

Long-awaited CFIUS reform legislation introduced in U.S. Congress

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A group of Republican and Democratic lawmakers have introduced legislation in both chambers of Congress to reform the Committee on Foreign Investment in the United States (CFIUS). CFIUS is the U.S. government interagency committee that conducts national security reviews of foreign investments. Fundamentally, the [Foreign Investment Risk Review Modernization Act](#) (FIRRMA) would significantly expand CFIUS's existing statutory mandate by permitting the Committee to examine national security threats posed not only by foreign "control" of U.S. companies, but also by: (1) *any* non-passive foreign investment in a U.S. company involved in critical technology or critical infrastructure; (2) a U.S. company's joint ventures or licensing agreements involving transfers of critical technologies to foreign persons; (3) a foreign person's *lease* of U.S. real estate located near a sensitive U.S. Government installation; and (4) certain changes in a foreign investor's rights in a U.S. company, if the changes could result in foreign control of the company or a non-passive investment in a company involved in critical technologies or critical infrastructure. FIRRMA also mandates the filing of declarations (so-called "light filings") for certain foreign-government investments, extends CFIUS's initial review period from 30 to 45 days, and codifies certain factors for CFIUS to consider in its national security reviews – many (or all) of which, in our experience, CFIUS already examines.

FIRRMA also is aimed at maintaining U.S. technological and industrial leadership in areas affecting U.S. national security. In this respect, and overall, the bill clearly targets China, and the bill's sponsors, including Senator John Cornyn (R-TX), have emphasized that FIRRMA is an effort to address a national security threat emanating from China and other U.S. adversaries. The White House is believed to be supportive of the bill, which closely tracks the Administration's previously expressed views on CFIUS, its *de facto* hold on numerous pending transactions involving Chinese companies, and its focus on U.S. manufacturing and technological leadership. Yet, with Congress's already ambitious legislative agenda, it is too early to predict whether and how soon the legislation has a meaningful chance of becoming law. Sen. Cornyn has indicated that the bill will proceed through "regular order" in the Senate, including hearings and mark-ups, meaning that the bill could change.

The bill delegates to the Treasury Department and CFIUS the task of drafting key regulations, including a host of important definitional terms, such as "critical technologies," "critical materials," "U.S. critical technology company," "U.S. critical infrastructure company," and "non-public technical information." Thus, the full scope and application of the bill will only become clear when this process is completed.

Hogan Lovells is actively monitoring the legislation and would be pleased to assist your company in navigating any changes to the CFIUS process.

What's changing?

The current CFIUS statute covers transactions that result in foreign “control” of a U.S. business. The proposed legislation clarifies and significantly expands CFIUS’s jurisdiction, and is likely to increase the number of deals that will be subject to its review. The legislation’s most far-reaching changes would effectively expand CFIUS’s jurisdiction to include *any* non-passive investment in a U.S. company involved in critical technology or critical infrastructure, certain joint ventures, certain technology transfers and licensing arrangements, and leases of U.S. real estate near U.S. military bases or other sensitive national security facilities.

An official section-by-section breakdown of the legislation asserts that the legislation would broaden the purview of CFIUS by explicitly adding five new types of “covered transactions”:

1. **Non-passive investments:** Any non-passive investment by a foreign person in any U.S. critical technology company or critical infrastructure company, including a non-controlling investment stake, that, when coupled with parallel partnerships, material financial relationships, or other side agreements, can result in the foreign person having significant influence over the company.
2. **Joint ventures:** The contribution by a U.S. critical technology company (other than through an ordinary customer relationship) to a foreign person of both intellectual property and associated support through a joint venture or other arrangement.
3. **Changes in foreign investors’ rights:** Any change in a foreign investor’s rights in a U.S. business, if the change could result in foreign control of the U.S. business or in a non-passive investment in a U.S. critical technology or critical infrastructure company. This would allow CFIUS to review any circumstance where a non-controlling investment changes to a controlling investment, or where a passive investment changes to a non-passive investment.
4. **Transactions aimed at evading CFIUS:** Any other transaction, transfer, agreement, or arrangement the structure of which is designed/intended to evade/circumvent CFIUS review.
5. **Real estate in proximity to sensitive facilities:** The purchase/lease by a foreign person of certain real estate located in the U.S. in close proximity to U.S. military or other U.S. Government national security facilities.

Other notable changes include the following:

- **New national security factors:** Adding new national security factors for CFIUS to consider in its analyses (e.g., whether the transaction is likely to reduce the U.S. technological and industrial advantage, relative to any country of special concern; whether the transaction will involve personally identifiable information).
- **Mandatory “light-filings” for certain transactions:** Imposing a mandatory “light filing” requirement for certain types of transactions (all CFIUS filings are currently voluntary). These light filings would take the form of mandatory declarations for certain “covered transactions,” including ones involving foreign governments and state-owned enterprises. These light filings generally would be limited to five pages in length and could trigger a full CFIUS review. These declarations must be filed 45 days prior to completion of the transaction.
- **U.S. ally exemption:** Authorizing CFIUS to exempt certain otherwise “covered transactions” if all foreign investors are from a country that meets certain criteria, such as being a U.S. treaty ally, having a mutual defense treaty with the U.S., and having a comparable CFIUS-like process. Specific countries are not identified in the legislation.

- **CFIUS power to suspend covered transactions:** Granting CFIUS the explicit authority – already held by the President but not the Committee itself – to suspend covered transactions under review.
- **Sharing information with foreign governments:** Permitting the Secretary of the Treasury, in the interest of national security, to authorize the sharing of information submitted by parties to a CFIUS notice with foreign governments.

Why now?

The legislation comes at a time when Chinese investment into the U.S. has grown sharply in recent years—much to the consternation of certain members of Congress and U.S. policymakers. According to [Bloomberg](#) data, Chinese acquisitions and minority investments in the U.S. grew to \$45.9 billion in 2016, up from \$17.7 billion in 2015. CFIUS has subjected certain high-profile Chinese investments to increased scrutiny. In September, for example, President Trump blocked a proposed purchase of Lattice Semiconductor Corporation by a Chinese venture capital fund on national security grounds. A number of other Chinese acquisitions are before CFIUS, and the prospects for their clearance by the Committee appear dim.

The CFIUS review process has not been amended by Congress in nearly a decade.¹ The lead sponsors [argue](#) that “gaps in the current process have allowed foreign adversaries to weaponize their investment in U.S. companies and transfer sensitive dual-use U.S. technologies, many of which have potential military applications.” Moreover, the sponsors argue, these “investment-driven technology transfers have jeopardized the United States’ ability to maintain our historical military advantage and have, in turn, weakened our defense industrial base.” Sen. Cornyn has regularly voiced his concern that Chinese state policy has sought to “weaponize” investment as a means of obtaining technology that could be deployed by the Chinese military. FIRRMA also addresses concerns expressed in a report issued earlier this year by the Department of Defense’s Defense Innovation Unit Experimental (DIUx), which warned of the threat to U.S. national security from technology transfers to China, particularly through joint ventures and Chinese investments in start-up technology companies.

Legislative outlook

As noted above, the bill has bipartisan co-sponsors in the Senate and House and apparent support from the Trump Administration. The lead sponsors, Sen. Cornyn and Representative Robert Pittenger, a senior Member of the Financial Services Committee, have each invested considerable political capital in forging bipartisan and bicameral coalitions in support of the legislation. Their staffs worked closely over several months with the Treasury Department, which chairs CFIUS, and with other CFIUS member agencies to craft FIRRMA’s language. Senior Administration officials have urged CFIUS reform in recent months. Attorney General Sessions is quoted in the lead sponsors’ [press release](#) emphasizing the need for legislation, and other key Administration officials, including Secretary of Defense James Mattis and Director of National Intelligence Dan Coats, have cited the need for CFIUS reform. Treasury Secretary Steven Mnuchin has said publicly on a number of occasions that the Trump Administration supports reforms to CFIUS that preserve its national security focus, but do not deter foreign investment.

Because tax reform is likely to dominate the Administration and Congressional agenda for the rest of the year, the window for the bill to move likely will open sometime next year. Moreover, despite the bipartisan nature of the bill’s sponsors, the bill does not yet have the support of the Republican Chairmen of the House Financial Services Committee and Senate Banking Committee, the respective committees of jurisdiction. Despite being approached for their support, Rep. Jeb Hensarling (R-TX) and

¹ CFIUS operates pursuant to section 721 of the Defense Production Act of 1950, as amended by the Foreign Investment and National Security Act of 2007 (section 721) and as implemented by Executive Order 11858, as amended, and regulations at 31 C.F.R. Part 800.

Sen. Mike Crapo (R-ID) did not co-sponsor the legislation. Both have historically been avowed free market champions, and their positions on the bill will be important.

Unilateral steps

The Trump Administration could also intentionally link ongoing concerns about the national security threat posed by Chinese investments in the United States with its efforts to pressure Beijing into isolating North Korea economically. Threatening to, or even rejecting, deals through CFIUS might be a lever that President Donald Trump uses to cajole his Chinese counterpart, Xi Jinping, into tightening Chinese enforcement of international sanctions. Meanwhile, the Trump Administration already appears to realize the considerable power CFIUS wields today even in the absence of statutory changes, as many Chinese transactions undergoing CFIUS review currently remained stalled.

We will continue to watch this space closely and report back with new developments.

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