

ISSUE BRIEF

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FIRRMA: Lighter Touch Needed as Senate Introduces Legislation to Improve Investment Security

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Senator John Cornyn (R-TX) has recently introduced his long-awaited legislation to reform how foreign investment in the U.S. is reviewed. Co-sponsored with bipartisan support, including from Senators Marco Rubio (R-FL) and Dianne Feinstein (D-CA), the bill aims to enhance and support the Committee on Foreign Investment in the U.S. (CFIUS)—the multi-agency committee chaired by the Secretary of the Treasury and tasked with reviewing foreign investment for national security purposes. There has been growing support in Congress for CFIUS reform as Members have grown skeptical of foreign entities gaining control of American companies. A similar bill was introduced in the House sponsored by Representative Robert Pittenger (R-NC).

The current review process of CFIUS is not designed to review non-security requirements, such as so-called economic security, and would be a mistake to include in CFIUS. Therefore, reforms to CFIUS will need to keep the committee focused on national security. The committee, already over-taxed with reviewing an increasing number of investments, will need to be adequately funded in order to maintain its mission of balancing both national security and keeping the U.S. as a place that

welcomes foreign investment. And, with increasing global investments by multinational entities, greater information sharing between the U.S. and its allies is needed to reduce threats to U.S. national security.

The Foreign Investment Risk Review Modernization Act

Senate bill 2098, the Foreign Investment Risk Review Modernization Act (FIRRMA) seeks to improve the CFIUS process.¹ The proposed legislation is more likely to enhance CFIUS's ability to review transactions than limit foreign investment into the U.S. The burden for CFIUS has always been finding a balance between open investment and national security. Senator Cornyn's proposal avoids burdening CFIUS with non-essential members or non-security requirements, but still relies heavily on CFIUS drafting new regulations—adding potential costs for companies seeking to invest in the U.S.

If passed, the CFIUS process would include not just whether a foreign entity controls an American company but what amount of access that entity has to sensitive information, including Americans' personally identifiable information. There has been growing concern over the years not just about foreign governments being able to control American companies, but about deals that fall outside CFIUS's authority allowing foreign entities to access and undermine American information. New factors for consideration within the CFIUS review process would also include how investments affect U.S. cybersecurity.

FIRRMA expands the CFIUS focus beyond just how investments affect critical infrastructure with greater focus on both critical materials and criti-

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cal technology. Critical materials could include any physical material, such as steel or rare earths. Critical technology would expand to include any technology that could be essential to U.S. national security in the future. But these expansions could potentially be exploited within CFIUS as a non-security matter. There should be greater focus on what critical sectors and emergent technologies should be protected. It will be up to agencies within CFIUS to show that credible threats exist. With the addition of a risk-based analysis in FIRRMA, a greater focus on what is truly critical for U.S. national security could be specified.

Given the increasing complexity of foreign investments, concerns tend to be greater if the foreign investor is a state-owned enterprise (SOE). SOEs already trigger an automatic CFIUS review, but FIRRMA would allow CFIUS to create an implicit list of countries whose investments should be of special concern, SOE or not. Meanwhile, greater cooperation is needed between the U.S. and its allies abroad given the challenges of tracking foreign entities' investment strategies. To ease the review process for reputable foreign entities and focus resources on more questionable transactions, FIRRMA adds a provision of exclusion from CFIUS review. Exclusion from review would be possible for foreign entities from countries where the U.S. has a mutual defense treaty, has a mutual arrangement to safeguard national security as it pertains to foreign investment, and depending on what that country's own national security review process looks like.

FIRRMA also includes some technical, but no less important, changes. The review process would extend from a 30-day period to a 45-day period. If a transaction moves from a review to being investigated, after the current 45-day period of investigation, there is opportunity for a 30-day extension. This would also allow CFIUS additional time on a case-by-case basis instead of insisting that companies withdraw and resubmit their transaction for a new round of reviews. FIRRMA also creates a CFIUS fund in the Department of the Treasury to help CFIUS mitigate its review costs. CFIUS may also collect a fee from

companies that file for a review to facilitate its costs. Fees may be no more than 1 percent of the value of the transaction or greater than \$300,000 and will be deposited in the fund. Treasury would also be able to submit a unified budget request for CFIUS, compared to the current patchwork of funding by each individual agency.

Senator Cornyn's bill is just one of a number of CFIUS proposals in Congress. While his bill leaves CFIUS mostly focused on U.S. national security, the complexity and length of his proposal is at risk of being exploited by other Members who may seek to add non-security provisions. CFIUS costs already affect investment patterns, and any significant change to its process will affect companies' incentives to invest in the United States. It is best to maintain the current CFIUS process as much as possible.

In order to protect CFIUS's focus on maintaining U.S. national security, Congress must:

- **Remove any addition of non-security requirements to the CFIUS process.** As a market economy, the U.S. government has no place in restricting how private individuals do business or allocate resources. Given how expensive it would be to measure the economic impact of foreign investments, assuming there was even an agreeable and feasible standard of measurement, Congress would be unwilling to supply CFIUS with adequate funding.
- **Determine what is really essential to U.S. national security.** CFIUS considers how investments will affect U.S. critical infrastructure. Presidential Policy Directive 21 (PPD-21) identifies 16 critical infrastructure sectors essential to the U.S.² However, this criteria may be too broad. From within PPD-21, it is possible to separate those sectors that are essential to U.S. national security from those that are simply critical sectors. Doing so would not just have implications for the CFIUS process but would allow all of government to focus time and resources more efficiently.

1 Foreign Investment Risk Review Modernization Act of 2017, S. 2098, 115th Congress, 1st Sess., <https://www.congress.gov/bill/115th-congress/senate-bill/2098?q=%7B%22search%22%3A%5B%22foreign+investment%22%5D%7D&r=1> (accessed November 20, 2017).

2 News release, "Presidential Policy Directive—Critical Infrastructure Security and Resilience," The White House, February 12, 2013, <https://obamawhitehouse.archives.gov/the-press-office/2013/02/12/presidential-policy-directive-critical-infrastructure-security-and-resil> (accessed November 17, 2017).

- **Incentivize investment in the U.S. by publishing CFIUS statistics.** Congress should seek out and publish statistics on the average length of CFIUS reviews and investigations by sector and by country, while protecting investors' anonymity. Doing so would help facilitate foreign entities' decision to invest in the U.S.
- **Guide CFIUS, and not let it fall to the regulators.** Any reform to CFIUS should happen under the guidance of Congress. Too much reliance on CFIUS to draft its own regulations may lead the current review process in the wrong direction. There are also clear differences in how the heads of different agencies within CFIUS assess critical materials and infrastructure. Guidance by Congress will mitigate the risk of non-security requirements being added at the agency level within CFIUS.
- **Refuse to let politics get in the way.** U.S. national security is a serious matter. Politics must be removed from the upcoming debates in Congress over CFIUS reform—lest Congress get wrapped up in another Dubai Ports debacle.

CFIUS has a small but important job in the grand scheme of all investments coming into the United States. As the Department of the Treasury tries to maintain its leadership of CFIUS, it will need Congress's support. The future of U.S. national security is at stake. Working together with Congress, the Departments of Defense and State, and material experts, CFIUS reform has the potential to balance national security needs with the interests of investors.

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