

## Original Paper

# The Role of Committee on Foreign Investment in the United States in the Tech War with China

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### Abstract

*With the escalation of the science and technology war against China, the Committee on Foreign Investment in the United States (CFIUS) continues to expand its powers with the support of Congressional legislation, and plays an increasingly important role in the science and technology war against China. The committee strictly restricts Chinese technology companies' investment in the United States by means of routine review, case tracing, whitelisting, and long-arm jurisdiction, preventing China from acquiring advanced American technology through investment channels in the United States, so as to curb China's high-tech development and maintain American technological hegemony. The goal of CFIUS's review of Chinese companies' investment in the United States has shown trends such as generalization of security, joint action, focus on emerging fields, and strengthening of law enforcement capabilities China should pay attention to the scope of CFIUS expansion and behavioral trends, and take corresponding countermeasures to avoid and reduce investment risks in the United States.*

### Keywords

*great power strategic competition, CFIUS, technology war against China, Foreign Investment Risk Assessment Modern Act*

## 1. Introduction

The Trump administration has shifted its strategy towards China from “strategic competition” under the Obama administration to “strategic rivalry”. After taking the White House, Biden defined China as America’s “toughest competitor”, arguing that the U.S. must compete with China in the areas of economy, security, diplomacy, human rights, intellectual property rights, and global governance. This means that competition will be the core concept of the Biden administration’s thinking about China, the organizing principle of its policy toward China, and the tone of its handling of relations with China.

The field of science and technology is at the heart of the strategic competition between China and the United States. In order to maintain technological hegemony, the United States launched a technological war against China, and its main means of operation are concentrated as follows: 1. Sanction Chinese high-tech companies. The U.S. has placed specific Chinese high-tech companies (e.g., CGNPC, Fiberhome Technology Group) or research institutions (e.g., Harbin Institute of Technology, 11th Research Institute of China Electronics Technology Group Corporation) on the Export Control “Entity List” and imposed sanctions. 2. Increase the review of Chinese investment in the United States. Give CFIUS funding to expand its powers to strictly restrict Chinese companies’ investment and M&A activities in “sensitive areas” in the U.S., especially in “major industrial technologies” such as big data, artificial intelligence and semiconductors. 3. Joint allies to suppress the industrial chain of Chinese high-tech companies. Build an alliance system for science and technology warfare against China, restrict the supply of important raw materials, production equipment, and development tools in the upstream; reduce dependence on Chinese manufacturing in the midstream; and reduce the international sales market of Chinese companies in the downstream. 4. Cooperate with the use of financial warfare tools. Restrict overseas financing of Chinese high-tech companies, maliciously short related stocks and bonds, sanction Chinese companies, impose high fines and even arrest executives, and seriously disrupt normal operations of Chinese companies. 5. Restrict high-end talents to study and exchange in the United States. Restrict Chinese science and engineering student visas and Chinese scholars to the United States to participate in academic exchanges, strengthen the scrutiny of scientific research projects of Chinese scientists, and prevent China from benefiting from research results funded by the United States federal government.

Many scholars at home and abroad have conducted a comprehensive and in-depth analysis of the above-mentioned means used in the US science and technology war against China. There are also studies that analyze the U.S. suppression of science and technology in China from the policy level; The role of U.S. policy measures such as imposing “entity list” sanctions on Chinese high-tech companies and strengthening export controls to China in the U.S. technology war against China. Other scholars use case study methods to analyze the restrictions imposed by the U.S. on China in the high-tech field, such as a case study of the U.S. blocking Huawei and suppressing TikTok. Although the above analysis touches on the role of CFIUS in the science and technology war against China, it does not go into a thematic, in-depth study of it. This article provides a comprehensive analysis of the role, development trend and impact of CFIUS in the science and technology war against China, and proposes several countermeasures on this basis.

## **2. The History of CFIUS Expansion**

The Committee on Foreign Investment in the United States (CFIUS) is an interagency committee of the U.S. federal government whose function is to review all foreign investments in the United States in order to maintain U.S. national security. Since its establishment, CFIUS’s review system and its

connotation, authority setting, scope of review, and review procedures have all changed significantly. In recent years, CFIUS has expanded its review to include technology transfer and intellectual property-related transactions, and Chinese high-tech companies have faced more stringent and flexible security reviews for their investments in the United States.

### *2.1 Changes in the U.S. CFIUS before the Trump Administration*

CFIUS, an interagency committee established by President Ford in 1975 through Executive Order 11858, has the immediate purpose of: “Ensuring national security while promoting foreign investment, creating and sustaining jobs”. Later, due to the need to maintain the stability of the U.S. market, the plan to establish a more proactive CFIUS began to take shape, and the powers of CFIUS began to gradually expand.

The Exon-Florio Amendment of 1988 established the procedures by which CFIUS now reviews foreign investment transactions and expressly gave the President the authority to review and block any foreign acquisition, merger, or takeover of a transaction by a U.S. company engaged in interstate commerce that threatens the national security of the United States without being forced to invoke a national emergency under the International Economic Protection Act. President Reagan signed Executive Order 12661 to grant CFIUS the authority, allowing CFIUS to initiate a review of the transaction on its own, focusing on factors including: 1. Impact of the proposed acquisition on U.S. production capacity in areas related to national security. 2. the potential impact of the transaction on U.S. technology leadership in the area of national security. 3. potential national security-related impacts on U.S. critical infrastructure (including major energy assets). 4. whether the covered transaction is controlled by a foreign government. 5. the status of relations between the country in which the company is located and the United States, particularly with respect to cooperation on counterterrorism; 6. combined with reference to long-term projections of U.S. demand for energy and other key resources. The Byrd Amendment of 1992 further requires CFIUS to review or take over pending mergers and acquisitions as long as the acquirer is “controlled by or acting on behalf of a foreign government”. Accordingly, CFIUS has the authority to review acquisitions made by foreign governments or their agents, and has established a three-stage review process.

The passage of the Foreign Investment and National Security Act (FINSA) in 2007 was another milestone in the history of CFIUS’s expansion. The bill significantly expands the scope of CFIUS’s review of transactions by adding to the list of factors that CFIUS can use to determine whether a transaction is detrimental to national security. FINSA has made two major changes: First, it requires that the CFTC and the President “must” consider each of these factors in their review. Second, add a number of “considered factors”, including the impact on “critical infrastructure” and “key technologies”. In addition, Congress sought to further restructure the way CFIUS works through this bill. This includes a broad reform of the CFIUS framework that requires the Committee to consider the economic impact of foreign investment and acquisition programs, rather than limiting its review to national security issues, at a time when CFIUS already has a tendency toward security generalization.

Overall, between 1988 and 2017, CFIUS' jurisdiction was limited to transactions in which non-U.S. investors acquired control of U.S. companies. During this period, all filings with CFIUS are voluntary, although the Commission itself may review transactions for which no voluntary notice has been filed and take action upon completion of the review to mitigate any national security concerns up to and including a recommendation that the President order divestment. However, this authority has rarely been used, and only three deals have been blocked by the Obama administration (although some others were abandoned by the parties themselves due to CFIUS opposition).

## *2.2 Evolution of CFIUS in the Era of U.S.-China Strategic Competition*

In 2018 President Trump approved the Foreign Investment Risk Review Modernization Act (FIRRMA), passed by Congress, which further expands CFIUS's security review authority. It limits judicial constraints on security review authority and strengthens security reviews of foreign companies' investments and mergers in the United States. And the security review is more industry focused, and the review results are vulnerable to political interference. Key changes include allowing the Commission to treat country-specific investors differently; Allow it to promulgate rules requiring mandatory filings for certain transactions; Expand the scope of the Commission's authority to include the review of certain real estate and personally identifiable data transactions relating to U.S. citizens.

Under the Act, CFIUS shall review non-controlling investments in companies that possess "Critical Technology", "Critical Infrastructure", or collect and possess "Sensitive Personal Data" of U.S. citizens. These three categories of U.S. businesses are collectively referred to as "TID U.S. Business". Under FIRRMA, certain non-passive minority investments by foreign investors in TID are now subject to CFIUS review. In addition, in addition to the mandatory filing requirements that must be submitted for transactions involving TID U.S. corporate investments and other businesses, these investors are required to obtain an export license from the investor's country of citizenship.

In addition, the promulgation of the Export Control Reform Act (ECRA) in 2018 extended CFIUS's tentacles of foreign investment review to the field of export control. ECRA provides that CFIUS may review a transaction involving "critical technology" by virtue of its jurisdiction over the acquisition of U.S. corporate control sought by foreign investors. Section 1758 of ECRA requires the U.S. Departments of Commerce, Defense, Energy and State to coordinate a routine process for identifying "emerging and foundational" technologies that are critical to U.S. national security. If a foreign person seeks to invest in a U.S. company that "produces, designs, tests, manufactures, assembles, or develops" an "emerging or foundational" technology, the parties to the transaction may be required to file a CFIUS report.

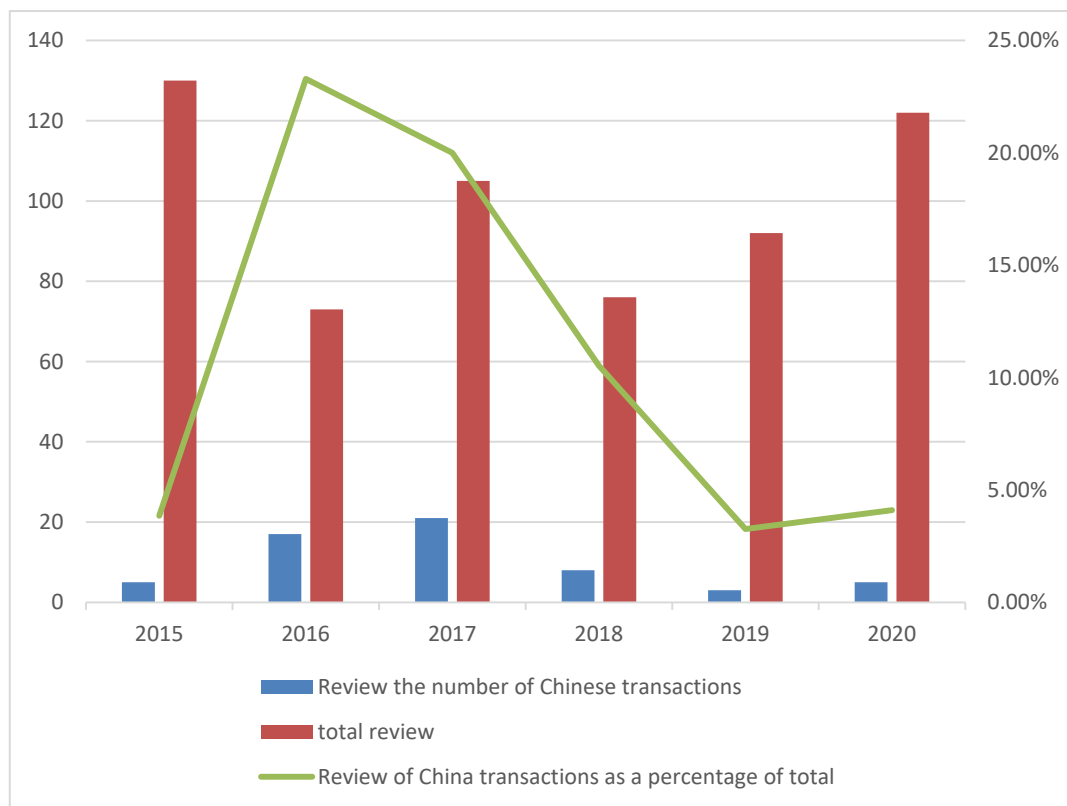
In summary, relative to the prior Act, FIRRMA expands CFIUS's jurisdiction over foreign investment review to cover non-controlled investments involving U.S. critical technology, critical infrastructure, sensitive personal data, or real estate. This marks a formal increase in the intensity, scope and sophistication of the U.S. government's review of foreign investments and transactions involving the United States.

### 3. Analysis of the Role of CFIUS in the Science and Technology War against China

“CFIUS will be key to President Biden’s strategy to contain China’s technology development”. In the context of the United States strengthening its strategic competition with China, CFlow has played a major role in the U.S. technology war against China. The main ways in which it plays its role are as follows:

#### 3.1 Regular Review

Regular review means that CFIUS jurisdiction is triggered when a non-U.S. person or any entity ultimately controlled by a non-U.S. person acquires “control” of a U.S. business. However, “control” is not clear-cut. Generally, an investor acquires control when it acquires only 10% of the U.S. business. And for investments of any size in TID companies, CFIUS jurisdiction is triggered whenever they provide certain governance or information access rights to investors. FIRRMA expands the authority of CFIUS to review non-controlled investments by foreign companies, particularly China, in U.S. critical and emerging technology companies. This has largely hindered Chinese investment in the United States, resulting in a significant reduction in Chinese filings with CFIUS, although this is also in line with the overall decline in Chinese investment in the United States amid global economic uncertainty, as shown in the Figure 1 below:



**Figure 1. CFIUS Review Changes in the Volume of Chinese Investment Transactions in the United States**

Data source: Compiled by the author based on the annual report published by CFIUS.

U.S. government security reviews make it nearly impossible for China to invest in U.S. tech companies of any kind. FIRRMA makes these investment barriers formal and permanent, and is fully reflected in the trade “deal” with China on the Section 301 tariff dispute. Investment restrictions have become part of the “new normal” in U.S.-China economic relations and have had a negative impact on Chinese investment in U.S. technology companies. Since 2019, CFIUS’s publicly disclosed annual reports indicate that Chinese companies have filed at least 16 documents with it. Of these, CFIUS approved six, President Trump blocked one, and the rest are either pending or have not publicly disclosed their dispositions. On the grounds of “national security”, CFIUS has tightened the routine review of Chinese companies’ investment and mergers and acquisitions, setting up barriers for Chinese companies to invest in high-tech in the United States.

### *3.2 Case Retrospective*

FINSA grants CFIUS unlimited recourse rights for foreign national security review, even if the review has been completed or passed, once it finds that there are factors affecting national security, it can be retrospective. FINSA grants CFIUS unlimited retroactive authority to conduct national security reviews of foreign investment, even if the review has been completed or passed, and can be retrospective once factors affecting national security are identified. Case Retrospective means that even if a merger is reviewed and the new entity is operational, it is still under the supervision of the CFIUS and may be reviewed again and dissolved to undo the previous merger.

In the context of the US strengthening its scrutiny of technology companies’ investment in the United States, CFIUS has targeted more companies with Chinese-funded backgrounds. CFIUS has gone to ten US technology companies to conduct retrospective inquiries on some long-awaited Chinese investment transactions. When information is available, CFIUS may initiate further investigation or even require divestiture of the investor’s equity. For example, CFIUS has taken a retroactive review of the acquisition of StayNTouch by Stonebase Information. Ltd. and StayNTouch is an American IT company engaged in hotel management software business. In 2019, CFIUS filed a petition for a presidential ruling on an M&A transaction, the 2018 acquisition of StayNTouch by Stonegate Information. The President of the United States, on the recommendation of CFIUS, forced Stonebase Information to divest its entire interest in StayNTouch. The divestiture order says there is “credible evidence” that Stonebase Information, which acquired StayNTouch in 2018, “may take actions that threaten to harm the national security of the United States”.

In addition to the retroactive review of Stonebase Information’s acquisition of StayNTouch, in October 2019, U.S. senators asked CFIUS to thoroughly investigate the acquisition between TikTok and U.S. social software Musical.ly two years ago. In August 2020, CFIUS concluded a 10-month investigation and made a recommendation to the President to divest TikTok’s business in the U.S., citing a threat to U.S. national security, which ultimately led to the termination of the deal. CFIUS can also trace its roots to funds established by the Chinese government that they believe were created to advance China’s priorities in scientific and technological knowledge and may have used U.S. seed and angel investors to

make investments that pose risks to the United States. All of these cases prove the important role CFIUS has played in the U.S. crackdown on Chinese technology.

### *3.3 Set up a Whitelist*

The “white list” is relative to the “country of special concern” (black list) under FIRRMA 2018. “Countries of special concern” refer to countries that have strategic plans for acquiring key technologies and critical infrastructure to be given special consideration. While FIRRMA does not require CFIUS to draw up a list of “countries of special concern”, it does require CFIUS to draw up a list of “exempt countries” and “exempt investors” with sufficient connections to “exempt countries”. “Exempt countries” are excluded from CFIUS review. While controlled investments by “exempt investors” are still subject to CFIUS jurisdiction, such transactions are not subject to mandatory filings. Pursuant to FIRRMA, CFIUS finalized the initial list of countries that qualify as exempt offshore countries, namely Australia, Canada, and the United Kingdom.

The list is valid for two years from February 13, 2020. According to the U.S. Treasury Department, CFIUS identified these countries because “there is a strong intelligence sharing and defense industrial base integration mechanism between these countries and the United States”, and said that CFIUS deliberately identified only a limited number of exempt foreign countries because of “potentially significant impacts on U.S. national security”. Thus, the purpose of the CFIUS white list is to differentiate between different foreign investments in the United States. By granting “exempted country” treatment, CFIUS allows its close allies to adopt strict restrictions similar to those of the United States when it comes to the review of investments in strategic rival countries.

### *3.4 Long-arm Jurisdiction*

CFIUS initiates jurisdiction with three elements - the alien, the transaction, and the U.S. enterprise. When CFIUS updated its regulations after the passage of FIRRMA, it changed the definition of “U.S. business” as reflected in FIRRMA. Before the update, a U.S. business was defined as “any entity that engages in interstate commerce in the United States, regardless of the nationality of the person who controls it, but only within the scope of its activities in interstate commerce”. This means that CFIUS’s jurisdiction is limited to entities that conduct activities to facilitate interstate commerce in the United States. When CFIUS issued the new rule, it removed the phrase “but only to the extent of its activities in interstate commerce”, which expanded CFIUS’s jurisdiction and laid the legal foundation for its long-arm jurisdiction.

In June 2021, the United States and South Korea jointly blocked a Chinese company’s acquisition of a Korean semiconductor company, demonstrating a “major extension” of CFIUS’s jurisdiction over extraterritorial technology acquisitions. Chinese company Wise Road Capital is attempting to acquire Korea-based Magnachip Semiconductor Corp., one of the global market leaders in OLED display driver ICs, for \$1.4 billion. Magna has no significant business in the US market. According to Magna’s annual report, all of its manufacturing and R&D activities are conducted in South Korea, almost all of its sales activities are conducted in South Korea, and the rest of its sales operations are located in China,

Hong Kong, Taiwan, Japan, and Germany; almost all employees are located in South Korea, the rest of the employees are located outside the United States and are only listed on the New York Stock Exchange. However, shortly after the transaction was announced, CFIUS determined that it had jurisdiction, required the parties to file and issued a temporary order preventing the parties from completing the transaction while it was under review.

This is not the first time CFIUS has acted against Chinese investment in a semiconductor company with primarily foreign operations. In 2016, a case in which the German government had approved the acquisition of German semiconductor maker Aixtron by China's Fujian Hongxin Fund was ultimately lost after the U.S. intervened to block it on national security grounds. CFIUS launched an investigation into the case and announced its findings on November 17 that the acquisition threatened U.S. national security and recommended that the President of the United States intervene to stop it. On December 2, President Obama signed an executive order prohibiting acquisitions, saying that after China's Grand Chip Fund acquired Aixtron and its U.S. affiliates, it may take actions that pose a threat to U.S. national security. In March 2018, CFIUS launched a full investigation into Singapore's Broadcom Corporation's acquisition of U.S. chip giant Qualcomm, citing the potential to give Chinese competitors an advantage in developing 5G. President Trump terminated the acquisition due to "national security" concerns and made it clear that Chinese companies dominating 5G would have negative consequences for U.S. national security. In addition, the U.S. government is increasing coordination with allies to limit Chinese acquisitions of strategic technologies, particularly in the areas of telecommunications, semiconductors and information technology where CFIUS has strengthened its oversight of Chinese companies.

#### **4. CFIUS's Movement against China's Technology Crackdown**

White House spokeswoman Jen Psaki said the administration "will ensure that CFIUS evolves into a 21st-century commission and is able to properly assess new and evolving risks". The CFIUS crackdown on Chinese technology has shown the following new trends:

##### *4.1 Security Generalization*

The expansion of CFIUS is a product of the U.S. strategic community's efforts to strengthen the so-called "great power strategic competition. In order to maintain U.S. technological hegemony and prevent China from acquiring advanced Western technologies through foreign investment channels, the U.S. has passed FIRRMAF legislation to authorize CFIUS to strengthen its review of investments in the U.S. by companies from strategic rival countries and to bring under its jurisdiction transactions involving "critical" or "sensitive" technologies as determined by the U.S. side. The "security generalization" is reflected in FINSA's avoidance of strict definitions of key concepts such as U.S. national security and control standards, stating only that the review will be conducted on a case-by-case basis. The relevant U.S. administrative regulations list a variety of situations that are and are not "covered transactions". Basically, any transaction identified as a "covered transaction" would be



subject to a national security review, thereby giving CFIUS full discretion. Since the United States has not provided sufficient clarity on key issues such as the core concepts, determination standards, and evaluation methods of foreign investment review in the Act, the review process is highly subjective, and CFIUS can easily impose jurisdiction on specific investments. There are strong similarities between CFIUS's discretionary authority to identify national security risks and the President's authority to declare a state of emergency under the International Emergency Economic Powers Act (IEEPA).

In terms of its enforcement process, CFIUS is an agency that lacks transparency in its operations and review process, which typically consists of four steps: filing, initial review, investigation, and decision. At the summary filing stage, CFIUS may, at its discretion, specify the transactions subject to mandatory declaration. FIRRMA notes the appropriate factors that CFIUS should consider in determining what types of transactions require notification, including the technology, industry, or economic sector involved in the transaction, the possibility of national security harm resulting from the completion of the transaction, etc. If CFIUS determines that a transaction may be a "covered transaction" and may threaten U.S. national security, and the foreign acquirer does not voluntarily file a review, CFIUS has the authority to require the foreign acquirer to provide it with the necessary materials to determine whether the transaction is a "covered transaction". CFIUS security generalization is one of the U.S. policy tendencies to maintain global economic and technological dominance.

#### *4.2 Joint Action*

CFIUS is an interdepartmental cooperation agency established by the United States to defend national security. Joint action is the basic feature of its activities, showing three joint movements: Cross-departmental, cross-party, and cross-national.

##### *4.2.1 Cross-departmental Cooperation*

CFIUS is led by the U.S. Department of the Treasury, with the Secretary of the Treasury also chairing the committee and the secretariat located in the Treasury's Office of Investment Security assuming transactional duties. CFIUS members are divided into: the heads of the nine voting departments (Treasury Secretary, Attorney General, Homeland Security Secretary, Commerce Secretary, Defense Secretary, Energy Secretary, Secretary of State, U.S. Trade Representative, and Director of the Office of National Science and Technology Policy); 2 non-voting department heads (Secretary of Labor, Director of National Intelligence); 5 observer department heads (heads of White House Office of Management and Budget, President's Council of Economic Advisers, National Security Council, National Economic Council, Homeland Security Council).

In terms of CFIUS cooperation with the Federal Bureau of Investigation (FBI), the CFIUS enforcement team works closely with the FBI to track technology investments that intelligence agents believe may pose a threat to national security. The FBI maintains a master database of transactions involving foreign investors that raise security concerns, and CFIUS members rank these transactions based on threat assessments provided by the FBI and other intelligence agencies. In terms of the U.S. Department of Commerce and the International Trade Administration's (ITA) participation in CFIUS interagency

initiatives, CFIUS is responsible for implementing the “Strengthening the Economic and National Security of the United States” strategic plan. The Bureau of Industry and Security of the Department of Commerce is responsible for determining whether foreign acquisitions pose a risk to U.S. national security and ensuring that there are no outstanding national security issues at the time of transition approval. The ITA is the coordinating agency for the U.S. Department of Commerce’s participation in CFIUS, and also provides economic and market analysis. As foreign investment in the U.S. increases, the mutual cooperation between these roles will expand. The U.S. intelligence community also participates in CFIUS’s interagency cooperation initiatives through its own means. In each year’s CFIUS annual report to Congress, the United States Intelligence Community (USIC) participates in the compilation and submission of the department’s report and recommendations. Both CFIUS and USIC believe it is highly likely that foreign governments use a range of collection methods to gain access to critical U.S. technologies. A 2018 report to Congress by the National Counterintelligence and Security Center noted that foreign economic and industrial espionage against the United States poses a significant threat to U.S. prosperity, security, and competitive advantage. CFIUS is advised to be alert to equity participation or controlling investments by foreign companies in U.S. companies.

#### 4.2.2 Cross-party Cooperation

FIRRMA is the product of cross-party cooperation between the Democratic and Republican parties in the United States. While the two parties fight with each other and disagree on most domestic and foreign issues, this party polarization does not prevent them from developing a high degree of bipartisan consensus or agreement on strengthening strategic competition with China and containing China’s technological development. In addition to working together to pass FIRRMA, legislators in both parties have taken cross-party legislative action to introduce and pass competing bills that include provisions to increase scrutiny of Chinese direct investment in the United States. On April 8, 2021, Democratic Senator Bob Menendez and Republican Senator Jim Risch introduced the “Strategic Competition Act of 2021”. Two months later, the U.S. Senate passed the United States Innovation and Competition Act of 2021 (USICA). The bill includes several bills connoting the suppression of Chinese technology, including the Chip and ORAN 5G Emergency Appropriations, the Strategic Competition Act of 2021, and the Meeting the China Challenge Act of 2021. USICA proposes to expand the scope of CFIUS’s work to monitor the relationship between China and U.S. educational institutions and to assess whether there is espionage of technology acquired by foreign governments through U.S. institutions of higher education.

#### 4.2.3 United Allies

As mentioned above, the expanded CFIUS will also extend its review tentacles overseas, and implement “long-arm jurisdiction” for transactions that do not take place in the United States but involve advanced U.S. technology. CFIUS emphasizes “third country threats”, which are situations in which a foreign entity of a country (or even an ally) has ties to a country that the U.S. government has identified as a strategic competitor. For example, when an EU company intends to acquire a sensitive

U.S. business and has Chinese or Russian nationals on its board of directors or significant investors, a transaction can be forcibly terminated.

CFIUS believes that it is difficult to prevent strategic competitors such as China and Russia from gaining access to advanced Western technologies only by strengthening the review of foreign investment by the United States alone. Only international allies of the United States can achieve results by adopting a foreign investment review process similar to that of the United States. To this end, it has also undertaken extensive diplomatic coordination efforts to align the policies of its allies with its own, preventing rival countries from circumventing the barriers to U.S. investment screening to gain access to advanced technologies in their allies.

In August 2018, the U.S. pressured its trade partner countries, causing Australia, New Zealand, the United Kingdom, Japan and other countries to exclude Huawei and ZTE from their government procurement lists and 5G network construction and service bidding lists since August, interfering with the global communications services market by administrative means. Following its first meeting in Pittsburgh, Pennsylvania, on September 2, 2021, the new high-level U.S.-EU Trade and Technology Committee announced a coordinated approach to key global issues, including investment reviews and their implementation, to address national security risks.

#### *4.3 Focus on Emerging Fields*

The introduction of the FIRRMA implementation rules has led to an increase in the number of areas reviewed by CFIUS, expanding the areas of transactions it reviews from traditional industries to emerging technologies and industries. FIRRMA expands the types of investments reviewed to include “non-controlled investments” in areas related to critical technologies, critical infrastructure companies, and sensitive personal data collection to include “covered transactions”. In recent years, CFIUS has strengthened its review of Chinese companies’ investment in the U.S. semiconductor and chip industries, which has resulted in a relatively high percentage of traditional industry transactions passing the Chinese investment review, and a low rate of transactions involving emerging industries and core technologies passing. According to the data from 2015 to 2020, the number of cases passed by CFIUS review is 31, the number of cases failed due to regular review is 26, manufacturing, finance and wholesale and retail account for 88% of the cases passed, information transmission, software and information technology services and manufacturing account for 61% of the cases failed due to review, including information transmission, software and information technology services in the review failed mostly due to personal information data security, manufacturing industry in the review failed mostly due to core technology. Among them, the number of failed deals related to core technologies in emerging industries such as semiconductors, new energy and communications is higher. Acquiring a company is a way for foreign companies to acquire technology, but if the technology is sensitive, such as related to artificial intelligence or quantum computing, it could pose a threat to national security in the view of the U.S. government.

Notably, in light of the “technology transfer” loophole in venture capital, under FIRRMA, CFIUS has increased its scrutiny of applications submitted by Chinese companies involving emerging technologies, in addition to focusing on and investigating venture capital investments in U.S. companies developing critical technologies with funds from China.

#### *4.4 Strengthen Law Enforcement Capabilities*

In order to better serve the above-mentioned three major development trends of CFIUS, strengthening law enforcement capabilities is the key, and expanding the review authority is the only way. In terms of expanding CFIUS review authority, FIRRMA makes significant changes in two areas. 1. The scope of the mandatory declaration clause has been revised. Authorizes CFIUS to impose mandatory filing requirements on specified U.S. businesses for covered transactions involving the production, design, testing, manufacture, fabrication, or development of one or more key technologies. Introduce two contents of “U.S. regulatory authorization” and “voting rights for key technologies”. Introduce two contents of “U.S. regulatory authorization” and “voting rights for key technologies”. The term “U.S. regulatory authority” refers to a license or authorization under one of the four major U.S. export control regimes: the U.S. Department of State’s International Traffic in Arms Regulations, the U.S. Department of Commerce’s Export Administration Regulations, the U.S. Department of Energy’s regulations governing assistance to certain foreign atomic energy activities, and the Nuclear Regulatory Commission’s regulations governing the import and export of certain nuclear equipment and materials. Specifically, a proposed governed transaction would be subject to mandatory CFIUS filings in which U.S. regulatory authority would be required for foreign persons who export, re-export or retransfer key technology from a U.S. business to a foreign investor or who have significant ownership or control of a foreign investor. It is easy to see that the final rule will be a mandatory declaration requirement for key technology transactions with the U.S. export control regulations echoing each other, and that the U.S. executive authorization will cover the aforementioned licenses or approvals.

A foreign government holding a 29% or greater interest over a general partner, manager, or other party is considered to hold a “critical technology vote” if the business activity is controlled by the general partner, manager, or other party. “FIRRMA revises the definition of “Substantial Interest”. A foreign government holding a 49% or greater interest over a general partner, manager or equivalent party is considered to hold a “significant interest” if the business is controlled by the general partner, manager or equivalent party. This definition is fundamental to the mandatory reporting of the proposed transaction.

To strengthen CFIUS’s enforcement capabilities, FIRRMA has also strengthened CFIUS’s enforcement capabilities through the creation of new agencies, increased funding, and expanded staff. CFIUS has created a new enforcement unit to root out old investment deals that involve sensitive technology and could pose a threat to national security. The enforcement agency looks at venture capital investments, even small deals, and reviews past startup transactions related to credit for Chinese investors. Each U.S. business that is acquired by or receives investment from a foreign person is required to determine

whether its products and technologies are subject to the latest mandatory CFIUS filing requirements. FIRRMA also provides for a \$20 million expansion of CFIUS appropriations, a \$40 million increase to the agency's 2020 and 2021 budgets, to emphasize its new authority and prominence as the centerpiece of the new national security law. In order to better cope with the expansion of jurisdiction and the increase in review business, CFIUS will accordingly increase the number of its full-time employees from 32 in 2019 to 120 in 2021.

### **5. Impact of CFIUS on China's Investment in the United States**

The U.S. suppression of science and technology against China can not only weaken the exogenous driving force of China's national innovation system, but also drive the "return" of the U.S. technology industry chain, thereby enhancing the contribution of American companies to the U.S. national innovation system. As with the impact of pulling Chinese technology companies onto the Commerce Department's "Entity List", strengthening export controls on China, and tightening study and exchange for Chinese students and researchers in the U.S., the U.S. legislation to expand CFIUS's authority to review foreign investment in the U.S., primarily by Chinese investors, has undoubtedly had a negative impact on Chinese investment in the U.S. China should actively respond to minimize the negative impact of the increased U.S. investment review on China.

First, the willingness of Chinese enterprises to invest in the United States has decreased, and China's investment in the United States has decreased sharply. FIRRMA gives CFIUS the right to retroactively review previous transactions, review transactions completed without CFIUS filing, a subjective determination of which transactions are "subject to jurisdictional transactions", and the probability of denial for Chinese companies involved in U.S. "critical technologies" and "emerging industries" transactions, etc., which increases the perceived risk of Chinese technology companies investing in the U.S. and discourages Chinese technology companies from investing in the U.S., greatly reducing the willingness of Chinese companies to invest in the U.S. With the expansion of CFIUS jurisdiction and new mandatory filing requirements, Chinese investment in U.S. technology companies is riskier than ever, which has directly led to a sharp decline in Chinese companies' investment in the U.S. in recent years and a sharp drop in the amount of investment. 2015-2020, Chinese investment in the U.S. has generally shown a slowing trend, and Chinese investment flows to the U.S. as a percentage of outbound investment flows. The percentage of total outbound investment flows from China to the U.S. also shows a fluctuating downward trend (see Table 1).

**Table 1. Chinese Direct Investment Flows to the U.S. and its Share**  
(Unit: billion dollars)

Year	Chinese Direct Investment Flows to the U.S.	China's direct investment flows to the world	Chinese investment flows to the U.S. as a percentage of total outbound investment flows	Annual Growth Rate of Chinese Direct Investment in the U.S.
2015	80.29	1456.67	5.50%	—
2016	169.81	1961.49	8.70%	112%
2017	64.25	1582.88	4.06%	-62.16%
2018	74.77	1430.37	5.23%	16.37%
2019	38.06	1369.07	2.78%	-49.10%
2020	60.18	1537.10	3.92%	58.12%

*Data source:* National Bureau of Statistics of China.

Second, reduce the willingness of the U.S. government and companies to cooperate with Chinese companies. CFIUS' willingness to unbundle venture capital has changed the minds of some U.S. startups, causing them to either forgo working with Chinese venture capital or seek CFIUS approval before completing the deal and agreeing to concessions to win government approval to ensure they are not targeted for future investigations. Many U.S. companies have chosen to accept foreign (including Chinese) investment only after improving cybersecurity and data protection, demonstrating to CFIUS that they will not become victims of technology theft. Growing geopolitical tensions and the new crown pneumonia outbreak have led members of the U.S. House to keep a close eye on U.S. investments in China and the risks such investments could pose to national security. U.S. foreign direct investment in China over the past several decades has weakened "critical national capabilities", arguing that such investment, if not properly controlled, could lead to the transfer of potentially sensitive technologies, outsourcing of critical production, and reduced supply chain transparency.

Third, it will limit China's high-tech development in the short term and stimulate China to close the technology gap with the United States in the long term. CFIUS's enhanced security review of Chinese investments in the U.S. under the new law FIRRMA has hampered China's high-tech development by limiting, in the short term, Chinese companies' use of partnerships with U.S. companies to acquire advanced technologies. But in the long run, unjustified U.S. suppression will only prompt Chinese technology companies to accelerate the pace of their own innovation, which will eventually narrow the technology gap with the United States.

As the world enters an era of profound changes unseen in a century, the United States has intensified its "great power strategic competition" with China. The field of science and technology has become the main battlefield of strategic competition between China and the United States. In order to maintain U.S.

hegemony over technological innovation and prevent China from “transferring” advanced U.S. and Western technologies to China, the U.S. has taken measures in the areas of trade, education, justice, and finance, including placing Chinese technology companies and universities on the U.S. Department of Commerce’s “Entity List”, strengthening export controls on China, restricting Chinese science and technology students from studying STEM in the U.S., tracking so-called “Chinese spies” at U.S. universities and research institutes, and prohibiting U.S. citizens from investing in the stocks of listed Chinese companies. The passage of FIRRMA in 2018 granted CFIUS new powers, expanded the scope of CFIUS review, and enhanced CFIUS enforcement capabilities. CFIUS has done its utmost to guard against China’s acquisition of advanced U.S. and Western technologies through outbound investment channels through regular review, case retrospective, set a whitelisting, and long-arm jurisdiction. Because FIRRMA is essentially tailored to meet the Chinese challenge, CFIUS has also focused on Chinese technology companies investing in the U.S., and its targeted review leaves little room for error. Therefore, CFIUS has played an important role in the U.S. technology war against China. The expanded CFIUS undoubtedly increases the political risk of Chinese technology companies investing in the United States, which directly leads to a substantial reduction in China’s direct investment in the United States in recent years, and objectively stimulates Chinese technology companies to accelerate the pace of independent innovation. As the U.S. technology war against China deepens, Chinese companies and government need to actively respond to break the U.S. and Western high-tech blockade of China and strive to improve their own basic research and technology development capabilities.

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