing a Commission on Foreign Investment and National Security, populating it, issuing regulations, and educating investors and other parties about the process is arduous and expensive. From our perspective, these objections are not insurmountable and are outweighed by the benefits of bringing

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[3] Congress has established a range of commissions over the past 50 years, each designed to address issues that needed stability and continuity while considering the risks and issues associated with the activities or transactions. Commissions include the following:

Federal Trade Commission

Nuclear Regulatory Commission

Commodity Futures Trading Commission

Federal Maritime Commission

Equal Employment Opportunity Commission

Federal Election Commission

Consumer Product Safety Commission

Each has different authorities designed to protect interests that extend beyond political circumstances. This report focuses on the SEC and the FCC as statutory organizations with among the most mature and robust structures that have addressed national security and other policy interests.

[4] 15 USC §§ 78a, et seq. (as amended) (Securities Exchange Act of 1934, § 4, pp. 57-68); 47 USC §§ 151, et seq. (established the FCC, §§ 1 (purpose), § 4 (Commissioners), § 5 (organization and functions)

objectivity, internally driven resources, a broader mandate, and more certainty to a currently uncertain process that is at best reactive and at worst incapable of addressing the serious national security threats faced by the United States and the industrial base.

This analysis includes the following sections:

- A brief overview of CFIUS from 1975 through the present
- A brief overview of the SEC and FCC legislative foundations and Executive branch construct; and
- An outline of the foundations and structure of the new Commission on Foreign Investment and National Security, or CFINS.

Congress can establish a new CFINS by drawing on the extensive legislative background related to the FCC and SEC models, combined with the working history of CFIUS since 1975. Funding and resources for CFINS could be drawn initially from the collective budgets for all member agencies of CFIUS now involved in the CFIUS process. Regulations could be prepared in fairly short order based on CFIUS member agencies' approaches to the national security reviews currently conducted.

The CFINS concept would focus on independence, accountability, transparency, objectivity, consistency, and internal expertise with a structure that would include the following:

- Five independent, Senate-confirmed commissioners with fixed terms, staggered in the same manner that has become routine for commissions;
- Internal bureaus or offices with resident expertise in at least national security, technology, financial structures, mitigation measures, intelligence, and multilateral engagement;
- Expanded jurisdiction to cover both inbound and outbound investments, allowing one authority to address the national security concerns for investment overall[5];
- Each commissioner would have subject matter experts on staff who would advise on the consolidated positions of each of the internal bureaus'/offices' reports on each transaction; staff members would not supplant the bureaus/offices within CFINS but would act as advisors to the commissioners, similar to judicial clerks for federal and state court judges;
- The Commission's regulations would reflect a coordinated, consolidated view of the equities of the current CFIUS members;

[5] Commentators and certain congressional factions have expressed an interest in establishing an outbound investment review process—another CFIUS-like committee to conduct the reviews. Although these interests have been preliminarily reflected in some draft legislation, such as the National Critical Capabilities Defense Act proposed by Senators John Cornyn and Bob Casey, more definitive actions have not yet occurred. The Cornyn/Casey legislation proposes an outbound investment regime to be managed by the US Trade Representative to address key supply chain issues. Other regimes outline outbound investment review approaches that would either extend CFIUS's current jurisdiction or establish a new committee. Consolidating the authority to review inbound and outbound investment in CFINS would eliminate the need to continuously tweak or establish new committee-type frameworks for transactions.

- Government agencies, the intelligence community, the military services, and interested parties could contribute information through an established regulatory process similar to existing practices of other commissions;
- A more robust mandatory filing process that expanded the reviews to cover not only certain critical technologies and critical infrastructure, but classified assets, supply chain consolidations, expanded data issues, and cyber-related concerns; and
- Allowing third-party submissions, similar to the FCC and/or International Trade Commission process.

The most challenging aspect would involve the need for underlying legislation to establish the CFINS and the practicalities of shifting existing CFIUS cases to the new Commission once it is established. But the benefits to this approach will allow for a more robust, yet nuanced, national security analysis, less interagency conflict, objectivity in the process, and more consistent outcomes.

OVERVIEW OF CFIUS

In 1975, President Gerald Ford issued Executive Order (EO) 11858 outlining a foreign investment review process managed by the Executive branch through CFIUS. The order assigned primary responsibility for an ad hoc review process to the US departments of Treasury and Commerce and included a series of study and reporting requirements managed by Commerce. At the time, the Ford administration was concerned about certain overseas investments targeting the strategic industry sectors[6] and issued EO 11858 to study the impact that foreign direct investment would have on these industries. Based on the study, Ford considered it essential to establish a monitoring and flexible decision-making Executive branch process to examine these investments.[7]

The order designated the Treasury Department as chair and assigned the Commerce Department to conduct various studies about foreign investment.[8] The Committee's primary, if not sole interest, focused on evaluating national security concerns.

Between 1975 and 1988, CFIUS conducted a limited number of ad hoc reviews of transactions that came to its attention or were submitted to it through the Department of Defense. During that time, CFIUS published no decisions or other summaries of outcomes and provided only aggregate information or select details of its activities.[9] The Government Accountability Office (GAO) published more than 10

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[6] *See, e.g.*, Statement of Commissioner Patrick Mulloy, US-China Economic and Security Review Commission, October 20, 2005 (citing concerns over spiking energy prices, the formation of OPEC, and purchases of significant assets by OPEC countries based on the revenue generated from oil/gas sales), Annual Report, pp. 151-152 (2005); *see also* S. Auerbach, "US May Halt Sale of Firm to Japanese," Wash. Post, Nov. 8, 1986; "Fairchild Deal with Fujitsu Raises Concerns," J. of Commerce, March 19, 1987 (noting that Fairchild was already foreign owned by Schlumberger, a French company).

[7] EO 11858, §§ 1(b) and (c). The establishment of CFIUS was arguably the first organized, federal attempt to focus on national security issues with FDI. Previously, the focus had been more economically oriented. *See* M. Wilkins, The History of Foreign Investment in the United States to 1914.

[8] EO 11858, § 1(c)(2).

[9] Congressional Research Service. "The Committee on Foreign Investment in the United States (CFIUS)" (Updated July 3, 2018) (CRS CFIUS Report), p. 4.

studies highlighting how CFIUS reviews were conducted and whether or how the Committee could be effective. In 1990, the GAO noted that as of February 1, 1990, CFIUS reviewed approximately 240 investments between 1988 and 1990, but only conducted six complete investigations.[10] Thus, little visibility or oversight existed into the effectiveness of the process, even though foreign investment continued at a brisk pace.[11]

In the 1980s, Japan began an assertive campaign, similar to the one that China has been pursuing since the 2000s, to invest in strategic sectors designed to develop vertical and horizontal capability throughout these sectors.[12] In particular, Japan began to invest in semiconductor and microelectronic capabilities in the United States at the same time that the US government began to loosen export controls for products, data, and technology in these industries.[13] At the same time, concerns arose over the government's decline in research and development funding in these areas.

These concerns carried through from 1988 until 2006, when Dubai Ports proposed a transaction to assume responsibility for the management of several US ports then managed by a UK company. Post-9/11 concerns arose over the national security impact of this transaction, given the strategic importance of US ports to US economic and defense capabilities. Ultimately, those concerns led to the passage of the Foreign Investment and National Security Act of 2006 (FINSA), which further solidified CFIUS and granted the Committee additional authorities.

From 1990 through 2006, CFIUS continued to review transactions, focusing almost entirely on those submitted voluntarily to the Committee but also beginning, over time, to consider transactions identified by CFIUS member agencies with national security equities. At the same time, extensive export decontrol

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[10] "Foreign Investment: Analyzing National Security Concerns," Report to the Chairman, Subcommittee on Oversight and Investigations, Committee on Energy and Commerce, House of Representatives (March 1990), p 9.

[11] *Id.* at p. 17 ("The Defense Department … does not have a comprehensive database that would show foreign investments in national security related sectors …"); *id.* at p. 19 ("Virtually none of the information used in the CFIUS review process came from formal US government statistics on foreign direct investment. Commerce data, even if it were to exist for aerospace and semiconductors, do not provide the kind of detail about defense relationships, the firm's technology, alternate suppliers, or the new owner's intentions that are needed in the review process. … Information on alternate suppliers does not readily exist in US government databases.")

[12] CRS CFIUS Report, at p. 5 ("By the late 1980s, Congress and the public had grown increasingly concerned about the sharp increase in foreign investment in the United States and the potential impact such investment might have on the US economy. In particular, the proposed sale in 1987 of Fairchild Semiconductor Co. by Schlumberger Ltd. of France to Fujitsu Ltd. of Japan touched off strong opposition in Congress.")

[13] *See, e.g.*, "Export Controls: Challenges with Commerce's Validated End User Program May Limit Its Ability to Ensure that Equipment Exported to China Is Used as Intended," GAO-08-1095 (September 2008); "Export Controls: Rapid Advances in China's Semiconductor Industry Underscored the Need for Fundamental US Policy Review," GAO-02-620 (April 2002); "Export Controls: More Thorough Analysis Needed to Justify Changes in High Performance Computer Controls," GAO-02-892 (August 2002); "Export Controls: Inadequate Justification for Relaxation of Computer Controls Demonstrates Need for Comprehensive Study," GAO-01-534T (2001); "Export Controls: System for Controlling Exports of High Performance Computing Is Ineffective," GAO-01-10 (December 2000).

continued as did the decline in US government interest in leading research and development efforts in emerging or disruptive technologies. The government ceded those research and development efforts primarily to industry, which opened the door to the primacy of commercial applications over national security applications. These gaps resulted in underlying shifts in the potential impact foreign investment could have on US national security since export controls no longer restricted many technology transfers nor provided the government the visibility needed to understand how the transfer of ownership of a US company could result in significant losses in technology.

While investments from Japan, the Middle East, and other countries formed the genesis for the shifts in how CFIUS managed these reviews, China's assertive moves to purchase or invest in US high technology industries, as well as its declaration of a civil-military fusion policy, created new concerns within Congress and the Executive branch. These concerns eventually resulted in passage of the Foreign Investment Risk Review Modernization Act of 2018 (FIRRMA), yet another reactive solution. FIRRMA further expanded CFIUS jurisdiction to certain minority investments, outlined a process to identify excepted foreign government investors, established a limited mandatory filing process, and tethered the identification of emerging and foundational technologies (primary concerns of the national security agencies) to the Department of Commerce and US export controls. FIRRMA also expanded CFIUS to include a limited set of real estate transactions, though Congress ultimately rejected calls for including greenfield transactions within the Committee's jurisdiction.

After launching pilot programs and testing the mandatory process, CFIUS issued implementing regulations for FIRRMA in early 2020, which established several carve-outs to CFIUS jurisdiction and left gaps in the critical technologies jurisdiction the Committee had over emerging and foundational technologies. These regulations, therefore, pared back some CFIUS jurisdiction even further. For example, critical infrastructure reviews are limited to a finite set of identified categories, while real estate reviews are even more circumscribed, and focus almost entirely on proximity to certain military assets.[14]

Even if the face of strong Congressional support for the expansion of FDI reviews, the nature of how CFIUS was established has led to an Executive branch ability to scope jurisdiction less broadly than originally envisioned by Congress. As a result, Congress has attempted to pass a range of amendments to FIRRMA although none have cleared as of the date of this analysis. A number have been the subject of hearings where further changes have been discussed.

Continuous changes to regulatory processes based on geopolitical circumstances counsel for a new approach similar to that used to address securities and telecommunications concerns, both of which were in need of greater organization and less politicization. Foreign direct investment and national security concerns, like the securities and telecommunications issues that reflect longstanding problems ineffectively addressed through ad hoc reactive legislative changes, require a more defined and consistent process. The establishment of a CFINS to review these transactions would help create a more robust, forward-leaning approach to FDI, providing greater protection of national security and a more relevant balance with the historical US open investment policy.

Although any number of commissions could be used as examples for CFINS, the history of the FCC and SEC provide instructive guidance on the drivers, similar to those facing CFIUS, that resulted in these commissions. The lessons learned in these areas provide support for an FDI review Commission.

[14] 31 C.F.R. part 800 App. A; 31 C.F.R. part 802.

THE SEC AND FCC AS PRECEDENT

FCC: Overview of Authorities, Structure, and Process

The FCC was a deliberate creation that resolved ongoing issues arising from the existence of multiple agencies with jurisdiction over communications. When Samuel Morse introduced the telegraph in 1842, it was subject to the jurisdiction of three separate entities—the US Post Office, Interstate Commerce Commission (ICC), and state governments. When telephone service was introduced in 1877, regulatory authority followed suit. When radio was introduced, it was a maritime concern initially, so jurisdiction was given to the US Navy. Later, radio jurisdiction transferred to the Federal Radio Commission, as its usage broadened beyond maritime. As radio and telephone matured, and the market power of the participants increased, government officials recognized a need for greater technical and legal expertise to counter the strength of these dominant players and also saw state governments overwhelmed by the commercial resources of the industry.

Federal regulatory authority was deemed ineffective because it was spread across various agencies, and those agencies had other primary mandates. To combat this weak and ineffective federal oversight, President Franklin D. Roosevelt commissioned a report (*Study of Communications by an Interdepartmental Committee*, 1934) by the Department of Commerce, which concluded that communications should be "regulated by a single body." Roosevelt then submitted the report to Congress with a request that Congress consider creating the FCC.[15]

In his request, Roosevelt set forth the rationale for the creation of the FCC:

> In the field of communications, however, there is today no single Government agency charged with broad authority.
>
> The Congress has vested certain authority over certain forms of communications in the Interstate Commerce Commission, and there is in addition the agency known as the Federal Radio Commission.
>
> I recommend that the Congress create a new agency to be known as the Federal Communications Commission, such agency to be vested with the authority now lying in the Federal Radio Commission and with such authority over communications as now lies with the Interstate Commerce Commission—the services affected to be all of those which rely on wires, cables, or radio as a medium of transmission.[16]

The resulting legislative effort was coordinated, as the House and Senate introduced bills the day after the report was transmitted. Withing five months, Roosevelt had signed the legislation and the FCC became a reality. According to the conference report, the Communications Act did not change existing authorities, but instead simply consolidated them into one commission. The FCC gained the following responsibilities from these agencies:

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[15] Although the report advocated for more than one solution, Roosevelt settled upon a commission as the best approach.

[16] Message from the President of the United States Recommending that Congress Create a New Agency to Be Known as the Federal Communications Commission, February 26, 1934.

- Authority over civilian radio use
    - Federal Radio Commission
    - Department of Commerce, Radio Service
- Authority over telephone, telegraph, and cable companies from the Interstate Commerce Commission
- Authority over telegraph rates from the Post Office Department
- Authority over cable landing rights from the Department of State

The FCC is approaching its 100th anniversary, and while its history has included controversy, its staying power suggests that the creation of a commission has withstood the test of time. While jurisdictional questions have arisen, ultimately the FCC's mandate is well established. By concentrating communications regulation into one body, the country and industries affected have had the benefit of relative certainty, procedural improvements, and strong congressional oversight. Moreover, by removing the regulation of communications from interagency processes, the FCC has been able to develop substantial expertise across all areas of its jurisdiction.

These same benefits should accrue to a Commission on Foreign Investment and National Security.

SEC: Overview of Authorities, Structure, and Process

The SEC) was born from a concern regarding the existing failure to monitor issues that needed to transcend specific parties or politics.[17] The 1929 stock market crash highlighted the fact that little to no oversight existed over information flow to investors or regarding standards of accuracy and transparency that would allow investors to make informed decisions. While a patchwork of state laws attempted to impose some standards, the inconsistent and scattered nature of the processes left investors with a confusing set of protections or, in most instances, no protections at all.

At the same time, the devasting effect to the US economy, as well as to the country's security and industrial base posture, encouraged Congress to examine the issues more closely and to decide that a more robust process was needed to remedy the identified concerns. Rather than create another government agency or a committee to study the matter, Congress passed the Securities Exchange Act of 1934, which established the SEC, an independent body with internal resources designed to identify, review, and remediate issues that failed to meet the standards of transparency and accountability set out in the statute.

To address the concerns, Congress determined that a more stable review process was required to protect consumers and provide the objectivity, consistency, and transparency needed for effective management of securities transactions. The Securities Exchange Act of 1934 provided the organizational structure, established the commissioners and their authorities, and provided for the necessary staffing and budgetary powers needed for the SEC to function independently of any specific agency. The SEC, with its own staff of subject matter experts and the independence of its commissioners, created a stable review process that through today has provided certainty for those involved in the securities world.

Both the SEC and FCC collect and consider information from private parties as well as data points from government agencies with stakes in their respective processes. Both have established regulations, hearing processes, evidentiary standards, and requirements to practice before or engage with the

[17] *See, e.g.*, 15 USC §§ 78a, et seq., Sec. 1 (policy for establishing the Commission).

commissions. From the 1930s, these commissions have functioned, more or less, in the same manner. Their strength and independence from politicization have served their missions and the country robustly for almost a century. This experience provides a roadmap for establishing a similar Commission for FDI reviews.

The SEC and FCC structures share several common features that counsel the same approach for a FDI review process:

- *Commissioners:* Both commissions have independent, objective commissioners tasked with reviewing the details of matters before them. Each commissioner has experience in the field or in an ancillary field that impacts the decisions made by each body, and all commissioners must be confirmed by the Senate. Commissioners serve for set terms and are limited in the number of times they may be reappointed.
- *Resident subject matter experts:* Executive branch agencies' equities are addressed and managed through subject matter experts that are housed within the commissions and within certain specific bureaus in each commission. These experts focus on understanding the issues within the legal remit of each commission and identify areas for each commissioner to consider when making decisions within the commissions' jurisdiction.
- *Rigorous, time-based processes govern engagement with the commissions:* Both the SEC and FCC have robust "rules of engagement" akin to court-based rules of procedures. These processes allow parties to present their cases, bring forth evidence, request and appear at hearings, and challenge decisions made by each commission. This allows for objective as well as persuasive representation and the ability of parties to gather and present relevant evidence to the commissions.
- *Confidentiality is treated with respect but within a framework of understanding the benefit to all regulated parties for transparency and accountability:* Information may be submitted to the commissions in confidence, but commission decisions are generally published and require support. Filings and evidence are considered and, if rejected, the commissions indicate the reasons why. The FDI process would benefit from this clarity both for the decision-making process needed to decide whether and when to file notices for reviews of FDI transactions and for government accountability—in essence to prevent skewed or inconsistent decisions that undercut the certainty that is beneficial to financial transactions.

FDI has been part of the fabric of US development since the nation's founding. There is no indication that FDI, either both incoming and outgoing, is fading and thus the FDI review process is one that would benefit from consistency, independence, and substantive knowledge that extends beyond parochial interests of agencies that currently vie for primacy during case reviews. As with the issues that faced Congress with the SEC and FCC, a CFINS would manage the changing nature of the FDI issues in a more measured and consistent way, the same as with the SEC and FCC. Moreover, with the burgeoning recognition that more and more types of FDI impact national security, a CFINS would help ensure that US policy is both consistent and measured.

Though CFIUS exists as a form of "centralized" review for examining foreign investments in the United States, its composition as a "committee" has contributed to its inability to be less effective. CFIUS relies heavily on laws and regulations other than FIRRMA to mitigate national security concerns that are

themselves fraught with infirmities.[18] As with prior situations, where competing interests presented challenges to the effectiveness of a regulatory scheme, new and more concrete legislative solutions are needed. This situation exists with CFIUS today and requires a reassessment, not only of the parameters for how these important national security interests are addressed, but the structure of the regulatory body as well.

[18] Although beyond the scope of this analysis, the underpinnings of FIRRMA drew heavily upon US export control laws to manage outbound activities although those laws do not review, license, or mitigate investments. They are designed to address transaction-specific transfers of products, software, equipment, materials, technology, and, in some instances, services. These items can sometimes touch upon the vehicle through which transfer can occur, such as a joint venture, but the export agencies do not review the vehicle, approve its structure, or delve into the requirements of local laws affecting the manner in which the structure operates. Thus, a decision to establish a joint venture in country X with party Y in which the US company maintains a 40% interest and contributes the technology would only result in a review of the technology transfer itself. And the manner in which key export laws—in particular, the Export Control Reform Act and Export Administration Regulations are structured—the majority of exports subject to the Export Administration Regulations do not require submission of a license application or the Commerce Department's approval prior to the export.

These gaps demonstrate that the current reliance of CFIUS on the export laws to provide the necessary mitigation for outbound investments, technology transfers, or other cross-border foreign party access to US companies' products and technologies is misplaced. The key exporting agencies—the US departments of Commerce, State, and Energy—participate in the CFIUS process but current Treasury regulations do not require the collection of information that would be germane to the analysis. For example, the regulations only ask for the export classifications of products, technology, etc., subject to three or four specific regimes. Requests are not made for the export licenses submitted (whether approved, withdrawn, or denied) and the agencies lack visibility into what license exceptions or exemptions the parties may have used since no filings are made with the agencies for the use of exceptions/exemptions. Even if the exporting agencies have access to the information, the compressed timeframes, coupled with the lack of visibility due to the limited number of license exceptions that apply, render the input less relevant.

Even in circumstances where the use of a license exception, such as ENC, requires the submission of reports, those reports are post-transfer and are driven by the records the party has available. Cross-checking the reliability of the report would require Commerce, for example, to attempt to audit the party and collect classification, export, end user, and diligence related information. This process would be unwieldly and inefficient, as well as resource intensive for both parties and the agency.

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