

# ISSUE BRIEF

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## Congress Needs to Give CFIUS Flexibility, Guidance, and Resources, Not Regulations

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The Committee on Foreign Investment in the U.S. (CFIUS) has generally been successful in balancing national security with maintenance of the U.S. as a destination for foreign investment. This record of success indicates that CFIUS has little need for significant reform. However, the 2019 National Defense Authorization Act (NDAA) overlooks that indication and includes amendments that considerably reform CFIUS. CFIUS reform is too important on its own to be rushed through the NDAA process. New CFIUS proposals like the Senate Banking Committee's discussion draft have been expanded to include proposals to reform foreign investment review, export control, and foreign access to U.S. technology.<sup>1</sup>

Congress should only consider reforms that improve the efficiency of CFIUS. Many of the current proposals still miss this mark. CFIUS reform should include explicit factors for consideration when reviewing foreign investment to incorporate such threats to personal information or from real estate located near defense infrastructure. Reform should protect those assets the government has already *identified* as essential to U.S. national security, not those *perceived* to be important. Most importantly, the committee needs more resources. Any congressional miscalculation now could burden

CFIUS with an unmanageable caseload and undermine U.S. national interests.

### The Successes of CFIUS

When considering CFIUS, and any possible reforms, lawmakers need to understand how the committee works, its success, its limitations, and how burdening it with too many new rules can create more harm than benefit.

CFIUS's success to date stems from the purposefully ambiguous definition of national security, which allows the committee flexibility in reviewing a variety of transactions. In addition, the committee's strict focus on national security, and not even more ambiguous concepts like economic security, has guided the committee to focus its limited resources to those transactions that present a real threat to the U.S.

In 2017, the 2018 NDAA introduced efforts to increase the efficiency of reviewing foreign investment between the Departments of Treasury, Defense, State, and the Director of National Intelligence.<sup>2</sup> These efforts were simple, made no significant changes to CFIUS, and focused on inter-agency coordination. Congress needs to recognize the difference between giving guidance to CFIUS and telling CFIUS to create its own regulations. The latter hampers CFIUS's flexibility.

### The Limitations of CFIUS

CFIUS does have its limitations. To counter the threat from Chinese investment in the U.S. the committee needs to focus on what it does best—reviewing foreign investment for national security concerns.

Aside of the constant struggle of resource allocation, CFIUS is not a vehicle to compete with China.

This paper, in its entirety, can be found at <http://report.heritage.org/ib4857>

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The committee cannot bring back stolen intellectual property, nor will it invest its resources in U.S. start-up companies or emerging technologies. The question is not whether CFIUS *could* expand its authorities to review all transactions such as those that allow foreign individuals who may work for a foreign government access to sensitive information, but if it *should*.

Current proposals continue to ignore CFIUS's limitations. Some proposals have CFIUS review more joint ventures, whether or not the U.S. government has access to scarce resources, and even look into outward U.S. investment. Again, the question is whether CFIUS *should* consider these things. These efforts not only stretch CFIUS resources but also begin to shift the nature of CFIUS altogether.

Congress has been good at giving guidance in the current CFIUS debate to expand CFIUS authorities to review greenfield or construction investments, possible threat of investments to Americans' personal information, and the threat of increased cyber espionage or attack. To be clear, CFIUS does have the authority to investigate many of these threats. Heath Tarbert, Assistant Secretary at the Department of the Treasury, testified on CFIUS reform, noting cases where CFIUS looked at American's personal information at threat of coming under foreign ownership and how CFIUS would require mitigation.<sup>3</sup> Even investors would like more guidance from Congress on what CFIUS needs from companies in order to invest in the U.S.

### Concerns About CFIUS's Workload

Congress is concerned about Chinese investment, as well as Chinese activities involving intellectual property theft, human rights violations, or aggressive military actions. Congress should be able to recognize credible threats from foreign competitors. Congress needs to recognize that CFIUS is not a catch-all vehicle for these threats and avoid passing CFIUS reform simply from a desire to pass legislation instead of a desire to improve the committee. The best way for Congress to strengthen CFIUS is to give it guidance and flexibility, not new regulations. To that end, Congress should:

- **Avoid pushing CFIUS reform through the National Defense Authorization Act.** Any reforms to CFIUS should be able to stand on their own merits. Pushing reform to the committee through legislation is an inadvisable route to contributing positive, effective, and lasting changes to CFIUS.
- **Avoid a complicated CFIUS reform.** The only reforms Congress should be considering are those that aim to make CFIUS more efficient, not those that change its nature outright.
- **Continue to give CFIUS guidance.** CFIUS should be explicit about the factors it will consider in reviewing foreign investment (greenfield, cybersecurity, personal information). These are long-needed simple additions that allow the committee to remain flexible. CFIUS should not become a replacement for export-control laws. Tell the committee what is needed, if needed, and do not defer regulation creation to the regulators.
- **Give CFIUS more resources.** As it stands now, CFIUS needs more resources. In the original Foreign Investment Risk Review Modernization Act of 2018, Senator John Cornyn (R-TX) had a number of good proposals to increase CFIUS resources, including giving the Department of Treasury a CFIUS fund and allowing for a singular appropriation request.

### Conclusion

CFIUS reform should be simple. However, Washington can (and does) often complicate such simple issues. Policymakers should focus on passing a simplified reform aimed at increasing the efficiency of CFIUS. Such reform should be able to stand on its own merits.

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1. National Defense Authorization Act for Fiscal Year 2019, H.R. 5515, 115th Cong., 2nd Sess., <https://amendments-rules.house.gov/amendments/Gallagher%20CFIUS51618120328328.pdf> (accessed May 21, 2018).

2. Riley Walters, "CFIUS Tested in the 2018 NDAA, Maintains Focus on National Security," Heritage Foundation *Issue Brief* No. 4801, December 20, 2017, <https://www.heritage.org/defense/report/cfius-tested-the-2018-ndaa-maintains-focus-national-security>.

3. Heath P. Tarbert, "Perspectives on Reform of the CFIUS Review Process," testimony before the Subcommittee on Digital Commerce and Consumer Protection, Committee on Energy and Commerce, U.S. House of Representatives, April 26, 2018, <https://energycommerce.house.gov/hearings/perspectives-on-reform-of-the-cfius-review-process/> (accessed May 21, 2018).