

# PROTECTING NATIONAL SECURITY: HOW THE UNITED STATES GOVERNMENT PUT OUR NATION AT RISK BY APPROVING THE ACQUISITION OF SMITHFIELD FOODS BY SHUANGHUI INTERNATIONAL

## I. INTRODUCTION

On September 13, 2013, the Committee on Foreign Investment in the United States (“CFIUS”) formally approved the acquisition of Smithfield Foods by one of the largest food conglomerates in the People’s Republic of China (“PRC” or “China”), Shuanghui International.<sup>1</sup> United States based Smithfield Foods is the world’s largest hog producer.<sup>2</sup> Smithfield and Shuanghui were under the spotlight for more than three months as CFIUS considered Shuanghui’s \$4.7 billion cash offer to purchase all existing shares of Smithfield.<sup>3</sup> The agreement represents the largest Chinese takeover of an American firm in history.<sup>4</sup> CFIUS had little historical experience with agri-business before the Smithfield-Shuanghui review process.<sup>5</sup> The acquisition was one of the first agricultural reviews CFIUS has

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<sup>1</sup> Shruti Date Sing & Bradley Olson, *Smithfield Receives U.S. Approval for Biggest Chinese Takeover*, BLOOMBERG (Sep. 6, 2013, 4:37 PM), <http://www.bloomberg.com/news/2013-09-06/smithfield-receives-u-s-regulator-approval-for-shuanghui-deal.html>.

<sup>2</sup> Press release, Smithfield Foods, *Smithfield Foods to Reaffirm Benefits of Shuanghui-Smithfield Transaction for U.S. Agriculture Industry* (July 10, 2013) (on file with author).

<sup>3</sup> SHRUTI & OLSON, *supra* note 1.

<sup>4</sup> Steven M. Davidoff, *China’s Pork Deal May Hinge on Risk for an Uproar*, N.Y. TIMES (May 30, 2013, 10:02 PM EST), *available at* <http://www.cnbc.com/id/100778381>.

<sup>5</sup> Bill Black, *U.S. Senate Hearing on Smithfield Poses a Challenge to CFIUS*, FORBES (July 9, 2013, 11:49 PM), *available at* <http://www.forbes.com/sites/simonmontlake/2013/07/09/u-s-senate-hearing-on-smithfield-foods-poses-challenge-to-cifus/>.

undertaken<sup>6</sup> and was the first acquisition involving the United States food supply examined by CFIUS in history.<sup>7</sup>

The National Security Act of 1947 was created “with the intent to provide a comprehensive program for the future security of the United States.”<sup>8</sup> However, Congress notably chose to leave the term “national security” undefined.<sup>9</sup> Traditionally, the preservation of national security involved mainly military power and the manner in which the Armed Forces defended the nation from incursion.<sup>10</sup> However, the concept of national security has evolved over time.<sup>11</sup> New threats have emerged that have nothing to do with war or invasion but have the same ability to cripple the nation.<sup>12</sup> There are many ways an enemy can harm our country.<sup>13</sup> For example, an intentionally contaminated food or water supply would have devastating repercussions to American citizens.<sup>14</sup> Additionally, a foreign government may engage in illegal or clandestine activity to steal proprietary information or technology.<sup>15</sup> This would be economically devastating for American companies; the loss from theft of intellectual property has been

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<sup>6</sup> DAVIDOFF, *supra* note 4.

<sup>7</sup> BLACK, *supra* note 5.

<sup>8</sup> 50 U.S.C. § 3002 (2012). (“In enacting this chapter, it is the intent of Congress to provide a comprehensive program for the future security of the United States; to provide for the establishment of integrated policies and procedures for the departments, agencies, and functions of the Government relating to the national security; to provide a Department of Defense, including the three military Departments of the Army, the Navy (including naval aviation and the United States Marine Corps), and the Air Force under the direction, authority, and control of the Secretary of Defense; to provide that each military department shall be separately organized under its own Secretary and shall function under the direction, authority, and control of the Secretary of Defense...”); (“To promote the national security by providing for a military department shall be separately organized under its own Secretary and shall function under the direction, authority, and control of the Secretary of Defense...”).

<sup>9</sup> See 50 U.S.C. app. § 2170 (2012); Matthew R. Byrne, *Protecting National Security and Promoting Foreign Investment: Maintaining the Exon-Florio Balance*, 67 OHIO ST. L.J. 849, 867 (2006).

<sup>10</sup> See 50 U.S.C. § 3002 (2012).

<sup>11</sup> See *supra* Part I.

<sup>12</sup> See *infra* Part V.

<sup>13</sup> See *infra* Part V.

<sup>14</sup> See *infra* Part V.A.

<sup>15</sup> *Backgrounder No. 6 – Economic Security*, CANADIAN SECURITY INTELLIGENCE SERVICE (last updated Feb. 2004), <https://www.csis.gc.ca/nwsrm/bckgrndrs/bckgrndr06-eng.asp>.

estimated to exceed hundreds of billions of dollars annually.<sup>16</sup> The emergence of these new threats required that national security take on a broader meaning, adding economic, environmental, and energy components, and no longer solely concern the physical defense of the nation's borders.<sup>17</sup>

CFIUS should not have approved the Smithfield-Shuanghui acquisition because of the significant risks the merger posed to United States national security.<sup>18</sup> These included threats to the domestic food supply, technological developments, and military security created by a foreign purchaser taking control of a vast American company.<sup>19</sup> Additionally, blocking the proposed merger would have been an important pre-emptive measure to protect against risk of future foreign takeovers of United States agri-business.<sup>20</sup>

This Comment will argue that the United States should not have approved the sale of Smithfield Foods to Shuanghui International after intense examination and scrutiny by both CFIUS and the President, regardless of the economic benefit of foreign direct investment during this period of United States economic reconstruction. The Comment will also provide a description of the process through which CFIUS and the President could have blocked the merger between these two private parties. Part II of this Comment will describe the benefits of

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<sup>16</sup> *Id.*

<sup>17</sup> CYNTHIA A. WATSON, U.S. NATIONAL SECURITY: A REFERENCE HANDBOOK (2002).

<sup>18</sup> See Marilyn Geewax, *Can a Huge Hog Deal Pose a National Security Risk?*, NPR (May 31, 2013, 11:14 AM), <http://www.npr.org/2013/05/31/187351539/can-a-huge-hog-deal-pose-a-national-security-risk>.

<sup>19</sup> See Theodore H. Moran, *When Does a Foreign Acquisition Pose a national Security Threat?*, VOX (Sept. 11, 2009), available at <http://www.voxeu.org/article/when-does-foreign-acquisition-pose-national-security-threat> (discussing how “potential damage to national security from a foreign acquisition” falls into three main categories: dependency on a foreign supplier, transfer of technology, and infiltration and sabotage).

<sup>20</sup> See *China, in Need of Pork, to Buy U.S. Supplier*, N.Y. TIMES NEWS SERVICE (May 29, 2013, 5:50 PM), [http://www.necn.com/05/29/13/CHINA-IN-NEED-OF-PORK-TO-BUY-US-](http://www.necn.com/05/29/13/CHINA-IN-NEED-OF-PORK-TO-BUY-US-SUPPLIER/landing_health.html?&apID=3accbebe04f3e1e429c947ddd68f38bd)

[SUPPLIER/landing\\_health.html?&apID=3accbebe04f3e1e429c947ddd68f38bd](http://www.necn.com/05/29/13/CHINA-IN-NEED-OF-PORK-TO-BUY-US-SUPPLIER/landing_health.html?&apID=3accbebe04f3e1e429c947ddd68f38bd). China has a strong demand for poultry, but has difficulty meeting domestic demand while the country repeatedly struggles with bird flu and hoof and mouth disease. A foot in the door of United States agriculture --- via the pork industry --- could be a gateway for China to take over other critical infrastructure segments of United States agriculture.

foreign direct investment (“FDI”) and the potential national security risks that accompany FDI. Part III will briefly describe the details of the Smithfield Acquisition. Part IV will outline the current law that addresses potentially threatening foreign acquisitions. This section will further discuss the legislative review process, the authority of the President to disallow perilous foreign acquisitions under the Exon-Florio Amendment, and the factors within the Amendment that are used to assess risk to national security. Part V will apply the relevant Exon-Florio Factors to the Smithfield Foods acquisition. Finally, Part VI will discuss legislative solutions that aim to avoid the same outcome as occurred in the Smithfield acquisition.

## II. FDI LEADS TO ECONOMIC GROWTH BUT MUST BE BALANCED AGAINST POTENTIAL THREAT TO NATIONAL SECURITY

The United States is currently experiencing a period of economic reconstruction due to the recession that officially began in December 2007 and ended in 2009.<sup>21</sup> The recession lasted eighteen months and was the longest recessionary period in the United States since World War II.<sup>22</sup> Millions of jobs were lost during 2008 and 2009, and by the end of 2011, the United States unemployment rate was 8.5%.<sup>23</sup> In times such as these, the government looks toward FDI as one method to rebuild an economy.<sup>24</sup> The International Monetary Fund defines FDI as “an investment made to acquire lasting interest in enterprises operating outside of the economy of the investor.”<sup>25</sup> In other words, FDI occurs when “an investor based in one country (the home country) acquires an asset in another country (the host country) with the intent to manage that asset.”<sup>26</sup> The investment is “direct” because the investor, which could be a foreign person, company, or group of

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<sup>21</sup> NAT'L BUREAU OF ECON. RESEARCH, BUS. CYCLE DATING COMM., (2013), available at <http://www.nber.org/cycles/sept2010.html>.

<sup>22</sup> *Id.*

<sup>23</sup> *Unemployment Rate Falls to 8.5% in December 2011*, BUREAU OF LABOR STATISTICS (Jan. 8, 2012), [http://www.bls.gov/opub/ted/2012/ted\\_20120109.htm](http://www.bls.gov/opub/ted/2012/ted_20120109.htm).

<sup>24</sup> ALAN P. LARSON & DAVID M. MARCHICK, FOREIGN INVESTMENT AND NATIONAL SECURITY: GETTING THE BALANCE RIGHT 7 (2006).

<sup>25</sup> *United Nations Conference on Trade and Development, Foreign Direct Investment*, UNCTAD.ORG, [http://unctad.org/en/Pages/DIAE/Foreign-Direct-Investment\(FDI\).aspx](http://unctad.org/en/Pages/DIAE/Foreign-Direct-Investment(FDI).aspx) (last visited Jan. 12, 2014).

<sup>26</sup> Press Release, World Trade Organization, Trade and Foreign Direct Investment, (Oct. 9, 1996) (on file with author).

entities, is seeking to control, manage, or have significant influence over the foreign enterprise.<sup>27</sup>

Economists have found a positive correlation between a prosperous national economy and the level of international investment in the United States upon the belief that FDI attracts asset expansion, provides job creation, and increases productivity and competitiveness.<sup>28</sup> The Obama Administration has officially identified FDI as a critical element in the country's road to recovery,<sup>29</sup> and current United States policy encourages foreign investment to stimulate growth.<sup>30</sup> As the second largest economy in the world, and one that possesses the largest foreign exchange reserves of any country, China is a significant source of foreign capital investment for the United States.<sup>31</sup> Attracting Chinese investment is a key element of our country's path back to financial health and prosperity.<sup>32</sup>

Historically, the United States government has welcomed and encouraged foreign investment in domestic companies<sup>33</sup> and has had a "long-standing international commitment to maintaining an open and receptive environment for foreign investment."<sup>34</sup> It cannot be doubted that foreign investment has a positive impact on the economy, especially at a time when the economy is struggling to rebuild.<sup>35</sup>

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<sup>27</sup> *United Nations Conference on Trade and Development, Foreign Direct Investment, supra* note 25.

<sup>28</sup> Exec. Order No. 11858, 40 Fed. Reg. 20263 (May 7, 1975), reprinted as amended in 50 U.S.C. app. §2170 (2008).

<sup>29</sup> Mary Bruce, *White House Touts Growing Foreign Direct Investment in the United States*, ABC NEWS BLOGS (June 20, 2011), available at <http://abcnews.go.com/blogs/politics/2011/06/white-house-touts-growing-foreign-direct-investment-in-the-us/>.

<sup>30</sup> Press Release, The White House, Statement by President on United States Commitment to Open Investment Policy (June 20, 2011) (on file with author).

<sup>31</sup> Harold James, *International Order After the Financial Crisis*, 1 Penn. St. J.L. & Intl. Aff. 275, 281 (2012).

<sup>32</sup> Amrietha Nellan, *AVIC International a Success: How Regulatory Changes to CFIUS Has Limited Political Interference and Empowered Chinese Investors to Obtain a Successful Review*, 9 Hastings Bus. L.J. 517, 518 (2013).

<sup>33</sup> *\$2 million Deal=Big CFIUS Mistake*, TROUTMAN SANDERS (Mar. 7, 2011), available at <http://www.troutmansanders.com/2-million-deal--big-cfius-mistake-03-07-2011>.

<sup>34</sup> JAMES K. JACKSON, CONG. RESEARCH SERV., RL33388, THE COMMITTEE ON FOREIGN INVESTMENT IN THE UNITED STATES 5 (2013).

<sup>35</sup> Aaron Brickman, *USA: Open for Business* (Jul. 2008), <http://www.locationusa.com/UnitedStatesGovernmentAssistance/jul08/foreign-direct-investment-United-States.shtml>.

However, federal law requires the United States to “unequivocally” foster the economic benefits associated with an open investment climate “consistent with the protection of the national security.”<sup>36</sup> The economic upside to foreign capital investment must be balanced against potential risks to United States national security that an acquisition may create.<sup>37</sup>

There are countless risks associated with FDI, including risks to the safety and adequacy of the United States food supply.<sup>38</sup> Risks to food safety arise when a foreign company has historically operated at levels below minimum food handling standards established by the United States, either because minimum standards are more lenient in the home nation or because the foreign acquirer operates with a clear indifference to human safety.<sup>39</sup> Further, an otherwise adequate food supply can be compromised when a foreign-controlled supplier has the ability to “delay, deny, or place conditions upon provision” of the supply.<sup>40</sup> These types of concerns have specific application to the Smithfield-Shuanghui acquisition.<sup>41</sup>

National security risks may also arise that threaten critical United States infrastructure, both economic and military.<sup>42</sup> Critics have long argued that economic infrastructure is at risk when significant foreign investments in domestic financial institutions and debt instruments result in reduced U.S. control over its own economy.<sup>43</sup> Foreign investment also puts the security of U.S. military defense infrastructure at risk.<sup>44</sup> These risks include the transfer of classified military technologies to rival nations and the resulting loss of technological advantage. This occurs when technology is deployed by the rival nation or government in a way that could potentially damage the national interests of the country where the acquired firm is

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<sup>36</sup> Exec. Order No. 11858, 40 Fed. Reg. 20263 (May 7, 1975), reprinted as amended in 50 U.S.C. app. §2170 (2008) (emphasis added).

<sup>37</sup> Press Release, The White House, Statement by President on United States Commitment to Open Investment Policy, *supra* note 30.

<sup>38</sup> See MORAN, *supra* note 19 (discussing three types of national security threats from foreign acquisitions).

<sup>39</sup> See *infra* Part V.A.

<sup>40</sup> MORAN, *supra* note 19.

<sup>41</sup> See *infra* Part V.A.

<sup>42</sup> Cecelia M. Waldeck, *Proposals for Limiting Foreign Investment Risk Under the Exon-Florio Amendment*, 1991 Hastings L.J. 1175, 1185-88.

<sup>43</sup> *Id.*

<sup>44</sup> *Id.* at 1188.

located.<sup>45</sup> Additionally, substantial risks exist when foreign controlled companies have an integral role in the support of United States military programs.<sup>46</sup> This could occur if the United States is reliant upon foreign-controlled goods or services crucial to the functioning of the country's defense industrial base.<sup>47</sup>

Other national security risks surface in the event of a domestic acquisition controlled by a hostile foreign government.<sup>48</sup> These risks include the very real possibility that a foreign-controlled business may operate as a clandestine agent for its home nation or that classified information will be disclosed to the home nation by the foreign controlled firm.<sup>49</sup> Over time, these activities could provide opportunity for terrorism and espionage against the United States.<sup>50</sup>

### III. THE SMITHFIELD-SHUANGHUI ACQUISITION

Smithfield Foods, Inc. is a \$13 billion global food company and, prior to the acquisition by Shuanghui, the world's largest hog producer and pork processor.<sup>51</sup> The company was founded in 1936 and currently employs approximately 46,000 U.S. workers.<sup>52</sup> Smithfield is headquartered in Smithfield, Virginia and is home to brands like Armour and Farmland.<sup>53</sup> Currently, Smithfield owns nearly 460 pork farms located in more than a dozen mid-western states<sup>54</sup> and has contracts to purchase pork products with more than 2,000 other

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<sup>45</sup> MORAN, *supra* note 19.

<sup>46</sup> Waldeck, *supra* note 42, at 1188.

<sup>47</sup> MORAN, *supra* note 19.

<sup>48</sup> See Waldeck, *supra* note 42, at 1231.

<sup>49</sup> *Id.* at 1246.

<sup>50</sup> EDWARD M. GRAHAM & DAVID M. MARCHICK, US NATIONAL SECURITY AND FOREIGN DIRECT INVESTMENT 54 (2006).

<sup>51</sup> Geewax, *supra* note 18; *supra* note 2.

<sup>52</sup> Marilyn Geewax, *Smithfield Says Pork Won't Change, but Some Aren't Buying It*, NPR (July 10, 2013 2:32 PM), <http://www.npr.org/2013/07/09/200393587/smithfield-says-pork-won-t-change-but-some-aren-t-buying-it>.

<sup>53</sup> *China, in Need of Pork, to Buy U.S. Supplier*, *supra* note 20.

<sup>54</sup> JACKSON, *supra* note 34, at 11; *Smithfield Foods Inc. Buyout is a Matter of National Security*, MOTLEY FOOL (July 18, 2013 11:08 AM), <http://www.fool.com/investing/general/2013/07/17/smithfield-buyout-is-a-matter-of-national-security.aspx>.

farms.<sup>55</sup> Smithfield currently produces pork for consumption in China, the third largest export market for United States pork.<sup>56</sup>

Shuanghui International Holdings Limited is a state-run Hong Kong-based holding company<sup>57</sup> and owns a variety of global businesses related to food.<sup>58</sup> Pre-merger, Shuanghui was the largest meat processing and pork producing enterprise in China<sup>59</sup> but today is the world's single largest pork producer.<sup>60</sup> The company claimed their intent to purchase Smithfield Foods was based upon their desire to meet increasing Chinese demand for pork.<sup>61</sup> Chinese citizens are the biggest consumers of pork in the world.<sup>62</sup>

Shuanghui must also secure a foreign supply of pork because Chinese consumers want better quality foods than those produced domestically.<sup>63</sup> Recent food safety scandals involving Chinese food processing companies have created doubt among Chinese consumers about the safety of the domestically produced food supply.<sup>64</sup> Public anxiety spread quickly over lax national food handling protocol that resulted in fake or toxic food.<sup>65</sup> Acquiring Smithfield can help Shuanghui overcome the aftermath of the food safety scandals by newly branding themselves as an "American-based food company," presumed to meet the uncompromised strict safety standards of the

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<sup>55</sup> *Smithfield Foods Inc. Buyout is a Matter of National Security*, *supra* note 54.

<sup>56</sup> Bill Chappell, *Smithfield Foods to be Sold to Chinese Firm for \$4.72 Billion*, NPR (May 29, 2013, 9:27 AM), <http://www.npr.org/blogs/thetwo-way/2013/05/29/187029237/smithfield-foods-to-be-sold-to-chinese-firm-for-4-72-billion>.

<sup>57</sup> *Smithfield Foods, Inc., Hormel Foods Corporation: Will this Huge Chinese/US Deal Go Through?*, MOTLEY FOOL (June 12, 2013 12:15 PM), available at <http://www.insidermonkey.com/blog/smithfield-foods-inc-sfd-hormel-foods-corporation-hrl-will-this-huge-chineseus-deal-go-through-167678/>.

<sup>58</sup> SHUANGHUI INTERNATIONAL, <http://www.shuanghui-international.com/index.html> (last visited Mar. 20, 2013).

<sup>59</sup> *Smithfield Foods: A Match Made in Hog Heaven*, MOTLEY FOOL, (June 7, 2013, 9:39 AM), <http://www.insidermonkey.com/blog/smithfield-foods-inc-sfd-a-match-made-in-hog-heaven-162125/>.

<sup>60</sup> SHUANGHUI INTERNATIONAL, *supra* note 58.

<sup>61</sup> Denny Thomas & Olivia Oran, *China's Appetite for Pork Spurs \$4.7 Billion Smithfield Deal*, REUTERS, (May 29, 2013, 5:22 PM), <http://www.reuters.com/article/2013/05/29/us-shuanghui-idUSBRE94S0K920130529>.

<sup>62</sup> CHAPPELL, *supra* note 56.

<sup>63</sup> Thomas & Oran, *supra* note 61.

<sup>64</sup> *Id.*

<sup>65</sup> *Id.*



United States.<sup>66</sup> Shuanghui intends to label all American pork sold in China as “[b]orn, raised and slaughtered in the United States”<sup>67</sup> to promote increased quality perception in the Chinese domestic marketplace.<sup>68</sup>

Smithfield’s motivation to sell to Shuanghui was primarily profit driven: the pork business is no longer returning to shareholders the profits once enjoyed.<sup>69</sup> According to Bloomberg News, Smithfield was one of the “worst performing large United States food companies” over the past five years<sup>70</sup> and had been struggling with growth.<sup>71</sup> Selling the company to a single buyer provided a convenient and favorable avenue for shareholders to divest themselves of their ownership interest in Smithfield.<sup>72</sup> Further, the transaction with Shuanghui generated a significant windfall for Smithfield shareholders: Shuanghui offered \$34 per share in cash, a thirty-one percent premium over the company’s closing stock price on May 28, 2013, the last trading day before the deal was announced.<sup>73</sup>

#### IV. GOVERNMENT AUTHORITY TO INTERVENE IN DOMESTIC ACQUISITIONS BY FOREIGN COMPANIES

##### *A. Under Congressional Mandate, CFIUS Must Conduct a Review of Foreign Acquisitions That Potentially Threaten United States National Security*

CFIUS is an interagency government panel that exists within the Executive Branch of the United States government<sup>74</sup> and was established by President Ford in 1975.<sup>75</sup> It is overseen by the Treasury

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<sup>66</sup> See *China, in Need of Pork, to Buy U.S. Supplier*, *supra* note 20.

<sup>67</sup> Alan Guebert, *Reasons to Love Smithfield*, AGWEEK (July 1, 2013, 10:22 AM), <http://www.agweek.com/event/article/id/21152/>.

<sup>68</sup> See *China, in Need of Pork, to Buy U.S. Supplier*, *supra* note 20.

<sup>69</sup> See Geewax, *supra* note 52.

<sup>70</sup> Guebert, *supra* note 67.

<sup>71</sup> See *id.*

<sup>72</sup> See *Shuanghui to Acquire Smithfield Foods for \$34/Share*, STREET INSIDER (May 29, 2013, 7:37 AM), <http://www.streetinsider.com/Hot+Corp.+News/Shuanghui+to+Acquire+Smithfield+Foods+%28SFD%29+for+%2434Share/8374430.html>.

<sup>73</sup> *Id.*

<sup>74</sup> *\$2 million Deal=Big CFIUS Mistake*, *supra* note 33.

<sup>75</sup> Exec. Order No. 11858, 40 Fed. Reg. 20263 (May 7, 1975), reprinted as amended in 50 U.S.C. app. §2170 (2008).

Department.<sup>76</sup> The singular purpose of the CFIUS process is to discern whether a foreign acquisition could potentially threaten United States national security.<sup>77</sup> The primary goal of CFIUS is to allow global trade and foreign investment to flourish but only after taking into account broadly defined national security needs.<sup>78</sup> CFIUS has been a central figure in the shaping of foreign investment in the United States for nearly four decades<sup>79</sup> but has no inherent power of enforcement.<sup>80</sup> It is merely a reviewing agency and does not itself have the authority to block foreign transactions in the event a significant national security risk is identified.<sup>81</sup> Rather, after close scrutiny of a transaction, CFIUS notifies the investor of its intention to recommend that the President of the United States block the acquisition under Executive Order.<sup>82</sup> The review process that CFIUS conducts is strictly confidential.<sup>83</sup> All information disclosed to CFIUS is forbidden from being shared with the public<sup>84</sup> and is not subject to disclosure under the United States Freedom of Information Act.<sup>85</sup>

There are potentially three phases to CFIUS's review process of a proposed foreign acquisition.<sup>86</sup> Phase One is the initial review and lasts thirty days.<sup>87</sup> If risk to national security is discovered or if CFIUS is unable to resolve all outstanding national security concerns during the first phase, CFIUS then performs a second, more scrutinizing

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<sup>76</sup> Geewax, *supra* note 18. CFIUS membership consisted of the Secretary of the Treasury, Secretary of State, Secretary of Defense, Secretary of Commerce, Assistant to the President for Economic Affairs, and the Executive Director of the Council on International Economic Policy. Exec. Order No. 11858, 40 Fed. Reg. 20263 (May 7, 1975), reprinted as amended in 50 U.S.C. app. §2170 (2008).

<sup>77</sup> GRAHAM & MARCHICK, *supra* note 49, at 38.

<sup>78</sup> Geewax, *supra* note 18.

<sup>79</sup> *Id.*

<sup>80</sup> *Id.*

<sup>81</sup> *Id.*

<sup>82</sup> Christopher Doering, *Senators Seek Extra Scrutiny of Smithfield Deal*, THE COURIER-JOURNAL (June 21, 2013), available at <http://www.courier-journal.com/usatoday/article/2445795>.

<sup>83</sup> Byrne, *supra* note 9, at 901-02.

<sup>84</sup> *Id.*

<sup>85</sup> Lawrence Ward, *The Ralls Case: Warning Sign for International Investments in the U.S.*, LEXOLOGY (Nov. 13, 2012), <http://www.lexology.com/library/detail.aspx?g=87132a41-7f79-4af9-8f04-12a8d544b3a8>.

<sup>86</sup> BLACK, *supra* note 5.

<sup>87</sup> GRAHAM & MARCHICK, *supra* note 49, at 35.

review that lasts forty-five days.<sup>88</sup> Phase Three begins when a foreign acquisition is elevated to the Executive Branch along with a recommendation to reject.<sup>89</sup> The President then has fifteen days to consider the recommendation<sup>90</sup> and “may 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.”<sup>91</sup>

*B. Under Authority of the Exon-Florio Amendment, The President May Exercise Broad Authority to Block a Private Sector Acquisition Upon a Credible Finding of Threat to National Security*

Passed in 1988, the Exon-Florio Amendment (“Exon-Florio”) is a modified provision of the Defense Production Act of 1950.<sup>92</sup> The purpose of Exon-Florio is to ensure that foreign transactions that pose a potential threat to national security are identified and mitigated to the fullest extent possible.<sup>93</sup> Exon-Florio authorizes the President to investigate, through CFIUS, any private merger, acquisition, or takeover by foreign persons that “results in control of [a] United States company shifting to the acquiring person,” and empowers the President to “block” the deal and/or demand divestiture.<sup>94</sup> If a matter is referred after investigation by CFIUS to the President with a recommendation to reject the acquisition, the President can order a disruption of either the entire deal or a specific portion.<sup>95</sup> The President is not required to provide comment or explanation regarding his decision to block a merger or demand divestiture under Exon-Florio.<sup>96</sup> Only “credible evidence” that a “foreign interest exercising

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<sup>88</sup> *Id.*

<sup>89</sup> Brian Hoffman & Owen O. Denby, *Cross-Border M&A: Managing the CFIUS Review Process*, MONDAQ (Oct. 23, 2013), <http://www.mondaq.com/unitedstates/x/270460/M+A+Private%20equity/CrossBorder+MA+Managing+the+CFIUS+Review+Process>.

<sup>90</sup> 50 U.S.C.A. app. § 2170(d)(2) (West 2013); GRAHAM & MARCHICK, *supra* note 49, at 35.

<sup>91</sup> 50 U.S.C.A. app. § 2170(d)(1) (West 2013).

<sup>92</sup> See GRAHAM & MARCHICK, *supra* note 49, at 34.

<sup>93</sup> See LARSON & MARCHICK, *supra* note 24, at 4; *A Review of the CFIUS Process for Implementing the Exon-Florio Amendment: Hearings Before the Comm. on Banking, Hous. and Urban Affairs*, 109th Cong. 3 (2005).

<sup>94</sup> 50 App. U.S.C.A. § 2170.

<sup>95</sup> Geewax, *supra* note 18.

<sup>96</sup> See JACKSON, *supra* note 45, at 16.

control might take action that threatens to impair the national security” need be present.<sup>97</sup> However, the President may implement executive power under Exon-Florio only upon conclusion that there are no other provisions of law that provide “adequate and appropriate” authority to sufficiently protect the national security of the United States.<sup>98</sup> According to Senator Exon, one of the sponsors of the Amendment, the purpose of the amendment was to “encourage the Administration to protect the national interest” and to create legal authority by which the President could block foreign acquisitions of United States companies without having to invoke the more limited International Emergency Economic Powers Act.<sup>99</sup>

Exon-Florio is a “unique” piece of legislation.<sup>100</sup> Under paragraph (e) of the statute, no court can review the president’s decision.<sup>101</sup> Courts have held that the plain statutory language in paragraph (e) forbidding judicial review is enough to insulate the President’s actions under Exon-Florio from retaliatory action by disgruntled foreign investors.<sup>102</sup> Further, there is no time bar on reviews, and the president may force divestiture of a transaction years after it closes provided it was never reviewed by CFIUS.<sup>103</sup> There are only two instances in history that a United States President has exercised his power to divest under Exon-Florio and forbid the foreign acquisition of a domestic company.<sup>104</sup> In both instances, the purchaser was Chinese-based.<sup>105</sup>

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<sup>97</sup> *Id.*

<sup>98</sup> *Id.*

<sup>99</sup> GRAHAM & MARCHICK, *supra* note 49, at 41. The International Emergency Economic Powers Act (IEEPA) is a provision of the National Emergencies Act. The IEEPA authorizes the president to declare the existence of an “unusual and extraordinary threat ... to the national security, foreign policy, or economy of the United States” that originates “in whole or substantial part outside the United States.” After such a declaration, the president may block transactions and freeze assets to deal with the threat. An emergency declared under the act must be renewed annually to remain in effect, and can be terminated by Congressional resolution. 50 U.S.C.A. §1701-1707 (West 2013).

<sup>100</sup> LARSON & MARCHICK, *supra* note 24, at 9.

<sup>101</sup> 50 U.S.C.A. app. § 2170(e) (West 2013).

<sup>102</sup> *Ralls Corp. v. Comm. on Foreign Inv. in the U.S.*, 926 F.Supp.2d 71, 86 (2013).

<sup>103</sup> LARSON & MARCHICK, *supra* note 24, at 9.

<sup>104</sup> *Id.* at 14. (Note: This document was written in 2006, prior to the second instance in 2012 of exercise of authority under Exon-Florio to block a private foreign acquisition; see *Obama Blocks Chinese Purchase of Small Wind Farm Project*, THE OREGONIAN (Sept. 28, 2012, 3:31 PM), available at [http://www.oregonlive.com/environment/index.ssf/2012/09/oregon\\_wind\\_farm\\_purchase\\_by\\_c.html](http://www.oregonlive.com/environment/index.ssf/2012/09/oregon_wind_farm_purchase_by_c.html).

Subsequent statutory revisions have caused the President's exercise of this power to be less discretionary and, in certain instances, mandatory.<sup>106</sup>

*C. The Byrd Amendment Mandates Review of Acquisitions by Entities With Strong Ties to a Foreign Government and Expands Upon the Definition of "National Security"*

By the late 1980s, many business leaders and policy makers had become concerned with sharply increasing levels of FDI and that the powers of the President under Exon-Florio to intervene in foreign investiture were too limited by its vague language.<sup>107</sup> The term "national security" has largely remained undefined. However, the language within the Act was chosen with a specific purpose.<sup>108</sup> The legislative history of Exon-Florio indicates that Congress specifically did not elaborate on the term, giving CFIUS and the President broad discretion<sup>109</sup> to interpret it "without limitation to particular industries."<sup>110</sup> In fact, as shown in the preamble to the final regulations on mergers, acquisitions and takeovers by foreign persons, the Committee took affirmative action to guarantee that the term "national security" remained undefined by outright rejecting all of the recommended definitions "because they could improperly curtail the President's broad authority to protect the national security."<sup>111</sup>

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<sup>105</sup> See *Ralls*, 926 F.Supp.2d at 76; see Byrne, *supra* note 83, at 871-72.

<sup>106</sup> See *infra* Part IV.C-D.

<sup>107</sup> JACKSON, *supra* note 34, at 4.

<sup>108</sup> See Byrne, *supra* note 9, at 867. In March 1992, Deputy Assistant Secretary of the Treasury William Barreda testified before a congressional committee and explained that the Exon-Florio statute and subsequent CFIUS regulations were intentionally authored to leave the term "national security" undefined. "We have not defined national security. I think the intent of Congress was very clear, that national security should be looked at in a broad sense." Barreda stated that "defining" the term would actually provide foreign acquirers the possibility to structure their transactions in a way that would circumvent the definition. *Id.* (quoting *Foreign Direct Investment, the Exon Florio Foreign Acquisition Review Process, and H.R. 2624, the Technology Preservation Act of 1991, to Amend the 1998 Exon-Florio Provision: Hearings Before the Subcomm. on Econ. Stabilization of the H. Comm. on Banking, Fin. and Urb. Aff.*, 102d Cong. (1992)).

<sup>109</sup> GRAHAM & MARCHICK, *supra* note 49, at 38.

<sup>110</sup> *\$2 million Deal=Big CFIUS Mistake*, *supra* note 33.

<sup>111</sup> 31 C.F.R. part 800 (1991) (Text is located within the preamble to the final regulations on mergers, acquisitions and takeovers by foreign persons.).  
Regulations on Mergers, Acquisition, and Takeovers by Foreign Persons (Published

What constitutes “credible evidence” is also statutorily unclear.<sup>112</sup> CFIUS may, at its discretion, apply a fairly low threshold to the credible evidence standard: evidence is “credible” so long as it is “worthy of belief.”<sup>113</sup> The United States Supreme Court has never defined “credible evidence.”<sup>114</sup> Many state supreme courts have attempted to interpret the term but have only provided circular definitions that fail to provide substantive clarification.<sup>115</sup> Further, because no authority has articulated how much “credible” evidence is required to meet the threshold, a mere showing will suffice.<sup>116</sup>

These factors demonstrate that Congress, concerned that potentially threatening foreign acquisitions be resolved before approval, intended to give the president and CFIUS maximum discretion in their determination of national security risk.<sup>117</sup> Lesser legislative concern would be evidenced by a higher burden required be met by CFIUS during the review and investigation process. Yet Congress did not impose a higher burden through the wording of the legislation. Rather, statutory language was specifically chosen so as to not limit the President’s powers under Exon-Florio and to allow the President every possible opportunity to prohibit an acquisition if he believed it to be in the best interest of the United States.<sup>118</sup> Further, the President is not required to explain his exercise of power under the law, and his actions and findings may not be reviewed judicially.<sup>119</sup> These provisions insulate CFIUS and the President from the burden of providing justification for their finding, and allow that the least possible

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November 21, 1991.

<sup>112</sup> See 50 U.S.C.A. app. § 2170(d)(4)(A) (West 2013).

<sup>113</sup> GRAHAM & MARCHICK, *supra* note 49, at 39.

<sup>114</sup> *Id.* at 40. The term “credible evidence” has not been precisely defined by the U.S. Supreme Court as a legal term, nor within the context of the Exon-Florio Amendment.

<sup>115</sup> *Id.*; *Morgan v. Great Falls School Dist. No. 1*, 298 Mont. 194, 197 (Mont. 2000); *Cusick v. Kerik*, 305 A.D. 2d 247, 248 (N.Y. 2003), citing *Meyer v. Board of Trustees*, 90 N.Y. 2d 139, 147 (1997).

<sup>116</sup> See 50 U.S.C.A. app. § 2170 (West 2013).

<sup>117</sup> See 31 C.F.R. part 800 (1991) (Text is located within the preamble to the final regulations on mergers, acquisitions and takeovers by foreign persons.).

<sup>118</sup> Byrne, *supra* note 83, at 867 (quoting *Foreign Direct Investment, the Exon Florio Foreign Acquisition Review Process, and H.R. 2624, the Technology Preservation Act of 1991, to Amend the 1998 Exon-Florio Provision: Hearings Before the Subcomm. on Econ. Stabilization of the H. Comm. On Banking, Fin. and Urb. Aff.*, 102d Cong., 2d Sess. (1992)).

<sup>119</sup> See 50 U.S.C.A. app. § 2170(e) (West 2013).

discovery of “credible evidence” of threat to national security can result in a blocked foreign acquisition between private parties.<sup>120</sup>

In 1992, Congress passed the Byrd Amendment and further strengthened Exon-Florio.<sup>121</sup> The Byrd Amendment created the first instance of mandatory CFIUS review where the acquirer is controlled by or acting on behalf of a foreign government and where the acquisition could potentially result in “control of a person engaged in interstate commerce in the United States that could affect the national security of the country.”<sup>122</sup> The Byrd Amendment also expanded the list of characteristics that constituted a risk to national security to twelve factors that the President may consider when exercising his power to block a foreign acquisition,<sup>123</sup> including in pertinent part: (1) control of domestic industries by foreign citizens as it affects the capability and capacity of the United States to meet the requirements of national security; (2) the potential effects of the transaction on United States technological leadership in areas affecting United States national security; (3) whether the transaction has a security-related impact on critical infrastructure in the United States; (4) whether the transaction is a foreign government controlled transaction; and (5) such other factors as the President or the Committee determine to be appropriate.<sup>124</sup>

#### *D. FINSA Adds Broadly Defined “Critical Infrastructure” as a Mandatory Factor for CFIUS Review*

In 2007, Congress began legislative reform of CFIUS, culminating in the passage of the Foreign Investment and National Security Act of 2007 (“FINSA”).<sup>125</sup> FINSA further strengthened both Exon-Florio and CFIUS<sup>126</sup> by broadening the review process and including “critical infrastructure” on the list of factors for mandatory consideration under

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<sup>120</sup> See *supra* Part IV.C.

<sup>121</sup> See Byrne, *supra* note 9, at 868.

<sup>122</sup> JACKSON, *supra* note 34, at 6.

<sup>123</sup> See Kenneth Y. Hui, National Security Review of Foreign Mergers and Acquisitions of Domestic Companies in China and the United States, 12 (2009) Cornell Law School Inter-University Graduate Student Conference Papers, *available at* [http://scholarship.law.cornell.edu/lps\\_clacp/34](http://scholarship.law.cornell.edu/lps_clacp/34).

<sup>124</sup> 50 U.S.C.S. app. § 2170(f) (West 2013).

<sup>125</sup> JACKSON, *supra* note 34, at summary.

<sup>126</sup> See *id.* at 13.

Exon-Florio.<sup>127</sup> The language chosen by Congress to define critical infrastructure was deliberate, and provided a broad, sweeping definition: critical infrastructure are any systems or assets so vital to the United States that the incapacity or destruction of them would have a debilitating impact on security (national or economic), or on public health or safety.<sup>128</sup> Under Exon-Florio, it is not necessary to actually “debilitate” a vital system or asset, the incapacity need only have a “debilitating impact” for the infrastructure to be deemed critical.<sup>129</sup> The statutory language allows wide classification of a perceived threat in an attempt to establish critical infrastructure, and gives CFIUS significant latitude and freedom in its interpretation of what may or may not pose a risk to national security in this context.

#### V. ANALYSIS OF THE EXON-FLORIO FACTORS IMPLICATED BY THE ACQUISITION OF SMITHFIELD FOODS

Historically, the United States has struggled to answer whether foreign acquisition of domestic companies affects national security.<sup>130</sup> In addition, CFIUS had little experience with prior agri-business acquisitions to guide its review of Smithfield-Shuanghui.<sup>131</sup> However, because CFIUS’s investigative findings are by law privileged and classified,<sup>132</sup> it is unclear what CFIUS or the president considered during the review process.<sup>133</sup> Five of the factors identified in Exon-Florio that could potentially compromise United States national security are applicable to the Smithfield Foods acquisition. Nevertheless, it will likely never be known if the government considered these factors and unearthed information that mitigated fear of risk, or if they were considered at all.

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<sup>127</sup> DAVIDOFF, *supra* note 4.

<sup>128</sup> 50 U.S.C.A. app. § 2170(a)(6) (West 2013).

<sup>129</sup> *Id.* at 2170(a)(6).

<sup>130</sup> Edward Wyatt, *Senators Question Chinese Takeover of Smithfield*, N.Y. TIMES (July 10, 2013, 2:34 PM), available at <http://dealbook.nytimes.com/2013/07/10/lawmakers-have-concerns-over-chinese-takeover-of-smithfield>.

<sup>131</sup> DAVIDOFF, *supra* note 4.

<sup>132</sup> Byrne, *supra* note 9, at 901-02.

<sup>133</sup> *See id.*



*A. Safe and Adequate Food Supply*

The first relevant factor under Exon-Florio requires the President to consider the effect the foreign acquisition will have on the capability and capacity of the United States to meet the requirements of a safe and adequate food supply.<sup>134</sup> What the United States feeds its citizens, and how it does so is unquestionably a matter of national security.<sup>135</sup> Our nation's leaders have long made clear the importance of food safety.<sup>136</sup>

Throughout most of China, there is a widespread feeling of ambivalence toward safe food handling protocol.<sup>137</sup> China has a long history of outrageous food safety violations and food adulteration<sup>138</sup> that have resulted in the sickness and death of consumers.<sup>139</sup> Repeatedly, Chinese companies have proven their willingness to disregard food safety regulations in exchange for short-term profits.<sup>140</sup> If state-controlled Shuanghui operates their newly-acquired U.S. food processing facilities in a manner consistent with their own negligent previous operational conduct, the United States pork supply could easily become contaminated, putting American consumers at great risk of death or illness.<sup>141</sup> Although food production in the United States is regulated by the U.S. Food and Drug Administration, the agency is financially and administratively overwhelmed, and relies increasingly on *voluntary compliance* and *self-regulation* and less on on-site inspections and other more proactive methods of enforcing food safety standards.<sup>142</sup>

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<sup>134</sup> See 50 U.S.C.A. app. § 2170(f)(3) (West 2013).

<sup>135</sup> *Nightly Business Report* (CNBC broadcast May 30, 2013), available at <http://nbc.com/2013/05/30/nightly-business-report-may-30-2013/>.

<sup>136</sup> See Wiley Act, Pub. L. No. 59-384, 34 Stat. 768 (1906).

<sup>137</sup> See Mike Adams, *Not Even Good Enough for Dog Food*, NATURAL NEWS (May 10, 2013), [http://www.naturalnews.com/040266\\_food\\_fraud\\_China\\_heavy\\_metals\\_contaminati\\_on.html](http://www.naturalnews.com/040266_food_fraud_China_heavy_metals_contaminati_on.html).

<sup>138</sup> GEEWAX, *supra* note 52.

<sup>139</sup> See *infra* Part V.A.

<sup>140</sup> *China's Melamine Milk Crisis Creates Crisis of Confidence*, VOA, <http://www.voanews.com/content/a-13-2008-09-26-voa45/403825.html> (last updated Nov. 1, 2009).

<sup>141</sup> See *Smithfield Foods Inc. Buyout is a Matter of National Security*, *supra* note 54.

<sup>142</sup> Frank J. Maduri, *China's Ownership of an Iconic American Food Company*, UPI (Oct. 25, 2013 12:04 AM), [http://www.upi.com/Top\\_News/Analysis/Outside-](http://www.upi.com/Top_News/Analysis/Outside-)

These abbreviated case studies are intended to make clear how the United States food supply could be intolerably threatened by allowing the entry of a derelict and delinquent food processor into the domestic agri-business sector.

### *1. Shuanghui's Pig Feed Scandal*

In 2011, it was revealed that Shuanghui was involved in blending the banned carcinogenic additive, clenbuterol, into pig feed to prevent the accumulation of fat in hogs.<sup>143</sup> The additive is poisonous to humans if ingested, causing increased heart rate, muscle tremors, nausea, and fevers.<sup>144</sup> Although clenbuterol is banned for use in pig feed in China, a Shuanghui subsidiary purposefully added clenbuterol-contaminated pork to its meat products, gravely sickening hundreds of Chinese consumers.<sup>145</sup> A total of seventy-two people were taken into police custody for allegedly using, producing, or selling clenbuterol.<sup>146</sup>

### *2. Chinese Infant Milk Scandal*

In 2008, six infant babies died and 300,000 were sickened as a result of the tragic incident known as the Chinese Milk Scandal.<sup>147</sup> More than twenty-one Chinese companies purposely added melamine to milk and infant formula<sup>148</sup> to create the appearance of a higher protein

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View/2013/10/25/Chi...ownership-of-an-iconic-American-food-company/UPI-75821382673840/ (emphasis added).

<sup>143</sup> *China, in Need of Pork, to Buy U.S. Supplier*, *supra* note 20.

<sup>144</sup> *Clenbuterol-Contaminated Meat Hits China, Mexico and Sports*, CONSUMER COMPACT (Feb. 2012), available at

<http://www.sgs.com/~media/Global/Documents/Technical%20Documents/Technical%20Bulletins/Scoop/sgs-cts-cc-food-clenbuterol-feb-2012-en-p4.pdf>.

<sup>145</sup> *Shuanghui Apologizes Over Additive Scandal*, CHINA DAILY (Mar. 17, 2011, 9:53 AM), [http://www.chinadaily.com.cn/business/2011-03/17/content\\_12185197.htm](http://www.chinadaily.com.cn/business/2011-03/17/content_12185197.htm); Geewax, *supra* note 18.

<sup>146</sup> *China to Launch One-year Crackdown on Contaminated Pig Feed*, CONSULATE GENERAL OF THE PEOPLE'S REPUBLIC OF CHINA IN N.Y. (Mar. 29, 2011), <http://www.nyconsulate.prchina.org/eng/xw/t810691.htm>.

<sup>147</sup> Tania Branigan, *Chinese Figures Show Fivefold Rise in Babies Sick From Contaminated Milk*, THE GUARDIAN (Dec. 2, 2008, 5:44 AM EST), <http://www.theguardian.com/world/2008/dec/02/china>.

<sup>148</sup> *China Seizes 22 Companies With Contaminated Baby Milk Powder*, CHINAVIEW (Sept. 17, 2008, 1:07 AM), [http://news.xinhuanet.com/english/2008-09/17/content\\_10046949.html](http://news.xinhuanet.com/english/2008-09/17/content_10046949.html).

content.<sup>149</sup> Melamine is known to cause critical renal and urinary problems in humans and animals, and it is universally forbidden for use in food production.<sup>150</sup>

This issue raised concerns about the connection between food safety and political corruption in China.<sup>151</sup> Unscrupulous business practices were found within the milk inspection system and collection stations as early as 2005, as well as “practically nonexistent” government supervision.<sup>152</sup> The Nanfang Daily reported “the practice of mixing melamine into animal feed is an ‘open secret.’”<sup>153</sup> Of the scandal, Hu Xingdou, a professor at Beijing Institute of Technology, said: “There has not been an effort to establish a moral foundation to the market economy, and this incident is the inevitable result.”<sup>154</sup>

### 3. Chinese Pet Food Ingredient Scandal

The Chinese Pet Food Recalls of 2007 concerned widespread adulteration of melamine-infused dog and cat food exported from China to the United States.<sup>155</sup> The U.S. Food and Drug Administration received reports of approximately 4,000 animal deaths from renal failure.<sup>156</sup> More than 5,300 pet food products were recalled in the United States.<sup>157</sup>

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<sup>149</sup> WORLD HEALTH ORGANIZATION, GLOBAL ALERT AND RESPONSE: QUESTIONS AND ANSWERS ON MELAMINE <http://www.who.int/csr/media/faq/QAmelamine/en/> (last visited Nov. 20, 2013).

<sup>150</sup> See *id.* (“While there are no direct human studies on the effect of melamine[,] data from animal studies can be used to predict adverse health effects.”).

<sup>151</sup> See *China’s Melamine Milk Crisis Creates Crisis of Confidence*, *supra* note 140.

<sup>152</sup> *Spilling the Blame for China’s Milk Crisis*, (Oct. 2010, 7:18 PM), <http://english.caijing.com.cn/2008-10-10/110019183.html>.

<sup>153</sup> Wu Jiao, *Checks on Animal Feed ‘Tightened’* CHINA DAILY (Nov. 1, 2008, 8:44 AM), available at [http://www.chinadaily.com.cn/china/2008-11/01/content\\_7164471.html](http://www.chinadaily.com.cn/china/2008-11/01/content_7164471.html).

<sup>154</sup> Simon Elegant, *China’s Poisoned Milk Scandal: Is Sorry Enough?*, TIME (Sept. 23, 2008), available at <http://content.time.com/time/world/article/0,8599,184>.

<sup>155</sup> WORLD HEALTH ORGANIZATION, GLOBAL ALERT AND RESPONSE: QUESTIONS AND ANSWERS ON MELAMINE, *supra* note 149.

<sup>156</sup> Susan Heavey, *U.S. Pet Food Recall Widens on Cross-Contamination*, Reuters (May 4, 2007, 6:00 PM), available at <http://www.reuters.com/article/2007/05/04/us-petfood-idUSN0327064320070504>.

<sup>157</sup> Elizabeth Weise and Julie Schmit, *FDA Limits Chinese Food Additive Imports*, USA TODAY (May 1, 2007 10:23 PM), available at [http://usatoday30.usatoday.com/money/industries/2007-04-30-chinese-imports-usat\\_N.html](http://usatoday30.usatoday.com/money/industries/2007-04-30-chinese-imports-usat_N.html).

#### 4. Dead Pigs Incident

The Huangpu River Dead Pigs Incident occurred in early March of 2013, when nearly 16,000 dead pigs were found floating in the river.<sup>158</sup> The Huangpu River supplies the city of Shanghai with its drinking water.<sup>159</sup> When hogs are found to be diseased, pig farmers routinely engage in “pig dumping” into the river.<sup>160</sup> Previously, Chinese farmers illegally sold pork products to consumers harvested from diseased pigs, but increased efforts by law enforcement to combat this activity have forced farmers to turn to pig dumping to dispose of the carcasses.<sup>161</sup>

A safe food supply is essential to the health and survival of Americans.<sup>162</sup> Shuanghui is a proven food adulterator based in a country widely known to disregard food safety. It is irresponsible for the United States government to speculate on the hope that Shuanghui will not attempt to continue their outstandingly bad food handling tactics on American soil. It is a cavalier disregard of the duty required under the Exon-Florio Amendment.<sup>163</sup>

Exon-Florio further requires CFIUS to also consider the vulnerability of the United States food supply that is partially foreign-controlled.<sup>164</sup> The adequacy of the food supply is a matter of great importance and national security.<sup>165</sup> The acquisition of Smithfield Foods has placed Shuanghui in a position powerful enough to willfully disrupt the United States pork supply.<sup>166</sup> Because pork is one of the primary meat sources in the United States, control of the largest production line of pork in the world could lead to a disastrous food shortage at the hands of a hostile foreign government.<sup>167</sup> Further, Shuanghui could be in a position that requires the import of pork into the United States in order to fulfill its contractual obligations to its

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<sup>158</sup> DAVIDOFF, *supra* note 4.

<sup>159</sup> *Number of Pigs Plucked From Shanghai River Reaches 12,000*, USA Today (Mar. 16, 2013 10:43 GMT), available at <http://news.ca.msn.com/top-stories/number-of-pigs-plucked-from-shanghai-river-reaches-12000-1>.

<sup>160</sup> *Id.*

<sup>161</sup> *Id.*

<sup>162</sup> See Wiley Act, Pub. L. No. 59-384, 34 Stat. 768 (1906).

<sup>163</sup> See *supra* Part IV.B.

<sup>164</sup> See 50 U.S.C.A. app. § 2170(f)(8) (West 2013).

<sup>165</sup> *Nightly Business Report*, *supra* note 135.

<sup>166</sup> See Geewax, *supra* note 18.

<sup>167</sup> See generally *id.*

newly acquired customer base.<sup>168</sup> This scenario would again give rise to the possibility of an unsafe food supply as pork products could become intermixed within the foreign and domestic market.<sup>169</sup> Although foreign products are subjected to import regulations and quality inspections at United States ports of entry, at least one expert in the field of United States imports stated that only 1.7% of product offered for import is subject to examination at the ports of entry due to constrained enforcement resources.<sup>170</sup> This means that of every five containers presented for import, one is examined and four are not.<sup>171</sup> Further, the Federal Drug Administration inspects only 1%-2% of all food imports from China, and rarely tests for toxic contaminants.<sup>172</sup> This kind of superficial import inspection process allows ample opportunity for those countries that do not meet minimum food safety standards set by the United States to move their food products across the country's borders and into the food supply.<sup>173</sup> This puts American consumers at grave risk, and nearly negates domestic food safety standards.<sup>174</sup>

### *B. Technological Leadership*

The second factor under Exon-Florio relevant to the Smithfield acquisition is the potential effects of the transaction on U.S. technological leadership in areas affecting national economic security.<sup>175</sup> Smithfield Foods is a leader in U.S. agriculture and has developed advantageous technologies for application within the agricultural industry.<sup>176</sup> For example, Smithfield has developed advanced genetic research that produces exceptionally lean hogs.<sup>177</sup> This eliminates the need to trim excess fat from a carcass and provides

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<sup>168</sup> See *supra* Part III.

<sup>169</sup> See *supra* Part V.A.

<sup>170</sup> *Nightly Business Report*, *supra* note 135.

<sup>171</sup> *Id.*

<sup>172</sup> ADAMS, *supra* note 137.

<sup>173</sup> See *Nightly Business Report*, *supra* note 135.

<sup>174</sup> See *supra* Part V.A.

<sup>175</sup> 50 U.S.C.A. app. § 2170(f)(5) (West 2013).

<sup>176</sup> *After Smithfield Foods, Inc. (SFD), Which of These Companies is Next?*, Motley Fool (June 6, 2013, 10:12 AM), available at <http://www.insidermonkey.com/blog/after-smithfield-foods-inc-sfd-which-of-these-companies-is-next-161142/2/>.

<sup>177</sup> *Id.*; JAMES K. JACKSON, THE COMMITTEE ON FOREIGN INVESTMENT IN THE UNITED STATES, 11 (2013).

better cuts of meat to sell into the market.<sup>178</sup> In turn, this leads to more productivity and efficiencies in production, desirable to any processor.<sup>179</sup> The acquisition by Shuanghui of this advanced agricultural technology raises significant questions about the protection of Smithfield's intellectual property and future ability of the United States to compete in the agricultural sector.<sup>180</sup> Having access to advanced technology such as this gives Shuanghui an advantage that undermines the competitive edge currently retained by United States agri-business.<sup>181</sup> This is precisely the kind of situation legislators intended to avoid by drafting language within Exon-Florio that required an investigation into foreign acquisitions involving the loss of technological leadership.<sup>182</sup>

### C. Critical Infrastructure

The third relevant factor that must be considered under Exon-Florio review is whether a transaction has a security-related impact on critical infrastructure in the United States.<sup>183</sup> The Department of Homeland Security has interpreted critical infrastructure to include certain economic sectors, including agriculture.<sup>184</sup> The concern under this factor is the effect Shuanghui could have on domestic agriculture markets, and if that effect rises to the level of threatening national economic security. If Shuanghui continues to employ its sub-standard food handling procedures and the health of pork consumers was in

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<sup>178</sup> E-mail from Mark Krebsbach, Senior Commodities Merchandiser, Western Milling Quality Feeds, to author (Nov. 24, 2013, 14:47 PST) (on file with author).

<sup>179</sup> *Id.*

<sup>180</sup> See Frank J. Maduri, *China's Ownership of an Iconic American Food Company*, UPI (Oct. 25, 2013 12:04 AM), [http://www.upi.com/Top\\_News/Analysis/Outside-View/2013/10/25/Chi...ownership-of-an-iconic-American-food-company/UPI-75821382673840/](http://www.upi.com/Top_News/Analysis/Outside-View/2013/10/25/Chi...ownership-of-an-iconic-American-food-company/UPI-75821382673840/) (discussing the competitive advantage Shuanghui now has with new access to Smithfield's proprietary food science secrets that could be used to the disadvantage of other domestic pork producers).

<sup>181</sup> *Id.*

<sup>182</sup> See LARSON & MARCHICK, *supra* note 24, at 4; see *A Review of the CFIUS Process for Implementing the Exon-Florio Amendment: Hearings Before the Comm. on Banking, Hous. and Urban Affairs*, 109th Cong. 3 (2005).

<sup>183</sup> 50 U.S.C.A. app. § 2170(f)(6) (West 2013).

<sup>184</sup> Economic threat is considered a security-related risk because it falls within the "national economic security" element of FINSA's definition of critical infrastructure. Hui, *supra* note 123.

jeopardy, a widespread food safety scare would undoubtedly result.<sup>185</sup> This would destroy consumer confidence in the pork industry and cause many to turn away from pork as a food choice.<sup>186</sup> The inevitable decline in the value of pork would be financially ruinous to remaining United States pork producers.<sup>187</sup> In this case, because Shuanghui is now the single largest pork producer in the world, the influence this foreign-based company has on the domestic marketplace is significant, with far-reaching consequences for American farmers.<sup>188</sup> In 2012, gross income for domestically produced hogs exceeded \$22 billion.<sup>189</sup> A degradation of this important revenue stream brought about by lower commodity prices would have an alarming impact on the economic security of the United States agri-business sector.<sup>190</sup>

Congress' definition of critical infrastructure further includes United States military bases and installations.<sup>191</sup> Most CFIUS cases focus on geography and whether the desired company in the acquisition is near sensitive United States facilities.<sup>192</sup> CFIUS has repeatedly demonstrated its refusal to allow foreign acquisitions of companies within the vicinity of a United States defense facility.<sup>193</sup>

In early 2012, Chinese-owned Ralls Corporation acquired four wind farm projects in Oregon.<sup>194</sup> President Obama later ordered the divestiture of the wind farms after it was determined the farms were

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<sup>185</sup> James Van Horn, *Food Safety Scares and the Repercussions on the Agricultural Industry*, YAHOO CONTRIBUTOR NETWORK (July 24, 2008), <http://www.voices.yahoo.com/food-safety-scars-repercussions-agricultural-1703417.html>.

<sup>186</sup> See MADURI, *supra* note 180.

<sup>187</sup> *Id.*

<sup>188</sup> SHUANGHUI INTERNATIONAL, *supra* note 58; *Id.*

<sup>189</sup> UNITED STATES DEPARTMENT OF AGRICULTURE: NATIONAL STATISTICS FOR HOGS (2013), *available at* [http://www.nass.usda.gov/Statistics\\_by\\_Subject/result.php?89A35E7C-F175-31CF-9025-FEE9871DCD2B&sector=ANIMALS%20%26%20PRODUCTS&group=LIVESTOCK&comm=HOGS](http://www.nass.usda.gov/Statistics_by_Subject/result.php?89A35E7C-F175-31CF-9025-FEE9871DCD2B&sector=ANIMALS%20%26%20PRODUCTS&group=LIVESTOCK&comm=HOGS).

<sup>190</sup> See MADURI, *supra* note 180.

<sup>191</sup> See 50 U.S.C.A. app. § 2170 (West 2013).

<sup>192</sup> BLACK, *supra* note 5.

<sup>193</sup> See Daniel B. Pickard, Nova J. Daly & Usha Neelakantan, *CFIUS Forces Chinese Government-backed Firm to Divest Interest in Canadian Mining Company with US Operations*, LEXOLOGY (June 25, 2013), <http://www.lexology.com/library/detail.aspx?g=bf079b8b-4bba-459a-a8def71c1ec6505b>.

<sup>194</sup> *Ralls Corp. v. Comm. on Foreign Inv. in the U.S.*, 926 F.Supp.2d 71, 76 (2013).

located within a five-mile radius of the airspace used by the Naval Weapons Systems Training Facility in Boardman, Oregon.<sup>195</sup> In his executive order, President Obama wrote simply that he found “credible evidence that leads me to believe that Ralls Corporation through exercising control [of the wind farm projects] might take action that threatens to impair the national security of the United States.”<sup>196</sup>

Within the last three years, CFIUS rejected three attempts by Chinese companies to acquire United States mining interests located too closely to Fallon Naval Air Station and other military installations in Nevada.<sup>197</sup> In the case of the bid by Northwest Non Ferrous Investment Company to acquire Firstgold Corporation, CFIUS rejected the acquisition because of “serious, significant, and consequential national security” concerns that could not be overcome.<sup>198</sup> When CFIUS rejected the bid by Far-East Gold Resources Investment to acquire Nevada Gold Holdings, Far-East chose not to comply with the onerous mitigation agreements demanded by CFIUS, and instead willingly rescinded the transaction and divested themselves entirely of the mining company.<sup>199</sup> CFIUS found the acquisition and presence of another purchaser, state-owned China National Machinery Industry Corporation, a threat urgent enough to national security that the panel demanded not only complete divestiture but also prior authorization from the United States government before China National could enter the target property.<sup>200</sup>

The Shuanghui deal is identical to both Ralls and the mining company acquisitions, because Smithfield Foods Headquarters is located near the United States Navy’s oldest and largest shipyard, Norfolk Naval Shipyard. The Smithfield deal should have been rejected for this reason alone because it presented exactly the type of

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<sup>195</sup> *China’s Ralls Corp. Sues Obama Over Wind Farms*, JOURNAL OF TURKISH WEEKLY (Oct. 6, 2012), <http://www.turkishweekly.net/news/143150/china%C3%ADs-ralls-corp-sues-obama-over-wind-farms.html>.

<sup>196</sup> Order Signed by the President Regarding the Acquisition of Four U.S. Wind Farm Project Companies by Ralls Corporation, WHITE HOUSE OFFICE OF THE PRESS SECRETARY (Sept. 22, 2012), available at <http://www.whitehouse.gov/the-press-office/2012/09/28/order-signed-president-regarding-acquisition-four-us-wind-farm-project-c>.

<sup>197</sup> Pickard, et al., *supra* note 193.

<sup>198</sup> Memorandum from Firstgold Corporate Legal Counsel to Northwest Non-Ferrous International Company Ltd. (Dec. 14, 2009) (on file with author).

<sup>199</sup> Pickard, et al., *supra* note 193.

<sup>200</sup> *Id.*



profound national security risk that concerned the President and CFIUS upon review of Ralls and the mining company mergers: foreign owned facilities located within close proximity to military installations.<sup>201</sup> Additional equivalent risks lurk because the purchase of more than 460 pork farms and production relationships with over 2,000 independent pork farmers ensure near certainty that there are other military facilities that Shuanghui is now in close proximity to post-acquisition.<sup>202</sup>

The acquisition of any United States company by a foreign purchaser introduces some degree of risk of terrorism, and the Smithfield merger is no exception.<sup>203</sup> A broad array of ideologically driven groups have engaged in terrorism to further their own objectives, and terrorism has been practiced by both right and left-wing political parties, religious groups, and revolutionaries.<sup>204</sup> “Limited political terrorism” is classified and defined by the United States National Advisory Committee on Criminal Justice Standards and Goals as acts that are “generally one time only plots to make a political or ideological statement where the goal is not to overthrow the government, but to protest a governmental policy or action.”<sup>205</sup> This is the terrorist risk most likely present in the Smithfield acquisition. The many operational facilities Shuanghui has gained in the Smithfield acquisition create a convenient opportunity for the execution of a terrorist act by a determined party; because many Smithfield facilities are likely located in close proximity to United States military installations, the critical nature of the terrorist risk to national security is elevated.<sup>206</sup>

Because CFIUS’s findings are by law privileged and classified,<sup>207</sup> answers to the following questions are not forthcoming: (1) What kind of sensitive information can Shuanghui gather from Smithfield customers? (2) Are any of Smithfield’s customers located near a military installation? (3) Are any of Smithfield’s facilities located near military bases or other security agencies, raising questions about

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<sup>201</sup> BLACK, *supra* note 5.

<sup>202</sup> Geewax, *supra* note 18; *supra* Part III.

<sup>203</sup> See Pickard, et al., *supra* note 193.

<sup>204</sup> ENCYCLOPEDIA BRITANICA, *available at*

<http://www.britannica.com/EBchecked/topic/588371/terrorism> (last visited Nov. 21, 2013).

<sup>205</sup> *Crime Library: Types of Terrorism*, CRIME MUSEUM,

<http://www.crimemuseum.org/library/terrorism/typesOfTerrorism.html>.

<sup>206</sup> See MORAN, *supra* note 19.

<sup>207</sup> Byrne, *supra* note 9, at 901.

spying?<sup>208</sup> (4) Does Smithfield currently supply pork products to the military or other security agencies? Because the law will not compel the answers to these questions, assurances of sufficient investigation into the issues affecting critical U.S. military infrastructure will never exist.

#### *D. Control by a Foreign Government*

In consideration of the fourth relevant Exon-Florio factor, the President must determine the extent of the risk to national security associated with an acquisition controlled by a foreign government.<sup>209</sup> Statutory language within Exon-Florio specifically requires a formal review of mergers and takeovers by foreign companies controlled by foreign governments.<sup>210</sup> Congress, therefore, considers state-owned foreign organizations that attempt to acquire United States companies an increased risk to United States national security.<sup>211</sup>

In 1990, China National Aero-Technology Import and Export Corporation (“CATIC”) purchased Washington-based MAMCO Manufacturing.<sup>212</sup> The acquisition was subject to mandatory CFIUS review because the acquired technology had military applications.<sup>213</sup> After review, CFIUS took the rare step of recommending the President to block the acquisition and mandate the divestiture.<sup>214</sup> During its review, CFIUS discovered CATIC had purchased United States designed airplane engines allegedly for business purposes, but in actuality, CATIC provided them to the Chinese military to reverse engineer and ascertain the technological principles of the engines.<sup>215</sup> President George H. W. Bush, using the authority granted under Exon-Florio, ordered CATIC immediately to divest its acquisition of MAMCO Manufacturing.<sup>216</sup>

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<sup>208</sup> Geewax, *supra* note 18.

<sup>209</sup> 50 U.S.C.A. app. § 2170(f)(8) (West 2013).

<sup>210</sup> *See supra* Part IV.C.

<sup>211</sup> LARSON & MARCHICK, *supra* note 24, at 21.

<sup>212</sup> JACKSON, *supra* note 34, at 4.

<sup>213</sup> Nellan, *supra* note 32, at 531.

<sup>214</sup> *See id.*

<sup>215</sup> Nellan, *supra* note 32, at 532.

<sup>216</sup> Presidential Statement to the Congress on the China National Aero-Technology Import and Export Corporation Divestiture of MAMCO Manufacturing, Incorporated, PUB. PAPERS (Feb. 1, 1990).

In May 2010, Huawei Technologies Company (“Huawei”), a Chinese telecommunications company, purchased the patents and intellectual property of 3Leaf Systems.<sup>217</sup> 3Leaf Systems owned advanced technology that facilitated computer networking.<sup>218</sup> CFIUS was gravely concerned that Huawei had close ties to the Chinese People’s Liberation Army (“PLA”), the Taliban, and the Iranian National Guard.<sup>219</sup> CFIUS was further concerned the technology acquired from 3Leaf Systems would allow Huawei to disrupt or intercept United States telecommunications.<sup>220</sup> Initially, Huawei refused to comply with CFIUS’ divestiture request but shortly thereafter abandoned the deal.<sup>221</sup>

Shuanghui is similar to both CATIC-MAMCO and Huawei.<sup>222</sup> The Smithfield acquisition should have been rejected because the Chinese Government has close ties to Shuanghui and “effectively controlled” the company.<sup>223</sup> The top executive at Shuanghui International is a high-ranking member of the Chinese Communist Party, appointed by and serving at the will of the Party.<sup>224</sup> Further, the Smithfield purchase is funded in part by the Bank of China, and the Chinese government exerts significant control over the Bank of China in their funding matters.<sup>225</sup> According to Daniel Slane, a member of the United States-China Economic and Security Review Commission, “the Bank of China does not finance any transaction unless it is told to do so by the Chinese government.”<sup>226</sup>

Domestic business ownership by a government-controlled Chinese company is further risky because the PRC is a totalitarian state.<sup>227</sup> It is

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<sup>217</sup> \$2 million Deal=Big CFIUS Mistake, *supra* note 33.

<sup>218</sup> *Id.*

<sup>219</sup> *Id.*

<sup>220</sup> *Id.*

<sup>221</sup> See John Villasenor, *If You Want to Buy an American Company, Ask Permission, Not Forgiveness*, FORBES, Nov. 2012, available at <http://www.forbes.com/sites/johnvillasenor/2012/11/14/if-you-want-to-buy-an-american-company-ask-permission-not-forgiveness/> (discussing that Huawei chose to divest itself of the proposed deal rather than comply with the Government’s requests pertaining to CFIUS approval).

<sup>222</sup> See *infra* Part V.D.

<sup>223</sup> WYATT, *supra* note 130.

<sup>224</sup> *Id.*

<sup>225</sup> *Id.*

<sup>226</sup> *Id.*

<sup>227</sup> *Enforcement of Federal Espionage Laws: Hearing Before the Subcomm. on Crime, Terrorism, and Homeland Sec. of the House Comm. on the Judiciary 5* (2008)

a politically unchallenged regime—unwilling to adopt political reforms—with a long history of corruption within its ranks.<sup>228</sup> The development of the private sector within China's economy has motivated government officials to misuse their power, and business deals rarely involve participation without corruption.<sup>229</sup> Corrupt behavior is unaccompanied by significant repercussions, since the odds of a government official going to jail for corruption are less than three percent.<sup>230</sup> Bribery, kickbacks, theft, and misspending of public funds are extraordinarily costly and account for at least three percent of China's annual GDP.<sup>231</sup> Ideally, the United States should engage in business relations with reliable and ethical business partners, and allowing domestic acquisition by a company controlled by a corrupt government establishment undermines this important principle.<sup>232</sup>

#### *E. Additional Factors That Threaten National Security*

Finally, the President and CFIUS must consider other factors they determine may appropriately threaten national security.<sup>233</sup> One such factor is the clear threat to the United States of foreign espionage activities.<sup>234</sup> For many years, United States counterintelligence experts have recognized a rapidly growing espionage threat from China, the result of an ever-present frenetic race to technological development.<sup>235</sup> In today's global economy, "technology is as vital as political intelligence."<sup>236</sup> China is the current "perceived foreign threat" to the United States<sup>237</sup> because of its commonly known and widespread efforts to acquire United States military technology and other

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[hereinafter *Hearings*] (statement of Larry M. Wortzel, Chairman, U.S.-China Econ. and Sec. Review Comm'n).

<sup>228</sup> MINXIN PEI, *CORRUPTION THREATENS CHINA'S FUTURE* 4 (2007).

<sup>229</sup> See Murong Xuecun, *No Roads Are Straight Here*, N.Y. TIMES (May 8, 2012), available at <http://www.nytimes.com/2012/05/09/opinion/no-roads-are-straight-here.html>.

<sup>230</sup> PEI, *supra* note 228, at 5.

<sup>231</sup> *Id.* at 4-5.

<sup>232</sup> See *supra* Part V.A.

<sup>233</sup> 50 U.S.C. app. § 2170(f)(11) (West 2013).

<sup>234</sup> Pauline Arrillaga, *China's Spying Seeks Secret US Info*, (Oct. 25, 2013, 10:48 PM), available at <http://hutchnews.com/Nation/China-s-spying-seeks-secret-US-info>.

<sup>235</sup> *Id.*

<sup>236</sup> *Id.*

<sup>237</sup> DAVIDOFF, *supra* note 4.

classified information through the use of espionage.<sup>238</sup> In 2007, the United States-China Economic and Security Review Commission concluded, “China’s espionage activities are the single greatest threat to United States technology.”<sup>239</sup> In 2011, Joel Brenner who served as the United States National Counterintelligence Executive said, “The Chinese espionage threat has been relentless recently... we’ve never seen anything like it. Some of it’s public. Some of it’s private. And then some of it lies in that ambiguous area in between.”<sup>240</sup> The “spies” of today are white-collar professionals including professors, engineers, and entrepreneurs.<sup>241</sup> Businessmen export legitimate commodities while also shipping restricted technology, munitions, and defense-related equipment.<sup>242</sup>

Some individuals engage in espionage activity against the United States at the discretion of government handlers, supplying information for state-sponsored research.<sup>243</sup> One way in which the PRC engages in espionage is by using private civilian companies who partner with American businesses to acquire advanced technology and economic data.<sup>244</sup> During a four-month period in late 2002, five Chinese businessmen were accused of unlawfully transporting computer equipment and trade secrets regarding the development of nuclear weapons from California to China.<sup>245</sup> Other cases involve trade secrets leaked by individuals previously employed by vast United States corporations, including Motorola, Boeing, and Dow.<sup>246</sup> In one case, the stolen secrets involved technology related to the development of organic pesticides and other advancements applicable to agribusiness.<sup>247</sup> This is a tremendous financial burden for American companies to bear. This kind of loss robs companies of the investments made to fund their developments, and places them at a

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<sup>238</sup> ARRILLAGA, *supra* note 234.

<sup>239</sup> *Hearings, supra* note 227, at 2 (statement of Larry M. Wortzel, Chairman, U.S.-China Econ. and Sec. Review Comm’n).

<sup>240</sup> ARRILLAGA, *supra* note 234.

<sup>241</sup> *Id.*

<sup>242</sup> *Id.*

<sup>243</sup> *Id.*

<sup>244</sup> *Hearings, supra* note 227, at 4 (statement of Larry M. Wortzel, Chairman, U.S.-China Econ. and Sec. Review Comm’n).

<sup>245</sup> *Chinese Intelligence Operations in the United States*, CHINA WATCH CANADA (June 28, 2013), <http://chinawatchcanada.blogspot.com/2013/06/chinese-intelligence-operations-in.html>.

<sup>246</sup> ARRILLAGA, *supra* note 234.

<sup>247</sup> *Id.*

severe financial disadvantage.<sup>248</sup> It undermines the economic health of domestic companies while simultaneously weakening national economic security from the loss of proprietary information.<sup>249</sup>

In 2011, the Chinese aviation firm AVIC International acquired the United States aviation company, Teledyne Continental.<sup>250</sup> Teledyne was a general aviation piston engine manufacturing business.<sup>251</sup> AVIC is the international branch of China Aviation Industry Corporation, and has ties to China's Ministry of Aerospace Industry.<sup>252</sup> AVIC filed a voluntary notice with CFIUS, and after agreeing to certain mandated mitigation agreements, was approved by CFIUS to complete their acquisition of Teledyne.<sup>253</sup>

Shuanghui is distinguished from the AVIC-Teledyne acquisition—and should have been rejected by CFIUS—because the relationship between AVIC and China's Ministry of Aerospace is transparent and clarified,<sup>254</sup> minimizing concern of foreign state-control. It is unclear exactly how close Shuanghui's relationship is with the Chinese government, and this does nothing to dispel potential suspicions of adverse government control or espionage-related motivations.<sup>255</sup> Shuanghui is further distinguished from AVIC because AVIC allayed Congressional suspicion of ulterior motives for acquiring the United States based company by demonstrating the legitimacy of their motivation: (1) AVIC spent two years on the Fortune 500 list prior to completing its acquisition of Teledyne,<sup>256</sup> and (2) AVIC has a solid reputation within the aviation industry as a company with quality aviation products.<sup>257</sup> Shuanghui is decisively differentiated here because the company lacks credibility as a legitimate business

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<sup>248</sup> See *supra* Part I.

<sup>249</sup> See *supra* Part I.

<sup>250</sup> Press Release, Teledyne Technologies, Teledyne Completes its Sale of Piston Business (Apr. 19, 2011) (on file with author).

<sup>251</sup> *Id.*

<sup>252</sup> *Teledyne-Continental Bought by Chinese Interests*, AVWEB (Dec. 14, 2010), [http://www.avweb.com/avwebflash/news/TeledyneContinentalMotors\\_SoldToTechnology\\_AVICInternational\\_China\\_203788-1.html](http://www.avweb.com/avwebflash/news/TeledyneContinentalMotors_SoldToTechnology_AVICInternational_China_203788-1.html).

<sup>253</sup> Nellan, *supra* note 32, at 526.

<sup>254</sup> *Id.* at 533.

<sup>255</sup> See *supra* Part V.D.

<sup>256</sup> Nellan, *supra* note 32, at 533.

<sup>257</sup> See Press Release, Teledyne Technologies, Teledyne Completes its Sale of Piston Business, *supra* note 250 (Most companies that are "leading provider[s]" within their industry have solid reputations regarding their ability to put quality products into the marketplace.).

enterprise that performs to United States standards of commercial ethics and principles.<sup>258</sup> Further, Shuanghui has a tarnished reputation within the pork industry because of its own embarrassing participation in the food scandal involving carcinogen adulterated pig feed.<sup>259</sup>

#### VI. LEGISLATING A SOLUTION TO AVOID A RECURRENCE OF SMITHFIELD-SHUANGHUI

In September 2013, the United States Government allowed Shuanghui International to acquire Smithfield Foods in spite of the acquisition's widely known national security risk.<sup>260</sup> In the absence of information regarding the review process and justification for approving the purchase, the American public can only assume that those on the review panel found the economic benefit of FDI outweighed the risk of harm to national security.<sup>261</sup> But that will never be definitively confirmed.<sup>262</sup>

The statutorily mandated duty to “unequivocally” foster economic benefits associated with open investment “*consistent with the protection of the national security*”<sup>263</sup> requires a comprehensive balancing act by those who sit in review of a proposed acquisition.<sup>264</sup> The stakes are high and the erroneous approval of a foreign purchase creates a dangerous situation for the United States.<sup>265</sup> It is an extremely risky problem with little precedent, but the goal is clear as set forth by American law: protect national security.<sup>266</sup>

Future situations similar to those created by the mistaken approval of Smithfield-Shuanghui can be avoided through new legislation. One possible legislative solution is to require CFIUS to exercise a higher degree of scrutiny for foreign acquisitions involving food production. The importance of a safe food supply adequate to meet the needs of the American People cannot be overstated.<sup>267</sup> Current law allows

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<sup>258</sup> See MADURI, *supra* note 180.

<sup>259</sup> See Thomas & Oran, *supra* note 61.

<sup>260</sup> See *supra* Part I.

<sup>261</sup> See *supra* Part IV.A.

<sup>262</sup> See *supra* Part IV.A.

<sup>263</sup> Exec. Order No. 11858, 40 Fed. Reg. 20263 (May 7, 1975), reprinted as amended in 50 U.S.C. app. §2170 (2008) (emphasis added).

<sup>264</sup> See *supra* Part II.

<sup>265</sup> See *supra* Part I.

<sup>266</sup> See *supra* Part IV.A.

<sup>267</sup> See *supra* Part V.A.

CFIUS great discretion in its determination of which acquisitions are reviewed and which are not,<sup>268</sup> but legislative overhaul should mandate an exhaustive investigation into every proposed foreign acquisition of an American food production company. This would ensure that CFIUS takes a hard, critical look into every possibility that foreign control of a domestic food company could affect the safety and adequacy of our food supply. The new legislation should remove from CFIUS *only* the discretion to review or not to review, and retain for CFIUS all other authority originally granted by the statute. This legislative solution would be simply an additional layer of insurance, designed to uphold and safeguard national security.

A second legislative solution that would avoid the same misguided outcome as occurred in the Smithfield acquisition is to require that effort be made by the seller of an American company to identify a domestic buyer prior to entering into a similarly crafted agreement with a foreign company that includes possible risk to national security. Under this policy, finding an American buyer, if possible, would eliminate the need for CFIUS review and the problematic balancing of FDI and national security.<sup>269</sup> The United States would reap the benefits of a free market economy and new capital investment, without the risks associated with FDI.<sup>270</sup> As such, the inherent benefits of investment are fostered, and national security is preserved, as required under law.<sup>271</sup> Although the government has the authority to intervene in matters between private parties to protect national security, it must do so delicately so as to preserve individual private rights as much as possible. To that end, this legislative solution (that may be perceived to tread on private rights) should apply only to acquisitions involving agri-business that implicate a threat to the United States food supply.

Finally, new legislation should be enacted concerning the vast discretion given to the President in his decision to review and approve or not. Current law does not allow a President to reverse his decision or change his mind once a review has taken place.<sup>272</sup> However, an *initial* review may occur at any time in the future post-acquisition, and the President retains all of his authority to divest for reasons of

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<sup>268</sup> See *supra* Part IV.B.

<sup>269</sup> See *supra* Part II.

<sup>270</sup> See *supra* Part II.

<sup>271</sup> See *supra* Part II.

<sup>272</sup> LARSON & MARCHICK, *supra* note 24, at 9.



national security if he so chooses.<sup>273</sup> Legislation should be enacted that addresses the acquisitions that were never reviewed. The law should require that a cursory mini-review of all *completed* foreign acquisitions that CFIUS, under its discretion, *initially chose not to review* must occur when a new administration takes office. This would force a new president to briefly consider whether the acquisition contains enough risk to national security to warrant an official review or not. The purpose of this is two-fold: it upholds the original legislative intent of the provision that retains the possibility of an initial review at any time,<sup>274</sup> and requires a second look by the Executive Branch that considers the ramifications of a foreign acquired American company.

While each of these legislative solutions could potentially create new administrative burdens and restrictions on the free market, the need to protect our food supply prevails. These solutions are reasonable and necessary in the face of foreign threat that endangers the national security of the United States.

## VII. CONCLUSION

Most foreign acquisitions of domestic companies are statutorily required to undergo review by CFIUS during which time the legislative panel determines what impact the acquisition could have on United States national security.<sup>275</sup> To faithfully advance the goals of Exon-Florio, the Byrd amendment, and FINSAs, CFIUS must consider and mitigate all potential risks to national security prior to Executive approval.<sup>276</sup> CFIUS must ensure proper scrutiny is given to every proposed foreign acquisition, and those proposals with merely a credible finding of threat to national security must be rejected, even when faced with the promise of highly coveted FDI in a period of economic reconstruction.<sup>277</sup>

The Smithfield acquisition encompassed fundamental threats to the nation's security including risks of a contaminated and compromised food supply, stolen technologies, foreign government control, terrorism, and espionage.<sup>278</sup> Although Shuanghui represented nearly

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<sup>273</sup> *Id.*

<sup>274</sup> *See supra* Part IV.B.

<sup>275</sup> *See supra* Part IV.

<sup>276</sup> *See supra* Part IV.

<sup>277</sup> *See supra* Part II.

<sup>278</sup> *See supra* Part V.

\$5 billion of cash investment,<sup>279</sup> the enticement of new money should have been rejected in the face of obvious and unmistakable danger that threatened the safety of our nation. Once given, however, the President's approval may not be rescinded, but simple legislative solutions exist that would curtail the possibility of a future situation similar to Smithfield-Shuanghui.

The acquisition of Smithfield Foods by Shuanghui International should not have been allowed. We the People of the United States deserve nothing less than the resolute action of the government, undertaken to safeguard and fortify the security of our country.<sup>280</sup>

NICHOLA GARVER KREBSBACH<sup>281</sup>

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<sup>279</sup> SHRUTI & OLSON, *supra* note 1.

<sup>280</sup> *See* U.S. CONST. pmbi.

<sup>281</sup> J.D. Candidate, San Joaquin College of Law, 2016. Many thanks to my brilliant faculty advisor, Christine Goodrich, J.D. Also thank you to David Benton and the rest of the SJALR 2013-14 Editorial Board. I am fortunate to know brilliant women, and must give thanks to Nancy Lynch and Jessica Benevento for their valuable input. Thank you to all of my family and friends for their support throughout the writing process, but especially to Mark, Jacob, Clara and Lila; you four are the best part of every day.