

ISSUE BRIEF

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Reform Proposals to the Committee on Foreign Investment in the United States

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There are increasing demands to reform the review process for foreign investment in the United States. However, there are conflicting interests within Congress over what type of transactions get reviewed and what constitutes as a threat to U.S. national interests.

The Committee on Foreign Investment in the U.S. (CFIUS) reviews transactions that may threaten U.S. national security such as investments in security-related technology or critical infrastructure. The Committee is tasked with balancing both U.S. national security interests and maintaining the U.S. as a place that welcomes foreign investment. The Committee must be allowed to continue unburdened by attempts to qualify the impact investments have on employment, productivity, or allocation of resources.

As a market economy, the U.S. must not intervene in the allocation of resources. The Committee should expand to include some additional types of transactions. However, it is the responsibility of policymakers to be explicit about the information they need from investors in order to expedite the review process. Policymakers should seek reforms that are achievable, reasonable, and market focused and maintain established national security interests.

Current Proposals

The last major reform to CFIUS was the 2007 Foreign Investment and National Security Act (FINSA). Congress was pressured into reform after increasing inquiries into the ownership of the management contracts of six major U.S. ports. British-owned P&O Stream Navigation Company owned the management contracts until the company was purchased by United Arab Emirates–owned Dubai Ports World. Despite the transaction clearing the CFIUS review process, the ownership transfer to a Middle Eastern state-owned enterprise (SOE) became an overblown cause for concern in Washington. Thus, FINSA was drafted to increase Congress’s oversight of the committee.

Since 2007, there have only been a handful of proposals to reform the Committee, a couple of which were already introduced in the 114th Congress. There are currently four policy proposals, two of which have been formally introduced as legislation for consideration.

S. 616: Food Security Is National Security Act of 2017

Introduced by Senator Chuck Grassley (R-IA), S. 616¹ would explicitly include food and agricultural security as factors to be considered in any transaction’s CFIUS review. There are already 10 explicit factors that may be taken into consideration to maintain national security.² Senator Grassley’s review would include the potential effects a deal would have on the availability, access, safety, and quality of food as well. It would also permanently add the Secretaries of Agriculture and Health and Human Services to a committee membership already made up of 7 agency heads, as well as the Attorney General and Director of National Intelligence.³

This paper, in its entirety, can be found at <http://report.heritage.org/ib4753>

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H.R. 2932: Foreign Investment and Economic Security Act of 2017

Introduced by Representative Rosa DeLauro (D-CT), H.R. 2932⁴ would add “net benefit” criteria along with national security interests for a transaction’s review. Factors for consideration would include the level and quality of employment, resource processing, use of parts and services produced in the U.S., use of parts imported into the U.S., and exports. In addition, production, industrial efficiency, technological development, public health, safety, environment, well-being of U.S. consumers, and foreign governments’ governance structures are included for review. For transactions of a commercial basis, export destinations, processing locations, U.S. employment, sourcing patterns, and capital expenditures are several criteria for review. Additionally, a second committee for “net benefit” determination would be established based on CFIUS’s current membership, plus the U.S. Trade Representative and minus the Secretaries of Defense, State, and Homeland Security.

“A Better Deal on Trade and Jobs”

Proposed by Senator Chuck Schumer (D-NY) as a part of the Democrat legislative agenda, CFIUS

reform⁵ may be rolled in with a number of other proposals that may impact trade, government spending, and international economic relations. Senator Schumer’s bill would likely include a “net benefit” test similar to Representative DeLauro’s test for transactions to be approved by the committee. Criteria may include tests for economic security, the health of jobs and wages, and the impact to regional economies. Senator Schumer most recently called upon President Trump to use CFIUS to block all pending Chinese transactions because of North Korea’s continued missile tests.⁶ It is questionable whether doing so would have any impact on Chinese pressure towards North Korea, but it would certainly negatively impact U.S. economic interests.⁷

Foreign Investment Risk Review Modernization Act (FIRRMA)

Proposed by Senator John Cornyn (R-TX), FIRRMA⁸ is a comprehensive review to modernize CFIUS that maintains a focus on national security. The bill will likely include a tiered list of countries known to be investing in means to undermine U.S. national security or modernize their own militaries. Transactions coming from these countries would

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1. Food Security Is National Security Act of 2017, S. 616, 115th Cong., 1st Sess., <https://www.congress.gov/bill/115th-congress/senate-bill/616/text?q=%7B%22search%22%3A%5B%22grassley%22%5D%7D&r=35> (accessed August 4, 2017).
 2. Factors to be considered in CFIUS review include: (1) domestic production needed for projected national defense requirements; (2) the capability and capacity of domestic industries to meet national defense requirements, including the availability of human resources, products, technology, materials, and other supplies and services; (3) the control of domestic industries and commercial activity by foreign citizens as it affects the capability and capacity of the United States to meet the requirements of national security; (4) the potential effects of the proposed or pending transaction on sales of military goods, equipment, or technology to certain countries; (5) the potential effects of the proposed or pending transaction on United States international technological leadership in areas affecting United States national security; (6) the potential national security-related effects on United States critical infrastructure, including major energy assets; (7) the potential national security-related effects on United States critical technologies; (8) whether the covered transaction is a foreign government-controlled transaction, as determined under subsection (b)(1)(B); (9) as appropriate, and particularly with respect to transactions requiring an investigation under subsection (b)(1)(B), a review of the current assessment of country-specific regulations and relationship with the U.S. in efforts such as counter-terrorism; and (10) the long-term projection of United States requirements for sources of energy and other critical resources and material. See Authority to Review Certain Mergers, Acquisitions, and Takeovers, 50 U.S. Code § 4565, <https://www.law.cornell.edu/uscode/text/50/4565> (accessed August 11, 2017).
 3. CFIUS membership is currently comprised of the Secretary of the Treasury (Chairperson), the Secretary of Homeland Security, the Secretary of Commerce, the Secretary of Defense, the Secretary of State, the Attorney General, the Secretary of Energy, the Secretary of Labor (non-voting), the Director of National Intelligence (non-voting), and the head of any other agency the President determines necessary on a case-by-case basis.
 4. Foreign Investment and Economic Security Act of 2017, H.R. 2932, 115th Cong., 1st Sess., <https://www.congress.gov/bill/115th-congress/house-bill/2932?q=%7B%22search%22%3A%5B%22deLauro%22%5D%7D&r=11> (accessed August 4, 2017).
 5. News release, “A Better Deal: Better Jobs, Better Wages, Better Future,” U.S. Senate Democrats, July 2017, <https://democrats.senate.gov/wp-content/uploads/2017/07/A-Better-Deal-on-Trade-and-Jobs-FINAL.pdf> (accessed August 4, 2017).
 6. Aaron P. Bernstein, “Top Senate Democrat Urges Trump to Block China Deals Over North Korea,” Reuters, August 1, 2017, <https://www.reuters.com/article/us-northkorea-missiles-usa-china-idUSKBN1AH4EL> (accessed August 4, 2017).
 7. Ibid.
 8. Diane Bartz, “Leading U.S. Senator Urges Changes in Foreign Investment Rules,” Reuters, June 26, 2017, <http://www.reuters.com/article/us-china-usa-investment-cornyn-idUSKBN19H2I5> (accessed August 4, 2017).

likely receive extra scrutiny in their review process. There may include a tiered list for technologies the military finds essential to maintaining its defense capabilities. Investment transactions in firms that deal in these technologies would likely receive extra scrutiny during review. The technology list may include emerging technologies that the Department of Defense is still investing in that have yet to reach full potential. And the types of investments reviewed will likely increase to include other types of joint ventures.

The addition of joint ventures not already covered by CFIUS may be necessary for review if Congress can show that joint ventures have reduced U.S. national security. The same goes for green field investments (establishing investments instead of mergers or acquisitions), which may also be explicitly included for review.

Recommendations for Congress

Changes that impact foreign entities' ability to invest in the U.S. will come with a cost. Therefore, it is important for Congress to:

- **Come to an agreement about what is important.** While there is no explicit definition of national security, reforms to CFIUS should be direct in what it needs from companies to expedite the review process. Additional hurdles for investment will not only detract investment but waste valuable committee resources to review harmless investments.
- **Fund CFIUS adequately.** The committee continues to operate with limited resources. While Treasury maintains an annual 100 percent timely review of transactions, the number of transactions are increasing with the complexity of transaction type. It is silly to ask the committee to increase its efforts for each review—and to include other types of transactions for review—without being able to supply CFIUS with the resources it needs.
- **Maintain a focus on national security.** The committee has always focused on the national security implications for investments into the U.S. Not only would any economic net benefit detract from the review for national security, it is impossible to determine what might pass as an economic net benefit. Most foreign direct investment into the U.S. comes from allies such as the United Kingdom and Japan. Most mergers and acquisitions come from European countries. While the conversation quickly turns to the impact of Chinese investment into the U.S., it remains our friends and allies that would likely be hurt the most.
- **Expand collaboration with international partners.** An international firm may not limit its investments to the U.S. alone. And risks to U.S. national security may be similar risks to our friends and allies abroad. Other countries have investment review mechanisms with which CFIUS collaborates, such as that created by Japan's Foreign Exchange and Foreign Trade Act. Establishing better lines of communication between these mechanisms may help ensure the right investments are being allowed and that investment freedom is being maintained.

Those in Congress will have to consider both the resources of CFIUS and the incentives of foreign firms—both benign and threatening—when investing in the U.S. Reforms to the committee may be warranted, but the committee has also excelled in maintaining U.S. national security for the past 42 years. It does not need radical surgery. It simply needs to be brought up to date in a way that will continue to facilitate foreign investment in the U.S.

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