

Learning from Others: How CFIUS can be Applied in the Education Sector to Control Influence from Foreign Investments

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ABSTRACT

Money flowing from foreign entities into U.S. universities has rapidly grown recently, and so too have been the concerns over undue influence. The U.S. Senate, FBI, university interest groups, and now the Department of Education have shared their concerns that unchecked foreign funding in the United States' academic sector can influence a university's curriculum, grant improper access to sensitive research, and even stifle free speech.

The stakes are high. The Department of Education credits the strength of both the U.S. economy and national security to its unencumbered universities. The U.S. higher education system conducts a significant portion of the total research and development in the United States. Critical technologies such as nuclear power, defense equipment, and telecommunications are developed and tested at university research centers. Confucius Institutes within the United States have chilled discourse that critiques the Chinese government. Nuclear equipment has been improperly released from school research facilities to foreign countries.

Facing this modern and growing problem is a 22-year-old amendment to a 55-year-old statute. Section 117 of the Higher Education Act requires certain disclosures of foreign gifts, contracts, and donations. Institutional compliance with this statute has been poor due to lax enforcement and low penalties, resulting in large gaps in transparency of who is funding and influencing the U.S. higher education system.

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This Note looks to the regulations governing the business sector to find a solution to strike a balance between innocuous foreign investment and national security—the Committee on Foreign Investment in the United States (CFIUS). CFIUS could provide a gateway mechanism that blocks any funds that could pull the U.S. education system away from the national interest and quell the growing concerns. This Note analyzes whether universities are currently exposed to CFIUS reach when accepting foreign donations and grants, and where any foreign funding is out of CFIUS’ scope, advocates for the regulatory and statutory changes necessary to adequately protect the higher education system.

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INTRODUCTION

Money from foreign entities has flown into U.S. universities at a rapidly increasing rate. From 2014 to 2019, annual totals of foreign funding increased twofold to \$3.65 billion.² This money can buy influence.³ It can buy access.⁴ It may even stifle free speech.⁵ Higher institutes of learning are a crucial resource for the economic strength and security of the United States. They shape the minds of future participants of the U.S. market and contribute over 10% of the nation's total research and development.⁶ A balance, therefore, must be made between incentivizing a vital source of funding and protecting academic freedom and sensitive research. Joining a chorus of concern from the U.S. Senate, FBI, and university interest groups, the U.S. Department of Education expressed serious doubts over the current legislation and regulation that aim to curb the undue influence of foreign funding in an October 2020 report.⁷ University requirements to disclose foreign gifts and donations have been inadequate, with lax enforcement and loopholes reinforcing an acceptance of noncompliance.⁸ Even strict export controls have failed to prevent the transfer of sensitive technologies that may be used for nuclear proliferation or terrorism.⁹

Missing from the education system's protections is a gatekeeping mechanism that can prevent foreign investment that could limit academic freedom and grant improper access to sensitive research. Looking toward the business world for an example, the Committee on Foreign Investment in the United States ("CFIUS") functions as a gatekeeper, allowing innocuous foreign funding while halting investments that raise serious national security concern.¹⁰ CFIUS review has not yet applied to any investment made to a U.S. university, but given the overlapping concerns of foreign influence, the

² U.S. DEP'T OF EDUC., SECTION 117 OF THE HIGHER EDUCATION ACT – PUBLIC RECORDS: FOREIGN FUNDING DISCLOSURE REPORTS (2021).

³ U.S. DEP'T OF EDUC., OFFICE OF GEN. COUNS., INSTITUTIONAL COMPLIANCE WITH SECTION 117 OF THE HEA OF 1965 2 (2020).

⁴ See U.S. DEP'T OF JUST., FBI, HIGHER EDUCATION AND NATIONAL SECURITY: THE TARGETING OF SENSITIVE, PROPRIETARY AND CLASSIFIED INFORMATION ON CAMPUSES OF HIGHER EDUCATION 9-10 (2011).

⁵ STAFF OF S. PERMANENT SUBCOMM. ON INVESTIGATIONS, 116TH CONG., CHINA'S IMPACT ON THE U.S. EDUCATION SYSTEM 22 (2019).

⁶ See William Beasley, *Thousand Talents Program Exposes New Legal Risks for Universities*, BAKER DONELSON (July 15, 2020), <https://www.bakerdonelson.com/thousand-talents-program-exposes-new-legal-risks-for-universities>.

⁷ See U.S. DEP'T OF EDUC., *supra* note 2 at 13.

⁸ *Id.*

⁹ See, e.g., U.S. DEP'T. OF COM., BUREAU OF INDUS. AND SEC., DON'T LET THIS HAPPEN TO YOU! 39 (2020).

¹⁰ See Guidance Concerning the National Security Review Conducted by the Committee on Foreign Investment in the United States, 73 Fed. Reg. 74567-68 (December 8, 2008).

Committee may wish to interpret its authorizing statute to cover U.S. universities as well. If unable, the statute should be amended to cover foreign funding made to universities.

This Note will begin with a background on the history and practice of foreign funding in universities, as well as issues that can arise from those contributions. This background will also outline current protections against undue foreign influence in the education sector and their effectiveness. It will then compare the national security concerns with corresponding protective measures regarding foreign investment between academic institutions and U.S. businesses. With the understanding of the regulations affecting businesses, this Note will then explore how those regulatory powers could be used by the U.S. government to address undue foreign influence in academia. This Note will analyze what types of foreign payments to universities fall within and outside the scope of the current CFIUS regulations, as well as what changes would be necessary to completely incorporate this spending into CFIUS' purview. The Note will end with recommendations of specific amendments to CFIUS' authorizing statute that would allow for the incorporation of universities into CFIUS' authority.

I. BACKGROUND

A. *History and Methods of Foreign Spending in the U.S. Higher Education System*

Before the discussion of foreign funding specifically, it is important to understand the complexities of funding a university generally. The cashflow funding higher education in the United States is not a simple stream, but rather a complicated series of channels from a variety of sources.¹¹ Student tuition is the most direct and apparent, but often only covers around 20% of the total funding needs of a university.¹² Universities also derive income from contracts or grants from the U.S. government and non-federal private

¹¹ To grasp the proportionality of the various sources of money, breakdowns of revenue sources for universities shows that money received for research can match or even exceed the money received for all tuition. As an example, Harvard received 17% of its revenue from research as well as tuition. *See e.g.*, THOMAS J. HOLLISTER & PAUL J. FINNEGAN, HARV. UNIV., FINANCIAL OVERVIEW 6 (2020), https://finance.harvard.edu/files/fad/files/fy20_harvard_financial_report.pdf. For a public university example, *see 2017 Chancellor's Report*, N. CAROLINA STATE UNIV., <https://web.ncsu.edu/annual-report/2016-2017/financials/index.html> (last visited Feb. 22, 2022).

¹² *See, e.g.*, HOLLISTER & FINNEGAN, *supra* note 10 at 6.

entities like Intel.¹³ Common among these non-federal entity agreements are material transfer agreements, which involve the transfer of biological materials, equipment, or data, and sponsored research agreements, which provide funding in exchange for reports or certain deliverables.¹⁴ The efficacy of university research is of particular concern since that research contributes 13% of the country's total research and development spending and may involve areas of great national concern, like nuclear power or sensitive technologies.¹⁵ Additionally, gifts, in the form of cash, securities, and real property, are donated to universities and are motivated by philanthropic intent where no service in exchange is expected.¹⁶ However, donors may restrict the usage of the gift to specific areas.¹⁷

For some of the larger universities, like Harvard and MIT, one source of funding dwarfs any other source by comparison: the endowment fund. Endowment funds are investment funds, often managed by a subsidiary of the related university, which receives capital to be invested by the investment fund, whose returns are then allocated to the university.¹⁸ Endowed funds can be unrestricted, in which the university has complete discretion to use gains of the investment in any way, or restricted, in which endowed funds have their earnings expended only where the donor specifies.¹⁹ 80% of Harvard's endowed funds are restricted.²⁰

Foreign countries and entities have been participating in this donation, grant, and investment market for decades.²¹ Foreign spending in U.S. universities has increased rapidly in the past few years: in 2014, foreign spending totaled \$1.77 billion, then rose to \$2.45 billion in 2017, and reached

¹³ See, e.g., *External Research Funding Sources*, CALIFORNIA STATE UNIV., <https://www.csustan.edu/sites/default/files/honors/documents/ExternalResearchFundingSources.pdf> (last visited Feb. 25, 2022).

¹⁴ See Dov Greenbaum, *Academia to Industry Technology Transfer: An Alternative to the Bayh-Dole System for Both Developed and Developing Nations*, 19 *FORDHAM INTEL. PROP. MEDIA & ENT. L.J.* 331, 361 (2008).

¹⁵ See Beasley, *supra* note 5; see also U.S. DEP'T OF EDUC., *supra* note 2 at 20.

¹⁶ See e.g., *Gift Acceptance, Counting and Reporting Policy*, CARNEGIE MELLON UNIV., <https://www.cmu.edu/policies/administrative-and-governance/gift-acceptance.html> (last visited Feb. 20, 2022).

¹⁷ *Id.*

¹⁸ See James Chen, *Endowment Fund*, INVESTOPEDIA (JUNE 3, 2021), <https://www.investopedia.com/terms/e/endowment-fund.asp>.

¹⁹ *Id.*

²⁰ HOLLISTER & FINNEGAN, *supra* note 10 at 31.

²¹ As an example, Oman, Kuwait, and United Arab Emirates funding helped Georgetown University establish the Center for Contemporary Arab Studies in 1975. See U.S. DEP'T OF EDUC., *supra* note 2 at 4.

Our Mission, GEORGETOWN UNIV. CTR. FOR CONTEMP. ARAB STUD., <https://ccas.georgetown.edu/about/mission/> (last visited Feb. 26, 2022).

up to \$3.65 billion in 2019.²² Foreign gifts and donations to U.S. universities have been rightly praised for their contribution towards student aid, which increases access to higher education for many American citizens, its promotion of international collaboration, and its direct aid to ongoing research of areas of global interest.²³ However, unchecked foreign investment into U.S. universities has led to great consternation from American professors, academic interest groups, and most vocally, the U.S. government.²⁴

B. Problems with Non-transparent Foreign Spending

Unchecked foreign investment creates three causes for concern: it may restrict academic freedom and push a curriculum against the national interest, it may direct research resources away from U.S. interests towards foreign interests, and it may cause improper sharing of sensitive technologies.

American higher education is seen as a “critical human and technological strategic resource.”²⁵ It is the view of the Department of Education that the U.S. higher education system contributes significantly to economic and national security because it draws its strength from a firm commitment to academic freedom, free inquiry, and free speech.²⁶ Foreign donations and partnerships may impinge on this freedom.²⁷ An example is China’s spending and sponsorship of Confucius Institutes. To establish a Confucius Institute, a Chinese government office within their Ministry of Education (“Hanban”) creates a partnership contract with a U.S. institution to set up classrooms for Chinese language and cultural education.²⁸ China

²² U.S. DEP’T OF EDUC., *supra* note 1.

²³ See Sue Cunningham, *Foreign Gifts to U.S. Colleges and Universities: Why They Matter*, INSIDE HIGHER ED (March 9, 2020), <https://www.insidehighered.com/views/2020/03/09/generosity-foreign-donors-should-be-celebrated-opinion>.

²⁴ See *On Partnerships with Foreign Governments: The Case of Confucius Institutes*, AM. ASS’N OF UNIV. PROFESSORS (June 2014), <https://www.aaup.org/report/confucius-institutes>; U.S. DEP’T OF EDUC., *supra* note 2 at 2.

²⁵ U.S. DEP’T OF EDUC., *supra* note 2 at 6.

²⁶ *Id.* at 4.

²⁷ This concern is not unique to the United States. A UK study showed that “evidence that foreign donations have substantially and demonstrably affected the academic activities of many universities, and their handling of subjects designated strategically important.” At some universities, “the choice of teaching materials, the subject areas, the degrees offered, the recruitment of staff, the composition of advisory boards and even the selection of students are now subject to influence from donors.” ROBIN SIMCOX, CTR. FOR SOCIAL COHESION, A DEGREE OF INFLUENCE: THE FUNDING OF STRATEGICALLY IMPORTANT SUBJECTS IN UK UNIVERSITIES 12-13, 163 (March 16, 2019).

²⁸ STAFF OF S. PERMANENT SUBCOMM. ON INVESTIGATIONS, *supra* note 4 at 2.

provides money for start-up costs, books, as well as the approval of the teachers.²⁹ Since 2006, the Senate Subcommittee on Investigations determined China directly provided over \$158 million in funding to U.S. schools for Confucius Institutes.³⁰ According to the Senate’s Permanent Subcommittee on Investigations for the Committee on Homeland Security and Governmental Affairs, this program sponsorship is a form of “soft power” designed to portray China as approachable and compassionate and to change the impression that China is an economic and security threat.³¹ Certain issues, such as Taiwan or the massacre at Tiananmen Square, are prohibited topics of discussion.³² Teachers are under threat of termination if they speak out against the national (Chinese) interest.³³ Foreign money that permits third-party control of the education at U.S. universities is counter to the historic institutional autonomy of U.S. universities, pushes a state agenda, and erodes a significant contributing factor to U.S. economic and national security—academic freedom.³⁴

Foreign money can also spur U.S. research in sensitive areas for the donator’s benefit. For example, two Chinese companies are funding a U.S. university research project “involving crowd surveillance and predictive behavior technology, which the Chinese government could potentially harness for nefarious purposes.”³⁵ Huawei, a Chinese corporation under heavy influence from their government, made agreements and gifts to multiple U.S. universities that “strategically concerned sensitive topics like nuclear science or those related to competitive industries like robotics, semiconductors, and online cloud services.”³⁶ Foreign funding may also grant improper access to sensitive research. According to the FBI’s Counterintelligence Strategic Partnership Unit, foreign entities can steal valuable intellectual property and sensitive technologies by funding joint research projects with stipulations to place their own recruits in positions with little to no oversight from the university.³⁷

Universities are not the only facet of higher education that is targeted in this manner. Individual researchers and professors may also be subject to foreign influence, which can lead to the same ill effects. China’s Thousand

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.* at 1.

³² *Id.* at 55.

³³ *Id.* at 2.

³⁴ See *On Partnerships with Foreign Governments*, *supra* note 23.

³⁵ Press Release, U.S. Dep’t. of Educ., U.S. Department of Education Uncovers Vast Underreporting of Foreign Gifts and Contracts by Higher Education Institutions (Oct. 20, 2020) (available at <https://content.govdelivery.com/accounts/USED/bulletins/2a6e157>).

³⁶ U.S. DEP’T OF EDUC., *supra* note 2 at 20.

³⁷ See U.S. DEP’T OF JUST., *supra* note 3 at 9-10.

Talents Plan “incentivizes individuals engaged in research and development in the United States to transmit the knowledge and research they gain here to China in exchange for salaries, research funding, lab space, and other incentives.”³⁸ According to a 2020 report from the Government Accountability Office (the “GAO”), researchers may be influenced by financial conflicts of interests, as well as non-financial conflicts of interest, like foreign appointments.³⁹

C. Current Protections Against Undue Foreign Influence and their Effectiveness

Facing this modern, growing problem is a 22-year-old amendment to a 55-year-old statute. Section 117 of the Higher Education Act (“HEA”) requires universities to report any contracts, gifts, or donations from foreign entities, but only when they total \$250,000 in aggregate within the calendar year.⁴⁰ Institutional compliance with this statute has been poor. Fewer than 3% of eligible institutions reported receiving foreign gifts or donations.⁴¹ Those that do report often do so inadequately.⁴² After prompting investigations into 12 universities, the Department of Education discovered \$6.5 billion in undisclosed foreign gifts and contracts.⁴³ The underreporting can be credited to “lax” federal enforcement as well as universities’ use of intermediaries, such as research, endowment, or alumni foundations, which may not be subject to the disclosure requirements of Section 117.⁴⁴ Additionally, the procedure after a university is discovered to have violated 10 U.S.C. § 1011f is a civil suit and, only when it can be shown that the violation was knowing or willful, a fine for the costs of investigation and enforcement.⁴⁵

³⁸ STAFF OF S. PERMANENT SUBCOMM. ON INVESTIGATIONS, *supra* note 4 at 1. As an example, on May 8, 2020, a professor at Emory university researching Huntington’s Disease pleaded guilty for failing to disclose that he received \$500,000 in foreign income while also conducting the same research in two Chinese universities. *See* Press Release, Dep’t of Just., Former Emory University Professor and Chinese “Thousand Talents” Participant Convicted and Sentenced for Filing a False Tax Return, (May 11, 2020) (available at <https://www.justice.gov/opa/pr/former-emory-university-professor-and-chinese-thousand-talents-participant-convicted-and>).

³⁹ *See* U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-21-130, AGENCIES NEED TO ENHANCE POLICIES TO ADDRESS FOREIGN INFLUENCE 4 (2020).

⁴⁰ 20 U.S.C. § 1011f.

⁴¹ *China’s Impact on the U.S. Education System: Hearing before the Permanent Subcomm on Investigations of the S. Comm. on Homeland Sec. and Gov’t Affs.*, 116th Cong. 3 (2019) (statement of Mitchell M. “Mick” Zais, Deputy Sec’y of the U.S. Dep’t of Educ.).

⁴² U.S. DEP’T OF EDUC., *supra* note 2 at 7.

⁴³ *Id.* at 9.

⁴⁴ *Id.* at 13; U.S. DEP’T OF JUST., *supra* note 3 at 3.

⁴⁵ 20 U.S.C. § 1011f(f).

That is not to imply that the stakes are low for universities. 20 U.S.C. § 1094 requires institutions of higher education to create a Program Partnership Agreement (“PPA”) with the Department of Education to be eligible for any program under the Student Assistance subchapter that provides federal funding to universities.⁴⁶ The PPA may be terminated if an institution violates the requirements of § 1094, which include an obligation to complete any “Federal postsecondary institution data collection effort, as designated by the Secretary.”⁴⁷ In an effort to address the “widespread underreporting” of foreign gifts and donations, the Department issued a November 2020 notification of interpretation in which it stated that those disclosure submissions are to be considered “any other Federal postsecondary institution data collection effort, as designated by the Secretary.”⁴⁸ According to the Department’s Principal Deputy General Counsel, this will grant the Department the “authority to implement a range of corrective measures for an institution that violates its PPA, including termination of the institution’s Title IV participation.”⁴⁹

An additional safeguard exists specifically to combat the release of sensitive technologies and information. Universities operate under export controls, which offer protection against the release of sensitive materials in three main ways: (1) by preventing the physical exportation of sensitive goods—like research equipment or test samples—to certain foreign countries; (2) by preventing the release of research that should not be published publicly; and (3) by regulating how foreign persons can view sensitive technologies and any relevant sensitive information (called “deemed exports”).⁵⁰ Despite severe penalties for violations, sensitive technologies still leak.⁵¹ The GAO has long identified vulnerabilities in these university export controls, particularly due to inconsistent reporting requirements, a lack of university-specific guidance and resources for addressing threats, and

⁴⁶ 20 U.S.C. § 1094(a).

⁴⁷ 20 U.S.C. § 1094(a)(17).

⁴⁸ The Department’s Enforcement Authority for Failure to Adequately Report Under Section 117 of the Higher Education Act of 1965, as Amended, 85 Fed. Reg. 72,567, 72,568 (Nov. 13, 2020) (to be codified at 34 C.F.R. pt. 668).

⁴⁹ *Id.*

⁵⁰ 15 C.F.R. § 734.13(a)(3) (2016).

⁵¹ Violations can be found in Bureau of Industry and Security’s “Don’t Let This Happen to You!” reports. For example, two oscilloscopes, which are controlled for nuclear non-proliferation and/or anti-terrorism reasons, were exported from the US to a Chinese university. See U.S. DEP’T. OF COM., *supra* note 8 at 39.

inconsistent interpretation of export control regulations by the Department of Defense (“DOD”).⁵²

Regarding the problem of individual researchers or professors being targeted for undue influence, some granting agencies will condition funding on disclosures from the individual recipients to determine any conflicts of interest.⁵³ Of the top five granting agencies in the United States, only three require these disclosures to include financial interests.⁵⁴ The two that do require disclosure of financial interests are the Department of Energy (“DOE”) and the DOD.⁵⁵ While some agencies use the disclosures to assess foreign influence, the DOD and National Science Foundation use them only to assess the capacity of the researcher.⁵⁶ None of the agencies account for non-financial conflicts of interest.⁵⁷ It is important to note that these protective controls only apply to projects that receive federal funding; those researchers who do not seek federal funding due to exposure of foreign ties may be more reliant on foreign funding as a result.⁵⁸

D. Comparison between National Security Measures on Foreign Investment for U.S. Businesses and Academic Institutions

The balancing act between incentivizing foreign aid to drive innovation and protecting against undue foreign influence and access is not unique to higher education. Neither is the trend of significant investments coming from China. These considerations are closely paralleled with U.S. businesses, where foreign investment can create jobs and wealth but may lead to control by foreign nationals, redirection of production away from U.S. interests, or the improper release of sensitive technologies to non-nationals to the detriment of national security. With such similarities between the two areas, it is worth considering the methods employed to strike this balance for U.S. businesses and to determine whether they can be applied to higher education.

Similarly to academic institutions, U.S. businesses operate under export controls to ensure that transfers of items, technology, or services are

⁵² See U.S. GOV'T ACCOUNTABILITY OFF., GAO-20-394, EXPORT CONTROLS: STATE AND COMMERCE SHOULD IMPROVE GUIDANCE AND OUTREACH TO ADDRESS UNIVERSITY-SPECIFIC COMPLIANCE ISSUES 21-29 (2020).

⁵³ See, e.g., *Financial Conflict of Interest*, NAT'L INST. OF HEALTH (Jan. 10, 2020), <https://grants.nih.gov/grants/policy/coi/index.htm>.

⁵⁴ U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 51 at 7-8.

⁵⁵ See *id.*

⁵⁶ See *id.* at 9-10.

⁵⁷ See *id.*

⁵⁸ See *id.* at 4.

accomplished in a manner that is consistent with U.S. national security and foreign policy goals.⁵⁹ Like universities, under Section 117 of the HEA, U.S. businesses are required to disclose foreign direct investments resulting in foreign ownership of 10 percent or more of the voting securities of an incorporated U.S. business enterprise or an equivalent foreign interest in an unincorporated U.S. business enterprise.⁶⁰ However, U.S. businesses have an additional check on foreign influence not shared by universities: CFIUS.⁶¹

Foreign investment resulting in control over a U.S. business must first be approved by CFIUS prior to completion of the transaction.⁶² This approval process looks at the foreign ties of the investor and the sensitivity of the technologies manufactured or supported by the U.S. corporation to determine whether the investment can be made.⁶³ If the investment is deemed a national security risk, CFIUS can require processes and procedures to mitigate any perceived threat.⁶⁴ Mitigation steps could include limitations on who can access technology, requirements to provide the U.S. government with access to books and records, or obligations to make reports to the U.S. government.⁶⁵

CFIUS does not foreclose foreign direct investment in the United States that supports researching and manufacturing sensitive technologies. In fact, it was still the sense of Congress in updating CFIUS in 2018 that “foreign investment provides substantial economic benefits to the United States, including the promotion of economic growth, productivity, competitiveness, and job creation, thereby enhancing national security” and that “maintaining the commitment of the United States to an open investment policy encourages other countries to act similarly and helps expand foreign markets for U.S. businesses.”⁶⁶ A strong connection can be made between Congress’ intent for CFIUS to strike the necessary balance between investing in the U.S. economy and national security and the Department of Education’s

⁵⁹ *U.S. Export Controls*, INT’L TRADE ADMIN., <https://www.trade.gov/us-export-controls> (last visited Mar. 1, 2022).

⁶⁰ 15 C.F.R. § 801.7 (2016).

⁶¹ *CFIUS Overview*, COOLEY LLP, <https://www.cooley.com/services/practice/export-controls-economic-sanctions/cfius-overview> (last visited Mar. 1, 2022).

⁶² 31 C.F.R. §800.211(b)(3)(ii) (2020).

⁶³ *See Committee on Foreign Investment in the United States: Key Questions Answered*, LATHAM & WATKINS LLP, <https://www.lw.com/thoughtLeadership/committee-foreign-investment-united-states-key-questions-answered-CFIUS> (last visited Mar. 1, 2022).

⁶⁴ *See CFIUS Overview*, *supra* note 60.

⁶⁵ *See* COMM. ON FOREIGN INV. IN THE UNITED STATES, ANNUAL REPORT TO CONGRESS 26 (2019).

⁶⁶ Foreign Investment Risk Review Modernization Act of 2018, H.R. 5841, 115th Cong. § 101(b) (enacted).

desire to encourage investment in U.S. education without harming national interests.

CFIUS gains its statutory authority through Section 721 of the Defense Production Act of 1950, an act passed in response to the Korean War giving the executive branch large grants of power to influence domestic industry to protect national security.⁶⁷ CFIUS is currently composed of the Department of the Treasury, which acts as its chair, along with the Department of Justice, Department of Homeland Security, Department of Commerce, DOD, Department of State, DOE, the Office of the U.S. Trade Representative, and the Office of Science & Technology Policy.⁶⁸

Congress has repeatedly expanded the power of CFIUS as the amount of foreign investment around the world has increased. While the Defense Production Act did not originally grant any power to prevent transactions, it was amended in 1988 to grant the President sweeping authority to “suspend or prohibit any . . . acquisition . . . by or with a foreign person, of a person engaged in interstate commerce in the United States when, in the President’s view, the foreign interest exercising control over that person might take action that threatens to impair the national security.”⁶⁹ Signaling the increased concern about recent foreign influence, particularly from China, the Foreign Investment Risk Review Modernization Act of 2018 (FIRRMA) gave CFIUS new powers and appropriations.⁷⁰ CFIUS must now approve any investment that grants a foreign person access to any material nonpublic technical information in the possession of a U.S. business, as well as any involvement, other than through voting of shares, in substantive decision making regarding the use, development, acquisition, or release of critical technologies.⁷¹ The Department of Treasury promulgated regulations in 31 CFR § 800 to fulfill its statutory duty under Section 721 of the Defense Production Act of 1950.⁷²

⁶⁷ MICHAEL H. CECIRE & HEIDI M. PETERS, CONG. RSCH. SERV., R43767, THE DEFENSE PRODUCTION ACT OF 1950: HISTORY, AUTHORITIES, AND CONSIDERATIONS FOR CONGRESS 2 (2020).

⁶⁸ *Committee Composition*, CFIUS OVERVIEW, U.S. DEPT. OF THE TREASURY, <https://home.treasury.gov/policy-issues/international/the-committee-on-foreign-investment-in-the-united-states-cfius/cfius-overview> (last visited Feb. 10, 2022).

⁶⁹ 31 C.F.R. § 800.101(a) (2022).

⁷⁰ Roland A. Oleynik et al., *FIRRMA Expands CFIUS Jurisdiction in 2 Major Ways*, HOLLAND & KNIGHT LLP (Aug. 16, 2018), [https://www.hklaw.com/en/insights/publications/2018/08/firma-expands-cfius-jurisdiction-in-2-major-ways#:~:text=The%20regulations%20implementing%20the%20Act,%C2%A7800%20\(CFIUS%20Regulations\)](https://www.hklaw.com/en/insights/publications/2018/08/firma-expands-cfius-jurisdiction-in-2-major-ways#:~:text=The%20regulations%20implementing%20the%20Act,%C2%A7800%20(CFIUS%20Regulations).).

⁷¹ 50 U.S.C. § 4565(a)(4)(D)(i).

⁷² 31 C.F.R. § 800.101(a)-(b) (2022).

E. Differences between Universities and U.S. Businesses

Universities, in some ways, function differently than businesses. Their primary motivations are to educate, foster the development of ideas, and further build upon existing knowledge for the betterment of the country and the world, with an ancillary self-interest in remaining solvent to further those academic pursuits.⁷³ Businesses, on the other hand, are primarily focused on accruing profits for their shareholders.⁷⁴ The production of useful research for the good of the world is often a happy side effect of this drive to create profits. This translates to a different motivation structure for the leaders of each respective entity.

Despite their different motivations, universities and businesses exist in the same arena for research on critical technologies. Both can be sponsored or hired to test and develop specific technologies or materials.⁷⁵ Both have the potential to release sensitive technologies to foreign adversaries. Universities and businesses can even conduct R&D jointly on the same projects.⁷⁶

What differs between the two is the form that monetary influence takes. Certain acquisitions of ownership can influence businesses by either granting access to affect key decisions or, to a greater degree, granting control of the entity altogether through majority ownership.⁷⁷ Universities, in contrast, do not solicit purchases of stocks; rather, they receive philanthropic gifts, endowment donations, or grants that may encourage or direct a university to research a specific technology or teach a certain subject.⁷⁸ The form of monetary influence is different, but the effect is not incongruent between universities and businesses. Considering that the stated goal of FIRRMA is to modernize CFIUS review to address the national security concerns of the shifting nature of investments, a flexible regulatory

⁷³ See Pedro Conceição et al., *R&D Funding in US Universities: From Public to Private Support or Public Policies Strengthening Diversification?*, in PUBLIC-PRIVATE DYNAMICS IN HIGHER EDUCATION: EXPECTATIONS, DEVELOPMENTS AND OUTCOMES 301, 301, 305 (Jürgen Enders & Wolfgang Jongbloed eds., 2007).

⁷⁴ See *Dodge v. Ford Motor Co.*, 170 N.W. 668, 679 (Mich. 1919).

⁷⁵ See COMM. ON FOREIGN INV. IN THE UNITED STATES, *supra* note 64 at 33.

⁷⁶ Certain DoD-created University-Affiliated Research Centers (UARCs) combine government employees, university staff, and members of industry to work on the same projects. See e.g., *University Affiliated Research Centers (UARCs)*, U.S. ARMY, <https://www.arl.army.mil/business/uarcs/>. Arguably, if operating on the same project, the different entities should fall under the same rules.

⁷⁷ See CECIRE & PETERS, *supra* note 66 at 2.

⁷⁸ See Chen, *supra* note 17; Conceição et al., *supra* note 72 at 306.

system covering all forms of this shifting investment landscape is necessary.⁷⁹

Having presented the potential harmful effects of foreign control of U.S. universities, an overview of the sources of foreign funds, and the background of CFIUS, the remainder of this Note will discuss whether universities, upon accepting foreign funds, are currently exposed to CFIUS regulation, and if not, whether the discretionary power granted to the Department of the Treasury could allow it to promulgate new CFIUS regulations that could cover foreign funds in domestic universities.

II. ANALYSIS

Given that foreign entities can provide funding to U.S. universities—either directly through contracts or grants or indirectly through restricted-use donations to endowment funds and gifts—to direct research or establish a foreign directed curriculum, is CFIUS available to ensure the balance of investment and national security?

A. Coverage under Current CFIUS Regulations

Agencies may not interpret their own regulations contrary to their unambiguous meaning.⁸⁰ *Auer* states that an agency’s own interpretation of its ambiguous regulation is controlling unless the interpretation is “plainly erroneous or inconsistent with the regulation.”⁸¹ *Auer* deference, now narrowed by *Kisor v. Wilkie*, requires the agency to show that (1) the regulation is “genuinely ambiguous;” (2) the agency’s interpretation is reasonable in that it falls within the zone of ambiguity identifiable by interpretive tools; (3) the interpretation is the agency’s authoritative or official position; (4) the interpretation in some way implicates the agency’s substantive expertise; and (5) the interpretation reflects the agency’s fair and considered judgment.⁸²

Applying these deference rules to the current regulations in place, 31 C.F.R. § 800 likely does not cover a large portion of the foreign funding into U.S. universities due to restrictive definitions that foreclose its application to non-equity-based entities.⁸³ Even under the *Auer* deference afforded to an

⁷⁹ Foreign Investment Risk Review Modernization Act of 2018, *supra* note 65.

⁸⁰ *See Auer v. Robbins*, 519 U.S. 452, 461 (1997).

⁸¹ *Id.* (quoting *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 359 (1989)).

⁸² *Kisor v. Wilkie*, 139 S. Ct. 2400 (2019).

⁸³ *Id.*

agency's interpretation of their own ambiguous statutes, the clarity of the definitions that are further bolstered by examples provided in the regulatory text likely eschew the opportunity of CFIUS to interpret its regulations to cover different types of funding.⁸⁴

CFIUS may review two main types of financial activity: transactions that result in control over any U.S. business and investments in businesses that are involved in critical technologies, critical infrastructure, or sensitive personal data (labelled "TID U.S. businesses") that do not result in actual control but rather afford access and powers to influence the business.⁸⁵ If CFIUS wished to interpret 31 C.F.R. § 800 to apply to universities accepting certain foreign funds, the committee would need to prove two elements: (1) universities are entities covered by the regulation, and (2) the foreign funding accepted by universities qualify as controlled transactions or investments. Applying the rules laid out in *Kisor*, the committee could invoke its substantive expertise over foreign investments and national security for greater deference but would struggle to prove a genuinely ambiguous regulation.⁸⁶ The clarity of their own regulations would likely prevent them from satisfying the second element.

1. Analysis of U.S. Universities as Covered Entities

Addressing the first element, CFIUS review covers two types of businesses: any U.S. businesses where a transaction results in foreign control and TID U.S. businesses for other investments. Universities likely qualify under both definitions.⁸⁷ U.S. businesses are defined as U.S. entities engaged in interstate commerce.⁸⁸ Universities are entities that engage in interstate commerce through the admission of out-of-state residents, thus fitting into the definition of U.S. businesses.⁸⁹ TID U.S. businesses are not so simple. A TID U.S. business can be any U.S. business that "[p]roduces, designs, tests, manufactures, fabricates, or develops one or more critical technologies . . . or maintains or collects, directly or indirectly, sensitive personal data of U.S. citizens."⁹⁰ The application to universities turns on the regulatory definition of critical technologies and sensitive personal data. According to CFIUS, critical technologies include the following:

⁸⁴ *Auer*, 519 U.S. at 461.

⁸⁵ 31 C.F.R. § 800.210 to 211 (2022).

⁸⁶ *Kisor*, 139 S. Ct. 2400.

⁸⁷ See discussion *infra* Section II.A.i.

⁸⁸ 31 C.F.R. § 800.252 (2022).

⁸⁹ See Jack Stripling, Interstate Commerce, INSIDE HIGHER ED (Feb. 12, 2009), <https://www.insidehighered.com/news/2009/02/12/interstate-commerce>.

⁹⁰ 31 C.F.R. § 800.248 (2022).

1. Defense articles or defense services included on the United States Munitions List (USML) set forth in the International Traffic in Arms Regulations (ITAR) (22 CFR parts 120-130);
2. Critical technologies include Items on the Commerce Control List (CCL) set forth in Supplement No. 1 to part 774 of the Export Administration Regulations (EAR) (15 CFR parts 730-774), and controlled –
3. Pursuant to multilateral regimes, including for reasons relating to national security, chemical and biological weapons proliferation, nuclear nonproliferation, or missile technology; or
4. For reasons relating to regional stability or surreptitious listening;
5. Specially designed and prepared nuclear equipment, parts and components, materials, software, and technology covered by 10 CFR part 810 (relating to assistance to foreign atomic energy activities);
6. Nuclear facilities, equipment, and material covered by 10 CFR part 110 (relating to export and import of nuclear equipment and material);
7. Select agents and toxins covered by 7 CFR part 331, 9 CFR part 121, or 42 CFR part 73; and
8. Emerging and foundational technologies controlled under section 1758 of the Export Control Reform Act of 2018 (50 U.S.C. 4817).⁹¹

Universities can research, test, and develop certain critical technologies, such as nuclear equipment through National Science Foundation grants and

⁹¹ 31 C.F.R. § 800.215 (2022).

defense articles through DOD grants.⁹² Universities may eventually be involved in emerging and foundational technologies as well. Emerging and foundational technologies must first be designated by the Bureau of Industry and Security (“BIS”), which operates multilaterally with other countries to name cutting-edge technologies of great importance to national security.⁹³ BIS is categorizing emerging and foundational technologies slowly but may incorporate goods researched and tested in universities, such as artificial intelligence or 3D printing in the near future.⁹⁴

The other way to be classified as a TID U.S. business is to control sensitive personal data.⁹⁵ Sensitive personal data includes financial data that could be used to “analyze or determine an individual’s financial distress or hardship” and “data relating to the physical, mental, or psychological health condition of an individual.”⁹⁶ For an entity to qualify as a TID U.S. business for holding sensitive personal data describe above, it must store the data on greater than one million individuals.⁹⁷ Universities likely contain the type of information considered to be sensitive and personal related to its students, but not the quantity required to be categorized as a TID U.S. business for the purposes of controlling sensitive personal data.

Given the critical nature of some university research, and the fact that universities engage in interstate commerce, it is safe to say that all universities could qualify as U.S. businesses, and some, depending on their research capabilities, could qualify as TID U.S. businesses for the purposes of this regulation.

2. Foreign Funding as “Covered Transactions” or “Investments”

Similar to the two types of entities covered under CFIUS review, two corresponding types of investments are within the regulation’s scope:

⁹² See *About Awards*, NAT’L SCI. FOUND.,

<https://www.nsf.gov/awards/about.jsp#:~:text=The%20NSF%20funds%20research%20and,academic%20institutions%20for%20basic%20research> (last visited Feb. 26, 2022).

⁹³ Identification and Review of Controls for Certain Foundational Technologies, 85 Fed. Reg. 52,934 (Aug. 27, 2020) (to be codified at 15 C.F.R. pt. 742, 774).

⁹⁴ On November 19, 2018, BIS published an advanced notice of proposed rulemaking that listed artificial certain technologies it was considering as emerging, such as artificial intelligence, biotechnology, microprocessor technology, advanced computing, data analytics, quantum computing, additive manufacturing, robotics, advanced materials and advanced surveillance technologies. See Review of Controls for Certain Emerging Technologies, 83 FR 58, 201, (Nov. 19, 2018) (codified at 15 C.F.R. pt. 744).

⁹⁵ 31 C.F.R. § 800.211 (2022).

⁹⁶ 31 C.F.R. § 800.241 (2022).

⁹⁷ *Id.*

“covered transactions” for those that result in control of a U.S. business, or “covered investment” for investment of a TID business that results in access and influence.⁹⁸ To determine whether donations, grants, or other forms of foreign funding for universities fall under CFIUS, the two types of investment will be analyzed separately. Beginning with covered transactions, 31 C.F.R. § 800.301 grants CFIUS review over transactions “which, irrespective of the actual arrangements for control provided for in the terms of the *transaction*, results or could result in *control* of a U.S. business by a foreign person.”⁹⁹ Transaction is defined to mean mergers, acquisitions, takeovers, or investments and conversions of contingent equity interest rising to 50% or greater ownership.¹⁰⁰ There is a potential conflict between § 800.249, which defines transaction, and § 800.301, which describes covered controlled transactions. Section 800.249 describes transaction in terms of actual arrangements for control, like mergers, acquisitions, or takeovers, while § 800.301 directly states that “actual arrangements for control” aren’t authoritative, and instead focuses on the results of control “irrespective” of the terms of the transaction. Given this ambiguity of what is considered a transaction, there may be room to interpret transactions that lead to control without an equity interest but still lead to control as defined in the regulations.

Control is defined as “the power, direct or indirect, whether or not exercised, through the ownership of a majority or a dominant minority of the total outstanding voting interest in an entity, board representation, proxy voting, a special share, contractual arrangements, formal or informal arrangements to act in concert, *or other means*, to determine, direct, or decide *important matters* affecting an entity.”¹⁰¹ The regulation provides examples of important matters, including – “but without limitation” –reorganization, selection of new business lines, “appointment or dismissal of employees with access to critical technology or other sensitive technology,” and “the closing, relocation, or substantial alteration of the production, operational, or research and development facilities of an entity.”¹⁰²

There is purposeful ambiguity in the definition of “control” through the use of phrases like “or other means” and “but without limitation.” However, an agency interpretation of its own regulation must fall under an identifiable zone of ambiguity to the interpretation that is discoverable through tools of

⁹⁸ 31 C.F.R. § 800.210 to 211 (2022).

⁹⁹ 31 C.F.R. § 800.301 (2022) (emphasis added).

¹⁰⁰ 31 C.F.R. § 800.249 (2022).

¹⁰¹ 31 C.F.R. § 800.208 (2022) (emphasis added).

¹⁰² *Id.*

interpretation.¹⁰³ Applying the textual canon of *noscitur a sociis* as an interpretive tool requires generic terms to be read to mean something similar to specific terms listed in a series.¹⁰⁴ “Or other means,” under the review of *noscitur a sociis*, bolstered by the examples such as “ownership of a majority...of outstanding voting interest” and “contractual arrangements” point to means of significant proportion. A similar review of “but without limitation” should eliminate any interpretation of “important matters” outside of major decisions involving corporate governance or major transfers of assets. Thus, foreign funding through donations, gifts, and research contracts simply do not reach the scale to be considered a covered transaction as defined by 31 C.F.R. § 800.301. However, partnership arrangements formed between foreign governments and universities to set up foreign-government influence curriculum, like those found in the Confucius Institute program, are closer to qualifying. A university’s decision on what curriculum to teach is similar in importance and nature to the selection of business lines or the alterations of an operational facility for a corporation, and thus arrangements which determine curriculum decision could fall under the definition of control.

What about investments that do not require acquisition resulting in control? Turning now to covered investments, 31 C.F.R. § 800.303 states CFIUS can control any transaction involving:

investment, direct or indirect, by a foreign person... in an unaffiliated TID U.S. business and that affords the foreign person: (1) access to any *material nonpublic technical information* in the possession of the TID U.S. business; (2) membership or observer rights on, or the right to nominate an individual to a position on, the board of directors or equivalent governing body of the TID U.S. business; or (3) any *involvement*, other than through voting of shares, in *substantive decision-making* of the TID U.S. business regarding: (i) The use, development, acquisition, safekeeping, or release of sensitive personal data of U.S. citizens maintained or collected by the TID U.S. business; (ii) The use, development, acquisition, or release of critical technologies; or (iii) The management, operation, manufacture, or supply of covered investment critical infrastructure.¹⁰⁵

¹⁰³ *Kisor*, 139 S. Ct. 2400.

¹⁰⁴ See *Entergy Corp. v. Riverkeeper, Inc.*, 556 U.S. 208, 222 (2009).

¹⁰⁵ 31 C.F.R. § 800.211 (2022) (emphasis added). It should be noted that the writers of the final draft of FIRRMA did not define what they meant by “access.” In the legislative

Foreign funding of U.S. universities may provide access to material nonpublic technical information or grant certain forms of involvement in the substantive decision-making regarding critical technologies. Contained within this critical provision are key definitions required to fully understand the scope of this CFIUS authority over non-controlling investments. Material nonpublic information relates to “any information or know-how not available to the public domain, which is necessary to design, fabricate, develop, test, product, or manufacture a critical technology.”¹⁰⁶

Involvement is considered “a right or ability to participate, whether or not exercised, including by doing any of the following: (a) Providing input into a final decision; (b) Consulting with or providing advice to a decisionmaker; (c) Exercising special approval or veto rights; (d) Participating on a committee with decision-making authority; or (e) Advising on the appointment officers or selecting employees who are engaged in substantive decision-making.”¹⁰⁷

Substantive decision-making is defined as the following:

[T]he process through which decisions regarding significant matters affecting an entity are undertaken, including, as applicable: (1) Pricing, sales, and specific contracts, including the license, sale, or transfer of sensitive personal data to any third party, including pursuant to a customer, vendor, or joint venture agreement; (2) Supply arrangements; (3) Corporate strategy and business development; (4) Research and development, including location and budget allocation; (5) Manufacturing locations; (6) Access to critical technologies, covered investment critical infrastructure, material nonpublic technical information, or sensitive personal data, including pursuant to a customer, vendor, or joint venture agreement.¹⁰⁸

The determination of what is researched and developed at contracting universities could be considered a substantive decision. However, it would be difficult to characterize the form of involvement, as defined by the regulation, foreign funders have when directing university research. Contracts and grants may be specific and likely could provide for rights to

history, however, the House added that access is meant to be “the ability and opportunity to obtain information, subject to regulations prescribed by the Committee.” H.R. 4311, 115th Cong., Sec. 3(a)(1) (2017). Likely, the Congress purposefully meant to keep the definition of access broad by removing a static definition in the final version of the Act.

¹⁰⁶ 31 C.F.R. § 800.232 (2022).

¹⁰⁷ 31 C.F.R. § 800.229 (2022).

¹⁰⁸ 31 C.F.R. § 800.245 (2022).

direct the decision, but conditional gifts and restricted-use endowment funds likely cannot qualify as a “right” to consult or provide input into the final decision.

Lastly, we must address what CFIUS means by the term “investment.” Investment could have been left broadly to mean an allocation of money with the expectation of some benefit in the future.¹⁰⁹ However, the drafters narrowed the term to mean the acquisition of equity interest, which includes contingent equity interest that can be converted into an equity interest upon a contingency or defined event.¹¹⁰ An acquisition of equity interest is understood as a purchase of shares to own a percentage of a business. Given the purposeful usage of the term “equity” in all relevant definitions throughout the regulation, none of the forms of foreign funding concerned in the Department of Education report *Institutional Compliance with Section 117 of the HEA of 1965*, such as gifts, endowment fund payments, or grants, are likely covered under CFIUS review since universities do not operate under an equity investment structure.

Recalling the potential issues of foreign funding in domestic academia, the two issues highlighted in the Department of Education report were the potential chilling of free thought and free speech due to foreign partnerships limited curriculum and the release of sensitive technologies researched and developed at U.S. universities.¹¹¹ There is a scintilla of foreign funding activity that may now be covered under CFIUS, which are partnership arrangements that result in restrictions placed on the curriculum taught on the U.S. campus, but only under a liberal reading of § 800.301. Other foreign funding likely is not covered. Despite the argument in the Department of Education report that infringing on free speech on campuses could harm national security, a strict reading of the CFIUS regulations contemplate a much narrower understanding of national security threats. By locking the application of CFIUS review for noncontrolling investments to only those entities that research and develop critical technologies, the committee could not seek to protect issues, such as free speech or any matters for universities not engaged in the research of critical technologies. In addition, even those universities that do engage in critical technology research, short of purchases of equity interest into the university could be checked by CFIUS. Other forms of softer influence, such as funding

¹⁰⁹ In the field of international investment arbitration, an international investment has been defined as simply as “a commitment of money or other assets for the purpose of providing a return.” *Malasian Historical Salvors v. Malaysia*, Decision on Annulment, 16 April 2009.

¹¹⁰ 31 C.F.R. 800.207, 227 (2022).

¹¹¹ U.S. DEP’T OF EDUC., *supra* note 2 at 6, 11, 32.

endowments or sponsoring specific projects, lack the level of involvement necessary to be considered by CFIUS. Looking toward the organic statute, now amended by FIRRMA, could the committee promulgate broader regulations to potentially cover foreign funding in U.S. universities?

B. Promulgating Regulations Pursuant to the Defense Production Act in order to Embrace Foreign Funding in U.S. Universities

Were CFIUS to promulgate new regulations that cover payments into U.S. universities to protect against release of sensitive technologies and against the chilling of free speech, it would need to make key changes to the regulations currently in place in 31 C.F.R. § 800. This section will describe the changes required, followed by what legal challenges U.S. universities would likely make to prevent such an expansion of regulatory power.

To protect against the release of sensitive technology, the following changes would need to be made: First, to cover foreign funding in universities, the regulation would need to broaden the term “investment” to include other financial transactions that yield similar levels of control over an entity that purchases of equity interest would have in a typical business. A redrafting to expand “acquisition of equity interest” to “acquisition of equity interest or transfer of funds that leads to similar control” would be necessary.

Second, CFIUS could broaden the definition of “control” and “important matters” in Section 800.208 to include foreign gifts and research grants respectively.

Third, considering the different form of involvement donors and sponsors of university research take, to guarantee coverage, an addition should be made to the definition of “involvement” to include “providing input into a final decision, through vocal or financial support.”

Fourth, to more likely protect against financial arrangements that could control university’s curriculum, like the university partnerships with the Chinese government to form Confucius Institutes, the term “transaction” would need to be broadened from “mergers, acquisitions, or takeovers” to include foreign government partnerships.

C. Likely Challenges to Proposed Changes

Were CFIUS to make such changes in their regulations to cover foreign funding, there would be significant challenges raised by universities addressing an impermissible construction of the empowering statute, the Defense Production Act of 1950.

Agencies are afforded great deference in the interpretation of their empowering statute.¹¹² Presidential and executive statutory interpretations are given an even stronger presumption of correctness where foreign affairs and national security concerns are implicated.¹¹³ A statute should be interpreted in light of its statutory purpose, but text-based limits on the law's scope is part of its purpose.¹¹⁴ However, an agency may not interpret their statute contrary to clear congressional intent.¹¹⁵ Congressional intent is derived from standard tools of interpretation, such as textual canons, context, or canons of statutory interpretation.¹¹⁶ Every provision must be read in light of the whole act.¹¹⁷ Legislative history can be used to supplement an interpretation if traditional tools do not adequately clarify the meaning.¹¹⁸ If Congress has not spoken directly to the issue, the interpretation must fit within the zone of ambiguity left by Congress.¹¹⁹ Additionally, courts side against granted deference if an expansive interpretation covers a large area of the economy, especially if Congress did not speak directly to its inclusion.¹²⁰

Applying these principles, the proposed regulation required to address the threat of foreign monetary influence on U.S. universities is limited.

It may first be argued that an attempt to expand coverage to universities is statutory scope creep, that the Department of Education is not a member of CFIUS and thus educational entities should not apply, and that if Congress meant to include universities as entities covered by the statute, they would have done so specifically. Legislative history shows that Congress chose to remove a statement found in the House version of the bill which stated, “in

¹¹² See *Chevron, U.S.A., Inc. v. Nat. Resources Def. Council, Inc.*, 467 U.S. 837 (1984).

¹¹³ See *U.S. v. Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936); See also *Republic of Iraq v. Beaty*, 556 U.S. 848, 856-57, 860 (2009).

¹¹⁴ See *ABC, Inc. v. Aereo, Inc.*, 134 S.Ct. 2498 (2014); *But see* *Limelight Networks Inc. v. Akamai Tech. Inc.*, 134 S.Ct. 2111 (2014).

¹¹⁵ See *ABC, Inc.*, 134 S.Ct. 2498.

¹¹⁶ See *id.*

¹¹⁷ See *Samantar v. Yousuf*, 560 U.S. 305 (2010).

¹¹⁸ See *Bond v. United States*, 134 S.Ct. 2077 (2014); See also *Arlington Cent. Sch. Dist. Bd. Of Educ. V. Murphy*, 548 U.S. 291 (2006).

¹¹⁹ *City of Chicago v. Env't. Def. Fund*, 511 U.S. 328 (1994).

¹²⁰ See *King v. Burwell*, 576 U.S. 473 (2015); *Gonzales v. Oregon*, 546 U.S. 243 (2006); *Whitman v. Am. Trucking Associations*, 531 U.S. 457 (2001).

order to maintain the Committee's effectiveness and guard against mission creep, CFIUS should remain narrowly focused on confronting risks related to national security."¹²¹ Congress's purposeful removal of this statement could show an intent to allow CFIUS to remain free from narrow construction. Secondly, the lack of the Department of Education in the current roster of CFIUS members can be alleviated by section 721(k), which allows the chair of the committee to invite whatever agency appropriate to participate.¹²² Third, entities that conduct research and development are primary fixtures of the statute. It could be argued that Congress contemplated U.S. universities, which contribute to over 10% of the nation's research and development, when creating the legislation.¹²³ Lastly, the statute explicitly excludes coverage of air carriers. The principle of *inclusio unius est exclusio alterius* suggests that the exclusion of one component of industry means there are no other excluded component, such as universities.

A fiercer argument can be made against the permissible construction of any regulations which aim to expand the forms of funding covered by CFIUS. The Defense Production Act of 1950, and FIRRMA which amends it, concerns the nation's security against, among other things, foreign influence on domestic industries necessary to keep America safe. Given this broad scope of agency concern, CFIUS's interpretation of their own powers is owed deference.¹²⁴ Where there is ambiguity, CFIUS has the ability to promulgate regulations that align with the object and purpose of the statute.¹²⁵ Part of the purpose stated in Section 1702 of FIRRMA is that the national security landscape has changed in recent years, "which warrants an appropriate modernization of the processes and authorities of the Committee on Foreign Investment in the United States."¹²⁶ Therefore, any interpretations that aim to protect the national security and further the purpose of modernizing the processes to do so should be considered with great weight. Any area where Congress has not spoken, such as the definition of "involvement" which was only defined in the regulations, could be changed with deference. However, any areas where Congress has directly spoken to, such as the definition of "transaction" and "investment," face an uphill battle for regulators seeking change. In FIRRMA, Congress stated that the "Committee shall prescribe regulations providing guidance on the types

¹²¹ H.R. 5841, 115th Cong. § 101(b)(5).

¹²² Defense Production Act of 1950, as amended, Section 721(k).

¹²³ See Beasley, *supra* note 5.

¹²⁴ See *Chevron, U.S.A., Inc. v. Nat. Resources Def. Council, Inc.*, 467 U.S. 837 (1984); *U.S. v. Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936).

¹²⁵ See *ABC, Inc.*, 134 S.Ct. 2498.

¹²⁶ FIRRMA § 1702 (b)(4).

of transactions that the Committee considers to be ‘other investment.’”¹²⁷ This may create an ambiguous gap wide enough for CFIUS to extend the narrow definition of “other investment” to embrace other forms of transactions other than those in acquiring equity. Consistent with the purposes of the statute to modernize the committee to deal with changing forms of foreign influence like foreign donations sponsoring state-benefiting research projects, it may be a permissible interpretation. However, when viewing this provision in light of the whole act, the statute closes in on much of the zone of ambiguity with a specific definition of “investment” and “other investment.” Much like the regulations, Congress specified that “investment” must be an acquisition of equity interest. “Other investments” are specified to mean “an investment, direct or indirect...that is not an investment described in subparagraph (B)(i),” which refers to mergers, acquisitions, or takeovers.¹²⁸ A comprehensive textual approach would therefore remove much of the ambiguity, which likely forecloses CFIUS from expanding the regulations to cover foreign funding of U.S. universities.

D. Analysis of Recently Proposed Legislation

After the drafting on this note, the Senate introduced and passed the U.S. Innovation and Competition Act of 2021. Tucked in its 2376 pages is an 11-page proposal to amend the Defense Production Act of 1950 to extend CFIUS’ coverage over U.S. universities, as similarly promoted by this Note.¹²⁹ This note has the unique opportunity to analyze the proposed regulation and offer feedback designed to improve the proposed amendment as it is written in the House.

The proposed statute adds gifts and contracts to universities as a “covered transaction” if they meet the following conditions: 1) the total gifts and contracts from a single foreign entity within two calendar years exceed \$1,000,000 and 2) it relates to “critical technologies and provides the foreign person *potential* access to any nonpublic technical information;” or 3) it is a conditional gift or contract that establishes *control*.¹³⁰

There is ambiguity in a few key words that is likely causing some of the consternation by universities. First, “potential” access should be explained since interpretations could be highly varied. There will always be a “potential” for access, so if Congress truly intends for CFIUS to only cover instances where funding relates to critical technology *and* grants access to

¹²⁷ 50 U.S.C. § 4565(a)(4)(D)(iii)(I).

¹²⁸ 50 U.S.C. § 4565(a)(4)(D)(i).

¹²⁹ U.S. Innovation and Competition Act, S. 1260, 117th Cong. § 3138 (2021).

¹³⁰ *Id.*

nonpublic information, this should be more clearly stated. Since Congressmembers' stated goal is not to limit funding to critical technologies, but rather the release of proprietary knowledge, statutory language that reflects this is necessary.¹³¹ Secondly, "control" should be modified in the Defense Production Act to clearly include gifts. As it is currently written, control means "the power, direct or indirect, whether exercised or not exercised, to determine, direct, or decide important matters affecting an entity, subject to regulations prescribed by the Committee."¹³² It's hard to argue that a gift can "determine, direct, or decide" an important matter. Therefore, Congress should add "influence" to the definition to better ensure its application to gifts.

Alternatively, if Congress is receptive to complaints about the overreach and excessive compliance costs, it could apply a more targeted approach. It could choose to only consider transactions with universities that are also TID U.S. businesses. This would mean the Committee would only review gifts and contracts with a university that "[p]roduces, designs, tests, manufactures, fabricates, or develops one or more critical technologies."¹³³ Hence, CFIUS would only apply to those universities with the capacity for improper release of sensitive technology, while foregoing any compliance costs on all other universities.

The fate of this portion of the bill is unsettled as the bill still needs to pass in the House. Despite the bipartisan support in the Senate for the act as a whole, there are pointed critics of its inclusion in CFIUS amendment.¹³⁴ The universities and the American Council on Education criticize the bill as an "intrusion" into university research that could "lead to research projects being denied funding for political reasons, not on their scientific merit" and it would create "massive" compliance costs.¹³⁵ They also have allies in Congress; Sherrod Brown (D-Ohio), the chair of the Senate Banking Committee that oversees CFIUS opposed the review process over university funding.¹³⁶

¹³¹ See generally Michael Stratford, *Universities fight scrutiny of foreign funding in Senate China bill*, POLITICO (May 27, 2021, 4:42 PM), <https://www.politico.com/news/2021/05/27/universities-foreign-funding-china-491239>.

¹³² 50 U.S.C. § 4565(a)(3).

¹³³ 31 C.F.R. § 800.248 (2020).

¹³⁴ Stratford, *supra* note 130.

¹³⁵ *Id.*

¹³⁶ *Id.*

This Note shows the cost of its non-passage—a scintilla of regulatory discretion to apply CFIUS safeguards to universities.¹³⁷ This should encourage Congress to pass the bill with the amendments to the Defense Production Act of 1950 since without an amendment there is little room for the Committee to act.

III. CONCLUSION

Disclosure and transparency are key, but only go so far. Efforts to amend the HEA to increase the enforcement power of the foreign gifts and donations disclosure requirements would increase transparency, but greater measures are required to fully address all negative consequences of unchecked foreign funding in U.S. universities.

The problem of foreign money redirecting American entities against the national interest is not unique to American academia. American businesses face this issue too. Despite the similar problem, the tools available to protect academia against negative foreign influence are either outdated or inadequate. CFIUS could step in to provide a stronger protection against the buying power of foreign funds, but the current regulations and statute are too narrowly written to embrace the unique form undue monetary influence takes when distributed to universities. Congress is heading in the right direction with the proposed U.S. Innovation and Competition Act of 2021, but the language could be clarified and improved to limit the regulatory burden to the universities with the greatest risk of sensitive technology theft. Ultimately, the Defense Production Act must be amended to widen the scope of CFIUS and broaden the definitions of investment, control, and transaction to allow the committee to promulgate the necessary regulations to adequately protect our higher education.

¹³⁷ See discussion *supra* Section II.A.ii.